

The Hon. Kelly O'Dwyer MP  
Minister for Small Business & Assistant Treasurer  
PO Box 6022  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

28 October 2015

*Copy to:*  
The Hon. Scott Morrison MP  
The Treasurer  
PO Box 6022  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

*Copy to:*  
The Hon Malcolm Turnbull MP  
Prime Minister  
P O Box 6022  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

Dear Minister,

***Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 (Cth)***

1. This letter has been prepared by the Business Law Section (**BLS**) of the Law Council of Australia on the advice of the Corporations Committee.
2. The BLS refers to the ongoing consideration of the *Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 (Cth)* (**Bill**) by the Senate.
3. The BLS continues to submit that there is a very strong case for the continuation of the Corporations and Markets Advisory Committee (**CAMAC**) as an independent, transparent, research-based corporate and market law reform body, constituted to facilitate appropriate input from business, market and legal sources.
4. The BLS has advocated the retention of CAMAC in four previous submissions:
  - (a) to the Minister for Finance and Acting Assistant Treasurer dated 11 June 2014, in response to the Commonwealth budget proposal to abolish CAMAC (included at Appendix A of this submission);

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- (b) to the Treasury dated 22 October 2014, in relation to the Exposure Draft of the Bill (included at Appendix B of this submission);
  - (c) to the Senate Economics Legislation Committee dated 20 January 2015, as part of a submission on the *Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014* (Cth) (included at Appendix C of this submission); and
  - (d) to the Senate Economics Legislation Committee dated 4 March 2015, in relation to the Bill (included at Appendix D of this submission without its appendices).
5. In summary, the BLS reiterates the key points made in its submissions dated 20 January 2015 and 4 March 2015, that:
- (a) a law reform body (now CAMAC) has been an integral part of the national co-operative legislative and administrative arrangements for the regulation of corporations and financial products and services since the 1980s;
  - (b) Australia has become a world leader in certain parts of corporate and markets law reform during the past 30 years. This has been largely because of the research-based input of an expert, independent committee, which has evolved over that time to become CAMAC;
  - (c) given that no satisfactory alternative has been identified, the abolition of CAMAC will be highly damaging for effective reform in this area. Ironically, this will occur 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;
  - (d) the cost saving achieved by the abolition of CAMAC would be less than \$1 million per annum;
  - (e) CAMAC's recent work, such as its report on crowd-sourced funding, has been outstanding, as has been recognised by the Government in its subsequent consideration of that subject;
  - (f) CAMAC's future work program relating to:
    - (i) the inefficient and outdated procedures around annual general meetings of shareholders; and
    - (ii) the legal structure for managed investment schemes, bearing in mind recent highly publicised failures which have caused substantial losses to investors,needs to be progressed.

6. In particular, the BLS notes that the integral role of CAMAC within the national regulatory arrangements, described above, was most recently expressed in the intergovernmental *Corporations Agreement 2002* (as amended), under which the States have referred constitutional legislative powers to the Commonwealth until 2016 (subject to the prospect of further extension). The various iterations of that Agreement have secured the continued existence of and State representation on CAMAC (and the predecessor Companies and Securities Advisory Committee) and its Legal Sub-Committee.
7. If the Commonwealth intends to seek the agreement of the States next year to an extension of the existing referral of power, or an indefinite referral of power, the BLS suggests that the Government consider that the abolition of CAMAC currently under consideration will leave a vacuum in terms of formal State and Territory input into the reform of corporations and financial markets law.
8. With respect, the BLS continues to find the reasons which have been advanced on behalf of the Government for the repeal of CAMAC to be unconvincing, including the reasons set out in the letter to the BLS Chairman from the Hon. Mathias Cormann, Minister of Finance, dated 17 July 2014. The response of the BLS to the Government's reasons is set out in the submissions of the BLS dated 22 October 2014 and 4 March 2015.
9. Noting the change of Treasury Ministers from 21 September 2015, the BLS again advocates the retention of CAMAC and re-emphasises the continued need for an independent, transparent, research-based corporate and market law reform body. Over the years, CAMAC has delivered a substantial body of high quality work and its work has received strong support from both major political streams. With a full-time staff of only two experienced lawyers and an administrator, supported by an external committee, CAMAC has significantly contributed to sensible law reform for the benefit of the Australian economy. Rather than being abolished, the BLS submits that CAMAC should be allowed to continue its work towards that goal.

