

27 September 2005

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
GPO Box 3967
SYDNEY NSW 2001

Dear Sir

CORPORATE DUTIES BELOW BOARD LEVEL - SUBMISSIONS

The Commercial Law Association of Australia Limited has a proud tradition within law and business spanning over 40 years. The Association provides an opportunity for lawyers and those involved within finance and commerce to network, and lobby government on issues of mutual concern. The Association also aims to improve the flow of information, promote high professional ethical standards, and increase the dissemination of information on corporate law issues.

We refer to the Corporations and Markets Advisory Committee's Discussion Paper entitled Corporate Duties Below Board Level dated May 2005.

We have had the opportunity to review submissions made on the Discussion Paper by the Australian Institute of Company Directors, as published on their web-site.

We support their submissions, with the following further observations.

- ***Directors ultimately responsible*** – it is clear that in most companies that the Directors are, by their Constitution or the applicable replaceable rule (s 198A(1), *Corporations Act*), mandated to manage the business under their direction. This mandate, and the attendant obligations that go with this mandate, has the corollary that the business structure and operations of the company in which a director holds office are, and are to be, a creature of director determination. It is they that institute, guide and monitor this structure and operations, and no amount of delegation may result in an abdication of their clear all-company encompassing responsibilities in this area. Cries from directors that they are not across what management is doing are generally not good enough.
- ***Effect on Directors' and Officers' insurance policies and cost*** – it would be disappointing if any extension of the duties and liabilities of officers, as that term may be defined or redefined, were to lead to an

increase in the costs and complexities for companies to secure adequate insurance cover.

- ***Interaction with employment law duties*** – the provisions of the Corporations Act, and its recent predecessors, pertaining to the duties of directors and officers has in many respects developed with greater focus on directors, as traditionally understood, than on employees who fall within the definition of officers. We submit that CAMAC very closely consider the employment law aspects of their proposals, as they may finally be drawn. An important example of how the law relating to directors as fiduciaries and employment law may collide is the duty of a director not to fetter his or her discretion. This duty is to be contrasted with the duty of an employee of fidelity, an element of which is the duty of an employee to take at least lawful direction. The duty to at least take lawful direction means that an employee does not have an unfettered discretion to decide matters for himself or herself. This collision becomes all the more apparent and of practical consequence where traditional directors' duties extend below Board level.
- ***Business judgment rule amendment*** – currently the business judgment rule, set out in s 180 of the *Corporations Act*, has a top down, director focus. We submit that for officers at below Board level it must necessarily be part of their business judgment, and in measuring their possible personal liability as an officer, that they have may have received a binding lawful direction as an employee.
- ***Effect on concept of limited liability of company; liquidation and voluntary administration issues*** – as has been seen in the recent Federal Court decisions in *Concept Sports* and *Sons of Gwalia*, disappointed shareholders are becoming, including through litigation funding, more adept at finding alternative avenues in seeking redress against companies, directors and officers where the assets of a company may be exhausted for whatever reason.

We submit that the extension of personal liability for directors and officers, in a way that is not generally co-terminous with the available assets of the company, of itself weakens the strength of properly cast limits on recovery for limited liability companies, and the facility for companies in circumstances of insolvency or near insolvency to either be resurrected, through the voluntary administration and deed of company arrangement processes, or brought to an orderly end through the liquidation process.

In considering any extensions of the liability for directors and officers, we suggest that CAMAC consider too the impact of any such extensions in these areas.

We trust that these submissions are of assistance in your deliberations.

Should you wish us to expand upon any of them, please do not hesitate to contact the writer.

Yours faithfully

Daren Armstrong
Secretary – Legislative Review Taskforce