



Senator the Hon Mathias Cormann
Minister for Finance and Acting Assistant Treasurer,
Parliament House,
CANBERRA ACT 2600
Via email: financeminister@finance.gov.au

11 June 2014

Copy to:
The Hon Joe Hockey MP,
The Treasurer,
Parliament House,
CANBERRA ACT 2600
Via email: J.Hockey.MP@aph.gov.au

Dear Minister,

Commonwealth budget proposal to abolish corporations and markets law reform body

1. This letter has been prepared by the Business Law Section of the Law Council of Australia on the advice of the Corporations Committee.
2. In the May Budget the Commonwealth Government announced its intention to abolish the Corporations and Markets Advisory Committee (CAMAC). CAMAC was established pursuant to an inter-governmental agreement to produce ongoing research-based law reform in the corporations and markets areas.
3. The proposed abolition of CAMAC goes further than the recommendation made by the National Commission of Audit earlier this year, which recognised that the functions carried out by CAMAC should be retained, though it proposed that they be located in another part of government.
4. While we understand and acknowledge the Government's broader reform agenda in relation to a range of Commonwealth bodies, we are writing to urge the Government to reconsider its budget decision regarding CAMAC.

Key points

5. The Business Law Section submits that there is a very strong case for the continuation of an independent, transparent, research-based corporate and

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markets law reform body, constituted to facilitate appropriate input from business, market and legal sources.

6. The policy reasons for maintaining such a law reform body are addressed more fully in the attached Annexure, but in summary:
- (a) corporations are the locomotives of the modern industrialised economy, and so their efficient operation and governance, and timely and effective corporate capital formation, are prerequisites for good economic management at the governmental level;
 - (b) poorly conceived corporations and markets laws can create excessive red tape, leading to substantial, unnecessary costs to be borne ultimately by shareholders, employees and consumers, and society at large; while conversely, CAMAC has a track record of making recommendations conducive to the reduction of costs and red tape;¹
 - (c) because the statutory corporate laws in many countries are based on the same UK model, research-based corporate law reform can draw upon a valuable experience-based resource to achieve optimum outcomes for Australia;
 - (d) the dynamic nature of corporations and markets means that the need for reform and legal regeneration in these areas is ongoing;
 - (e) an independent corporations and markets law reform body is desirable to supplement the resources and expertise within Treasury, bearing in mind that, although corporations and markets laws provide economic regulation, reform in this area is different from other economic responsibilities in several key respects noted in the Annexure;
 - (f) best practice legislative processes are not of themselves sufficient for good corporations and markets law reform, and need to be supplemented by expert independent consideration of reform proposals at the developmental stage;
 - (g) reform in the corporations and markets area often involves long lead-times and is most successful when it is bipartisan and outside the constraints of the political and electoral cycle;
 - (h) CAMAC, the specialist body for corporations and market law reform that is currently in place, has been shown to operate effectively, as demonstrated

¹ We would be happy to provide a supplementary paper listing the many ways in which CAMAC's recommendations have pointed to effective reductions of red tape and substantial efficiencies in the corporations and markets areas.

by its work since 1991 (including its very recent Report on *Crowd-Sourced Equity Funding*);

