

Senate Economics Legislation Committee

Inquiry into the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002

Submission No. 3

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Attachments? No Attachments



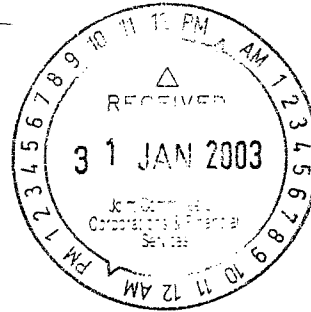
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THE TREASURY

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Dr Kathleen Dermody
Secretary
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600



Dear Dr Dermody

CORPORATIONS AMENDMENT (REPAYMENT OF DIRECTORS' BONUSES) BILL 2002

I refer to your letter of 16 December 2002, addressed to Dr Ken Henry, Secretary, Department of the Treasury, inviting submission on the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002 ('the Bill').

Background

In the wake of the collapse of One.Tel, the Government announced in June 2001 that the Government intended to pursue an amendment to the corporations legislation to enable the recovery of bonuses paid to the directors of companies that later collapse. The Bill contains the amendments to give effect to that announcement.

The Corporations Act already contains a range of measures, known as the voidable transaction provisions, that allow a liquidator access to moneys paid out by a company. The provisions permit the reversal of certain transactions entered into by an insolvent company in the lead-up to a liquidation. The Bankruptcy Act provides trustees with similar powers in relation to personal insolvency.

In certain limited circumstances, liquidators can attack payments made prior to a company becoming insolvent. This Bill adds to these circumstances, in relation to unreasonable payments made to directors of companies.

At present, most payments made by a company prior to winding up are not recoverable by a liquidator unless the company was insolvent at the time it made the payments. As a result, large payments or transfers of property made to a director of a company that is later wound up may not be caught if the company was technically solvent at the time of the payment or transfer.

Directors have the primary responsibility under Australian corporate law for the viability of companies. Further, directors are in a better position than most to know the true state of affairs of the company in the short to medium term, and should not profit from this knowledge at the expense of employees and other ordinary creditors.

Amendments under the Bill

The Bill covers transactions made to, on behalf of, or for the benefit of a director or close associate of a director. To be caught, the transaction must have been unreasonable, and entered into during the 4 years leading up to a company's liquidation, regardless of its solvency at the time the transaction occurred. The reasonableness of the transaction is determined with regard to a number of factors. They include the respective costs and benefits of the transaction to the company, and the benefits received by the recipient.

The meaning of 'transactions' is broadly described to prevent avoidance. It includes a payment made by the company, as well as conveyances, transfers and other dispositions of property. It also includes the issue of securities, including options. Further, incurring an obligation to enter into any these transfers in the future would be a "transaction" for the purposes of the Bill.

The focus of the Bill is transactions entered into by the company with its directors, and accordingly the recipients covered by it include directors of the company. The Bill also covers two further categories of person. It includes company transactions with close associates of a director. A 'close associate' is defined under the Bill to mean a relative or de facto spouse of a director, as well as the relative of a director's spouse or de facto spouse.

It will also apply to transactions entered into with third parties, where they are made on behalf of, or for the benefit of, either a director or close associate. This will prevent people avoiding the new provisions through restructuring or redirecting transactions.

The reasonableness of entering into the transaction is determined at the time the company actually enters into the transaction, regardless of its reasonableness at the time the company incurred the obligation to enter the transaction. This enables liquidators to recover payments where the true magnitude of the unreasonableness involved only becomes apparent when the company actually makes the payment, even if it appeared reasonable at the time the company agreed to make the payment.

The Bill provides that an unreasonable director-related transaction is voidable where it was entered into or given effect to within 4 years of the relation-back day. That day is usually the date of filing of an application to wind up the company, and is the usual point in time for measuring the reach of voidable transactions.

The Corporations Act already provides that the court may make a range of orders in relation to unreasonable director-related transactions. This Bill makes it clear that the court may make these orders in relation to the unreasonable portion of the total transaction, taking into account the reasonable value (if any) that is attributable to it.

Thank you for the invitation to make a submission on the Bill. If you require any further information, please contact Andrew Sellars (6263 3979) or Scott Rogers (6263 3076).

Yours sincerely



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