The BLS would welcome the opportunity to discuss further any aspect of this submission or of submissions made previously. In the first instance, please contact the Chair of the Corporations Committee of the BLS, Bruce Cowley, on (07) 3119 6213, if you would like to do so.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

**John Keeves, Chairman**  
Business Law Section

**Appendix A – Submission to the Minister for Finance and Acting Assistant Treasurer  
dated 11 June 2014**



Law Council  
OF AUSTRALIA

*Business Law Section*

Senator the Hon Mathias Cormann  
Minister for Finance and Acting Assistant Treasurer,  
Parliament House,  
CANBERRA ACT 2600  
**Via email: [financeminister@finance.gov.au](mailto: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](mailto: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;<sup>1</sup>
  - (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

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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

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<sup>2</sup> 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.

<sup>3</sup> 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 recognised<sup>4</sup>, 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.<sup>5</sup>

## 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

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<sup>4</sup> <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](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)

<sup>5</sup> 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.

**Appendix B – Submission to the Treasury dated 22 October 2014**



Law Council  
OF AUSTRALIA

*Business Law Section*

The Hon Joe Hockey MP  
The Treasurer  
House of Representatives  
P O Box 6122  
Parliament House  
Canberra ACT 2600  
Via email: [J.Hockey@aph.gov.au](mailto:J.Hockey@aph.gov.au)

22 October 2014

Dear Treasurer,

**Exposure Draft of the Australian Securities and Investments Commission  
Amendment (Corporations and Markets Advisory Committee) Bill 2014**

Attached for your information is a copy of a submission lodged with The Treasury today in response to the Exposure Draft of the Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee) Bill 2014.

The submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia.

I confirm that I have also copied the submission to the Minister for Finance and Acting Assistant Treasurer, Senator The Hon Mathias Cormann, for his information.

Yours sincerely,

John Keeves  
**Chairman, Business Law Section**

Enc.

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**BLS**



Law Council  
OF AUSTRALIA

*Business Law Section*

Manager  
Corporations and Schemes Unit  
Financial System and Services Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600  
**Via email:** [CAMACAbolition@treasury.gov.au](mailto:CAMACAbolition@treasury.gov.au)

22 October 2014

Dear Sir or Madam,

**Submission: Exposure Draft of the Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014**

This submission has been prepared by the Business Law Section (**BLS**) of the Law Council of Australia on the advice of a working party (and some other members) of the BLS Corporations Committee.

In summary, this submission:

- (a) reiterates strongly the BLS's objection to the winding up of CAMAC, set out in the letter from the Chairman of the BLS to the Minister for Finance dated 11 June 2014. [Commonwealth budget proposal to abolish corporations and markets law reform body \(June submission\)](#)
- (b) discusses the response to that letter, namely a letter to the BLS Chairman from the Hon Mathias Cormann, Minister of Finance, dated 17 July 2014 (**Minister's Response**) and explains why that response is not persuasive;
- (c) draws attention to the importance of maintaining confidence in the national system of corporate and securities market regulation, underpinned by referral of powers by the States to the Commonwealth, in which CAMAC plays a vital role;
- (d) describes in broad outline (upon which we would be pleased to elaborate) that inadequate arrangements have been made for continuing CAMAC's work, if CAMAC is abolished as proposed.

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1. **The BLS reiterates its objection to the abolition of CAMAC**

