



Law Council  
OF AUSTRALIA

*Business Law Section*

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The Treasury  
Langton Crescent  
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**Via email:** [CAMACAbolition@treasury.gov.au](mailto:CAMACAbolition@treasury.gov.au)

22 October 2014

Dear Sir or Madam,

**Submission: Exposure Draft of the Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014**

This submission has been prepared by the Business Law Section (**BLS**) of the Law Council of Australia on the advice of a working party (and some other members) of the BLS Corporations Committee.

In summary, this submission:

- (a) reiterates strongly the BLS's objection to the winding up of CAMAC, set out in the letter from the Chairman of the BLS to the Minister for Finance dated 11 June 2014. [Commonwealth budget proposal to abolish corporations and markets law reform body \(June submission\)](#)
- (b) discusses the response to that letter, namely a letter to the BLS Chairman from the Hon Mathias Cormann, Minister of Finance, dated 17 July 2014 (**Minister's Response**) and explains why that response is not persuasive;
- (c) draws attention to the importance of maintaining confidence in the national system of corporate and securities market regulation, underpinned by referral of powers by the States to the Commonwealth, in which CAMAC plays a vital role;
- (d) describes in broad outline (upon which we would be pleased to elaborate) that inadequate arrangements have been made for continuing CAMAC's work, if CAMAC is abolished as proposed.

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**BLS**

1. **The BLS reiterates its objection to the abolition of CAMAC**
- 1.1 The BLS submits that the budget decision to abolish CAMAC resulted from an insufficiently reflective application of a general 'smaller and more rational government' policy. The decision failed to recognise the vital importance for the Australian economy of practical, effective corporate and market regulation, and the exceptional contribution CAMAC has made over its lifetime, and would continue to make, in that regard. The decision has been severely criticised by the expert bodies which promote effective corporate and market regulation, as well as by many individual experts in the legal and business communities. The BLS calls upon the Government to reverse the decision forthwith.
- 1.2 In its June Submission, the BLS:
  - (a) drew attention to the very strong case for continuing an independent, transparent, research-based corporate and market law reform body, constituted to facilitate appropriate practical input from business, market and legal sources;
  - (b) set out the policy reasons for maintaining a specialist law reform body in the corporate and markets area;
  - (c) commended CAMAC for delivering a substantial quantity of first-class reports and discussion papers very economically, with a full-time staff of only two experienced lawyers and administrator, supported by an external committee.
- 1.3 In the opinion of the BLS, these considerations remain valid and amount to a powerful case for reversing the Government's decision on CAMAC.
- 1.4 We wish to reiterate the strongly favourable assessment of the quality of CAMAC's work by members of the BLS. In our opinion the Government would have no significant grounds for doubting the excellent contribution that CAMAC has made to the cause of sound corporate and market law reform. That is no doubt a result of the combination of the quality of the full-time lawyers engaged by CAMAC, and the practical and expert business and legal input systematically achieved both through CAMAC's committee structure and the submissions received through the consultation process. This means that any gaps in the practical expertise of CAMAC's staff can be filled through CAMAC's resources.
- 1.5 The crowd sourcing reference is a good example of this process in action. Crowd sourced fundraising is quite a new phenomenon which depends on communication by internet. CAMAC was able to produce an internationally applauded report through a combination of thorough research and practical inputs.
- 1.6 The Government has recently recognised the quality of CAMAC's work. In its paper, *Industry Innovation and Competitiveness Agenda: an action plan for a stronger Australia*, which was released on 14 October 2014 well after the budget decision to abolish CAMAC, the Government referred to CAMAC as 'a government advisory body with strong financial market experience' and announced that the Assistant Treasurer will consult widely on a regulatory framework to facilitate crowd sourced equity funding, building on CAMAC's report. In the opinion of BLS, that is

an excellent example of how CAMAC's high-quality work should be used to provide a foundation for sensible law reform for the benefit of the Australian economy.

- 1.7 Indeed, over the years CAMAC's work has received strong support from both major political streams.

## 2. The Minister's Response

- 2.1 The Minister's response makes six related points, which we shall address.

- 2.2 *First, the abolition of CAMAC will streamline the shape of government, reduce duplication, and improve coordination and accountability. But:*

- (a) while the BLS accepts the perceived need to reduce the number of Australian Government bodies and streamline the shape of government, removing a body with only three full-time staff will have negligible effect on streamlining the shape of government;
- (b) regrettably, rather than achieving the objective of efficient, streamlined government, the abolition of CAMAC will remove a vital element in the process of sound corporate and market law reform, namely research-based disinterested assessment of proposals with skilled practical input;
- (c) no duplication between the work of CAMAC and other government work has been identified, and there is none, because CAMAC acts on references from the Government and other relevant stakeholders;
- (d) there is no absence of coordination between CAMAC and other relevant parties, such as Treasury, ASIC, the professional associations and other interested parties, and on the contrary, CAMAC's structure caters for representation of these various interests;
- (e) CAMAC operates transparently by publishing discussion papers and reports which are available for, and receive, scrutiny and assessment in the public and private sectors, and so there is no lack of accountability.

