

3 March 2015

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Dear Ms Dermody

## **Inquiry into Australian Securities and Investment Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014**

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on the practice of governance. We provide the best education and support for practising chartered secretaries, governance advisers and risk managers to drive responsible performance in their organisations.

Our members are all involved in governance, corporate administration, risk management and compliance with the Corporations Act 2001 (the Act) with their primary responsibility being the development and implementation of governance and risk management frameworks in public listed and public unlisted companies, private companies, and not-for-profit organisations.

We welcome the opportunity to comment on the Australian Securities and Investment Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 (the repeal bill).

### **Opposition to the repeal bill**

Governance Institute does not support the bill and the decision to abolish the Corporations and Markets Advisory Committee (CAMAC.)

Governance Institute is firmly of the view that CAMAC should be retained.

### **Government's rationale for abolishing CAMAC**

The government released an exposure draft Bill and associated explanatory material to give effect to the 2014-15 Budget decision to abolish CAMAC. The rationale provided in the explanatory material is that 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.

We set out below our rationale for why the abolition of CAMAC is neither in the best interests of the proper functioning of our markets, nor likely to achieve the aims of the government's *Smaller and More Rational Government* reforms. The government's reforms are intended to reduce

complexity and duplication and achieve cost-cutting. We are of the view that abolishing CAMAC does not achieve any of these aims. Rather, it potentially would allow situations to continue that in fact increase costs and reduce efficiencies for the community.

## **Support for retention of CAMAC**

### **Functions of CAMAC**

CAMAC has been supplying advice to successive Australian Governments since 1989 on issues that arise in corporations and financial markets law and practice. It is most usually called on after a corporate disaster reveals a deficiency in the current law or to assess how best to deal with new developments, such as technology, that mean that regulation needs to be introduced or amended.

Importantly, the advice provided by CAMAC is independent and the process of arriving at that advice is transparent and objective. It is a research-based reform body, structured so as to facilitate the input of business, investment and advisory groups and legal experts. Its members are appointed on the basis of their knowledge and experience in business, financial markets, law, economics or accounting, with assistance provided by a Legal Committee, whose members have expertise in corporate law. Membership also ensures the representation of business, advisory and academic expertise from each state and the Northern Territory in reform discussions.

We also note that the advice provided by CAMAC is not subject to the constraints of the political and electoral cycle.

### **Can the functions of CAMAC be replicated by Treasury?**

CAMAC is respected by all stakeholders for the quality of its in-depth research and stakeholder consultation. Stakeholders also view the independence of CAMAC as a great strength. Governance Institute is of the view that such independence cannot be transferred to a government agency charged with implementing government policy. That is, Treasury cannot replicate the independent research and stakeholder consultation undertaken by CAMAC due to its charter of responding to government policy.

The Australian Government is of the view that the functions of CAMAC can be replicated by Treasury. While we appreciate the role that Treasury plays in coordinating advice, we note that its provision of advice to governments is frequently in response to particular policies that a government wishes to introduce and expressions of how such policy can be implemented. CAMAC provides advice on matters on which the government has not yet formed a policy position — it acts on referrals from the government in order to assist the government to formulate policy. It does so on the basis of having sought stakeholder input from business, legal experts and investment and advisory groups.

Moreover, the advice provided to the government by Treasury and the manner in which it is reached is not transparent. The manner in which CAMAC provides comprehensive research in the form of a discussion paper, with the opportunity to provide feedback on questions canvassed in the discussion paper, is very transparent. It is also more likely that any recommendations contained in the final CAMAC report would achieve stakeholder support.

We also are of the view that Treasury will not be able secure access to the calibre of expertise represented by the members of CAMAC in any ongoing and timely fashion or at comparable cost. The members of CAMAC, many of whom can command far in excess of the sitting fee when undertaking their normal duties, will not be available to Treasury on an 'as-needs' basis when it requires the depth of knowledge and experience to formulate advice on challenges in corporate and market law.

In the quarter century that it has operated, Governance Institute members have heard consistent praise for the expertise represented by CAMAC and the quality of its research and reports. We note that even those reports that are not enacted into law by the government remain a valuable resource for business, as the depth of research and examination of corporate and market law issues ensure they are a first point of reference when business is considering how to deal with particular matters in corporations and market law and practice that remain challenging.

While industry representative groups and business will continue to express their views to government on matters relating to the corporations law which they view as important, this process differs considerably from the provision of independent advice. The evolution of the corporate and market law is strengthened by the input of both processes, but will be diminished by a reliance on one only. Indeed, ensuring broad input from all stakeholders ensures that any reform introduced by the government fulfils its broader deregulatory initiatives rather than the particular interests of any one business or industry group.

Governance Institute is of the view that the functions of CAMAC cannot be replicated by Treasury. Rather the work of CAMAC supplements the work of Treasury.

Importantly, CAMAC does not duplicate the work of any government agency or other body, given that CAMAC acts on references from the government and other relevant stakeholder inputs. We are of the view that the Commission of Audit recognised that there was no such duplication. It did not recommend abolishing CAMAC — it recommended merging it with another government agency. It was one of only six government agencies recommended for merging rather than abolition.

