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29 October 2014

The Manager,
Corporations and Schemes Unit,
Financial System and Services Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: CAMACabolition@treasury.gov.au

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 is made on behalf of the Corporate Law Teachers Association (CLTA). The CLTA has been actively involved in corporate law teaching, research and scholarship since 1991. The association has over 250 members based in the professions, academia and business, predominantly from Australia, New Zealand and South East Asia. Our executive committee comprises 11 leading academics in the area.

The CLTA is strongly opposed to the abolition of the Corporations and Markets Advisory Committee (CAMAC) and requests that the proposal be reconsidered, taking into account the vital role played by CAMAC in corporate law policy development and legislation, law reform and scholarship.

CAMAC's contribution is wide-reaching and encompasses corporate law and governance, the regulation of financial markets and insolvency. These areas are fundamental to Australia's continued economic growth, market stability and investor confidence. For ease of reference these subject areas will be referred to below as "corporate law". The CLTA supports other submissions that have been made during the consultation, for example, by the Governance Institute of Australia and the Business Law Section of the Law Council of Australia.

However, the CLTA notes the following additional and important aspects of CAMAC's contribution to the calibre of corporate law and regulation in Australia:

1. CAMAC's role in the development of legislation
2. CAMAC's role as an independent voice in policy formation
3. The debate generated by CAMAC about law reform
4. CAMAC's contribution to scholarship

The submission will elaborate upon each of these points below.

1. The importance of CAMAC's role in the development of legislation

The Explanatory Memorandum to the Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 (the CAMAC Abolition Bill) states that CAMAC's role is to:

‘provide .. [i]ndependent 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

If the CAMAC Abolition Bill is passed, the government will no longer have access to this independent, research led guidance and advice that has been relied upon by successive governments when undertaking the reform of Australian corporate law.

The work of CAMAC, and its predecessor, the Companies and Securities Advisory Committee (CASAC) has had an impact on many past corporate law reforms. Evidence of the body's influence on the law reform process and the reliance placed on its recommendations by prior governments can be found in the explanatory memoranda attached to several corporate law reform Bills.

For example, the work undertaken by CAMAC was mentioned 42 times in the Explanatory Memorandum, Corporations Amendment (Insolvency) Bill 2007. This Bill was introduced by the Howard Government. The Explanatory Memorandum recognised CAMAC's significance in the reform process when it stated that:

The reforms have been developed having regard to the recommendations of a number of recent reviews into the corporate insolvency framework. Specifically, the reforms are based on the findings of the following reviews and inquiries into the corporate insolvency framework: the 1997 Review of the Regulation of Corporate Insolvency Practitioners; the 1998 Corporations and Markets Advisory Committee (CAMAC) Report Corporate Voluntary Administration; the 2000 CAMAC Report Corporate Groups; the 2004 CAMAC Report Rehabilitation of Large and Complex Enterprises and the 2004 Parliamentary Joint

¹ Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014, [1.4].

Committee on Corporations and Financial Services (PJC) Report Corporate Insolvency Laws: A Stocktake.²

Reliance placed by prior governments on the processes adopted by CAMAC is evidenced by the Explanatory Memorandum, Corporations Amendment (Corporate Reporting Reform) Bill 2010. Several references are made to the work of CAMAC and under the heading 'Consultation' the Explanatory Memorandum states that:

Consultation was undertaken as part of the CAMAC review and was taken into account by CAMAC in forming its recommendation. Groups who made submissions to the CAMAC inquiry included major businesses and business associations, accounting firms and shareholder representatives.³

Further evidence of the reliance placed by previous governments on CAMAC's advice and recommendations is found in the Explanatory Memorandum, Corporations Amendment (Sons of Gwalia) Bill 2010. This document referred to CAMAC on numerous occasions and to the CAMAC Report 'Shareholder claims against insolvent companies: Implications of the Sons of Gwalia decision in December 2008.'⁴

2. CAMAC's role as an independent voice in policy formation

Another important aspect of CAMAC's work is that it adds an independent voice to policy formation on corporate law in Australia. This may be demonstrated by Australia's continuous disclosure regime. The provisions of the *Corporations Act* which enacted a statutory disclosure regime for listed companies were introduced by the *Corporate Law Reform Act* 1994. These legislative provisions were based on the conclusions of CASAC's Report - *An Enhanced Statutory Disclosure System* (September 1991), which recommended the establishment of an enhanced statutory disclosure system.

The legislative framework that was introduced in 1994 underwent significant amendment with the commencement of the *Financial Services Reform Act* (FSR Act) on 11 March 2002, that is:

- The provisions were re-drafted and relocated from Part 7.11 to a new Chapter 6CA of the Corporations Act.
- A 'carve-out' based on ASX Listing Rule 3.1 was introduced into the continuous disclosure requirements governing unlisted disclosing entities.
- Contraventions of subsections 674(2) and 675(2) were made civil penalty provisions.⁵

² Explanatory Memorandum, Corporations Amendment (Insolvency) Bill 2007, [2.2]

³ Explanatory Memorandum, Corporations Amendment (Corporate Reporting Reform) Bill 2010, [212].

⁴ Explanatory Memorandum, Corporations Amendment (Sons of Gwalia) Bill 2010.

⁵ *Corporate Disclosure-Strengthening the Financial Reporting Framework* (the CLERP 9 Report) September 2002, <http://archive.treasury.gov.au/documents/403/PDF/Clerp9.pdf>, page 134.