- 1.1 The BLS submits that the budget decision to abolish CAMAC resulted from an insufficiently reflective application of a general 'smaller and more rational government' policy. The decision failed to recognise the vital importance for the Australian economy of practical, effective corporate and market regulation, and the exceptional contribution CAMAC has made over its lifetime, and would continue to make, in that regard. The decision has been severely criticised by the expert bodies which promote effective corporate and market regulation, as well as by many individual experts in the legal and business communities. The BLS calls upon the Government to reverse the decision forthwith.
- 1.2 In its June Submission, the BLS:
- (a) drew attention to the very strong case for continuing an independent, transparent, research-based corporate and market law reform body, constituted to facilitate appropriate practical input from business, market and legal sources;
  - (b) set out the policy reasons for maintaining a specialist law reform body in the corporate and markets area;
  - (c) commended CAMAC for delivering a substantial quantity of first-class reports and discussion papers very economically, with a full-time staff of only two experienced lawyers and administrator, supported by an external committee.
- 1.3 In the opinion of the BLS, these considerations remain valid and amount to a powerful case for reversing the Government's decision on CAMAC.
- 1.4 We wish to reiterate the strongly favourable assessment of the quality of CAMAC's work by members of the BLS. In our opinion the Government would have no significant grounds for doubting the excellent contribution that CAMAC has made to the cause of sound corporate and market law reform. That is no doubt a result of the combination of the quality of the full-time lawyers engaged by CAMAC, and the practical and expert business and legal input systematically achieved both through CAMAC's committee structure and the submissions received through the consultation process. This means that any gaps in the practical expertise of CAMAC's staff can be filled through CAMAC's resources.
- 1.5 The crowd sourcing reference is a good example of this process in action. Crowd sourced fundraising is quite a new phenomenon which depends on communication by internet. CAMAC was able to produce an internationally applauded report through a combination of thorough research and practical inputs.
- 1.6 The Government has recently recognised the quality of CAMAC's work. In its paper, *Industry Innovation and Competitiveness Agenda: an action plan for a stronger Australia*, which was released on 14 October 2014 well after the budget decision to abolish CAMAC, the Government referred to CAMAC as 'a government advisory body with strong financial market experience' and announced that the Assistant Treasurer will consult widely on a regulatory framework to facilitate crowd sourced equity funding, building on CAMAC's report. In the opinion of BLS, that is

an excellent example of how CAMAC's high-quality work should be used to provide a foundation for sensible law reform for the benefit of the Australian economy.

- 1.7 Indeed, over the years CAMAC's work has received strong support from both major political streams.

## 2. The Minister's Response

- 2.1 The Minister's response makes six related points, which we shall address.

- 2.2 *First, the abolition of CAMAC will streamline the shape of government, reduce duplication, and improve coordination and accountability. But:*

- (a) while the BLS accepts the perceived need to reduce the number of Australian Government bodies and streamline the shape of government, removing a body with only three full-time staff will have negligible effect on streamlining the shape of government;
- (b) regrettably, rather than achieving the objective of efficient, streamlined government, the abolition of CAMAC will remove a vital element in the process of sound corporate and market law reform, namely research-based disinterested assessment of proposals with skilled practical input;
- (c) no duplication between the work of CAMAC and other government work has been identified, and there is none, because CAMAC acts on references from the Government and other relevant stakeholders;
- (d) there is no absence of coordination between CAMAC and other relevant parties, such as Treasury, ASIC, the professional associations and other interested parties, and on the contrary, CAMAC's structure caters for representation of these various interests;
- (e) CAMAC operates transparently by publishing discussion papers and reports which are available for, and receive, scrutiny and assessment in the public and private sectors, and so there is no lack of accountability.

- 2.3 *Second, the abolition of CAMAC will reduce costs associated with separate governance arrangements and increase efficiency in how public funds are used to deliver services to the community. But:*

- (a) CAMAC operates in ASIC accommodation with only three full-time staff (two lawyers and a secretary), and a part-time committee operating at minimal cost. It is estimated that the total cost of CAMAC's operations is under \$1 million per annum<sup>1</sup>;
- (b) if CAMAC is abolished and its advisory function is merged into the Markets Group at Treasury, the Department will need to incur additional expenditure to arrange appropriate staffing and procedures, in order to ensure that

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<sup>1</sup> Indeed, CAMAC's *Annual Report 2012-2013*, page 37, shows that in that year it operated under budget: the net cost of services was \$911,636, against revenues from Government of \$985,000, a surplus of \$73,664.

CAMAC's important work is continued and all relevant inputs are properly assessed;

- (c) in these circumstances it is highly unlikely that there will be any cost saving, unless the task of corporate and market law reform is substantially downgraded or weakened.

2.4 *Third, the abolition of CAMAC will ensure greater value for taxpayers' money. But:*

- (a) CAMAC has delivered over its period of operation real value for taxpayers' money by producing high-quality reports and recommendations, through a transparent process with an effective structure for assessing business and expert inputs (as to the quality of CAMAC's work, please also see our comments at 1.4-1.7 above);
- (b) the Government's plans for continuing CAMAC's work are unclear and non-committal;
- (c) in our view, the Markets Group of Treasury is at present inadequately resourced to continue the work of CAMAC;
- (d) in those circumstances the explanatory material outlined in the Minister's Response and in the material accompanying the Exposure Draft provide no adequate basis for contending that greater value for taxpayers' money and more efficient delivery of services to the community will be achieved by the abolition of CAMAC.

