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Mr John Kluver  
Executive Director  
Corporations & Markets Advisory Committee  
Level 16, 60 Margaret Street  
SYDNEY NSW 2000  
Email: john.kluver@camac.gov.au

Dear Mr Kluver

This submission is made on behalf of the Insurance Council of Australia in response to the Corporations and Markets Advisory Committee's (CAMAC) discussion paper on *Corporate Duties Below Board Level*.

The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia. ICA membership represents more than 90 percent of total premium income written by private sector general insurers. ICA appreciates the opportunity to provide a response on these issues and welcomes continued consultation on these issues as they are under review.

While individual ICA members have made separate submissions, this letter touches on specific issues common to ICA members, primarily those involving regulatory consistency and the need for a considered approach.

### **Corporate Duties Below Board Level**

While ICA supports the 2003 HIH Royal Commission Report findings, it has concerns about CAMAC's view on how to implement these recommendations. For example, the proposed extension of the definition of "officer" to an indeterminate class of people has the potential to create greater uncertainty across levels of management. It is also likely that the lack of clarity in the definition could lead to a broad judicial interpretation which could expose unintended persons in areas of middle management and below to increased liability.

ICA does not believe that this was the Royal Commission's intention. The 2003 HIH Report focused on ensuring that a "functional" definition of personnel applied. It did not, however, indicate an intention to shift responsibility away from the Board and Directors and on to management. ICA is concerned that these reforms have the potential to develop a culture which would encourage the shifting of responsibility (both up and down the chain) and further encourage both officers and management to act in a manner which is compliance centred and risk averse.

Corporations are already regulated by a range of legislation with which management is required to abide in such areas as occupational health and safety, insurance, prudential regulation, and trade practices. These regulations impose responsibility and subsequently liability on these individuals. This legislation is becoming well established and understood, and is operating effectively. As such, ICA does not believe that this is an area that is in need of greater regulatory oversight.

Any decision to extend the definition of officer needs to be undertaken after due consideration of the intended outcomes including clearly identifying which groups of people are to be captured by these changes. In addition, any decision to include consultants and contractors must be done cautiously and should contemplate the unintended consequences that it may have on contractors, external consultants, and external advisors. Any change should be limited to such persons that are specifically performing the functions of officers.

### **Potential Insurance Issues**

The extension of liability could have yet unquantified impacts both on Directors & Officers (D&O) and Professional Indemnity Insurance (PI) cover. For managers that are captured in this broader definition, greater liability will mean that they will have to seek out D&O and/or PI insurance to offset their personal risk. By extending the level of management exposed to risk, there is potential that D&O and PI insurance premiums will be forced to rise in order to cover this extended pool of risk.

Members have indicated that risks based on work done for companies by external contractors, consultants and advisors are not covered by traditional D&O insurance. Specifically, companies would have to broaden the definition of "management" in their policies to include these external groups. Extending the definition of management has the potential to have claims brought against a corporation for any historic wrongful act committed by any of their past contractors or consultants. This has the potential to add significant unquantifiable exposure to insurers. For example, as part of writing a policy, an insurer would have to collect information on all past contractors and consultants of the corporation in order to quantify the additional exposure involved. This would have the potential to increase the risk and subsequently the pricing of D&O policies.

### **Regulatory Environment**

There is already growing evidence that the complexity of the regulatory environment has created a compliance mentality within corporations. Business decisions are being taken with compliance as a major factor. This need to further focus on compliance as the dominating concern, even at the middle management level, will continue to make companies more risk averse, stifle innovation and creativity.

ICA encourages CAMAC to have their reforms reflect the spirit of the Prime Minister's Taskforce to examine the reduction of red tape, and strongly believes that any changes should be implemented in a manner that keeps regulatory cost for companies to a minimum.

We would welcome an opportunity to discuss these matters further once you have had a chance to consider our comments.

Yours sincerely

Alan Mason  
Executive Director