- 2.3 *Second, the abolition of CAMAC will reduce costs associated with separate governance arrangements and increase efficiency in how public funds are used to deliver services to the community. But:*

- (a) CAMAC operates in ASIC accommodation with only three full-time staff (two lawyers and a secretary), and a part-time committee operating at minimal cost. It is estimated that the total cost of CAMAC's operations is under \$1 million per annum<sup>1</sup>;
- (b) if CAMAC is abolished and its advisory function is merged into the Markets Group at Treasury, the Department will need to incur additional expenditure to arrange appropriate staffing and procedures, in order to ensure that

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<sup>1</sup> Indeed, CAMAC's *Annual Report 2012-2013*, page 37, shows that in that year it operated under budget: the net cost of services was \$911,636, against revenues from Government of \$985,000, a surplus of \$73,664.

CAMAC's important work is continued and all relevant inputs are properly assessed;

- (c) in these circumstances it is highly unlikely that there will be any cost saving, unless the task of corporate and market law reform is substantially downgraded or weakened.

2.4 *Third, the abolition of CAMAC will ensure greater value for taxpayers' money. But:*

- (a) CAMAC has delivered over its period of operation real value for taxpayers' money by producing high-quality reports and recommendations, through a transparent process with an effective structure for assessing business and expert inputs (as to the quality of CAMAC's work, please also see our comments at 1.4-1.7 above);
- (b) the Government's plans for continuing CAMAC's work are unclear and non-committal;
- (c) in our view, the Markets Group of Treasury is at present inadequately resourced to continue the work of CAMAC;
- (d) in those circumstances the explanatory material outlined in the Minister's Response and in the material accompanying the Exposure Draft provide no adequate basis for contending that greater value for taxpayers' money and more efficient delivery of services to the community will be achieved by the abolition of CAMAC.

2.5 *Fourth, the principle of sourcing advice from independent sources will be met in the following way: Treasury will act as an adviser and coordinator of advice, the Government will receive independent advice from relevant regulators, and Treasury will draw on legal expertise in other specialist parts of the public service. But:*

- (a) for these proposals to be effectively introduced, the structure of the Markets Group of Treasury will need to be re-designed to ensure that there will be disinterested practical input at the point of development of law reform proposals;
- (b) while these proposals, if implemented, may deliver independent advice from the public sector, they will not ensure that policymakers will receive the balanced independent advice based on practical understanding of how corporations and markets operate;
- (c) additionally, it cannot be assumed that all advice sourced from the public sector will be independent, as some parts of the public sector (for example, regulators) have a measure of self-interest in promoting certain kinds of reforms.

2.6 *Fifth, the Government expects that Treasury policy advice will be informed by regular professional engagement with industry, including experts on corporations and financial markets law and practice, but business is 'quite capable of putting its views to government without the need for an additional layer of taxpayer-funded*

*bureaucracy', bearing in mind that the professionalism and capacity of industry representative groups is much stronger now than in the 1980s. But:*

- (a) the Minister's reasoning on this point does not recognise the fundamental distinction between, on the one hand, business lobbying, which (while no doubt more professional and capable now than in the 1980s) is generally driven by the need to promote the commercial interests of business; and on the other hand, the assessment of law reform proposals by disinterested experts who understand how corporations and markets actually work;
- (b) in those circumstances it is essential that there be a properly instituted facility for expert, practical and transparent input into legislative and regulatory policy regarding corporations and markets;
- (c) by releasing discussion papers CAMAC has established a process by which its proposals are considered, during the development phase, by a wide variety of legal and other experts, acting pro bono at conferences and seminars invariably attended by CAMAC staff, enabling them to fine tune CAMAC's recommendations;
- (d) CAMAC's experience shows that input must be available throughout the process of developing reform proposals, and not merely when an exposure draft is released for public comment, by which time there are public and private sector vested interests wishing to carry the proposal through to implementation and the opportunity for ensuring that proposals are practical and realistic may well be lost.

