

Allygroup

RESPECTED OUTCOMES

2 March 2015

Senate Economics Legislation Committee
The Senate
Parliament House
CANBERRA ACT 2600

Via email: economics.sen@aph.gov.au

**Re: Submission: Inquiry into the Australian Securities and Investments
Commission Amendment (Corporations and Markets Advisory Committee Abolition)
Bill 2014**

Dear Committee members

I am making this submission in my capacity as the Convenor of the Corporations and Markets Advisory Committee (CAMAC) when the Government announced its decision in May 2014 to abolish CAMAC.

This submission considers the following aspects of the role and functioning of CAMAC and its continuing relevance:

- CAMAC as an asset to the Government
- the continuing need for CAMAC-type reviews
- the staffing of CAMAC.

For the following reasons I urge the Committee to recommend that the Senate not pass the *Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014* and recommend that CAMAC be reactivated.

CAMAC as an asset to the Government

For the past 25 years, since first meeting in September 1989, CAMAC has been a highly productive and extremely cost-effective agency. It has consistently provided a policy and intellectual dividend to the Australian Government, and the public generally, in the form of its Reports on corporate and financial markets issues. This dividend will be lost with its cessation.

In fulfilling its statutory functions under s 148 of the ASIC Act, CAMAC produced carefully considered and closely reasoned Reports on a wide variety of subjects at the forefront of corporate law and financial markets reform in Australia. Its substantial output is set out in the **2013-2014 CAMAC Annual Report** under **Past Reports**, to which I refer the Committee.

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Virtually all CAMAC Reports were preceded by CAMAC Discussion Papers, in effect, almost doubling that output in terms of published documents.

At all times CAMAC has sought to ensure that its Reports display a high degree of intellectual rigour and that its policy recommendations are sound in principle, clearly reasoned, and capable of practical implementation. The success of this endeavour has been widely acknowledged by key business groups (including the Australian Institute of Company Directors, the Governance Institute of Australia and the Law Council of Australia), by leading professional journals (including the *Australian Business Law Review*, the *Company and Securities Law Journal* and the *Insolvency Law Journal*) and by leading academics. All of these parties have argued strongly for the retention of CAMAC.

This dividend to the Australian Government is clearly seen through the legislative and private sector changes that have been brought about from CAMAC's recommendations in its Reports, as well as the issues highlighted in other CAMAC Reports which still await resolution. These matters are outlined below.

CAMAC Reports resulting in legislative initiatives

Some of the legislative initiatives that are based on CAMAC Reports have become part of the standard lexicon of Australian corporate law, including those concerning related party transactions and continuous disclosure. Other CAMAC Reports have resulted in far-reaching legislative reforms on major and diverse areas of corporate and financial markets law, including in relation to takeovers, prospectuses, managed investment schemes, derivatives, compulsory acquisitions, netting in financial market transactions, personal liability for corporate fault, statutory derivative actions, executive remuneration, shareholder claims against insolvent companies and corporate external administration.

CAMAC Reports resulting in industry initiatives

CAMAC has also produced Reports which, equally importantly, concluded that legislative initiatives were not required, but instead provided exemplary informational sources for public use, as well as encouraging industry or other private sector initiatives as the most appropriate response. These Reports included diversity on company boards, the social responsibility of corporations, guidance for directors and various aspects of market integrity.

CAMAC Reports raising continuing relevant issues

Various other CAMAC Reports, not yet acted upon, identify and propose solutions to issues which remain as current and relevant today as when CAMAC reported.

For instance, the 2012 Report on managed investment schemes identified the pressing need for, and proposed the elements of, a regulatory structure to deal with the external administration of schemes or their responsible entities in financial stress. The current legislation is inadequate and unworkable in this regard, as shown in the aftermath of the collapse of various agri-business schemes. The need for reform remains compelling.

An earlier CAMAC Report on insider trading dealt with matters that still have the potential to undermine confidence in the fairness and efficiency of the securities market. For instance, the possibility still remains of persons seeking to take advantage of some judicial interpretation of the meaning of 'publicly available' information to engage in what, in effect, is insider trading but without breaching the legislation. Likewise, the problem remains of bona fide corporate officers being unable to acquire or sell shares in their company because of the possibility of always being aware of some undisclosed price-sensitive information. CAMAC proposed a practical and equitable way of assisting corporate officers in regard to this form of financial commitment to their companies, by permitting non-discretionary trading arrangements.

In regard to charitable trusts, CAMAC sought in its 2013 Report to develop a constructive way forward to break the long-standing impasse between some principal participants and interest groups concerning the administration of these trusts.

The CAMAC Report on long-tail liabilities stands as a legislative model in the event that circumstances comparable to those involving corporate liability for asbestos-induced diseases arises again.

Likewise, the CAMAC Report on members' schemes of arrangement represents the first comprehensive review of this key means of corporate reconstruction, with a series of constructive proposals to ensure that the process continues to operate in an effective and appropriate manner, and with appropriate safeguards, to facilitate corporate restructuring.

The review process

In providing its advice, CAMAC always sought to act independently in the public interest, in a manner comparable to the Australian Law Reform Commission, with which it worked in the 1990s on superannuation and managed investment schemes reviews. CAMAC never saw itself, and could not fairly be described, as a publicly-funded business lobby group.

In fulfilling its role, CAMAC attracted over the years many legal, accounting, financial and other professionals, academics and other leaders in their fields of endeavour, to serve as members of the Advisory Committee, its Legal Committee and its sub-committees. The **2013-2014 CAMAC Annual Report**, to which I refer the Committee, sets out a full list of the individuals (over 150) who have contributed to the work of CAMAC over the years, providing their expert advice on corporate and financial market matters at nominal or no cost.

