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Mr John Kluver  
Executive Director  
Corporations and Markets Advisory Committee

**By email to [john.kluver@camac.gov.au](mailto:john.kluver@camac.gov.au)**

Business  
Council of  
Australia



Dear Mr Kluver

### **CAMAC DISCUSSION PAPER – CORPORATE SOCIAL RESPONSIBILITY**

The Business Council of Australia (**BCA**) welcomes the opportunity to make a submission to the Corporations and Markets Advisory Committee (**CAMAC**) in relation to its Discussion Paper on Corporate Social Responsibility, November 2005 (**Discussion Paper**).

As you are aware, in September 2005, the BCA made a submission to the inquiry by the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) into corporate responsibility and triple-bottom-line reporting (**PJC Submission**). The BCA also appeared before the PJC at a public hearing held on 23 February 2006. We attach a copy of the PJC Submission and the Hansard transcript dated 23 February 2006 (**Hansard**).

The principal arguments raised by the BCA in its PJC Submission are as follows:

- Corporate Social Responsibility (**CSR**) is difficult to define and means different things to different people. There is no 'one-size-fits-all' definition of CSR. For the BCA, the essence of this issue can be captured as follows:

*Corporations operate within the community. For corporations to be sustainable and successful in the long term, they need to engage with the community and take account of community attitudes. Successful companies therefore factor into their forward strategies activities that manage the challenges and risks to the community and capture the opportunities that community engagement can bring. To be valid, these activities must deliver benefits both to the community and the shareholders of the corporation.*

- CSR initiatives within a company follow a maturity cycle, so that companies that are initially undertaking CSR initiatives may be more likely to undertake corporate philanthropy, but as the company matures and understands the business case for CSR, the company will be more likely to incorporate CSR initiatives into its business strategy and operations.<sup>1</sup>

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<sup>1</sup> See Deloitte and Our Community.com.au, "Community Business Partnerships- In search of the modern marriage" Business Community Intelligence Magazine, October 2005, page 13.

- A company's paramount obligation is to its shareholders - but that does not mean that companies must ignore the needs of other groups of stakeholders. The two are not mutually exclusive. Increasingly companies are recognising that the long-term viability of a company (and therefore shareholder interests) are protected by recognising other stakeholder interests that impact their operations. The fact that all BCA Member companies are undertaking some form of CSR activity suggests that company directors and officers can, and do, take into account interests of stakeholders other than shareholders in discharging their duties.
- While the BCA recognises the realities of market drivers towards greater corporate responsibility, and supports corporations having regard to the interests of stakeholders other than shareholders, there are limits to the extent that corporations can and should have regard to interests other than those of shareholders. The litmus test for any activity or responsibility is whether the performance of that activity or responsibility can reasonably be seen to be contributing to the growth of shareholder value.
- Companies differ in (amongst other things) their scale, nature and spheres of operation as well as maturity and impact on the community. Accordingly their CSR initiatives and the relevant stakeholders will differ also.
- Significant changes in the nature of the economy and the environment in which companies operate have taken place. For example, growth in globalisation and technology and information flows have seen a rise in the sophistication, power and knowledge of broader stakeholders. Therefore, companies are increasingly required to take into account the interests of such stakeholders in their business operations, and there is increasing recognition of a business case for companies to undertake CSR practices. The BCA has identified some of the drivers of the business case for CSR, including:
  - **employee recruitment, motivation and retention** - the reputation of a company affects its desirability as a potential workplace. It is in a company's strategic interests to attract and retain the most highly skilled and expert employees, and this can be encouraged by maintaining an ethical and attractive reputation;
  - **learning and innovation** - learning and innovation involves companies responding to changes within society to achieve and take advantage of business opportunities, to develop new business practices and to maintain or enhance competitiveness;
  - **reputation management** - business success is highly dependent on reputation within the community. Advances in information and communication technology (as noted above) and the breadth of stakeholders that can influence business today means reputation is increasingly important. Reputation can affect, among other things, consumption, investment and employment decisions;
  - **risk profile and risk management** - by identifying possible risks, through the use of CSR initiatives, a company may be able to reduce or eliminate avoidable risks and losses (such as those related to damage to reputation or operations, or changing community attitudes);

