

Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 – Exposure Draft

To
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Submission - Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 - Exposure Draft

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This submission is made by the Law Society of Western Australia (Society) in response to the *Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014*.

Key points

In this submission, the Society notes the following matters in relation to the proposed abolition of the Corporations and Markets Advisory Committee (CAMAC):

- the decision to abolish CAMAC appears to have been announced by the Commonwealth Government with little, if any, prior consultation with Western Australia or the other referring States and Territories, such unilateral action being at odds with the spirit and intent of the various Corporations Agreements that underpin the referral of State powers to the Commonwealth Government to enable it to legislate nationally in the area of corporations law;
- the important role that CAMAC plays in allowing continuing representation of the business and financial communities of the States and Territories in the process of corporate law reform in return for the referral of powers is being overlooked;
- CAMAC has a proven track record of producing detailed and thoughtful reports including sound, market oriented recommendations in which efficiency considerations are at the forefront;
- the decision appears to be at odds with the stated policy basis for the same in a number of key respects;
- the important and valuable role played by CAMAC is based upon a unique model that cannot be replicated from within an existing Government Department such as the Markets Group of the Department of Treasury; and
- The proposed abolition of CAMAC in the manner proposed by the exposure draft Bill will leave the States without a formal structure for input into the process of formulation of reforms to corporations and financial markets law.

The background to CAMAC

The Department of Treasury website indicates that the exposure draft Bill is proposed to give effect to the Commonwealth Government's 2014-2015 Budget Announcement that the Corporations and Markets Advisory Committee (**CAMAC**) will be abolished (**Budget Announcement**).

The Society is concerned to note that the Budget Announcement appears have been made unilaterally by the Commonwealth Government with little, if any, prior consultation with Western Australia or the other referring States and Territories.

The Society is also concerned that the history to the establishment of CAMAC and the important role that it plays in allowing representation of the business and financial communities of the States and Territories in the process of corporate law reform is apparently being overlooked.

The Society notes that:

- the power granted to the Commonwealth to legislate in relation to Corporations under s 51(xx) of the Commonwealth Constitution is limited. It does not allow the Commonwealth to make a law for the formation of trading or financial corporations, as opposed to a law regulating the activities of those corporations;
- as a consequence uniform national legislation and administration of corporations and financial markets law is only possible by agreement between the Commonwealth and the States;
- the constitutional validity of *Corporations Act 2001 (Cth)* and the *Australian Securities and Investments Commission Act 2001* was secured by means of referrals of power by each of the State parliaments;
- the referrals of power were not given on an open-ended basis and the most recent extension of the referral of corporations power expires in 2016; and
- both in the negotiations for the current regime and also during the history of the earlier co-operative scheme designed to achieve uniform legislation and administration of corporations law in Australia, a key issue has been the input the States would have on any reforms to the uniform legislation.

The referrals of power have been underpinned by the various Corporations Agreements between the Commonwealth and the referring States and the Territories. At all times during the negotiations of these Agreements, the input the States would have on any reforms to the uniform legislation has been a central issue.

The Society notes that it was against this background that CAMAC (and its predecessor, the Companies and Securities Advisory Committee (**CASAC**)), were established as a means to ensure continued input by the States on matters of corporate law reform.

Notably, the various versions of the Corporations Agreement have also secured the continued existence of, and State representation on, CAMAC and its Legal Sub-Committee as part of the arrangements for reviewing and suggesting reforms to the law.

The Heads of Agreement entered into between the Commonwealth and State and Territory Ministers having responsibilities in relation to corporate regulation in June 1990¹, as the basis for the former co-operative scheme, provided:

3.9 The States will be entitled to nominate a panel of persons for potential appointment to the Companies and Securities Advisory Committee and the Legal Sub-Committee.

The Commonwealth will ensure appointment of at least one member from each State to each of those bodies.

The Commonwealth will give first priority consideration to appointment of persons so nominated.

Where the Commonwealth proposes to appoint a person other than one so nominated, the Commonwealth Attorney-General will consult with the relevant State Minister.

Those arrangements were formalised in clause 606 of the Corporations Agreement 1997.

In the Corporations Agreement 2002, Clause 605 extended the arrangements regarding appointments to what was by then called the Corporations and Markets Advisory Committee (**CAMAC**) to each of the Territories, as well as to each State.

The Corporations Agreement 2002 was amended in 2005 (with effect from 2006). The current version of clause 605 provides:

605 (1) The Commonwealth will consult the Ministerial Council² on the making of appointments to the Corporations and Markets Advisory Committee.

(2) 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.

¹ This agreement is generally known as the Alice Springs Agreement.