As stated by a Treasury report in 2002:

A number of the amendments introduced by the FSR Act were based on the recommendations of CASAC's 1996 report on continuous disclosure, which examined the first 18 months of operation of the enhanced statutory disclosure provisions introduced by the Corporate Law Reform Act.⁶

This example from 2002 demonstrates that CASAC was still playing a vital role in the reform of the continuous disclosure regime, even though responsibility for corporate law policy had moved to Treasury in 1996 and by 1998 a specialised unit had been created in Treasury (the Corporate Law Economic Reform Program (CLERP)) which dealt with corporate law reform.⁷ Importantly, CAMAC's predecessor provided a voice which was independent of, but complementary with, the policy generated by CLERP.

The rigorous standard imposed by the continuous disclosure regime has placed Australia amongst the world leaders in ensuring market integrity and high corporate governance standards.

The CLTA also notes that CAMAC has been used to 'fine-tune' or apply policy generated by other bodies such as the Productivity Commission. In 2009 the Productivity Commission released a report entitled *Executive Remuneration in Australia*. The report made a number of recommendations designed to strengthen Australia's remuneration framework. The government considered that CAMAC had the requisite expertise to advise on legislation to improve reporting about expert remuneration. This resulted in an information paper and a report issued by CAMAC.⁸

3. The importance of the debate generated by CAMAC about law reform

CAMAC has provided a neutral and informed viewpoint about corporate law issues and a rich source of material to generate wide-ranging debates about law reform. Its reports and discussion papers have always been accessible to both expert and lay person alike. CAMAC's mix of practitioners and academics has provided a valuable conduit between the practical operation of corporations and markets and the academic scrutiny of these areas. It is unlikely that a policy unit in an agency could provide an independent voice nor achieve the same reach in communicating with courts, markets, firms, investors and academics.

To illustrate, the CLTA notes two recent contributions made by CAMAC to current debates about the regulation of corporations. The first concerns the report issued by CAMAC in May 2014 on crowd sourced equity funding.⁹ Crowd funding is now a pervasive activity which

⁶ *Corporate Disclosure-Strengthening the Financial Reporting Framework* (the CLERP 9 Report) September 2002, <http://archive.treasury.gov.au/documents/403/PDF/Clerp9.pdf>, page 134.

⁷ Corporate Law Economic Reform Program, *Policy Reforms*, 1998 <http://archive.treasury.gov.au/documents/264/PDF/clerp.pdf>.

⁸ CAMAC, *Executive Remuneration Report* (April 2011) *Executive Remuneration Information Paper* (July 2010).

⁹ CAMAC, *Crowd Sourced Equity Funding Report* (May 2014).

has been carefully regulated in many jurisdictions. It is an innovative method of funding which requires a consideration of fresh and traditional approaches. The CAMAC report provides an excellent foundation for this debate. Similarly, at the time that it was disbanded, CAMAC was working on a review of shareholder engagement in annual general meetings – an ongoing issue of importance to large and small investors. This resulted in a discussion paper¹⁰ and it is regrettable that further consideration of the issue appears to have been suspended. The CLTA dedicated a plenary panel in its February 2014 conference to this issue. It continues to be a serious issue for corporate governance.

4. The importance of CAMAC's work for corporate law scholarship

CAMAC (and its predecessor CASAC) have made a substantial contribution to corporate law scholarship. The aggregated data of its citations in Table 1 below demonstrates this significant impact. The data in the table tracks references to CAMAC and CASAC in the relevant databases. It shows that CAMAC/CASAC's output is obviously highly 'consumed' by academics and practitioners involved in teaching and research in this area. Many of the references and citations are in formal publications however the material demonstrates an impact which is wider than published scholarly papers. The committee's discussion papers and reports have also been discussed and cited in cases, books, commentaries, informal papers and regulatory materials.

The table mainly focusses on Australian publications but CAMAC/CASAC's work has also been referenced in international publications. For example, the *Diversity on boards of directors*¹¹ report was cited by an eminent corporate law scholar, Klaus Hopt.¹² The committee's work also crosses disciplinary boundaries, as exemplified by Ian Freckleton's discussion of its report on long-tail liabilities¹³ in the *Journal of Law and Medicine*.¹⁴

Table 1

Database	CAMAC	CASAC
Google Scholar	102+	120+
LexisNexis	72 journals 62 commentary 41 cases	35 journals 29 commentary 38 cases
Westlaw Au	189 journals 23 cases 7 encyclopaedia 20 news and current awareness	220 journals 81 cases 14 encyclopaedia 5 news and current awareness

¹⁰ CAMAC, *The AGM and Shareholder Engagement*, Discussion Paper (September 2012).

¹¹ CAMAC, *Diversity on boards of directors Report* (March 2009).

¹² K Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation' (2011) 59 *American Journal of Comparative Law* 1.

¹³ CAMAC, *Long-tail liabilities: The treatment of unascertained future personal injury claims Report* (May 2008).

¹⁴ I Freckleton, 'Long-tail liability law reform' (2007) 15 *Journal of Law and Medicine* 171.

Conclusion

CAMAC has played a vital role in corporate law in Australia and our submission shows that it has provided a firm foundation for corporate law legislation, policy development, law reform and scholarship. The CLTA therefore strongly urges you to reconsider this proposal to abolish the committee.

Please do not hesitate to contact me should you require elaboration or clarification of the above.

Yours faithfully,



Professor Peta Spender
President
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ANU College of Law, Australian National University