- **competitiveness and market positioning** - the long-run viability of a business depends on its strategic positioning which includes developing the economy and community in which it operates, working with Government to facilitate better regulatory regimes or integrating environmental breakthroughs into assets to reduce lifecycle costs and improve efficiency;
  - **operational efficiency** - the operational efficiency or capacity of a company depends on many factors, such as the ability to source skilled workers, the efficient use of company resources and/or the maintenance of a healthy local community to support the company's operations;
  - **investor relations and access to capital** - investment capital is important for a company's ongoing activities and ability to expand or enter into new ventures. Advancements in technology have ensured that investors have greater access to information about a company's operations, including its social and environmental performance. There is evidence that investors are increasingly taking into account a company's social and environmental performance when making investment decisions; and
  - **licence to operate** - companies are realising that their long-term viability depends on the continued support of the wider community and stakeholders, including customers, employees, shareholders and the local community.
- The importance of these drivers and the business case for CSR is clearly demonstrated by the extent, scope and innovativeness of the CSR initiatives being undertaken by BCA Member companies. The BCA undertook a survey of BCA Member companies and found that all BCA Member companies were conducting some form of CSR activity and that about one-third were reporting on their CSR activities.
  - **The difficulty in defining CSR, as well as the fact that CSR activities are already being pursued in Australia by large corporations, suggests that mandating CSR through legislative intervention runs the very real risk of stifling the innovative and creative approaches to CSR that are already being adopted by Australian companies.**
  - There are options other than regulatory alternatives that are likely to foster a more meaningful dialogue on CSR issues and create forums for companies to educate and learn from each other about CSR approaches and initiatives.

### **CAMAC Terms of Reference**

The Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, has requested CAMAC to review and report on the matters outlined below:

1. Should the Corporations Act be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?
2. Should the Corporations Act be revised to require directors to take into account specific classes of stakeholders or the broader community when making corporate decisions?
3. Should Australian companies be encouraged to adopt socially and environmentally responsible business practices and if so, how?

4. Should the Corporations Act require certain types of companies to report on the social and environmental impact of their activities?

Each of these terms of reference are addressed in more detail below.

### **Terms of reference 1 & 2 – Directors duties**

1. *Should the Corporations Act be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?*
2. *Should the Corporations Act be revised to require directors to take into account specific classes of stakeholders or the broader community when making corporate decisions?*

The BCA does not believe that the Corporations Act should be amended to clarify or require directors to take into account specific classes of stakeholders or the broader community when making corporate decisions.

The company's paramount obligation is to its shareholders - but that does not mean that companies must, or indeed do, ignore the needs of other groups of stakeholders. The two are not mutually exclusive. The interests of different stakeholders are not necessarily competing - companies need customers, employees, suppliers and supportive communities in which to operate in order to ensure their long-term viability. Increasingly, companies are recognising that the long-term viability of their business (and therefore shareholder interests) is enhanced by recognising other stakeholder interests that impact their operations. The fact that all of the BCA Member companies are undertaking some form of CSR activity suggests that directors can, and do, take into account interests of broader stakeholders. Further discussion of these issues can be found at pages 9-13 and 45-48 of the PJC Submission.

There is no evidence that company directors and officers feel constrained by their current duties from taking into account interests of stakeholders other than shareholders. Any amendment to the Corporations Act to either, clarify the operation of the directors duties in the Corporations Act such as an 'enabling' provision, or to make mandatory the consideration of stakeholder interests other than shareholders, is therefore considered unnecessary.

The BCA also believes that such amendments could be counter-productive. This is discussed further at pages 48-49 of the PJC Submission and pages CFS 98 – 99 of Hansard.

For example, an 'enabling' provision may be counterproductive for a number of reasons, including:

- Over time, an 'enabling' provision can become interpreted such that it becomes effectively mandatory. An amendment to the Corporations Act may give the impression that there is a problem with the operation of the directors duties in the Corporations Act as they currently stand. This may lead to judicial interpretation over time that changes the 'enabling' provision to in fact become mandatory.

- Over time, circumstances can change such that issues that were not considered important in the past, may become more important in hindsight. An ‘enabling’ provision can run the risk of creating a legal obligation for Boards to have addressed such issues at a Board level. Given that stakeholders are such a potentially wide class (and indeed, very difficult to define or identify) this potentially raises a significant due diligence issue for Boards, to show that they identified and considered a very wide class of potential stakeholder.
- Such an amendment runs the risk of providing rogue directors or officers with a loop hole to undertake activities that might not be in the best interests of the company. For example, a particularly charismatic and dominant director may use shareholders and investors money to pursue their own personal interests through philanthropic or other activities, at the expense of the company.

Accordingly, the BCA believes that the proposed amendments to the directors’ duties in the Corporations Act are unnecessary at best and counter-productive at worst.

