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EXPOSURE DRAFT

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
AMENDMENT (CORPORATIONS AND MARKETS ADVISORY COMMITTEE
ABOLITION) BILL 2014

EXPLANATORY MATERIAL

(Circulated by the authority of the
Treasurer, the Hon J. B. Hockey MP)

Table of contents

Glossary	1
Chapter 1 Cessation of the Corporations and Markets Advisory Committee	3
Index.....	15

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
CAMAC	Corporations and Markets Advisory Committee
ICCPR	International Covenant on Civil and Political Rights
the Minister	the relevant Treasury Portfolio Minister
Ombudsman	Commonwealth Ombudsman
the Treasury	Department of the Treasury

Chapter 1

Cessation of the Corporations and Markets Advisory Committee

Outline of chapter

1.1 This Exposure Draft repeals Part 9 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which provides for the establishment, functions and operation of Corporations and Markets Advisory Committee (CAMAC).

1.2 It also makes a number of consequential amendments to the ASIC Act as a result of the repeal of Part 9 and provides for the transitional and savings arrangements that are necessary to reflect the cessation of the agency.

1.3 Sections 1 to 3 set out the commencement details for this measure.

Context of amendments

1.4 CAMAC was established in 1989 as part of a legislative package that set up a national scheme for corporations and financial markets. CAMAC provides independent advice to the Australian Government on matters relating to the amendment, administration or reform of the corporations legislation, matters relating to companies or a segment of the financial products and services industry, and proposals to improve the efficiency of financial markets.

1.5 CAMAC is a statutory body corporate, comprising part-time members appointed by a Treasury Portfolio Minister under section 147 of the ASIC Act. Members are appointed in a personal capacity on the basis of their knowledge and experience in business, financial markets, law, economics or accounting. CAMAC is supported by a full-time Executive of three staff.

1.6 The decision to cease the operation of CAMAC was announced in the 2014-15 Budget. The decision was made in the context of the broader *Smaller and More Rational Government* reforms to reduce the number of Australian Government bodies and streamline the shape of government. The abolition and merger of some government bodies,

including CAMAC, is expected to improve coordination and accountability, reduce the costs associated with separate governance arrangements and increase efficiency in how public funds are used to deliver services to the community.

1.7 This Exposure Draft does not provide for the termination of the employment of CAMAC's Secretariat staff, as these are matters that are handled by administrative processes conducted in accordance with the *Public Service Act 1999* and relevant private contracts.

Summary of new law

1.8 CAMAC's operation ceases.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
CAMAC's operation ceases.	CAMAC is established and has functions under Part 9 of the ASIC Act.

Detailed explanation of new law

Short title and introductory matters

1.9 Once enacted, the name of the Act will be the *Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Act 2014*. [Clause 1]

1.10 Provisions of the ASIC Act are amended or repealed as set out in Schedule 1. Each other item in Schedule 1 has effect according to its terms. [Clause 3]

1.11 Clauses 1 (Short title), 2 (Commencement) and 3 (Schedules) commence on the day these measures receive Royal Assent. [Subclause 2(1), item 1 in the table]

Cessation of the Corporations and Markets Advisory Committee

1.12 CAMAC is abolished by repealing the provisions of the ASIC Act (that is, Part 9) which establish it and provide for its functions and operation. [Schedule 1, Part 1, item 11, Part 9 of the ASIC Act]

1.13 The cessation of CAMAC takes effect on the 28th day after this measure receives Royal Assent. This provides sufficient time to finalise any unresolved issues with the winding up of the operations of CAMAC before the cessation takes effect. *[Subclause 2(1), item 2 in the table]*

Consequential amendments

1.14 Numerous consequential amendments — repeals and omissions — are made to the ASIC Act to reflect the cessation of CAMAC. These take effect on the 28th day after these measures receive Royal Assent. *[Subclause 2(1), item 2 in the table]*