2.7 *Sixth, the legacy work which CAMAC had on hand is being handed over to Treasury to consider, and 'to the extent that there remain important issues that warrant ongoing work, this will be considered against other priorities'. But:*

- (a) it is a matter of concern to the BLS that the Minister has made no commitment to continue the fundamentally important legal and regulatory issues with which CAMAC has recently been grappling, concerning the annual general meeting, crowd sourced funding and managed investment schemes, upon which business and markets as well as regulators need the assistance of law reform;
- (b) more generally, the Minister has not explained how the Government proposes that future corporate and market reform processes will be conducted so as to ensure transparency, practicality and expert input. This point is more fully developed in Part 4 of the submission.

### **3. CAMAC is an important factor in the State's ongoing agreement to refer the corporations power to the Commonwealth**

3.1 In Australia, uniform national legislation and administration of corporations and financial markets law is only possible by agreement between the Commonwealth and the States. The *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) were enacted in 2001 following a referral of power by each of the State Parliaments made in accordance with section 51(xxxvii) of the Commonwealth Constitution. The arrangements require the

States periodically to extend the referrals. The most recent extension of the referral of corporations power was agreed on 24 August 2011 and expires in 2016.

- 3.2 Both in the negotiations for the current regime and also during the history of the earlier co-operative schemes designed to achieve uniform legislation and administration of corporations law in Australia, one of the key issues has been the input the States and Territories would have on any reforms to the uniform legislation.
- 3.3 The current referrals operate against the background of an intergovernmental Corporations Agreement. The various iterations of the Corporations Agreement have secured the continued existence of and State representation on CAMAC (and the predecessor Companies and Securities Advisory Committee) and its Legal Sub-Committee as part of the arrangements for reviewing and suggesting reforms to the law.
- 3.4 Clause 605 of the current Corporations Agreement 2002 (which was amended in 2005 with effect from 2006 and extended in 2011) deals with the appointment of members to CAMAC. It provides:
  - (a) The Commonwealth will consult the Ministerial Council<sup>2</sup> on the making of appointments to the Corporations and Markets Advisory Committee.
  - (b) Each State and Territory Minister will be entitled to nominate a panel of persons for potential appointment to the Advisory Committee and the Legal Sub-Committee of the Advisory Committee.
  - (c) The Commonwealth will ensure so far as practicable that at any time there is at least one member of the Advisory Committee from the Northern Territory and each referring State.
  - (d) The Commonwealth will ensure so far as practicable that at any time there is at least one member of the Legal Sub-Committee from the Northern Territory and each referring State.
  - (e) For the purposes of subclauses (3) and (4), a member is from a particular State and Territory if he or she is a resident of that jurisdiction.
  - (f) The Commonwealth Minister will confer with the relevant State or Northern Territory Minister if it is proposed that no person be appointed from the panel of persons nominated by the Minister.
- 3.5 The proposed abolition of CAMAC would leave a vacuum in terms of formal State and Territory input into the process of formulation of reforms to corporations and financial markets law.
- 3.6 The participation in CAMAC of members drawn from the business, advisory and academic communities in each State and Territory has been important in ensuring that amendments to corporations and financial markets law reflect and are

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<sup>2</sup> The Ministerial Council for Corporations is now known as the Legislative and Governance Forum for Corporations.

appropriate for business conditions in all jurisdictions. This is particularly important for Western Australia, Queensland and South Australia. Market conditions are not identical in each jurisdiction and having a formal consultative and reference body that draws its members from around Australia ensures that the law is more robust and able to cope with those differences. This cannot be replicated by giving CAMAC's work to Treasury staff in Canberra.

- 3.7 Also, giving the business, advisory and academic communities in each State a formal voice in reform discussions helps underpin the legitimacy of the legislative and administrative processes of corporations and markets law, and secure ongoing political support for continuation of the referral of powers to the Commonwealth.

#### **4. Need for adequate arrangements for continuing CAMAC's work**

- 4.1 The Minister of Finance, in his letter referred to above, indicated that the function of CAMAC would continue through Treasury, both generally and in terms of particular projects CAMAC had under way but did not have the chance to complete. The Exposure Draft Bill and Explanatory Memorandum do not provide for or explain the arrangements that will need to be made to complete CAMAC's existing projects and for achieving properly constructed corporate and market law reform proposals in future.

- 4.2 CAMAC had three significant projects under way when its abolition was announced. In the notes below we explain the importance of these projects and the importance of bringing recommendations to conclusion.