### **Term of reference 3 – Encouraging companies to take up CSR**

#### *3. Should Australian companies be encouraged to adopt socially and environmentally responsible business practices and if so, how?*

As outlined above, the BCA has identified eight key business drivers for companies undertaking CSR activities. The significance of the business case for CSR is seen in the extent, scope and innovativeness of the CSR initiatives already being undertaken by BCA Member companies. The BCA undertook a survey of BCA Member companies and found that all BCA Member companies were conducting some form of CSR activity and that about one-third were publicly reporting on their CSR activities.

Against this background of significant engagement, and coupled with the difficulties and limitations associated with ‘enabling’ provisions outlined above, the BCA does not support the proposed legislative responses to ‘encourage’ CSR activities such as amendments to the directors’ duties in the Corporations Act or mandating CSR reporting.

The BCA supports government and industry initiatives that may encourage more companies to adopt CSR initiatives on a voluntary basis (if such approaches are unlikely to, and do not become, counter-productive or mandatory). This is discussed in more detail at pages 49-50 of the PJC Submission and pages CFS 92-93, 104-105 of Hansard.

There are a number of methods by which Government and industry can encourage more companies to take up CSR initiatives. To be effective, the BCA considers that any methods adopted must focus on, or relate to, the market-based drivers of CSR. Consistent with this, the BCA has identified several possible methods to encourage CSR activities, including<sup>2</sup>:

- identifying and removing regulatory barriers to corporations implementing CSR activities;

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<sup>2</sup> PJC Submission, page 50.

- publicly recognising the achievements of those corporations leading the way in CSR (ie better showcasing best practice);
- raising awareness for corporations of the drivers and trends in CSR;
- providing guidance to corporations on developing and implementing CSR activities, drawing on the experiences of larger corporations; and
- facilitating discussions between businesses on approaches and experiences to CSR.

As an initial step, the Government could seek to identify and correct existing regulatory barriers to corporations implementing CSR activities. The BCA took a number of questions 'on notice' in its PJC appearance on 23 February 2006, including questions regarding examples of existing Commonwealth and State legislation and policies that may inhibit corporations engaging in socially responsible behaviour. The BCA conducted a brief survey of its Members<sup>3</sup> and found that there are a number of possible areas that could be reviewed to better support the take up of CSR activity (summarised below). A more extensive and timely review conducted by, or on behalf of, the Government could reveal additional areas that could be subject to reform.

- *Childcare*- Under current fringe benefits tax (**FBT**) law, employers are not required to pay FBT for employer-sponsored on-site childcare. Employer-sponsored childcare at third party facilities, however, attracts FBT. It is only feasible to offer on-site childcare where a significant share of a corporation's employees are located in large, central offices. Where however employees are spread across a range of locations, particularly in outer suburban, regional and rural locations, it is not feasible to offer all employees on-site childcare.
- *Insurance*- A common element of many CSR programs is an arrangement that allows employees to spend some of their company time volunteering with community organisations. This can raise some challenges, however, in terms of insurance cover for those employees. While recent legislative changes have given some protection to volunteers themselves, that protection is not extended to either the community organisation nor the corporate employer. Community organisations are usually not in a financial position to indemnify the corporation, nor might the corporation's own insurance cover it.
- *OH&S*- Corporations are obliged to provide safe working environments, but will have little direct influence over the working conditions of employees volunteering with community organisations. Corporations will be discouraged from allowing employees to volunteer through the company if they are uncertain of their OH&S obligations.
- *Taxation*- Many companies plan to establish corporate foundations for the benefit of the community. While a number of BCA Members have established such foundations, others have reported difficulties with taxation arrangements for their

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<sup>3</sup> We advise that this was not a comprehensive survey of BCA Member companies and that our prime concern was to identify a range of examples quickly. The examples given should not therefore be considered exhaustive.

foundations, particular in relation to gaining Income Tax Exempt Charity Endorsement or the Deductible Gift Recipient Status for corporate foundations.

The Government could also examine 'business case' or 'market-based' approaches that have been used successfully overseas to better encourage or support CSR activities.

- In the UK for example, the Government has established a CSR website [www.csr.gov.uk](http://www.csr.gov.uk) that outlines the initiatives that the Government are using to encourage business to undertake CSR activities.
- Also, the UK Minister for CSR provides an update report on Government initiatives to encourage companies to undertake CSR activities. In one of the reports the Minister for CSR recognises that 'encouragement' of a voluntary nature is an appropriate approach for Government:

*I am well aware of the many and increasing calls for more regulation of company behaviour. And I agree that Government has a responsibility to ensure minimum legal standards. I remain convinced that the main focus of CSR should continue to be a voluntary one. Our role in Government then is to be clear on the future direction and the challenges facing us and to set the appropriate framework that enables us to tackle them.....*

*We want to encourage more to follow suit but we recognise the need for a flexible rather than a "one size fits all" approach.<sup>4</sup>*

While the BCA does not support the legislative responses that have recently been taken in the UK, there may be other initiatives developed in the UK or elsewhere from which Australia may learn. The approaches being taken overseas are dynamic and evolving. Therefore, it may be possible for Australia to learn from these experiences (where they fit within the social and economic objectives and philosophy of our country) before serious consideration of any legislative action.