1.15 References to CAMAC or terms related to CAMAC in the ASIC Act are repealed or omitted as follows.

- A reference to CAMAC is omitted from the long title of the ASIC Act, which describes that the ASIC Act provides for the ASIC, CAMAC and certain other bodies, and for other purposes. *[Schedule 1, Part 1, item 1, Title of the ASIC Act]*
- The objects of the ASIC Act include establishing CAMAC. This description is repealed. *[Schedule 1, Part 1, item 2, paragraph 1(1)(c) of the ASIC Act]*
- Definitions of ‘CAMAC’, ‘Convenor’, ‘meeting’ and ‘member’ are amended or repealed, as appropriate. *[Schedule 1, Part 1, items 3 to 8, subsection 5(1) of the ASIC Act]*
- CAMAC is omitted from the list of agencies to which a person who is authorised by the Chairperson of the Australian Securities and Investments Commission (ASIC) may disclose particular information in certain circumstances. *[Schedule 1, Part 1, item 10, paragraph 127(4)(a) of the ASIC Act]*
 - A saving provision is provided — refer to paragraph 1.32.
- The broad provision in the ASIC Act listing entities and persons who are exempt from liability for damages in relation to the performance of their functions and powers is amended to omit references to CAMAC, its members and its staff, consultants and secondees. *[Schedule 1, Part 1, item 12, paragraphs 246(1)(b), (d) and (h) of the ASIC Act]*
 - A saving provision is provided — refer to paragraphs 1.60 and 1.61.

1.16 Section 261 of the ASIC Act provides that a body that was established under the *Australian Securities and Investments Commission Act 1989* (the ‘old ASIC Act’) continues in existence as if it had been established under this Act. A note is added to identify that CAMAC ceased to exist on the commencement of Schedule 1. [*Schedule 1, Part 1, item 13, note to section 261 of the ASIC Act*]

1.17 Notwithstanding the repeal of Part 9 of the ASIC Act, ASIC retains its power to advise and make recommendations to the relevant Treasury Portfolio Minister (the Minister), on its own initiative or when requested by the Minister, about matters relating to:

- proposals, amendment or reform of the corporations legislation;
- the operation or administration of the corporations legislation;
- companies or a segment of the financial products and financial services industry; and
- proposals to improve the efficiency of the financial markets.

1.18 These are matters on which both CAMAC and ASIC currently have the power to advise and make recommendations to the Minister. The functions of CAMAC will therefore not be transferred to ASIC or any other Commonwealth agency. [*Schedule 1, Part 1, item 9, subsection 11(3) of the ASIC Act*]

Transitional and saving provisions

1.19 Transitional and saving provisions are required to deal with the repeal of Part 9 of the ASIC Act or to preserve aspects of that Part. Many of these provisions are standard provisions that apply whenever an agency is abolished. These take effect on the 28th day after this measure receives Royal Assent. [*Subclause 2(1), item 2 in the table*]

1.20 References in this Exposure Draft and explanatory material to ‘Minister’ and ‘Department’ are references to the relevant Treasury Portfolio Minister (currently, the Acting Assistant Treasurer) and the Department of the Treasury (the Treasury), respectively.

1.21 In terms of the version of the *Acts Interpretation Act 1901* that applies to this Exposure Draft, the Exposure Draft specifies that section 5A of the ASIC Act applies to Part 2 in Schedule 1 to this Exposure Draft (the transitional and saving provisions) as if that Part were part of the

ASIC Act. Section 5A of the ASIC Act applies the *Acts Interpretation Act 1901* as in force on 1 January 2005 (rather than the current version from time to time) to the ASIC Act. Because Part 1 of Schedule 1 to this Exposure Draft only amends the ASIC Act, also applying section 5A to Part 2 of Schedule 1 to this Exposure Draft makes the operation of the *Acts Interpretation Act 1901* consistent. [Schedule 1, Part 2, subitem 14(2)]

Operational matters

Final reporting obligation

1.22 Currently, the Convenor of CAMAC is required to prepare an annual report under section 162 of the ASIC Act. Once the operation of CAMAC ceases, the Secretary to the Treasury must prepare and give to the Minister a report on the activities of CAMAC during the final reporting period. [Schedule 1, Part 2, subitem 22(1)]

1.23 The definition of ‘final reporting period’ provides flexibility to facilitate the commencement of Schedule 1 whenever it may commence.