### **The benefits that CAMAC has brought to corporate and market law reform**

The role CAMAC has played in advising the government of the day has played a vital role in shaping how our corporations and financial markets are regulated. We can point to some of the changes that have been brought in following acceptance of CAMAC's recommendations by the government of the day, as follows:

- The introduction of enhancements to the continuous disclosure regime has been central to ensuring that market sensitive information is released to all investors simultaneously and is integral to the integrity of Australia's equity markets.
- CAMAC's recommendations on related party financial transactions ensured that conflicts of interest did not intrude on the proper functioning of the market.
- The introduction of a statutory derivative action removed obstacles to shareholders in bringing litigation.
- The enhancements to the requirement that directors and senior executives of a listed entity disclose any trading by them in the securities of that listed entity meant that trading by directors did not undermine market fairness and efficiency.
- CAMAC has also taken a leading role in external administration, including the operation of the voluntary administration procedures.

CAMAC was also the first body to examine personal liability for corporate fault. This remains an important and challenging area that would benefit from the government acting on CAMAC's recommendations.

In addition to legal change, CAMAC has played a constructive role in attitudinal change. The 2009 CAMAC report on diversity on boards of directors, together with the ASX Corporate Governance Council's initiatives that followed the release of that report, are now reflected in significant improvements in gender diversity on ASX boards.

All of these reforms have greatly strengthened corporate governance in this country. Australia has a very strong reputation globally for corporate governance. The quality and independence of CAMAC's advice plays no small part in shaping those high standards and Governance Institute believes that the Australian Government should support the continuing strength of that framework.

### **CAMAC's role in reducing red tape**

Corporations and the financial markets are the lynchpin of Australia's economy. If they do not function efficiently, there will be detrimental consequences for business, investors and the capital markets.

Having an expert, research-focused, consultative and independent body like CAMAC to develop and advise the government on best practice policy has made a significant contribution to the strength and efficiency of our corporate and financial institutions.

For example, the Australian Government introduced the Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014, which includes the repeal of the 100-member rule to call a general meeting. In one of its consultations, CAMAC:

- provided evidence that the 100-member rule can result in a group of shareholders holding shares that represent only a minute fraction of the issued share capital having the power to requisition a general meeting, thereby subjecting the company and other shareholders, the majority of whom are not expected to support the resolutions put forward at the general meeting, to the expense of the meeting
- reviewed the approach taken in other jurisdictions and found that such a provision does not exist in any other jurisdiction, but that comparable jurisdictions employ a percentage test of between 5—10% for shareholder-requisitioned general meetings.

We note that the recommendations put forward by CAMAC are reflected in the bill currently before the parliament, which was supported by the Senate Standing Committees on Economics. It is important to note that the government's policy and deregulatory agenda on this matter benefited from the research undertaken by CAMAC.

CAMAC has also been at the forefront of cutting-edge policy, with its most recent projects including:

- recommendations to facilitate crowd-sourced equity funding
- reforms to modernise the AGM to better engage retail shareholders, and
- reforms to managed investments schemes (MISs).

In relation to the first matter, we note that the CAMAC report is the first of its kind in the world and is being reviewed by policy makers globally, many commenting on the quality of the research and recommendations.

The disbanding of CAMAC last year meant that work on the two major reports on which CAMAC was working and which were due to be released in 2014 (*The AGM and Shareholder Engagement* and *Managed Investment Schemes*) was discontinued. It is unknown if Treasury will complete these two reports and issue them publicly (we also acknowledge that this would pose some challenge to Treasury, which has not been involved in the stakeholder consultation process that CAMAC initiated on both matters).

On the matter of the future of the AGM, submissions to CAMAC noted that it is an essential component of the governance framework, yet it is an outdated, costly and inefficient institution which meets no one's interests — neither shareholders nor companies. There was significant interest in the CAMAC report that was to be issued last year, with business and the investment community hopeful that its recommendations would provide a way forward in terms of reducing

red tape and costs and facilitating shareholder engagement. The report expected from CAMAC has implications not only for red tape reduction, but more importantly for reformulating policy settings to accommodate a technological world. Without the benefit of the CAMAC report, there is significant concern in both the business and investment communities that any reforms to the AGM will be piecemeal and inconsistent, and will not address the underlying issues that have arisen as a 19<sup>th</sup> century model struggles to cope with the reality of corporations, markets and shareholder engagement in the 21<sup>st</sup> century. A significant investment was made in this review by both the government and the 36 bodies, such as Governance Institute, the Australian Institute of Company Directors, the Australian Shareholders' Association, the Australian Council of Superannuation Investors, the Business Council of Australia and the Law Council of Australia, as well as individual companies and individuals who made submissions and participated in the Roundtables organised by CAMAC. To waste that investment is neither efficient nor effective.

On the matter of MISs, we are also concerned that the very real need for reform, in light of the failures which received significant media and parliamentary attention and caused substantial losses to investors, will not eventuate, given the absence of any 'roadmap' from CAMAC as to how best to proceed. Again, a significant investment was made by bodies such as ours and individuals, to no effect.