Numerous other commercial entities, industry groups and individuals have also contributed valuable information, observations and proposals through their written submissions and participation at CAMAC Roundtables, while the CAMAC public consultation process, including through the publication of discussion papers, has ensured that all interested parties were given a full opportunity to be involved in CAMAC reviews.

This form of intellectual contribution to the public good, combined and marshalled into structured and integrated reports, will be lost for the future with the cessation of CAMAC.

The cost of operating CAMAC, compared with its output, was minimal. For most of its 25 years it was supported by a full-time staff of only two lawyers and an administrative officer, with the Executive Director serving in that capacity throughout the entire existence of CAMAC. In 2013-2014, its net cost of services was some \$900,000. In no manner could CAMAC fairly be described as costly, nor could its processes fairly be described as bureaucratic.

Continuing need for CAMAC-type reviews

The regulation of corporate and financial markets since the Commonwealth legislation commenced in the early 1990s remains highly dynamic, with the need for constant review and adjustment as these key sectors of the Australian economy evolve and change through domestic and international influences and other developments.

The work undertaken by CAMAC, typically in complex areas requiring detailed research, review and the development of carefully considered policy proposals, was one of the means available to successive Australian Governments to help ensure that the Australian regulatory structure remained responsive to these developments.

The notion that some end-point to this review process has now been reached, or can adequately be dealt with through bureaucratic processes alone and without the need for some dedicated independent review body such as CAMAC, seems out of step both with the experience of the last decades and with the needs of the future. There is no evidence that the process of ongoing evolution of the corporate and financial markets sector is slowing, or that the need for CAMAC-type reviews is diminishing.

At the time of the Government's announcement in May 2014 of its intention to close CAMAC, the Committee's work programme involved three major projects, namely crowd sourced equity funding, the annual general meeting and shareholder engagement, and the establishment and operation of managed investment schemes. Each of these projects needs to be completed, while other areas of possible review are also becoming apparent.

Crowd sourced equity funding

The May 2014 CAMAC Report on crowd sourced equity funding, which has been recognised internationally, sets out a detailed regulatory framework for this form of corporate fundraising, noting its potential to stimulate the innovative start-up and other small-scale enterprise sector of the Australian economy, with its significance for productivity, competitiveness and growth.

This CAMAC Report carefully considered the approaches to this form of funding in a number of overseas jurisdictions, including New Zealand. In that context, as in other CAMAC Reports, it detailed the reasoning behind its regulatory proposals, including in regard to those aspects of the New Zealand approach it supported and those it opposed, to assist the Australian Government in designing an optimal regulatory response. CAMAC could continue to provide this assistance, if reactivated.

The AGM and shareholder engagement

In May 2014 the CAMAC review of the AGM and shareholder engagement was well advanced, covering a broad range of issues concerning the future of this key corporate governance mechanism and the potential for online technology to stimulate and enhance shareholder participation in that process. CAMAC had received, and closely considered, numerous detailed submissions and had also conducted a series of Roundtables involving a large number of interested parties.

The Government stated in May 2014 that this project not be completed, but be handed over to Treasury, notwithstanding its having been advised that CAMAC would have been in a position to report on this reference no later than during the third quarter of 2014.

If CAMAC is reactivated, the Committee could move immediately to complete its work on this important project and report to the Government.

Managed investment schemes

The March 2014 CAMAC Discussion Paper on the establishment and operation of managed investment schemes, in conjunction with its earlier 2012 Report on the external administration of these schemes, was designed to provide comprehensive advice to the Government on all aspects of the regulation of this substantial sector of the Australian economy. The Government stated in May 2014 that this project be handed over to Treasury.

If reactivated, CAMAC could reissue its Discussion Paper, again call for submissions (as a number of intending respondents may have discontinued preparing their submissions after the May 2014 Government announcement) and complete this fundamental Report.

Liability of directors

A number of private sector bodies have raised the matter of whether the Australian director liability framework is in need of review and, if so, the possible changes to this framework.

A reactivated CAMAC would be ideally placed to conduct such a review. It could closely consider the views and proposals of various business and other interest groups and individuals, for the purpose of providing thoroughly considered and closely-reasoned independent advice to the Government.

Law of dividends

Reform of dividend law is a matter of current contention, with some recent regulatory proposals being withdrawn in the face of criticism that they were defective. CAMAC would be highly suited to undertake any such review, as has recently been suggested by the Law Council of Australia.

Future references from the Government

While CAMAC had the statutory power to initiate its own reviews, its practice has always been to give priority to references coming from the Government. For instance, CAMAC received its reference from the Government on crowd sourced equity funding in mid 2013, and provided its final Report to the Government, as requested, in May 2014 (notwithstanding that it was already conducting two other projects at that time). CAMAC achieved this result through the dedicated hard work of its subcommittee, staff, and the full Advisory Committee.

A reactivated CAMAC would stand ready to advise the Government in a similar manner on any matters referred to it.

Staffing of CAMAC

In creating CAMAC, Parliament intended that the Committee be an independent statutory body, separate from the bureaucracy or administrative agencies.

An important aspect of this process has involved CAMAC having its own professional staff. This arrangement has worked extremely well over the past 25 years, and has given CAMAC members full confidence in the quality and independence of the assistance on which they can rely in undertaking their role.

I am advised that the highly experienced former professional staff of CAMAC would be willing and able to be re-engaged by CAMAC, including as consultants, to assist in the completion of outstanding CAMAC projects.

Conclusion

I urge the Committee carefully to consider the strong and consistent contribution that CAMAC has made to good government in Australia over many years, and its capacity to continue this contribution should it be reactivated. For these reasons, I urge the Committee to recommend that the Senate not pass the Bill to abolish CAMAC and recommend that CAMAC be reactivated.

Yours sincerely/

Joanne Rees
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