- If, when CAMAC’s operation ceases (at the ‘commencement time’), CAMAC has not yet given the annual report for the last financial year ending before the commencement time to the Minister, then the final reporting period includes the financial year for which no annual report has been given, as well as so much of the new financial year that has passed before the commencement time.
 - Under Part 9 of the ASIC Act the Convenor of CAMAC is required to prepare and give to the Minister as soon as practicable after 30 June in each year a report on CAMAC’s operations during the financial year.
- Otherwise, the final reporting period is that part of the financial year in which CAMAC’s operation ceases that has passed prior to cessation. In this case, the final reporting period would be less than one full financial year.

[Schedule 1, Part 2, subitem 22(5)]

1.24 **Commencement time** is defined as the time at which Schedule 1 commences (being the 28th day after this measure receives Royal Assent). [Schedule 1, Part 2, subitem 14(1)]

1.25 The Minister for Finance (being the Minister administering the *Public Governance, Performance and Accountability Act 2013*) may give the Secretary to the Treasury written directions in relation to the report on

CAMAC's activities during the final reporting period. The Secretary is required to comply with any such directions in preparing the report. *[Schedule 1, Part 2, subitem 22(2)]*

1.26 The Minister for Finance may delegate this power to give directions — refer to paragraphs 1.42 and 1.43. *[Schedule 1, Part 2, subitem 24(2)]*

1.27 The Secretary to the Treasury must give the Minister the report within four months of the commencement time. *[Schedule 1, Part 2, subitem 22(3)]*

1.28 After the report is given to the Minister, the Minister is required to table the report in both the House of Representatives and the Senate within 15 sitting days of that House. *[Schedule 1, Part 2, subitem 22(4)]*

Transfer of records

1.29 Any records or documents that were in CAMAC's possession need to be transferred to the Treasury once CAMAC's operations are ceased. *[Schedule 1, Part 2, item 20]*

1.30 The records and documents are Commonwealth records for the purposes of the *Archives Act 1983*, which means that there are particular rules governing their transfer, storage and disposal. *[Schedule 1, Part 2, note to item 20]*

Preservation of protection of disclosures

1.31 Under subsection 127(4) of the ASIC Act, disclosure of information by ASIC to CAMAC is taken to be authorised use and disclosure of the information if the Chairperson of ASIC is satisfied that the information will enable or assist CAMAC to perform or exercise its functions or powers. Under subsection 127(4A), the Chairperson of ASIC may impose conditions in relation to the disclosed information.

1.32 Item 10 in Part 1 of Schedule 1 omits the reference to CAMAC in subsection 127(4) of the ASIC Act (see paragraph 1.15). Item 21 in Part 2 of Schedule 1 preserves the protection of information already disclosed by ASIC to CAMAC under subsection 127(4) of the ASIC Act. If ASIC imposed conditions on a person (for example, a member of CAMAC's Secretariat) under subsection 127(4A) of the ASIC Act in relation to the protected information, then those conditions continue to apply to the person after the commencement time. *[Schedule 1, Part 2, item 21]*

Assumption of assets and liabilities

1.33 When the operation of CAMAC ceases, CAMAC's assets and liabilities cease to be assets and liabilities of CAMAC and become assets and liabilities of the Commonwealth. They do so automatically without

the need for any conveyance, transfer or assignment. [*Schedule 1, Part 2, item 15*]

1.34 ‘Asset’ and ‘liability’ are defined broadly to ensure that all assets and liabilities, whether actual, contingent or prospective, of CAMAC are covered. **Asset** means any legal or equitable estate or interest in real or personal property and any right, power, privilege or immunity. **Liability** means any liability, duty or obligation. [*Schedule 1, Part 2, subitem 14(1)*]

1.35 While it is not expected that these provisions about the treatment of assets and liabilities will be used, the provisions provide a safety net in the event that CAMAC still has assets or outstanding liabilities upon cessation.