##### *4.3 The AGM and Shareholder engagement*

- (a) This review focused on 3 key areas:
- (i) the role of the AGM within the broader context of the ongoing relationship between the board and the institutional and retail shareholders of the company, often referred to as shareholder engagement;
  - (ii) the content of the annual report, being the principal document for consideration at the AGM that provides information to shareholders on the state of the company and the stewardship of the board;
  - (iii) the current processes, and possible future functions and formats, of the AGM, taking into account technological developments and opportunities.
- (b) A total of 36 submissions were received from a wide range of proxy advisers and shareholder representative groups, investor relations bodies, law firms, major corporates including BHP, Telstra and AMP, the Business Council of Australia, the Financial Services Council, superannuation bodies and the Law Council of Australia.
- (c) This review has implications both in terms of reducing "red tape" and driving efficiency (including through technology), and in terms of understanding the needs and perspectives of Australian investors, individually and as

represented through superannuation bodies, in the context of shareholder engagement.

- (d) Submissions closed in December 2012, and we understand that the report was close to completion when the abolition of CAMAC was announced.
- (e) On that basis it would take limited further work to capture the benefit of the significant investment which has already been made in this project by the government and the 36 individuals and bodies who made submissions. Those benefits may well reflect in efficiencies to the benefit of companies and their investors through more effective use of technology and keeping pace with other economies in this regard. On the other hand, that considerable investment will be wasted and those efficiency benefits forgone if the review is not completed.

#### 4.4 *Crowd sourced equity funding*

- (a) This review was commissioned as part of *Advancing Australia as a Digital Economy: An Update to the National Digital Economy Strategy* (June 2013).
- (b) This was a very specific and practical review, considering Australia's position in the context of global developments in this area from the different perspectives of
  - (i) issuers: corporate entities that are registered as companies under the *Corporations Act* and are seeking to raise capital through offers of their shares or other securities (equity); and
  - (ii) intermediaries: equity will be offered through online portals of internet website operators that come within the jurisdiction of Australian regulators; and
  - (iii) investors: those online offers, which may involve small contributions from many investors, will be open to Australian residents and/or other persons.
- (c) Submissions closed in November 2013. There was substantial interest in this review, with 41 submissions received from a wide range of individuals or bodies including the Innovation Australia, ASX, Philanthropy Australia, the Office of the NSW Small Business Commissioner, the Queensland Government, Community Sector Banking, Australian Community Renewable Energy, several individuals and small businesses operating in the technology/innovation/start up space, law firms and the Law Council of Australia.
- (d) CAMAC's Crowd Sourced Equity Funding Report was published in May 2014. The financial press at the time recognised it as the best such report available internationally. The report sets out a detailed regulatory blueprint for the stimulation of the innovative start-up and other small-scale enterprise sector of the Australian economy through internet-based funding. CAMAC's proposals are deregulatory in that they seek to overcome current legal impediments to raising funds through crowd sourced equity funding. The



personnel of CAMAC, whose perception and expertise is demonstrated by the report, will not be available to see through the recommended reforms in law and regulation if CAMAC is abolished.

#### 4.5 *Managed Investment Schemes*

- (a) This was a very significant project in which a substantial investment of resources, time and effort had already been made. Following an initial discussion paper in 2011, 21 submissions were received and considered, resulting in a further discussion paper being released in 2014. The period for submissions was still open when the CAMAC's abolition was announced. Those with submissions in progress (including our own Corporations Committee) were informed not to make the submissions because CAMAC would not finalise the review.
- (b) Some of the most serious adverse outcomes for investors and the broader market in the global financial crisis arose or were exacerbated because of shortcomings of the law in relation to managed investment schemes – for example:
  - (i) the fact that managed investment schemes, a common vehicle in which “mums and dads” and retirees invest, could be left with no responsible entity to manage them;
  - (ii) the complexity and uncertainty in relation to the respective rights of investors and creditors of the responsible entity in its own right and in its trustee capacity made it more complex, time-consuming and expensive to wind up or restructure managed investment schemes than would be achievable if reforms were implemented.

4.6 Without reform, those problems remain and would likely raise similar practical difficulties in another financial crisis. We urge the government to provide for the completion of this review so that the best way to mitigate those issues and protect the Australian market and investors from their impact in any future crisis can be determined and implemented.

## 5. **Conclusion**

5.1 The BLS urges the Government to reconsider its decision to abolish CAMAC, in the interests of ensuring that a program of sound legal and regulatory reform in the corporations and markets area is continued and enhanced, for the benefit of the Australian economy and the reduction of business costs.

- 5.2 If the Government proceeds to introduce the Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 into the Parliament notwithstanding the submissions by BLS and other expert bodies opposing that course of action, the BLS urges the Government to develop and publicly announce how it will ensure that CAMAC's important work and the key expert inputs that are necessary for that work will be effectively continued.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves  
**Chairman, Business Law Section**