2.5 *Fourth, the principle of sourcing advice from independent sources will be met in the following way: Treasury will act as an adviser and coordinator of advice, the Government will receive independent advice from relevant regulators, and Treasury will draw on legal expertise in other specialist parts of the public service. But:*

- (a) for these proposals to be effectively introduced, the structure of the Markets Group of Treasury will need to be re-designed to ensure that there will be disinterested practical input at the point of development of law reform proposals;
- (b) while these proposals, if implemented, may deliver independent advice from the public sector, they will not ensure that policymakers will receive the balanced independent advice based on practical understanding of how corporations and markets operate;
- (c) additionally, it cannot be assumed that all advice sourced from the public sector will be independent, as some parts of the public sector (for example, regulators) have a measure of self-interest in promoting certain kinds of reforms.

2.6 *Fifth, the Government expects that Treasury policy advice will be informed by regular professional engagement with industry, including experts on corporations and financial markets law and practice, but business is 'quite capable of putting its views to government without the need for an additional layer of taxpayer-funded*

*bureaucracy', bearing in mind that the professionalism and capacity of industry representative groups is much stronger now than in the 1980s. But:*

- (a) the Minister's reasoning on this point does not recognise the fundamental distinction between, on the one hand, business lobbying, which (while no doubt more professional and capable now than in the 1980s) is generally driven by the need to promote the commercial interests of business; and on the other hand, the assessment of law reform proposals by disinterested experts who understand how corporations and markets actually work;
- (b) in those circumstances it is essential that there be a properly instituted facility for expert, practical and transparent input into legislative and regulatory policy regarding corporations and markets;
- (c) by releasing discussion papers CAMAC has established a process by which its proposals are considered, during the development phase, by a wide variety of legal and other experts, acting pro bono at conferences and seminars invariably attended by CAMAC staff, enabling them to fine tune CAMAC's recommendations;
- (d) CAMAC's experience shows that input must be available throughout the process of developing reform proposals, and not merely when an exposure draft is released for public comment, by which time there are public and private sector vested interests wishing to carry the proposal through to implementation and the opportunity for ensuring that proposals are practical and realistic may well be lost.

2.7 *Sixth, the legacy work which CAMAC had on hand is being handed over to Treasury to consider, and 'to the extent that there remain important issues that warrant ongoing work, this will be considered against other priorities'. But:*

- (a) it is a matter of concern to the BLS that the Minister has made no commitment to continue the fundamentally important legal and regulatory issues with which CAMAC has recently been grappling, concerning the annual general meeting, crowd sourced funding and managed investment schemes, upon which business and markets as well as regulators need the assistance of law reform;
- (b) more generally, the Minister has not explained how the Government proposes that future corporate and market reform processes will be conducted so as to ensure transparency, practicality and expert input. This point is more fully developed in Part 4 of the submission.

### **3. CAMAC is an important factor in the State's ongoing agreement to refer the corporations power to the Commonwealth**

3.1 In Australia, uniform national legislation and administration of corporations and financial markets law is only possible by agreement between the Commonwealth and the States. The *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) were enacted in 2001 following a referral of power by each of the State Parliaments made in accordance with section 51(xxxvii) of the Commonwealth Constitution. The arrangements require the

States periodically to extend the referrals. The most recent extension of the referral of corporations power was agreed on 24 August 2011 and expires in 2016.