1.36 This Exposure Draft provides a process for the registration of the vesting of land and other assets, for use in the event that any land or other asset becomes vested in the Commonwealth under Part 2 of Schedule 1 to the Exposure Draft. (**Land** is defined as any legal or equitable estate or interest in real property, whether actual, contingent or prospective.) [*Schedule 1, Part 2, subitems 14(1), 16(1) and 16(2)*]

Authenticity of documents

1.37 Unless the contrary is established, a document that appears to be a certificate made under item 16 is taken to be such a certificate and to have been properly made. [*Schedule 1, Part 2, subitem 16(3)*]

1.38 This Exposure Draft states that a certificate made under item 16 of Schedule 1 is not a ‘legislative instrument’ within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law and is included to assist readers. The provision in no way purports to exempt the item from the requirements of the *Legislative Instruments Act 2003*. [*Schedule 1, Part 2, subitem 16(4)*]

Taxes not payable

1.39 No stamp duty or other tax is payable under the law of a State or Territory in respect of the vesting of an asset or a liability under Part 2 of Schedule 1 or the operation of the Part in any other respect. [*Schedule 1, Part 2, item 23*]

Compensation for acquisition of property

1.40 To the extent that the operation of Part 2 of Schedule 1 results in the acquisition of property from a person on other than just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person. If the Commonwealth and the person cannot agree on the amount of any such compensation to be paid, the person may institute

proceedings against the Commonwealth and the court may determine a reasonable amount of compensation. [Schedule 1, Part 2, item 26]

Ministers' powers

Delegation by Ministers

1.41 The Minister may delegate all or any of his or her powers and functions under Part 2 of Schedule 1 to this Exposure Draft to either the Secretary to the Treasury or a member of the Senior Executive Service (SES) (or acting member of the SES) of the Treasury. ('SES employee' and 'acting SES employee' are defined in the *Acts Interpretation Act 1901*.) The delegation must be made in writing. [Schedule 1, Part 2, subitem 24(1) and note to subitem 24(1)]

1.42 The Minister for Finance may delegate to the Secretary to the Department of Finance, his or her power to give directions to the Secretary to the Treasury in relation to the final report— see paragraphs 1.25 and 1.26.

1.43 In exercising powers or functions under a delegation, the delegate must comply with any directions of the delegating Minister. [Schedule 1, Part 2, subitem 24(3)]

Transitional rules

1.44 The Minister may make rules:

- specifying matters which are required or permitted by Schedule 1 to be prescribed in rules; or
- in relation to transitional matters that may arise out of the amendments and repeals made by Schedule 1.

[Schedule 1, Part 2, subitem 14(1) and item 27]

1.45 This standard rule-making power provides flexibility to ensure that the cessation of CAMAC occurs in an orderly and straightforward manner, and that unforeseen matters that may arise can be dealt with appropriately, without confusion, in accordance with the effect of this Exposure Draft. It is not designed to override or otherwise alter the effect of this Exposure Draft.

1.46 Such rules are legislative instruments governed by the *Legislative Instruments Act 2003*. The rules would be disallowable by either House of the Parliament under section 42 of the *Legislative Instruments Act 2003*. [Schedule 1, Part 2, item 27]

Matters related to instruments and the operation of laws

References to CAMAC in instruments

1.47 Once CAMAC's operation ceases, references to CAMAC in instruments that were already in force at that time are to be read as references to the Commonwealth. This preserves the operation of instruments despite the cessation of CAMAC. It does not prevent the instrument from being terminated or varied after the cessation. [Schedule 1, Part 2, subitems 17(1) and (2)]

1.48 **Instrument** is defined as including a contract, undertaking, deed, agreement, notice, authority, order or instruction. It also includes an instrument made under an Act or under regulations but does not include an Act or an instrument made under this Exposure Draft. The *Corporations Agreement 2002* is also excluded from the definition of 'instrument' to avoid the unworkable outcome that would result from references to CAMAC in that Agreement being read as references to the Commonwealth. [Schedule 1, Part 2, subitem 14(1)]

