

11 November 2003



Dr K Dermody
The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Room SG.64
Parliament House
ACT CANBERRA 2600

Dear Dr Dermody

CLERP (Audit Reform and Corporate Disclosure) Bill

On behalf of the Law Society of Western Australia, I enclose the Society's submission in relation to Schedules 6 and 3 of the CLERP (Audit Reform and Corporate Disclosure) Bill.

The Society's comments are limited to these Schedules, due to the short time provided, since the release of the Bill, within which to comment.

Yours sincerely

A handwritten signature in cursive script that reads "Elizabeth Heenan".

Elizabeth Heenan
President

**CLERP
(AUDIT REFORM AND CORPORATE DISCLOSURE) BILL –
Draft Provisions**

This submission is made in response to the invitation of the Parliamentary Joint Committee on Corporations and Financial Services issued on 13 October 2003

The following comments are limited to specific aspects of the CLERP (Audit and Reform Corporate Disclosure) Bill ('Draft Bill') due to the short response time available.

SCHEDULE 6 CONTINUOUS DISCLOSURE

ASIC Power to withdraw infringement notice

Under the proposed provisions, it is contemplated that ASIC, having served an infringement notice in relation to an alleged infringement of section 674(2) or 675(2) of the Corporations Act 2001 ('Act'), loses the ability, inter alia, to bring criminal proceedings in relation to the alleged infringement under section 1311 of the Act.

This is the case even in the event that ASIC chooses to proceed with the infringement notice and the entity doesn't comply (proposed subsections 1317DAG(3) &(4)). From comments made in the Commentary to the Draft Bill, this seems to be an intended consequence. The Society notes that the loss of the entitlement to take criminal proceedings upon the issue of the infringement notice is consistent with the stated intention that the infringement notice procedure is designed to be used only in relation to less serious contraventions of the continuous disclosure regime.

Under the proposed section 1317DAI, ASIC has the power to withdraw the infringement notice if it is satisfied that it is appropriate to do so. This power of withdrawal may be exercised at any time prior to payment of the penalty and the making of disclosures as required under the proposed section 1317DAF. A consequence of the withdrawal of the infringement is that the possibility of criminal action is revived.

The Society is concerned that whilst an entity is given 28 days in which to comply with an infringement notice, ASIC can withdraw the notice at any time before the entity pays the penalty and complies with the disclosure requirements.

In view of the effect that the withdrawal of the infringement notice will have on the availability of criminal proceedings, the Society considers that this may place undue pressure on the entity to pay the notice and make the required disclosures forthwith, rather than looking at the merits of whether the infringement notice is justified.

Bearing in mind the stated intention that the infringement notice procedure only be used in relation to less serious contravention of the continuous disclosure regime, it would seem reasonable for ASIC to retain the power to withdraw the infringement notice at any time prior to compliance by the entity with section 1317DAF, but for ASIC's ability to bring criminal proceedings in relation to the alleged infringement under section 1311 of the Act to be removed. Having conducted a hearing, ASIC should be in a position to determine whether the issue of an infringement notice (with the attendant loss of the right to bring criminal proceedings) is appropriate in the circumstances.

Representation at ASIC hearings

It is also considered that there is a need for clarification in relation the issue of representation under the proposed provision dealing with the ASIC hearing required to be conducted prior to the issue of an infringement notice.

The proposed section 1317DAD(1)(b) provides that ASIC must give 'a representative of the disclosing entity' an opportunity to appear at, give evidence and make submissions on behalf of the entity at the hearing. The proposed provision is unusual in referring to 'a representative' (singular), particularly in the context of giving evidence. It is not clear whether this proposed provision is intended to exclude other persons who are in a position to give evidence on the matter from doing so, and if so, what the regulatory benefit in such a restriction would be.

Nor is it clear whether the entity's entitlement to be legally represented is proposed to be curtailed. The legislation requires clarification on this point.

The Society would not support any arbitrary restriction on the number of persons who may present evidence on behalf of the entity. Whilst the strict rules of evidence may not be applicable in relation to ASIC proceedings generally, there can be little if any justification for provisions which promote, for example, the provision of hearsay evidence at ASIC hearings. Further, the Society can see no justification for removal of an entity's right to be legally represented in the proposed ASIC hearing, if that is in fact what is intended.

SCHEDULE 3 - PROPORTIONATE LIABILITY

The Society does not support proportionate liability in place of solidary liability for negligently caused property damage or pure economic loss. However, if proportionate liability is to apply to economic loss claims, then the legislative model adopted should be a uniform model where Commonwealth, State and Territory laws are consistent. An inconsistent model risks forum shopping and added cost of litigation. Any proposal for proportionate liability should be looked at in the context of civil liability overall and should only be adopted as part of an integrated approach. The Society can see no merit in principle in selective protection of auditors as one profession distinct from all others. If proportionate liability is to apply to economic loss claims, then a principled approach demands that this apply to any profession or occupational group.

Elizabeth Heenan
President, Law Society of Western Australia
10 November 2003