- (i) it is particularly regrettable that the decision to abolish CAMAC will make it difficult for the Government to move forward with much-needed reform (with associated reduction in red tape) to the legal requirements for annual general meetings and managed investment schemes, projects on which a great deal of time and effort has been expended by CAMAC and the principal business and advisory groups.
7. From 1984 to the present time, Australia has had the benefit of an independent, transparent, research-based reform body in the corporations and markets areas, structured so as to facilitate business and professional inputs.² Consequently this country has been able to implement on a national basis some of the best corporations and markets law reforms of any industrialised country. For an assessment of the work of CAMAC, see the Annexure, para 15.
 8. The current system of corporations and markets law reform contrasts very favourably with the *ad hoc*, under-resourced, inefficient and crisis-oriented law reform practices of the Australian States and Territories prior to the commencement of the national cooperative companies and securities scheme in 1981-1982.
 9. The principal Commonwealth legislation concerning corporations and markets depends for its constitutional validity on referrals of power by the States, which they have done pursuant to a Corporations Agreement.³ The Corporations Agreement assumes the existence of CAMAC and deals with its composition. The abolition of CAMAC pursuant to a Commonwealth budget decision, without proper participation by the States, is inconsistent with that assumption and consequently puts State referrals of power at risk. We note that the referral of power by the States is subject to a sunset, currently in 2016.
 10. CAMAC has delivered a substantial quantity of first-class reports and discussion papers very economically. It comprises a full-time staff of only two experienced lawyers and an administrator, supervised by an external Committee and housed in public sector premises. Members of the Committee and (until recently) its Legal Sub-Committee have contributed very substantial professional time to CAMAC's work in exchange for modest sitting fees. The system operates flexibly, drawing upon expert business and legal input. We submit that if CAMAC is abolished, the

² The Companies and Securities Law Review Committee (CSLRC) was established in 1984. The Corporations and Securities Advisory Committee (CASAC) was established in 1991 as part of a national Corporations Law system. CASAC became CAMAC in 2002, after State referrals of corporations power to the Commonwealth. We have prepared a brief history of statutory corporations and markets law reform which we would be happy to make available.

³ Again, we have prepared a short paper identifying the key commitments of the Commonwealth, the States and Territories relating to the operations of CAMAC, which we would be happy to make available.

Government will not be able to secure access to this level of expertise and experience at comparable cost.

11. If CAMAC is abolished and its function is transferred into Treasury, we are apprehensive that the quality of corporate and market law reform will inevitably deteriorate, because of:
 - (a) the absence of institutional arrangements for sound and practical business and professional input into the law reform process;
 - (b) the inevitable necessity for corporations and markets law reform to compete for resources to develop sound research-based proposals;
 - (c) lack of transparency; and
 - (d) increased exposure of the law reform process to the political cycle.

Conclusion

12. For these reasons, the Business Law Section urges the Government to reconsider the budget decision to abolish CAMAC, and to retain that agency in its present form.
13. However, the principal concern of the Business Law Section is to preserve and enhance the quality of corporate and market law reform proposals, so as to eliminate red tape and enhance business efficiency, rather than to preserve CAMAC as an agency in its current form.
14. Therefore, if the Government wishes (necessarily with the consent of the States and Territories) to review the provision of research-based corporate and market law reform proposals while abolishing CAMAC, the Business Law Section would encourage the Government to implement a system design which complies with the basic principles set out in this submission, particularly regarding independence, transparency, a research focus, business and professional input, and a well-qualified and experienced secretariat.
15. We would welcome the opportunity to discuss these matters with you further. To that end John Keeves, Chairman of the Business Law Section (telephone (08) 8239 7111) will call your office to arrange an appointment so that we can put our case on this important issue in person.

Yours faithfully,

John Keeves
Chairman, Business Law Section

Annexure: Public policy considerations supporting an independent body for corporations and markets law reform

Introduction

1. Policy considerations show that the corporations and markets law reform body should consist of experts from business and law, currently active in the markets, operating under a formal structure that both facilitates and guarantees the members' independence from government and from their individual firms and sectors. It should be supported by a standing secretariat and be able to access adequate high level research and drafting expertise in law and regulatory policy to work on sustained reform projects of substance.
2. In corporations and markets law reform, CAMAC has functioned as an independent expert body with the capability to assist significantly in improving the legal environment for corporations, investors and markets and reducing poor quality regulation. The Committee members are selected following consultation between the Commonwealth and the States and Territories, on the basis of their knowledge of, or experience in, business, the administration of companies, financial markets, financial products and financial services, law, economics or accounting (and the Committee was, until June 2013, assisted by a Legal Sub-Committee) selected, following consultation between the Commonwealth and the States and Territories, on the basis of their expertise in corporate law.
3. The detailed and thoughtful reports produced by CAMAC (and its predecessor, CASAC) have recommended a number of initiatives to improve corporate regulation and reduce the regulatory burden, including in the areas of directors' duties and liabilities and executive remuneration, areas also recommended for reform by the Banks Taskforce in 2006 and, in the case of remuneration, by the Productivity Commission in 2010.
4. 'The financial and corporate sectors are a key element of the Australian economy and their effective performance is integral to its overall strength' (Banks, 2006). The impact of corporations and markets regulation on the overall strength of the Australian economy is significant. Out-dated laws and poor quality regulation, including regulation that does not achieve the intended policy outcome or goes further than needed to achieve that outcome, have widespread detrimental impact on Australian business and investors.
5. The substantial economy-wide cost of regulation is identified as a key problem confronting Australia's international competitiveness (Deregulation Reform Discussion Paper, November 2012).

