

10 March 2006

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee
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By email: john.kluver@camac.gov.au

Business
Council of
Australia



Dear Mr Kluver

TREATMENT OF FUTURE UNASCERTAINED PERSONAL INJURY CLAIMS

The Business Council of Australia (**BCA**) appreciates the opportunity to make this submission to the Corporations and Markets Advisory Committee (**CAMAC**) in relation to proposed amendments to the Corporations Act to deal with future unascertained personal injury claims. As this is a complex and at times politically sensitive area, the BCA also appreciates the decision of the Federal Government to refer this matter to CAMAC for considered deliberation before deciding on an appropriate course of action.

The BCA is an association of Chief Executives from leading Australian corporations with a combined national workforce of almost one million people. It was established in 1983 to provide a forum for Australian business leadership to contribute directly to public policy debates in order to build a better and more prosperous Australian society.

The BCA appreciates that the Government wishes to address any potential shortcomings in how the current law deals with future unascertained personal injury claims. Care needs to be taken, however, to ensure any proposed solutions avoid creating further problems or moving the risk from one class of potential claimants to another. A balance therefore needs to be struck between any strengthening of the protection of personal injury claimants and the rights of existing claimants against companies, such as creditors, many of whom can be in small business.

There also needs to be recognition that dealing with the rights of future unascertained personal injury claims is inherently difficult. As the reference to CAMAC notes, in the normal course of business, companies will have little information about the likelihood or magnitude of future claims. The burden on businesses from having to provide for any possible future claims could be overwhelming. It is therefore vitally important that any provisions designed to deal with future unascertained personal injury claims only relate to circumstances where there is a very real expectation of claims based on similar claims or claims actually made against the company. For example, it is relevant that in the case of James Hardie, the company was aware of existing claims and the potential for future claims, as evidenced by its creation of a foundation to deal with these future claims. Any amendments to the law therefore need to be restricted to such circumstances and

should clearly not apply where there is only a chance of future claims or where claims only become apparent with hindsight and could not have been reasonably foreseen at the time.

Application of the Proposed New Provisions

Under the proposal being considered by CAMAC, the proposed new protections for future unascertained claimants would only apply where two pre-conditions are met, namely:

- a. there has already been an exceptional number of personal liability claims arising from the company's action or product; and
- b. further similar claims are expected.

The BCA strongly supports the scope of the new provisions being limited in such a way. Without a careful and precise limitation upon the operation of the proposed new provisions, it would be extremely difficult for companies to manage their operations, and for Directors and officers to fulfil their duties. For example, if the provisions were to apply where there is only the *possibility* of future claims, companies would be obliged to make provision for those possible future claims. Given that under such circumstances, the size of such possible future claims would be difficult to determine, companies, and their Directors and officers, would be obliged to act conservatively and assign considerable funds as a provision against these possible claims. Such an outcome would be commercially burdensome and economically inefficient, particularly as in most cases it will be found that no sustainable actions arise. Experience shows that it is only in rare and exceptional circumstances that mass claims will actually arise and be successful against a company.

It is therefore vital that any new provision to protect future unascertained claimants be restricted to circumstances where mass claims already exist and future claims against the company are a strong likelihood.

Scope of the Liability

Once it is apparent that a company will face future mass claims, there needs to be certainty around the appropriate legal responsibilities of the company. In particular, the company needs to be in a position to ensure it can meet legitimate future claims. It also needs to be able to determine, at any given time, whether the company is solvent. The challenge for the company therefore relates to its ability to assess the total future liability at any particular time.

The total future liability will depend on a number of factors, including the number of claimants and the level of damages awarded to claimants. These will in turn vary depending, for example, on the ways in which future damage or harm to claimants manifests. Similarly, advances in medical technology and expertise could increase the liability where improved diagnostics allow greater certainty over the causes of

harm, or could reduce liability where improved treatment reduces the impact of harm¹.

Actuarial expertise can be relied upon to make a reasonable estimate of the future potential liability. Any such estimate, however, is inherently uncertain, and may be shown to be incorrect over time, particularly as circumstances connected with a mass claim change. It is vital, therefore, that companies are provided with legal protection where they can demonstrate that they have exercised due diligence in determining the potential future liability and have acted according to that assessment.

For these reasons, the BCA supports the position proposed in the reference to CAMAC that the new provisions not apply unless it is possible to identify the circumstances giving rise to the future personal injury claims and the class of persons who will bring the claims. The BCA also believes any new obligations placed upon companies, their Directors and officers, must be matched with a due diligence defence.

Relativity of Claims

The reference to CAMAC recognises that companies may face a range of claimants, including employees, creditors and shareholders. Any proposals to strengthen the claims of future unascertained claimants should not come at the expense of the existing rights of other legitimate claimants. A concern in this regard is the additional time that may be required to wind up a company if there is an ongoing and uncertain level of liability arising from a mass claim.

The reference to CAMAC states that, in the case of liquidation, “*asset distribution to creditors known at the time of external administration would take place as normal except a proportion of the assets could be set aside for future creditors*”². Given the high degree of uncertainty of the actual level of future claims, this statement over-simplifies the difficulty of reconciling the interests of future unascertained claimants with those of other claimants known at the time of liquidation. If it is assumed that a proportion of the assets needs to be available to meet all actual successful claims, then the allocation of assets will necessarily be significantly delayed, as the claims, by their nature, only arise over a number of years. The only feasible alternative is if, at the time of winding up, a reasonable estimate of future claims is made and assets are assigned to meet this estimate, with the remaining assets distributed to the other claimants (employees, creditors, etc). Such a reasonable estimate of the future claims should be made independently and the validity of the estimate should be ‘certified’ by a court. The company’s Directors, officers and administrator should then be protected from any future action should the assets assigned based on that reasonable estimate prove inadequate to meet actual future successful claims. Without such an approach, other creditors could not gain access to the assets of the company before all future claims are known and settled.

1 A good discussion of these issues is to be found in the submission to CAMAC by the Institute of Actuaries of Australia, paras. 14 – 23.

2 *Reference in relation to the treatment of future unascertained personal injury claims*, Letter of the Hon Chris Pearce MP, Parliamentary Secretary to the Treasurer, to the Corporations and Markets Advisory Committee, 12 October 2005.

Summary

The BCA recognises the desire to ensure that the rights of future unascertained claimants are protected. The very nature of these claims, however, makes it extremely difficult to craft a regime that adequately protects future claimants without undue restraint on the normal operation of companies or without impeding the existing rights of other claimants.

The BCA supports the proposal to limit the operation of the new provisions to circumstances where it is very clear that substantial future claims are highly likely. Any broadening of this limitation will result in significant interference in the day to day operation of companies that are ultimately unlikely to be subject to substantial successful claims.

Even where companies are highly likely to face such claims, great care needs to be taken that a balance is struck with the rights of other creditors. In particular, a system is needed that allows companies to be wound up promptly to allow other creditors access to the assets of the company.

Any new regimes also need to provide protection for Directors and officers who have acted appropriately and with due diligence. This is particularly important as it is clear that the nature and size of future unascertained claimants can vary considerably with time and, even with the best effort at the time, insufficient provision can be made to meet these liabilities.

Overall, the BCA supports the general direction of the proposals under consideration by CAMAC, but believes further refinement is needed to make the proposed new regime practicable.

The relevant contact at the BCA on this issue is Steven Münchenberg (03 8664 2664 or steven.munchenberg@bca.com.au).

Yours sincerely

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Chief Executive