- 3.2 Both in the negotiations for the current regime and also during the history of the earlier co-operative schemes designed to achieve uniform legislation and administration of corporations law in Australia, one of the key issues has been the input the States and Territories would have on any reforms to the uniform legislation.
- 3.3 The current referrals operate against the background of an intergovernmental Corporations Agreement. The various iterations of the Corporations Agreement have secured the continued existence of and State representation on CAMAC (and the predecessor Companies and Securities Advisory Committee) and its Legal Sub-Committee as part of the arrangements for reviewing and suggesting reforms to the law.
- 3.4 Clause 605 of the current Corporations Agreement 2002 (which was amended in 2005 with effect from 2006 and extended in 2011) deals with the appointment of members to CAMAC. It provides:
  - (a) The Commonwealth will consult the Ministerial Council<sup>2</sup> on the making of appointments to the Corporations and Markets Advisory Committee.
  - (b) Each State and Territory Minister will be entitled to nominate a panel of persons for potential appointment to the Advisory Committee and the Legal Sub-Committee of the Advisory Committee.
  - (c) The Commonwealth will ensure so far as practicable that at any time there is at least one member of the Advisory Committee from the Northern Territory and each referring State.
  - (d) The Commonwealth will ensure so far as practicable that at any time there is at least one member of the Legal Sub-Committee from the Northern Territory and each referring State.
  - (e) For the purposes of subclauses (3) and (4), a member is from a particular State and Territory if he or she is a resident of that jurisdiction.
  - (f) The Commonwealth Minister will confer with the relevant State or Northern Territory Minister if it is proposed that no person be appointed from the panel of persons nominated by the Minister.
- 3.5 The proposed abolition of CAMAC would leave a vacuum in terms of formal State and Territory input into the process of formulation of reforms to corporations and financial markets law.
- 3.6 The participation in CAMAC of members drawn from the business, advisory and academic communities in each State and Territory has been important in ensuring that amendments to corporations and financial markets law reflect and are

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<sup>2</sup> The Ministerial Council for Corporations is now known as the Legislative and Governance Forum for Corporations.

appropriate for business conditions in all jurisdictions. This is particularly important for Western Australia, Queensland and South Australia. Market conditions are not identical in each jurisdiction and having a formal consultative and reference body that draws its members from around Australia ensures that the law is more robust and able to cope with those differences. This cannot be replicated by giving CAMAC's work to Treasury staff in Canberra.

- 3.7 Also, giving the business, advisory and academic communities in each State a formal voice in reform discussions helps underpin the legitimacy of the legislative and administrative processes of corporations and markets law, and secure ongoing political support for continuation of the referral of powers to the Commonwealth.

#### **4. Need for adequate arrangements for continuing CAMAC's work**

- 4.1 The Minister of Finance, in his letter referred to above, indicated that the function of CAMAC would continue through Treasury, both generally and in terms of particular projects CAMAC had under way but did not have the chance to complete. The Exposure Draft Bill and Explanatory Memorandum do not provide for or explain the arrangements that will need to be made to complete CAMAC's existing projects and for achieving properly constructed corporate and market law reform proposals in future.

- 4.2 CAMAC had three significant projects under way when its abolition was announced. In the notes below we explain the importance of these projects and the importance of bringing recommendations to conclusion.

##### *4.3 The AGM and Shareholder engagement*

- (a) This review focused on 3 key areas:
- (i) the role of the AGM within the broader context of the ongoing relationship between the board and the institutional and retail shareholders of the company, often referred to as shareholder engagement;
  - (ii) the content of the annual report, being the principal document for consideration at the AGM that provides information to shareholders on the state of the company and the stewardship of the board;
  - (iii) the current processes, and possible future functions and formats, of the AGM, taking into account technological developments and opportunities.
- (b) A total of 36 submissions were received from a wide range of proxy advisers and shareholder representative groups, investor relations bodies, law firms, major corporates including BHP, Telstra and AMP, the Business Council of Australia, the Financial Services Council, superannuation bodies and the Law Council of Australia.
- (c) This review has implications both in terms of reducing "red tape" and driving efficiency (including through technology), and in terms of understanding the needs and perspectives of Australian investors, individually and as

represented through superannuation bodies, in the context of shareholder engagement.

- (d) Submissions closed in December 2012, and we understand that the report was close to completion when the abolition of CAMAC was announced.
- (e) On that basis it would take limited further work to capture the benefit of the significant investment which has already been made in this project by the government and the 36 individuals and bodies who made submissions. Those benefits may well reflect in efficiencies to the benefit of companies and their investors through more effective use of technology and keeping pace with other economies in this regard. On the other hand, that considerable investment will be wasted and those efficiency benefits forgone if the review is not completed.

