



Submission to

Senate Economics Legislation Committee

Inquiry into

**Corporations Amendment (Repayment of
Directors' Bonuses) Bill 2002**

by

**The Association of Superannuation Funds of
Australia Ltd**

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Federal Secretariat

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About the Association of Superannuation Fund of Australia (“ASFA”)

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. ASFA provides representation for corporate, retail, public sector and industry superannuation funds, and for superannuation industry service providers. As such it is the “Voice of Super”.

ASFA’s 600 constituent members have been estimated to be responsible for around \$400 billion of assets, about 80 per cent of total superannuation funds under management.

Superannuation funds are amongst the most important investors in Australian equity markets. Shares held by Australian superannuation funds amount to over 30% of the capitalisation of companies listed on the ASX.

ASFA has long had an interest in good corporate governance practices as the good governance of companies can materially enhance returns from investments and therefore the improve adequacy of retirement income savings of all Australians. Any failure by companies to adopt appropriate remuneration and reward practices and or lack of any sanctions for inappropriate practices can lead to erosion of public confidence in investing in companies. Such erosion of public confidence could also have the subsequent effect of undermining the support the Government’s retirement income policy which relies on private saving and investment as its second pillar.

Looking to good governance of the superannuation funds themselves, the Association has produced a Best Practice paper for trustees on superannuation fund governance. It is also in the process of finalising a Best Practice paper on trustee action to promote good corporate governance in the companies in which the superannuation funds are invested. ASFA is a member of the ASX Corporate Governance Council. Both best practice guidance and mandatory requirements are necessary. The Association has supported the preparation of guidance for corporations in relation to the community’s expectations of behaviour (and corresponding disclosure practices where the guidelines are not met). However, ASFA considers that there are areas where requirements must be mandatory. The *Corporations Amendment (Repayment of Directors’ Bonuses) Bill 2002* addresses an area where mandatory requirements are appropriate rather than relying on voluntary adherence to codes of practice.

Comments on the Bill

Object

ASFA supports the primary object of the Bill which, as stated in the Explanatory Memorandum, is “to assist in the recovery of funds, assets and other property to companies in liquidation where payments or transfers of property to directors are unreasonable.”

Application

ASFA does not object to the amendments being restricted to unreasonable transactions entered into during the 4 years leading up to a company’s liquidation, regardless of its solvency at the time the transaction occurred. The four year period is shorter than the Corporations Law’s mandatory record retention requirement. It is arguable that there should be no time limit, for unreasonable transactions that should never knowingly be entered into by, or with, directors, officers or others. That said, the longer the period involved, the less likely recovery might be.

The explanatory memorandum considers that the application of the amendments only to companies in liquidation will mean that the legislation will have a low impact economy-wide. ASFA hopes that the presence of the amendments will have a broader impact in so far as they will encourage all directors to give greater consideration to broader corporate governance issues when entering into transactions.

Scope

It is noted that the definition of close associate for the purpose of new section 588FDA, while including de facto spouses, does not extend to same sex couples and neither does the definition of relative in Section 9 of the *Corporations Act 2001*. Commonwealth law in Australia continues to lag community expectations in this area.

While the provision includes transactions with a person “on behalf of, or for the benefit of” a director or close associate of a director of the company, it is not clear if this would capture a transaction with the trustee of a discretionary, or other, trust of which the close associate or director was a potential beneficiary. ASFA suggests that capture of such transactions would be appropriate.

The reasonable person test, as viewed from the company’s perspective, appears to be an appropriate test of the unreasonableness, or otherwise, of transactions.

ASFA supports the proposed granting of a power to the courts to determine what would have been a reasonable value for the transaction.

ASFA also supports the reasonableness test being applied at the time the company actually enters into the transaction, rather than at the time the company incurred the obligation. This reinforces the notion that directors at all times should act in the interests of the company.