1.49 In order to ensure that the substitution does not create an inappropriate outcome, the Minister may make rules specifying:

- particular instruments or references in instruments are not treated in accordance with subitem 17(1) of Schedule 1 (described in paragraph 1.47), meaning that a reference or references to CAMAC in an instrument are retained; or
- particular instruments or references in instruments are treated in accordance with subitem 17(1), but instead of substituting the Commonwealth for CAMAC, a person identified in the rules is substituted for CAMAC.

[Schedule 1, Part 2, subitem 17(3) and paragraph 27(a)]

1.50 This capacity for the Minister to make exceptions in rules provides flexibility to avoid a situation where substituting 'Commonwealth' for 'CAMAC' would create an absurd, unworkable or unintended outcome.

1.51 The rules must be registered in accordance with the *Legislative Instruments Act 2003*. Despite subsection 12(2) of the *Legislative Instruments Act 2003* (which provides for when legislative instruments may take effect) rules made by the Minister pertaining to references in instruments may take effect from a day before the rules are registered. They may not, however, take effect before the cessation of CAMAC. [Schedule 1, Part 2, subitem 17(4)]

CAMAC's acts attributed to the Commonwealth

1.52 Except in the case of the operation of the *Ombudsman Act 1976* (explained in paragraphs 1.56 to 1.58), once CAMAC's operation ceases, anything done by or in relation to CAMAC before it is abolished will be treated as if it had been done by, or in relation to, the Commonwealth. *[Schedule 1, Part 2, subitem 18(1)]*

1.53 In order to ensure that the substitution does not create an inappropriate outcome, the Minister may make rules specifying:

- particular things which are not treated in accordance with subitem 18(1) of Schedule 1 (described in paragraph 1.52), meaning that things done by or in relation to CAMAC before its cessation will continue to be treated as having been done by or in relation to CAMAC, despite its cessation; or
- particular things which are treated in accordance with subitem 18(1), but instead of substituting the Commonwealth for CAMAC, a person identified in the rules is substituted for CAMAC.

[Schedule 1, Part 2, subitem 18(3) and paragraph 27(a)]

1.54 Allowing the Minister to make exceptions in rules provides flexibility to avoid a situation where treating a thing as having been done by the Commonwealth would create an absurd, unworkable or unintended outcome.

1.55 Similar to rules relating to references in instruments, despite subsection 12(2) of the *Legislative Instruments Act 2003*, rules made by the Minister pertaining to things done by or in relation to CAMAC may take effect before the rules are registered. However, they may not take effect before the cessation of CAMAC. *[Schedule 1, Part 2, subitem 18(4)]*

CAMAC's acts attributed to the Treasury

1.56 For the purpose of the operation of the *Ombudsman Act 1976* after the cessation of CAMAC, action taken by or in relation to CAMAC prior to the cessation is taken to have been done by or in relation to the Treasury. *[Schedule 1, Part 2, subitem 18(2)]*

1.57 As the Commonwealth Ombudsman (the Ombudsman) is not empowered to investigate complaints about the Commonwealth, this provision substitutes the Department (being Treasury) rather than the Commonwealth for CAMAC.

1.58 If, at the commencement time, a complaint had been made to the Ombudsman about action taken by or in relation to CAMAC, or the Ombudsman had commenced an investigation into action taken by or in relation to CAMAC, then the *Ombudsman Act 1976* applies after CAMAC ceases as if the relevant action had been taken by or in relation to the Treasury. This item also allows new complaints to be made and dealt with after CAMAC's operation ceases, again substituting 'the Department' for 'CAMAC'.