#### 4.4 *Crowd sourced equity funding*

- (a) This review was commissioned as part of *Advancing Australia as a Digital Economy: An Update to the National Digital Economy Strategy* (June 2013).
- (b) This was a very specific and practical review, considering Australia's position in the context of global developments in this area from the different perspectives of
  - (i) issuers: corporate entities that are registered as companies under the *Corporations Act* and are seeking to raise capital through offers of their shares or other securities (equity); and
  - (ii) intermediaries: equity will be offered through online portals of internet website operators that come within the jurisdiction of Australian regulators; and
  - (iii) investors: those online offers, which may involve small contributions from many investors, will be open to Australian residents and/or other persons.
- (c) Submissions closed in November 2013. There was substantial interest in this review, with 41 submissions received from a wide range of individuals or bodies including the Innovation Australia, ASX, Philanthropy Australia, the Office of the NSW Small Business Commissioner, the Queensland Government, Community Sector Banking, Australian Community Renewable Energy, several individuals and small businesses operating in the technology/innovation/start up space, law firms and the Law Council of Australia.
- (d) CAMAC's Crowd Sourced Equity Funding Report was published in May 2014. The financial press at the time recognised it as the best such report available internationally. The report sets out a detailed regulatory blueprint for the stimulation of the innovative start-up and other small-scale enterprise sector of the Australian economy through internet-based funding. CAMAC's proposals are deregulatory in that they seek to overcome current legal impediments to raising funds through crowd sourced equity funding. The

personnel of CAMAC, whose perception and expertise is demonstrated by the report, will not be available to see through the recommended reforms in law and regulation if CAMAC is abolished.

#### 4.5 *Managed Investment Schemes*

- (a) This was a very significant project in which a substantial investment of resources, time and effort had already been made. Following an initial discussion paper in 2011, 21 submissions were received and considered, resulting in a further discussion paper being released in 2014. The period for submissions was still open when the CAMAC's abolition was announced. Those with submissions in progress (including our own Corporations Committee) were informed not to make the submissions because CAMAC would not finalise the review.
- (b) Some of the most serious adverse outcomes for investors and the broader market in the global financial crisis arose or were exacerbated because of shortcomings of the law in relation to managed investment schemes – for example:
  - (i) the fact that managed investment schemes, a common vehicle in which “mums and dads” and retirees invest, could be left with no responsible entity to manage them;
  - (ii) the complexity and uncertainty in relation to the respective rights of investors and creditors of the responsible entity in its own right and in its trustee capacity made it more complex, time-consuming and expensive to wind up or restructure managed investment schemes than would be achievable if reforms were implemented.

4.6 Without reform, those problems remain and would likely raise similar practical difficulties in another financial crisis. We urge the government to provide for the completion of this review so that the best way to mitigate those issues and protect the Australian market and investors from their impact in any future crisis can be determined and implemented.

## 5. **Conclusion**

5.1 The BLS urges the Government to reconsider its decision to abolish CAMAC, in the interests of ensuring that a program of sound legal and regulatory reform in the corporations and markets area is continued and enhanced, for the benefit of the Australian economy and the reduction of business costs.

- 5.2 If the Government proceeds to introduce the Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014 into the Parliament notwithstanding the submissions by BLS and other expert bodies opposing that course of action, the BLS urges the Government to develop and publicly announce how it will ensure that CAMAC's important work and the key expert inputs that are necessary for that work will be effectively continued.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves  
**Chairman, Business Law Section**

**Appendix C – Submission to the Senate Economics Legislation Committee dated  
20 January 2015**



Law Council  
OF AUSTRALIA

*Business Law Section*

Dr Kathleen Dermody  
Committee Secretary  
Senate Standing Committees on Economics  
The Senate  
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Parliament House  
Canberra ACT 2600  
Via email: [economics.sen@aph.gov.au](mailto: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

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**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.<sup>1</sup> 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).<sup>2</sup> Australia has become a world leader in certain parts of corporate and markets law reform during the past 30 years<sup>3</sup>, 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<sup>4</sup>, 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

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<sup>1</sup>[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2827\\_-\\_Corporations\\_Legislation\\_Amendment\\_Deregulatory\\_and\\_Other\\_Measures\\_Bill\\_2014.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2827_-_Corporations_Legislation_Amendment_Deregulatory_and_Other_Measures_Bill_2014.pdf)

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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-2800-2899/2857_-_Commonwealth_budget_proposal_to_abolish_corporations_and_markets_law_reform_body.pdf) and [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](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. Please contact the chair of the Committee, Bruce Cowley on (07) 3119 6213 if you would like to do so.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal stroke extending to the right.