Reasons why an independent expert body is needed

6. There are nine key reasons why this specialist structure is required in corporations and markets law reform.
7. **First**, corporations are a fundamentally important component of the modern industrialised economy, and so the efficient operation of many aspects of the Australian economy depends upon effective operation and governance of corporations and their efficient contribution to the process of capital formation. As *The Economist* recently said:
"Public companies built the railroads of the 19th century. They filled the world with cars and televisions and computers. They brought transparency to business life and opportunities to small investors" and they "have been central to innovation and job creation".
8. **Second**, poor corporations and markets laws create substantial red tape and costs to be borne by shareholders, employees and consumers, and society at large, while an independent law reform body can not only avoid but significantly reduce red tape and costs. Thus:
 - (a) on the negative side:
 - (i) poorly conceived corporate and market laws not only increase red tape but create substantial operational inefficiencies and distorted practices, excessively cautious decision-making and unjustified costs to be borne by shareholders, employees and consumers;
 - (ii) perhaps worse still, the heavy hand of Australian corporations and markets regulation can disadvantage Australian companies in the global marketplace; and
 - (iii) historically, corporate collapses have been perceived by the public and legislators to have been linked with inadequate corporate law, and consequently they have led to rushed amending legislation in response to political imperatives, in the absence of research-based and balanced reform proposals independent of the political process, with counter-productive outcomes;
 - (b) on the positive side:
 - (i) CAMAC has established an enviable reputation for sound, market-oriented recommendations in which efficiency considerations are at the forefront and the reduction of red tape is a happy consequence of implementation;
 - (ii) current recommendations which, though not yet implemented, would reduce red tape include:

- (A) the recommendations on members' schemes of arrangement (which would among other things extend the courts' jurisdiction over schemes to encompass managed investment schemes and facilitate short-form mergers in corporate groups); and
 - (B) the recommendations on insider trading (which would among other things extend the Chinese walls defence to cover the procuring offence and extend the 'own intentions' exemption to allow members of a prospective bid consortium to acquire on behalf of a consortium).
- 9. **Third**, the dynamic nature of corporations and markets means that the need for reform and legal regeneration in these areas is ongoing. The work of reform is never finished. A proactive approach to reform that identifies areas where the law is lagging behind new developments in corporate or market practice, generates ideas and proposes solutions on a real-time basis is crucial to reduce red tape, foster innovation and keep the law responsive and fit-for-purpose. It is difficult for governments to do this from within. Governments tend to respond to market issues rather than anticipate trends or new developments. People who are 'at the coalface' are better placed to drive this reform proactively.
- 10. **Fourth**, although (as noted at para 11(b) below) corporations and markets law is not purely statutory, the statutory part of Australian corporations law has traditionally been enacted in a single statute. Importantly, that single enactment is derived from UK legislation of the 19th century, which has also been the foundation for corporate law in other British Commonwealth countries and beyond. The experience that the business communities, administrators and judges of other countries have had with their legislation in this field, and the extensive published analysis and commentary, are available to be tapped for sensible law reform ideas in Australia. There are few other areas of law which have access to a similarly rich resource, and this provides special justification for an expert law reform body dedicated to the corporations and markets area.
- 11. **Fifth**, such a body is desirable to supplement the resources and expertise within Treasury. From the mid-1990s, Ministerial responsibility for corporations and markets law has been with the Treasurer, rather than in the legal portfolio of the Attorney-General. This reflects the fact that one core purpose of corporations and markets law is economic regulation. However corporations and markets law is **different from other economic responsibilities, and other economic laws**, within the portfolio in three key respects:
 - (a) Corporations and markets law is not just regulatory (that is, it is not just about controlling the actions of corporations and markets and their participants *vis-à-vis* the state). It is also facilitative (in that it provides the legal infrastructure for the existence and conduct of corporations and