Continuation of legal proceedings

1.59 Once CAMAC ceases, the Commonwealth is substituted for CAMAC as a party to any proceedings that were pending in any court or tribunal and to which CAMAC was a party. This provision ensures that any existing litigation is not affected by the cessation of CAMAC.
[Schedule 1, Part 2, item 19]

Preservation of exemption from liability

1.60 Although item 12 in Part 1 of Schedule 1 removes references relating to CAMAC from the list of entities and persons in subsection 246(1) of the ASIC Act who are exempt from liability for damages in relation to the performance of their functions and powers in certain circumstances, this Exposure Draft provides a saving provision.

1.61 Thus, despite the repeal of the references to CAMAC, its members and its staff, consultants and secondees in section 246 of the ASIC Act (specifically, paragraphs 246(1)(b), (d) and (h)), those persons continue to be exempt from liability for damages in relation to an act done or omitted in good faith in the performance or purported performance of any function or power conferred under the corporations legislation before the commencement time. The exemption from liability applies in relation to those acts or omissions as if the repeal (in item 12) had not happened.
[Schedule 1, Part 2, subitem 25(1)]

1.62 In the case of the reference to CAMAC in paragraph 246(1)(b) of the ASIC Act, the exemption from liability continues in relation to acts or omissions by CAMAC before the commencement time as if the Commonwealth were referred to in that paragraph. This substitutes 'the Commonwealth' for 'CAMAC'. *[Schedule 1, Part 2, subitem 25(2)]*

1.63 This item does not limit the operation of section 8 of the *Acts Interpretation Act 1901* as in force on 1 January 2005 in relation to matters that are not covered by the item. Section 8 of the *Acts Interpretation Act 1901* as in force on 1 January 2005 provides for the effect of the repeal of Acts or parts of Acts. (See paragraph 1.21 for an

explanation about the version of the *Acts Interpretation Act 1901*
applying.) [*Schedule 1, Part 2, subitem 25(3)*]

Index

Schedule 1: Amendments

<i>Exposure Draft reference</i>	<i>Paragraph number</i>
Part 1, item 1, Title of the ASIC Act	1.15
Part 1, item 2, paragraph 1(1)(c) of the ASIC Act	1.15
Part 1, items 3 to 8, subsection 5(1) of the ASIC Act	1.15
Part 1, item 9, subsection 11(3) of the ASIC Act	1.18
Part 1, item 10, paragraph 127(4)(a) of the ASIC Act	1.15
Part 1, item 11, Part 9 of the ASIC Act	1.12
Part 1, item 12, paragraphs 246(1)(b), (d) and (h) of the ASIC Act	1.15
Part 1, item 13, note to section 261 of the ASIC Act	1.16
Part 2, subitem 14(1)	1.24, 1.34, 1.48
Part 2, subitems 14(1), 16(1) and 16(2)	1.36
Part 2, subitem 14(1) and item 27	1.44
Part 2, subitem 14(2)	1.21
Part 2, item 15	1.33
Part 2, subitem 16(3)	1.37
Part 2, subitem 16(4)	1.38
Part 2, subitems 17(1) and (2)	1.47
Part 2, subitem 17(3) and paragraph 27(a)	1.49
Part 2, subitem 17(4)	1.51
Part 2, subitem 18(1)	1.52
Part 2, subitem 18(2)	1.56
Part 2, subitem 18(3) and paragraph 27(a)	1.53
Part 2, subitem 18(4)	1.55
Part 2, item 19	1.59
Part 2, item 20	1.29
Part 2, note to item 20	1.30
Part 2, item 21	1.32
Part 2, subitem 22(1)	1.22
Part 2, subitem 22(2)	1.25
Part 2, subitem 22(3)	1.27
Part 2, subitem 22(4)	1.28

<i>Exposure Draft reference</i>	<i>Paragraph number</i>
Part 2, subitem 22(5)	1.23
Part 2, item 23	1.39
Part 2, subitem 24(1) and note to subitem 24(1)	1.41
Part 2, subitem 24(2)	1.26
Part 2, subitem 24(3)	1.43
Part 2, subitem 25(1)	1.61
Part 2, subitem 25(2)	1.62
Part 2, subitem 25(3)	1.63
Part 2, item 26	1.40
Part 2, item 27	1.46