

12 August 2005

Mr John Kluver  
Executive Director  
Corporations and Markets Advisory Committee  
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Dear Mr Kluver

## **CORPORATE DUTIES BELOW BOARD LEVEL**

The Chamber of Commerce and Industry Western Australia (CCI) is the peak business association in Western Australia. It is the second largest organisation of its kind in Australia, representing approximately 5,000 organisations across all sectors including manufacturing, resources, agriculture, transport, communications, retailing, hospitality, building and construction, community services and finance. About 80 percent of CCI members are small to medium enterprises, and members are located across all geographical regions of WA.

### **1. Introduction**

We refer to the Corporations and Markets Advisory Committee (**CAMAC**) discussion paper of May 2005 titled "Corporate duties below board level" (**CAMAC Paper**).

The CAMAC Paper invites submissions on a number of proposals, including the possibility of extending corporate duties and liabilities under the *Corporations Act* 2001 and other legislation to additional classes of individuals below board level. The CAMAC Paper, like the HIH Royal Commission report of April 2003 titled "The Failure of HIH Insurance" (**HIH Report**), appears to adopt the view that there is a gap in liability below board level.

The purpose of this letter is to make a number of submissions in opposition to the proposed extension of corporate duties and liabilities below board level.

### **2. Making the "right" people accountable**

#### **2.1 Linking responsibility and accountability**

In considering whether corporate duties and liabilities should be extended to additional classes of individuals below board level, it is important to be mindful of the responsibility and accountability of the individuals concerned.

CCI submits that it is unreasonable for persons below board level to be burdened with greater accountability of the kind envisioned in the CAMAC Paper, where there is a real prospect that the greater accountability would, in many cases, substantially outweigh the responsibility those persons have for the affairs of the company.

Directors and other executive officers of a corporation typically assume a large degree of responsibility and accountability for the actions they take. Significant power resides in those people. In turn, they are remunerated accordingly.

By contrast, managerial personnel in a corporation are afforded less power and responsibility in controlling the functions of the company and are given less remuneration. The accountability of this group of individuals should match their level of responsibility and power.

Decision makers should be held accountable, in appropriate cases, where they have not, for example, been duly diligent in the performance of their duties. CCI is of the view that this should begin and end with the major decision makers of the corporation, the directors and other executive officers, not those persons below board level. Those with less responsibility should be burdened with less accountability.

## **2.2 Access to knowledge and resources**

The HIH Report strongly recommends the adoption of a “functional” test for determining whether a particular individual should be subject to corporate duties and liabilities, rather than simply restricting liability to directors and other officers. This would involve a consideration of the functions performed by an individual.

While this test appears outwardly reasonable, there is a considerable risk of injustice in its application. Directors and other officers typically have considerable resources and information at their disposal when making a decision. For this reason, they are generally able to make informed decisions, fully aware of the circumstances and operations of their organisation.

However, managers and other persons below board level often make decisions with limited resources. For example, while a manager in a large, complex organisation may have detailed knowledge of the particular division which they manage, they will often possess little information about the other aspects of the company. Managers will not always be privy to information and knowledge from all aspects of the organisation.

In the event that corporate duties and liabilities are extended to those below board level, there is a risk that managers may become inadvertently involved in a breach of duty, without their knowledge or intent. For example, a director may covertly instruct an employee to perform an action which the employee would not otherwise perform, had the employee been given all the relevant information or been in a position to investigate the circumstances on their own accord.

The legislature must be cautious not to foster a climate in which directors can inappropriately delegate responsibilities to persons below board level, and thereby pass the risk of prosecution for non-compliance to those with less information, knowledge and training. Directors and other executive officers are paid to take responsibility for making the decisions of their organisation, and the accountability for those decisions in appropriate (and in most cases already existing) circumstances should remain with the board. The extensive Commonwealth and State regimes of liability in that regard are summarised in CAMAC’s other discussion paper of May 2005 titled “Personal Liability for Corporate Fault”.

### **3. Existing mechanisms for regulating conduct below board level**

In addition, and despite the findings of the HIH Report, the extension of duties and liabilities to persons below board level is unnecessary, as those persons are already subject to sufficient regulation in the form of direct and accessorial liability.

Persons below board level can be prosecuted where they are directly involved in an offence or where they have aided and abetted the commission of an offence. To this extent, mechanisms already exist for regulating the conduct of these persons.

However, the thrust of the HIH recommendations and CAMAC proposals is that persons below board level should attract further corporate duties and liabilities (i.e. duty of care and diligence, and duty of good faith and proper purpose).

Considering the responsibility of most individuals below board level (see above discussion), CCI strongly submits that the existing regulatory mechanisms are sufficient and that a further extension of duties and liabilities is unnecessary, unreasonable and unfair, and could lead to a diminution in responsibility for a corporation's actions at board level.

### **4. Conclusion**

In summary:

- (a) It is unreasonable for persons below board level to be burdened with greater accountability, especially where that greater accountability may outweigh the responsibility those persons have for the affairs of their company.
- (b) Directors and other executive officers usually have considerable resources and information at their disposal, and are therefore able to make fully informed decisions. However, persons below board level often make decisions with limited resources, and with little information about the other aspects of the company.
- (c) Directors and other executive officers are paid to take responsibility for making the decisions of their organisation, and the accountability for those decisions should remain with the board.
- (d) The extension of corporate duties and liabilities to persons below board level is unnecessary, as those persons are already subject to sufficient regulation in the form of direct and accessorial liability.

Please contact our Mr Bill Sashegyi, Director Industry Policy on Tel: (08) 9365 7567 or e-mail [sashegyi@cciwa.com](mailto:sashegyi@cciwa.com) if you have any questions in relation to the above.

Yours sincerely

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Chief Executive