markets) and creates and embodies private law obligations between individuals that are not ordinarily the concern of the state.

- (b) Corporations and markets law is not purely statutory. Indeed it is not even predominantly statutory. A unique feature of Australian corporations and market law is that it involves the intersection of public and private law, arising through and embodied in a complex system of rights and obligations arising under common law, equity and statute.
- (c) Corporations and markets law is a wide-ranging, highly (and arguably unnecessarily) complex and difficult area of Australian law. The best way to understand it is as a complex eco-system of interacting and interdependent themes, principles and structures. Like any complex system it is highly sensitive to initial conditions and therefore highly path-dependent. It is non-linear in that it does not operate on simple cause-and-effect principles. Changes to one part of the system reverberate and rebound through the whole system. This means that an intimate and detailed understanding of the whole body of corporations and markets law is required to identify the need, and understand the likely systemic consequences of any proposals, for reform.

12. These differences mean that specialist expertise encompassing both law and economics is necessary to achieve meaningful reform. It is neither practical nor efficient to maintain this expertise within the Treasury bureaucracy. Experience suggests that the kind of specialist legal knowledge required is unlikely to develop or be maintained at senior levels within the Treasury, given its core functions lie outside this arena.

13. **Sixth**, ordinary '**best practice**' **process** in regulatory reform is **unlikely**, on its own, **to give rise to quality legislative outcomes** in this area. By this we mean that formal processes for reform recommended, for example, by the 2006 Banks Taskforce are not a substitute for proper and informed considerations of rule design. These processes typically involve 'rigorous cost-benefit analysis', 'coordinated and comprehensive consultation' and the use of formal Regulatory Impact Statements. While these processes are valuable, they are not sufficient on their own to ensure good outcomes in corporations and markets law reform. In particular:

- (a) Cost-benefit analysis is intended not only to test the benefits of a change to regulation against its cost, but also to test the relative costs and benefits of alternate forms of regulation. However it does not provide a basis for designing those alternative forms, which is a specialist task requiring an understanding of the various ways in which a policy outcome might be arrived at (for example, by more or less prescriptive rules, with different forms of sanctions attached).

- (b) While consultation can produce useful feedback on exposure drafts of proposed legislation (assuming there is adequate time to consider the issues and the comments received are taken into consideration, which has not always been the case in the past), it has significant limitations as a substitute for proper and expert independent consideration of technical issues relating to rule design and drafting. Lawyers and others asked to comment on exposure drafts may be constrained in what they can say outside a formal and independent process by the interests of their clients.
 - (c) Comment is generally sought only on specific proposals once the key policy choices have been made, without the opportunity to consider the broader systemic context within which the proposal sits.
 - (d) In practice, the process of 'consultation' can, notwithstanding a genuine desire to consult, turn out to be an exercise of form only, where those with differing opinions are invited to express them without a full understanding the starting position of those consulted or how disinterested, representative or authoritative their stance. At worst, it can result in legislation that is the product of trying to find a form of words to which as few of those consulted object as possible, rather than the right reform outcome. In other words, consultation can become negotiation between conflicting interests, with the integrity of the reform process being compromised.
14. **Seventh**, reform in the corporations and markets area often involves long lead-times and is most successful when it is bipartisan and conducted outside the constraints of the political and electoral cycle. This is particularly so because the constitutional power to make and amend the *Corporations Act 2001* (Cth) and related legislation is vested in the Commonwealth by a referral from the States that is not perpetual. The most recent referral, made in 2011, expires in 2016. Giving carriage of substantial reform proposals to an independent body that has operational autonomy and that can continue its work without undue disruption notwithstanding a change of government can be important to maintain efficiency in the process, and ensure reform is depoliticised.
15. **Eighth**, the specialist structure for corporations and market law reform that is currently in place has been shown to operate effectively:
- (a) CASAC and CAMAC have carried forward and enhanced the reputation of the CSLRC for sound, balanced and well-researched law reform proposals. A review of their reports from 1991 to date demonstrates that they have tackled, with distinction, many of the most difficult and challenging problems in the corporations and markets law reform areas.
 - (b) Some of their work has led fairly directly to legislation or implementation in other ways (most notably, their work on personal liability for corporate fault,