John Keeves  
**Chairman, Business Law Section**

**Appendix D – Submission to the Senate Economics Legislation Committee dated  
4 March 2015**



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*Business Law Section*

Dr Kathleen Dermody  
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Senate Standing Committees on Economics  
The Senate  
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Canberra ACT 2600  
**Via email:** [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

4 March 2015

Dear Dr Dermody,

**Australian Securities and Investments Commission Amendment (Corporations and Markets Advisory Committee Abolition) Bill 2014**

1. I refer to the Senate's referral of the above Bill (**CAMAC Abolition Bill**) to the Economics Legislation Committee (**Senate Committee**) for inquiry and report by 16 March 2015. The Senate Committee has called for submissions to be lodged by 4 March 2015.
2. This submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia (**Corporations Committee**).
3. The Corporations Committee submits that there is a very strong case for the continuation of the Corporations and Markets Advisory Committee (**CAMAC**) as an independent, transparent, research-based corporate and market law reform body, constituted to facilitate appropriate input from business, market and legal sources.
4. The case for retention of CAMAC has been presented in three previous submissions prepared by the Corporations Committee:
  - (a) to the Minister for Finance and Acting Assistant Treasurer dated 11 June 2014, in response to the Commonwealth budget proposal to abolish CAMAC;
  - (b) to the Minister for Finance and Acting Assistant Treasurer dated 22 October 2014, relating to the Exposure Draft of the CAMAC Abolition Bill;
  - (c) to the Senate Committee dated 20 January 2015, as part of a submission on the Corporations Legislation Amendment (Deregulatory and Other Measures) Bill 2014.

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For the convenience of Senators, copies of these submissions are attached as appendices to the present submission.

5. In summary, the Corporations Committee reiterates key points made in its submission dated 20 January 2015:
  - (a) a law reform body (now CAMAC) has been an integral part of the national co-operative legislative and administrative arrangements for the regulation of corporations and financial products and services since the 1980s, most recently expressed in the Corporations Agreement 2002 (as amended), under which the States have referred constitutional legislative powers to the Commonwealth until 2016 (subject to the prospect of further extension);
  - (b) Australia has become a world leader in certain parts of corporate and markets law reform during the past 30 years, largely because of the research-based input of an expert, independent committee, which has evolved over that time to become CAMAC;
  - (c) given that no satisfactory alternative has been identified, the abolition of CAMAC will be highly damaging for effective reform in this area, 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;
  - (d) the cost saving achieved by the abolition of CAMAC would be less than \$1 million per annum;
  - (e) CAMAC's recent work, such as its report on crowd-sourced funding, has been outstanding, as has been recognised in the Government's subsequent consideration of that subject;
  - (f) CAMAC's future work program would have included much-needed reforms which are now likely to be stalled, relating to:
    - (i) the inefficient and outdated procedures around annual general meetings of shareholders; and
    - (ii) the legal structure for managed investment schemes, bearing in mind recent highly publicised failures which have caused substantial losses to investors.

Work on these two important references was well developed when the decision to abolish CAMAC was announced, and there was every prospect that CAMAC would recommend important reforms that would enhance efficiency and reduce red tape, while protecting the interests of investors.

6. The reasons which have been advanced on behalf of the Government for repeal of CAMAC are, with respect, unconvincing, as explained in the Corporations Committee's submission dated 22 October 2014, section 2. Thus:
  - (a) there is no duplication between the work of CAMAC and other government work, because CAMAC acts on references from the Government and other

relevant stakeholders, and its work is coordinated with Treasury, ASIC, the professional associations and other interested parties;

- (b) CAMAC provides excellent value for taxpayers' money, producing very significant output with only three full-time staff;
- (c) the CAMAC structure is a proven, effective way of securing expert advice from independent sources;
- (d) CAMAC provides a structure in which expert input is received during the development of reform proposals, rather than merely by way of submissions and lobbying after a reform proposal is released for public consideration, thereby enhancing the efficiency of the reform process;
- (e) CAMAC's structure allows the States and Territories to have a say on membership of the Committee, so as to ensure that their interests are represented in CAMAC deliberations and that their nominating States and Territories are kept informed of legislative proposals that will make use of their referred powers;
- (f) the unfinished work of CAMAC is sufficiently important that it should remain the work of an expert, independent body which can give it appropriate priority.

7. The Corporations Committee would be pleased to discuss any aspect of this submission or give evidence should the Senate Committee decide to hold hearings. Please contact the chair of the Committee, Bruce Cowley on (07) 3119 6213 if you would like to discuss this submission or make arrangements for the giving of evidence to a hearing.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal stroke extending to the right.

John Keeves, Chairman  
**Business Law Section**