Law Council
OF AUSTRALIA
Business Law Section

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committees on Economics
The Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: economics.sen@aph.gov.au

20 January 2015

Dear Dr Dermody,

Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014 (Bill)

1. These submissions have been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia (**Corporations Committee**) to the Senate Economics Legislation Committee (**Senate Committee**).

Key points

2. The Corporations Committee:

supports the proposed removal of the 100 Member Rule from s 249D and submits that the Rule should also be removed from s 252B in respect of managed investment schemes;

supports the Bill's proposals for limited reform of the disclosure requirements for Remuneration Reports relating to options, and the proposed amendment to confine s 300A to listed disclosing entities, while suggesting that further work is needed in relation to this area of regulation, to reduce unnecessary regulation and enhance effective disclosure;

supports the proposed amendments to provide further relief for small companies limited by guarantee with respect to the appointment and replacement of an auditor;

supports the amendment to the ASIC Act which proposes to permit the President and members of the Takeovers Panel to perform certain Panel functions whilst abroad; and

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

urges the Senate Committee to consider and report on the impact of the proposed abolition of the Corporations and Markets Advisory Committee (CAMAC) on the future of corporate and markets law reform, including reform of the law of dividends, a topic that was included in the Exposure Draft of the Bill but withdrawn from the version introduced into Parliament.

3. The Exposure Draft of the Bill included proposals for the reform of dividend law. Those proposals were defective, for reasons pointed out by the Corporations Committee in its submission on the Exposure Draft.[1] Wisely, the dividend law reform proposals of the Exposure Draft were removed from the present Bill. And yet effective reform of Australia's highly unsatisfactory dividend law would have made a much greater contribution to efficient regulation and removal of red tape than any of the other reforms that have survived into the present Bill.

Abolition of Corporations and Markets Advisory Committee

4. The Corporations Committee is very concerned about the future of corporate and markets law reform, if the Parliament enacts legislation to abolish the Corporations and Markets Advisory Committee (CAMAC).[2] Australia has become a world leader in certain parts of corporate and markets law reform during the past 30 years[3], largely because of the research-based input of an expert, independent committee, which has evolved into CAMAC. Given that no satisfactory alternative has been identified, the abolition of CAMAC will be highly damaging for effective reform in this area[4], ironically at a time when the Australian Government is seeking to enhance efficient regulation and eliminate red tape, which is precisely the outcome that an expert committee is best placed to achieve. The cost saving achieved by the abolition of CAMAC would be less than $1 million per annum and no persuasive reason has been advanced for its abolition.

5. CAMAC's recent work, such as its report on crowd sourced funding, has been outstanding. Its future work program would have included much-needed reform to the inefficient and outdated procedures around annual general meetings of shareholders, and also a review of the legal structure for managed investment schemes, bearing in mind recent highly publicised failures which have caused substantial losses to investors. The importance of these law reform topics for investor protection and efficiency is obvious. Further, in the Corporations Committee's view, the best way forward to achieve effective dividend law

---

[1] http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2827_-_Corporations_Legislation_Amendment_Deregulatory_and_Other_Measures_Bill_2014.pdf

[2] Australian Securities & Investments Commission Amendment (Corporations & Markets Advisory Committee Abolition) Bill, 2014 (**CAMAC Abolition Bill**). The second reading debate was adjourned on 4 December 2014.

[3] Such as the statutory remedy for oppressive conduct, the shareholders' derivative action, the law concerning related party transactions, directors' and officers' insurance and indemnity, continuous disclosure, and netting in financial transactions. CAMAC and its predecessors had very significant roles in law reform on these topics.

[4] See the two previous submissions of the Business Law Section on the proposal to abolish CAMAC, http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2857_-_Commonwealth_budget_proposal_to_abolish_corporations_and_markets_law_reform_body.pdf
http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2893_-_Exposure_Draft_of_the_Australian_Securities_and_Investments_Commission_Amendment_Corporations_and_Market_Advisory_Committee_Bill_2014.pdf

reform would be to involve CAMAC in that process, in parallel with the continuing work of Treasury.

6. Therefore the Corporations Committee urges the Senate Committee to review the decision to abolish CAMAC, in the context of the unsatisfactory attempt to reform dividend law excluded from the present Bill, and to report to the Senate before the CAMAC Abolition Bill is considered by the Senate.

Submissions on the Bill

7. *Removal of the 100 members rule: proposed amendment to s 249D*

The Bill proposes that the statutory right of at least 100 members to require the directors of a company to convene a general meeting will be repealed by amendment to s 249D. The consequential statutory right of members holding more than 50% of the votes of the requisitionists, enabling them personally to convene a general meeting if the directors do not do so (s 249E), will be affected by the amendment to s 249D. A consequential amendment is that the regulation-making power with respect to the number of members (s 249D(1A)) will be repealed.

The statutory rights of members with at least 5% of the votes that may be cast at a general meeting of a company, to require the directors to convene a general meeting (s 249D) or themselves to convene a general meeting (s 249F), will not be affected. Nor will the proposed amendment affect the statutory right of members with at least 5% of the votes that may be cast on a resolution, or at least 100 members who are entitled to vote at a general meeting, to give notice of a resolution for a general meeting that has been effectively convened (s 249N).