diversity, derivatives/netting, anomalies in the takeover provisions, and compulsory acquisition of minority interests).

- (c) Additionally, their reports have laid the foundation for the most important legislative reforms in the corporations and markets area: such as the enhanced disclosure system, related party transactions, statutory derivative actions, and collective investments.
- (d) Other reports, not yet implemented, are valuable resources which should frame informed consideration of reform proposals (for example, the report on insider trading in 2003).
- (e) In summary, Australia has had an independent, transparent, research-focused corporate law reform body since 1984, with a demonstrated beneficial effect on the quality of amending legislation in this field.
- (f) The value of CAMAC's work was strikingly emphasised by the recent publication of its Report on *Crowd-Sourced Equity Funding* (May 2014). As media commentary has recognised⁴, the Report is not just a blueprint for the regulation of crowd-sourced equity funding in Australia, but is a new reference point for regulators around the world, which for the first time compares the steps that other industrialised countries are taking to facilitate crowd-funding.

16. **Ninth**, the abolition of CAMAC at this time will jeopardise and possibly prevent the achievement of some of the most important corporate law reforms under its review since its inception: the reform of the annual general meeting of shareholders and the review of governance, disclosure and regulatory issues for managed investment schemes. The AGM reference, in particular, has been accompanied by a great volume of submissions, roundtable presentations and discussions, and was reaching completion. Delay or frustration of the reform process will perpetuate gross inefficiency and red tape in management/shareholder engagement, which could be avoided if CAMAC were preserved and allowed to complete its task.⁵

Options

17. CAMAC has worked efficiently, cost-effectively and productively for 24 years. The first and best option would be to retain CAMAC in its present form, as a justified

⁴ <http://www.smh.com.au/business/-39jqd.html>. See also http://www.lawyersweekly.com.au/opinion/corporate-law-a-senseless-budget-casualty?mid=e65eede383&utm_source=Cirrus+Media+Newsletters&utm_campaign=e2c5c5239b-Lawyers+Weekly+Newsletter+-+20140610095613&utm_medium=email&utm_term=0_fe913f1856-e2c5c5239b-59270021

⁵ On 10 June 2014 the Governance Institute of Australia announced the results of its study, *Benchmarking Listed Company Secretarial Practice in Australia 2014*. The study found that, despite only 10 per cent of large companies reporting that 300 or more investors attended their 2013 AGM (only 0.5 per cent of the shareholder base), costs per shareholder have skyrocketed by 38 per cent since 2011.

exception to the Government's stated policy of rationalising the number of Commonwealth bodies.

18. An alternative option may be to fold the functions of CAMAC into a separate division of another body. The Ministerial Paper, 'Smaller and More Rational Government 2014-15' (May 2014) refers to the initiative to reduce the number of Australian Government bodies. As well as proposing the cessation of a number of bodies such as CAMAC, the paper proposes the merger of various bodies. We would be happy to discuss with you any alternative proposals that might be raised for consideration. Obviously it would be important for any such alternative to deliver efficiency and other benefits (if any) not currently provided by CAMAC, while not losing the benefit of specialist expertise.