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

(3) *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.*

(4) *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.*

(5) *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.*

(6) *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.*

The requirement for State and Territory representation on CAMAC also is formally reflected in the current section 147 of the *Australian Securities and Investments Commission Act 2001*(Cth), which states that in appointing members to CAMAC:

- a) the Minister must have regard to the desirability of the views of the business communities in the jurisdiction³ being adequately represented among the members; and
- b) the Minister must ensure that as far as practicable, there is at least one member of CAMAC from each State in this jurisdiction and the Northern Territory.

Viewed in the context of the history of the referral of State powers to the Commonwealth Government to enable it to legislate nationally in the area of corporations law, the role played by CAMAC is an important one. It was established and constituted to allow representation of the business and financial communities of the referring States and Territories in the process ongoing of corporate law reform.

Against that historical background, the Society was disappointed to note that the Budget Announcement appeared to have been made with little, if any, prior consultation with Western Australia or the other referring States and Territories. The Society considers such unilateral action as being completely at odds with the spirit and intent of the various Corporations Agreements that underpin the referral of powers. A careful, considered genuine consultation process, rather than a unilateral announcement, was clearly called for in the circumstances.

³ "the jurisdiction" is defined to mean each referring State, the Capital Territory and the Northern Territory

The role of CAMAC as a representative body

As noted above, CAMAC was established, and is constituted, to allow representation of the business and financial communities of the referring States and Territories in the process ongoing of corporate law reform. Its model, drawing on expertise from industry and the legal, economic and accounting professions, with due regard for appropriate representation across the States and Territories, has meant that the members of CAMAC are uniquely well placed to consider and advise upon corporate law reform.

The Society notes that the need for appropriate representation of the business and financial communities of the referring States and Territories is as relevant today as it was when the idea of CAMAC (or indeed, CASAC) was originally conceived.

There are differences in the market conditions in each of the referring States and Territories. In a State such as Western Australia, such differences can be marked. Having a consultative body such as CAMAC, with members selected from each of the States and Territories, ensures that corporate law reform proposals can be developed that are balanced and workable in all jurisdictions, rather than being designed to reflect the business and market practices of some jurisdictions only.

The proposed abolition of CAMAC would leave the States without a formal structure for input into the process of formulation of reforms to corporations and financial markets law. The need to respond to new market developments and keep laws up to date with developments in market practices and conditions make the need for reform an ongoing process.

Without the formal structure that CAMAC provides for the representation of the business and financial communities of the referring States and Territories in the process ongoing of corporate law reform, the Society is concerned that the quality, utility and robustness of our corporations and financial markets law will decline.

The track record of CAMAC

The Society holds the work of CAMAC in the highest regard. The Society notes that CAMAC has a proven track record of producing detailed and thoughtful reports including sound, market oriented recommendations in which efficiency considerations are at the forefront.

Past reports of CAMAC (together with its predecessor CASAC) have formed the basis for many of the matters that we now take for granted as fundamental to our system of corporations law in Australia. Examples include our laws on continuous disclosure, share buy-backs and executive remuneration.

The most recent CAMAC report on Crowd Funding demonstrates not just high standard of the work of this Committee, but also its continued relevance. The dynamic nature of corporations and markets means the need for law reform and legal regeneration in these areas is an ongoing process. Historically, CAMAC has taken a pro-active approach to reform and identified areas where the law is lagging behind new developments in corporate or market practice.

The high regard in which CAMAC is held in the business community and the legal, accounting and economics professions means that peak industry and professional bodies are prepared to spend considerable time and effort in preparing submissions for the consideration of CAMAC. The fact that the submission process is not subject to government-imposed time constraints has also meant that the response rate and the quality of the submissions has been consistently high.

At the time of the Budget announcement, CAMAC was working on two important references on annual general meetings and managed investment schemes. A considerable number of submissions on those references had been received at the time of the Budget Announcement and the Society understands that further submissions were under development.

The Society is concerned that the Commonwealth Government's announced decision to abolish CAMAC will make it difficult for the Commonwealth Government to move forward with much needed reform to the legal requirements for annual general meetings and managed investments schemes, projects upon which a great deal of time and effort has been expended by both CAMAC and the principal business and advisory groups who contributed submissions. The Society notes that no provision has been made in the draft bill for the continuation of this work and there is no reference to the same in the explanatory statement.

Comments on the stated policy rationale for the proposed abolition

The decision to abolish CAMAC has been stated to be part of the second phase of the Abbott Government's "Smaller and More Rational Government" reforms. According to the Government's own releases, the stated aim of these reforms is to "streamline government structures and identify improvements that would ensure greater value for taxpayer's money"⁴, and to "reduce duplications and increase efficiency in how public funds are used to deliver services to the community."