The Corporations Committee supports the proposed amendments. They will achieve an appropriate balance between the interests of minority and majority members. A group of 100 or more members will be able to have matters of concern dealt with at an annual general meeting or some other meeting convened by the company, while the cost of convening an extraordinary general meeting will only be incurred if it is requisitioned by shareholders who have material economic interest in the company.

The Corporations Committee notes that, as regards listed public companies, the Companies & Securities Advisory Committee (as CAMAC was then called) comprehensively examined the issues underlying the 100 member rule in its Report, *Shareholder Participation in the Modern Listed Public Company* (June 2000), paras 2.1-2.24, concluding that the 100 member rule should be removed (Recommendation 2).

CAMAC prepared statistics which demonstrated that a 100 member numerical test can result, in the case of listed companies, in a group of shareholders, who between them hold shares representing only a minuscule proportion of the issued share capital, having the power to requisition a general meeting at considerable cost for the company, particularly if the company has a large number of shareholders (para 2.6). CAMAC reviewed the approach taken in other countries and concluded that having a 5% member threshold without an alternative 100 member rule would still place the Australian law amongst the most liberal in the world (para 2.23).

CAMAC reasoned that the law should achieve a balance between legitimate shareholders' rights and the potential abuse of those rights at what could be substantial cost to the company. Shareholders should therefore have to satisfy a significant threshold test to justify the time and expense of holding an extraordinary general meeting, rather than having matters of concern dealt with at the next annual general meeting (para 2.9).

The Corporations Committee commends CAMAC's reasoning to the Senate Committee.

The Corporations Committee submits that the same reasoning should apply to meetings of members of registered managed investment schemes, and accordingly a corresponding amendment should be made to s 252B(1). Consequently s 252B(1A) should be repealed.

8. *Disclosure in the Annual Directors' Report relating to options: proposed s 300A(1)(e)(iv), amendment of s 300A(2) and repeal of s 300A(1)(e)(vi)*

The Corporations Committee supports the proposed changes to s 300A, for the reasons given below. However, the Corporations Committee submits that, given the present Government's policy to remove unnecessary regulation and red tape, it would be appropriate to revisit the whole of the remuneration reporting requirements in the next round of corporate law revision, with the aid of CAMAC. The current requirements of s 300A and the Corporations Regulations are highly prescriptive and in many respects, difficult to interpret, and ultimately unhelpful in assisting retail shareholders to understand remuneration policies adopted by reporting entities. The Corporations Committee recommends that the Senate Committee should encourage the Government to revisit the report by the Corporations and Markets Advisory Committee on *Executive Remuneration* (April 2011).

Section 300A(1)(e)(iv) currently requires disclosure of the value of options granted to a member of the key management personnel as part of their remuneration which have lapsed during the financial year because a vesting condition was not satisfied. It is proposed that this be replaced by a provision requiring disclosure of the number of options that have lapsed, and the year in which those options were granted. The information produced by the current requirement lacks utility, and the proposed disclosure will be more straightforward.

Section 300A(1)(e)(vi) requires disclosure of the percentage of the value of the remuneration of each member of the key management personnel that consists of options. It is proposed that this provision be repealed. The Corporations Committee agrees that this information is unnecessary, given the disclosure required in reg 2M.3.03.

Section 300A currently applies to any disclosing entity that is a company: s 300A(2). It is proposed that the application of the section be confined, by amendment to s 300A(2), to listed disclosing entities. The Corporations Committee agrees that the level of disclosure required by s 300A is less relevant for unlisted disclosing entities because they are not required to place the remuneration report before shareholders at their annual general meeting for a non-binding resolution.

9. *Determining a company's financial year: proposed note to 323D(2A)*

The Corporations Committee supports the proposed note to s 323D(2A), which clarifies the calculation of financial years for reporting purposes.

10. *Appointment of auditors of a company limited by guarantee: proposed ss 327A(1A), 327B(1A) and note to s 327C(1)*

The amendments proposed to ss 327A and 327B, and the proposed note to s 327C(1), are intended to relieve a small company limited by guarantee, and a company limited by guarantee with revenue falling within s 301(3) which elects to have its accounts reviewed rather than audited, from the obligation to appoint and replace an auditor. In the Corporations Committee's view, the proposals reflect the drafter's objective.

11. *Amendments to the ASIC Act*

The Corporations Committee supports the proposed introduction of ss 184(3A) and 188(3) of the ASIC Act, which will authorise the President of the Takeovers Panel and members of a Sitting Panel to exercise certain functions and powers outside Australia. This will avoid any technical objection to Panel members participating in the Panel's work (e.g., Panel teleconferences) whilst overseas, typically travelling to fulfil other professional obligations. The Corporations Committee has no submissions to make on the proposals to amend the ASIC Act, relating to the terms and conditions of appointment of members of the FRC, AASB and AUASB.

Further contact

12. The Corporations Committee would be pleased to discuss any aspect of this submission.

Yours sincerely,

John Keeves
Chairman, Business Law Section