Governance Institute notes that many of the recommendations of CAMAC have not been implemented by various governments. We are of the view that any failure in relation to corporate law reform lies not with the advisory body, but with the lack of implementation of its recommendations. Greater deregulatory benefits are to be gained from a stocktake and implementation by the Australian Government of the recommendations of CAMAC which have not been implemented to date than by abolishment of the body making those recommendations.

### **Cost savings**

The members of CAMAC and the Legal Committee all serve on a part-time basis, and are supported by three CAMAC employees.

In addition to having travel costs covered (which were reducing in consequence of using ASIC video-conferencing facilities), CAMAC members are entitled to a sitting fee, determined and published by the Federal Remuneration Tribunal, when attending CAMAC meetings or subcommittee meetings in person or by phone/video.

That sitting fee, as of May 2014, was \$772 for attending a CAMAC meeting or when one's cumulative hours of attendance at subcommittee meetings reached three hours. That fee included preparation time, or stated another way, there was no additional fee for time spent in reading Committee papers and otherwise preparing for a CAMAC or subcommittee meeting. Given the complex matters that CAMAC considered, Governance Institute members have no hesitation in noting that the time spent preparing for a CAMAC or subcommittee meeting and reading committee papers would be significant. Yet CAMAC members essentially provided their time for free in preparing for meetings.

Over the years, some CAMAC members chose not to receive any sitting fee, reducing costs even further.

The costs to maintain CAMAC are very low — \$1 million per annum. It is difficult to conceive of this tiny organisation as a bureaucracy imposing costs on the government and taxpayers. The financial savings generated by abolishing it are insignificant, particularly in light of the loss of the rigour in research and advice generated by CAMAC and its reach in ensuring the proper functioning of our markets.

On the basis of the matters we have set out above, we are of the view that the abolition of CAMAC is of no significance in achieving the aims of the government's *Smaller and More Rational Government* reforms, while its abolition has the potential to delay important legislative reform that would improve efficiencies and market effectiveness.

### **Potential impact on referral of powers**

Traditionally, regulation of corporate law was viewed as a matter for state legislation. However, in 1989 the Commonwealth government passed legislation that attempted to take over regulation of corporate law. As a result of the High Court's decision in *NSW v Commonwealth (1990) 169 CLR 482* it became clear that the Australian Constitution does not give the Commonwealth complete power to make laws about companies. In particular, the Commonwealth did not have constitutional powers to make laws dealing with forming companies.

The constitutional crisis was resolved in 2001 when all the states referred their constitutional powers with respect to the Corporations Law Scheme to the Commonwealth. National regulation of companies through a referral of powers to establish the *Corporations Act 2001* (Cth) has been of immense economic benefit and value to Australia.

The current referral of power expires in 2016.

### **Continuing involvement of the states in development of corporations law**

Where approval of amendments under the Corporations Agreement is required, the approval of at least three state or territory Ministers (at least two of whom must be state Ministers) is required. The Corporations Agreement itself may be amended only by the unanimous decision of all the parties to it.

Also, all the states and the Northern Territory must be represented on CAMAC and the Commonwealth must consult the Ministerial Council on appointments to CAMAC and ensure so far as practicable that CAMAC has at least one member from each referring state and the Northern Territory.

This ensures continued state involvement in the development of the corporations law.

While we acknowledge that a number of states agreed to the repeal bill, Governance Institute is concerned as to whether sufficient consideration has been given as to whether it is in the best interests of the functioning of the corporations law for the states and the Northern Territory not to have input to its development through representation on CAMAC. We also query whether the abolishment of CAMAC will have any bearing on the referral of powers due in 2016, given the abolition removes a key avenue for participation by the states and the Northern Territory in the ongoing development of the corporations law.

### **Recommendations**

**Governance Institute opposes** the Australian Securities and Investment Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014.

**Governance Institute recommends that CAMAC be retained**, on the basis that:

- the functions of CAMAC cannot be replicated by Treasury
- maintaining confidence in Australia's corporate and securities market regulation is of vital importance to the Australian economy
- an expert, research-focused, consultative and independent body is essential in light of the dynamism of markets

- the recommendations for reform made by CAMAC and implemented by successive governments have greatly strengthened corporate governance in this country
- the cost savings of abolishing CAMAC are insignificant, particularly in light of the loss of the rigour in research and advice generated by CAMAC and its reach in ensuring the proper functioning of our markets
- the states' and Northern Territory's role in CAMAC underpins the referral of powers by the states and the Northern Territory to the Commonwealth.

**Governance Institute also recommends that:**

- the CAMAC reports *The AGM and Shareholder Engagement* and *Managed Investment Schemes* be finalised by CAMAC and released publicly
- a stocktake and implementation of CAMAC's recommendations be undertaken as part of the Australian Government's drive to reduce red tape.

Having CAMAC to develop and advise the government on best practice policy has made a significant contribution to the strength and efficiency of Australia's corporate and financial markets. Governance Institute strongly urges the Senate Committee to oppose the Australian Securities and Investment Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014.

We are more than happy to discuss these matters with you.

Yours sincerely

Tim Sheehy  
Chief Executive