The reforms are stated to be "the Abbott Government's solution for reducing public sector staffing levels⁵" and to "ensure that overly-bureaucratic structures are simplified where possible".⁶

The Society does not consider that CAMAC is a body which needs to be abolished to eliminate duplication, or remove waste. In particular, the Society notes that:

- the role of CAMAC as a specialist independent research based corporation is not duplicated elsewhere in the government, indeed, it acts on specific references from the Government;
- CAMAC already provides great value to the taxpayer – it operates on a modest budget⁷ and draws upon the expertise of highly experienced members of the legal, economic, academic and business communities of each of the States and Territories, such persons making their services available to CAMAC in effect, for little or no charge. To replicate this model through another government department would quickly incur substantial consultancy fees whilst making the rationale for "streamlining" its function redundant.
- CAMAC already minimizes its overheads by sharing its premises and back-office support functions with ASIC. In doing so, it already demonstrates efficiency in how public funds are used to deliver services to the community.

⁴ "Smaller and More Rational Government 2014-2015" Ministerial paper May 2014 at page iii.

⁵ "Smaller and More Rational Government 2014-2015" Ministerial paper May 2014 at page 12

⁶ "Smaller and More Rational Government 2014-2015" Ministerial paper May 2014 at page iii.

⁷ The Society notes that the 2012-2013 Annual Report of CAMAC (the most recent currently available) shows it coming in under budget, the net cost of services as being \$911,636 (against revenues from Government of \$985,000, showing a surplus attributable to the Australian Government of \$73,364).

- CAMAC is the antithesis of an overgrown bureaucracy - its part-time committee member structure, supported by its highly skilled and experienced executive consisting of only two lawyers and an administrative assistant demonstrates that it has that kept its operating structure extremely lean and efficient throughout its 24 years of operation.

In summary, the Society notes that CAMAC has an established track record of operating effectively and efficiently on a modest budget. To abolish it would reduce public sector staffing levels by a mere 3 persons, whilst at the same time losing to the public sector some of the best and most experienced corporate law reform expertise that it possesses.

CAMAC provides great value for money to the taxpayer, given the quality and relevance of its reports. There is no need for it to be targeted as part of the “Smaller and More Rationale Government” reforms; the stated policy rationale for the Budget Announcement does not stand up to scrutiny.

Can CAMAC’s role be properly performed from within the Department of Treasury?

CAMAC is an independent, transparent and research based law reform body which has been constituted to facilitate practical input from the business, market and professional advisory communities.

The key features of the CAMAC model that have contributed to its past success are not matters that can be replicated by merging it into the Markets Division of the Department of Treasury without undertaking structural reform.

Such structural reforms would be required to accommodate the need to draw on relevant and current expertise from industry and the legal, economic and accounting professions, with due regard for appropriate representation across the States and Territories.

The Society notes that the Markets Division of Treasury is not currently resourced to perform the functions of CAMAC. Additional staffing would be required if the Government is genuinely committed to merging CAMAC’s functions into this Department, as opposed to ceasing CAMAC’s functions for practical purposes.

Further, it would be difficult, if not impossible, for any existing Commonwealth Government department maintain CAMAC's independence, another important feature of the CAMAC model. The work of CAMAC continues outside of the political cycle; it has no vested interest in the content of its reports, other than to ensure that they provide a solid foundation for reforms for the benefit of the Australian economy and the reduction of business costs.

Even if such structural changes could be implemented in a suitable manner, the Society doubts that such structural changes could be made and maintained within the same budget. Leaving the obvious structural issues aside, much of CAMAC's effectiveness rests not just upon its unique structure, but also upon its good reputation, a reputation earned from 24 years of effective service. It has an enviable reputation for quality and independence. That reputation is not transferable.

As noted above, high regard in which CAMAC is held in the business community and the legal, accounting and economics professions means that peak industry and professional bodies are prepared to spend considerable time and effort in preparing submissions for the consideration of CAMAC.

Further, the quality of such submissions is enhanced by the fact that the timeframes for submissions are realistic, recognising that adequate time needs to be allowed for stakeholder committee meeting cycles and proper consideration of complex issues. It would be unrealistic to expect the same level of engagement from the business community and the legal, accounting and economics professions if the submission timeframes are moved to the standard "best practice" Government consultation periods.

Conclusion

In conclusion, the Society observes that the proposed draft bill and associated explanatory material for the proposed abolition of CAMAC are more notable for what they do not say than for their content.

In particular, if the Government proceeds to introduce and pass *the Australian Securities and Investment Commission Amendment (Corporations and Markets Advisory Committee Abolition Bill 2014* in the manner proposed by the exposure draft, it will be leaving the referring States and Territories without a formal structure for input into the process of formulation of reforms to corporations and financial markets law.

The Society's clear preference is for CAMAC to be retained. If this is not possible, the Society would like to see alternative statutory arrangements put in place to ensure that State input into the process of formulation of reforms to corporations and financial markets law continues, in keeping with the spirit of the original referral of powers.

The proposed abolition Bill does not address this important matter, nor does it make adequate provision for the continuation of the functions of CAMAC and the completion of its open references generally.



Konrad de Kerloy
President

23 October 2014