The BCA considers that Governments should work with industry and business to develop voluntary initiatives to encourage greater CSR activity, based on market drivers and offering the flexibility for companies to learn about and undertake CSR based around their own unique business activities and circumstances. Governments in Australia are already involved in many areas relating to CSR through, for example, the Prime Minister's Business Community Partnership. However, there may be other opportunities for cooperation between Government and the private sector.

For example, to support the wider adoption of CSR by business, the UK Government has been exploring the benefits of CSR for general business performance. The UK Government has worked with others on projects looking at the links between CSR or sustainability and business performance, both in terms of the impact on the competitiveness of individual companies and national economies<sup>5</sup>.

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<sup>4</sup> UK Government, "Corporate Social Responsibility A Government update", [www.csr.gov.uk](http://www.csr.gov.uk), May 2004, page 4.

<sup>5</sup> UK Government, "Corporate Social Responsibility A Government update", [www.csr.gov.uk](http://www.csr.gov.uk), May 2004, page 10.

Enhanced education and knowledge of the business drivers of CSR can also be provided through workshops and forums with various industry and government participants. The more education and information provided to government, private business and the community about the business case for CSR, the greater the pressure will be for the implementation and up-take of CSR activities.

#### **Term of reference 4 –CSR reporting**

#### **4. Should the Corporations Act require certain types of companies to report on the social and environmental impact of their activities?**

Despite the absence of mandatory CSR reporting requirements, the BCA has found that around one-third of its Members report on CSR in some form. Given the strong business case for CSR, it is perhaps somewhat surprising that more companies are not reporting their CSR activities. Given the importance of improving understanding of the benefits of CSR, the BCA will do what it can to encourage Members to better publicise their CSR activities. The BCA does not believe, however, that mandatory CSR reporting is an appropriate step to encouraging more effective CSR activities and their reporting. Mandatory reporting runs the risk of stifling innovation and fostering a 'tick the box' mentality. Further, it would be very difficult to mandate meaningful and consistent reporting, given that:

- companies are diverse in their maturity, operations and scope, and therefore have different reporting and content requirements. There is no 'one-size-fits-all' approach to CSR or its reporting. For example, Rick Allert, Chief Executive of Coles Myer has highlighted that even within the business, different divisions have different responses to CSR because of their unique operations. Mr Allert has stated<sup>6</sup>:

*At Coles Myer we observed that we had been supporting community in a diverse way, but in doing so it didn't lead to a coordinated approach. So we decided to bring it all under one umbrella. While that is so, our brands such as Coles and Bilo in our supermarkets and Kmart, Target and Myer stores, Officeworks, Liquorland, etc. allocated some money and do have their own ways of dealing with the communities they deal with....*

*Bilo and Kmart have moved towards programs where we have targeted our CSR initiatives towards low-income Australian families. While Target has developed a program of activities of core business in fashionable merchandise with the prevention of cancer and Myer currently supports this initiative from a children and youth perspective. So, they are just examples of how our brands might have different approaches;*

- CSR is very difficult to define and will mean different things to different companies; and
- developments both in Australia and overseas, in terms of indices and benchmarking, mean that any attempt to mandate reporting is premature and counterproductive. Benchmarks in terms of best practice are rapidly shifting and efforts to enshrine a particular approach would limit innovation and the

<sup>6</sup> Deloitte and Our Community.com.au, "The chairman on CSR" Business Community Intelligence Magazine, October 2005, page 5.

application of best practice, including through the adoption of emerging practices from other dynamic economies.

Further discussion on these issues can be found at pages 50-51 of the PJC Submission.

There may be some scope to examine methods of 'encouraging' reporting around existing frameworks. For example in the context of listed companies there are existing ASX Principles of Good Corporate Governance and Best Practice Recommendations (**ASX Principles**) relating to reporting (such as ASX Principles 3, 7 and 10). At the least, any recommendation regarding mandatory reporting ahead of an examination of the scope for voluntary guidance to be developed by industry around existing frameworks would seem premature.

Yours sincerely



**Melinda Cilento**  
Chief Economist