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Corporations and Markets Advisory Committee  
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Thank you for the opportunity to make this brief submission in response to the CAMAC Discussion Paper *Corporate Social Responsibility*.

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**Introduction**

1. This submission relates to Part 5 of the Discussion Paper, 'Encouraging Responsible Business Practices', and therefore addresses aspects of Question 3 of the CAMAC terms of reference.
2. In Section 5.6 of the Discussion Paper, consideration is given to Government initiatives to achieve corporate social responsibility, including promotion of responsible practices by government agencies. There is also a list of other possible initiatives (5.6.2), in particular, tailoring conditions through public procurement and tendering policies, and requiring participants in public-private partnerships (PPPs) to demonstrate that they follow appropriate business opportunities, and use of taxation and other fiscal measures.
3. In my view, more attention can be given to such measures as a technique by which governments can assist corporations to be more accountable or responsible to society.

## Deployment of Government Wealth as a Regulatory Instrument

4. There is a rich international literature on the use of government deployment of public wealth to leverage corporate accountability to community standards, including environmental and labour standards.<sup>1</sup>
5. PPPs and public procurement programs are variations on the “*contracting out*” of previously public functions to private, voluntary or quasi-public providers.<sup>2</sup> They offer the potential for government to control activity utilising the exchange of public wealth for the provision of a good or performance of a service by a private actor.<sup>3</sup> The primary means by which the government secures the co-operation of an external actor is through the offer of a subsidy or fee, while a contract is generally the means of attaching conditions to, or “regulating” that subsidy. The external organisation consents to the attachment of these conditions because of the incentive provided by the contract payments. In the same way, external actors can be contracted to be conduits, or intermediaries employed to transfer government expenditure to its final recipient.
6. In addition to public-private partnerships and public procurement, consideration has also been given to the issue of corporate accountability to community standards in the context of government financial subsidies to corporations, or ‘industry assistance’.<sup>4</sup> This is in part because the justification for such subsidies is normally their ‘job creation’ benefits for the economy.
7. Financial subsidies or incentives to corporations may take the form of cash grants, loans or tax discounts that are intended to reduce the cost to the private sector of compliance with behavioural patterns desired by government that the private sector might not otherwise follow.<sup>5</sup> The use of financial incentives as a regulatory instrument has been observed in a number of different areas of government activity, including job creation and environmental protection.<sup>6</sup>

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<sup>1</sup> See, for example, Bovis C, “A Social Policy Agenda in European Public Procurement Law and Policy” (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 137; Arrowsmith S, “Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation” (1995) 11 *The Law Quarterly Review* 235; McCrudden C, “Using Public Procurement to Achieve Social Outcomes” (2004) *National Resources Forum* 25.

<sup>2</sup> On government use of contract as a regulatory instrument in Australia, see generally Davis G; Sullivan B, and Yeatman A, *The New Contractualism* (Macmillan, Melbourne, 1997); Seddon N, *Government Contracts: Federal, State and Local* (Federation Press, Sydney, 3<sup>rd</sup> edn 2002).

<sup>3</sup> See Hood C, *The Tools of Government* (Macmillan, London, 1983), pp 42-43.

<sup>4</sup> *Public Subsidies, Public Accountability: Holding Corporations to Labor and Community Standards*, (Washington DC: Grassroots Policy Project, Sugar Law Center for Economic and Social Justice, and Sustainable America, 1998); Baragwanath C and Howe J, *Corporate Welfare: Public Accountability for Industry Assistance* (The Australia Institute, Discussion Paper No. 34, Canberra, 2000).

<sup>5</sup> See, for example, Howse R, “Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State” (1993) 31 *Alberta Law Review* 455; Grabosky P, “Regulation by Reward: On the Use of Incentives as Regulatory Instruments” (1995) 17 *Law and Policy* 257.

<sup>6</sup> See, for example, Howe J, ‘Money and Favours: Government Deployment of Wealth as an Instrument of Labour Regulation’, in Arup C et al, *Labour Law and Labour Market Regulation: Essays on the Construction and Regulation of Labour Markets and Work Relationships* (Federation Press, Sydney, forthcoming early 2006). On the use of subsidies in the context of environmental policy, see Grabosky, *ibid.*

8. Notwithstanding that these instruments can be used to *promote* policy objectives through *market* mechanisms and *non-government* actors, they are nevertheless expressed and constrained by law. The types of legal measures used may range between administrative guidelines within the relevant government department or authority, through to government contracts, as well as other formal agreements or “quasi-contracts”, and legislation.
9. Regulatory instruments such as financial subsidies and incentives are frequently portrayed as “soft” or “light-touch” regulation, as distinct from “hard” legal regulation often associated with legislative models of regulation.<sup>7</sup> Regulating by means of economic incentives is a technique by which governments have endeavoured to promote external satisfaction of public policy objectives where legal coercion is seen to be inappropriate or ineffective.<sup>8</sup>
10. In other words, a perceived advantage of the deployment of wealth as a form of state regulation of the private sector is the capacity of such instruments to be “responsive” to existing values and social ordering, thereby fostering a culture of compliance.<sup>9</sup> It is argued that by advancing policy objectives based on the ideal of social or redistributive justice in a way which avoids “intrusive interference with private social and economic arrangements and market allocation decisions”, regulation is likely to be more effective.<sup>10</sup>
11. Further, in many jurisdictions these instruments offer a form of regulation which is less constitutionally restricted than legal regulation, and therefore able to be widely utilised by different levels of government, and, moreover, they may be used by the higher level government to regulate the behaviour of the other levels of government within the state hierarchy.
12. Thus, in Australia, there is evidence that social regulation based on the deployment of wealth is used by both State and Local Government, as well as by the Commonwealth.
13. For example, persons who supply or propose to supply goods and services to the Victorian Government must satisfy the requirements of an “Ethical Purchasing Policy” (EPP).<sup>11</sup> One of the principles which underpins this policy is stated to be the Government’s “Ethical Employment Standard” (EES).
14. The EPP requires suppliers of goods and services to demonstrate “to the reasonable satisfaction of the government buyer” that the contracting or tendering

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<sup>7</sup> The terms “soft” and “light-touch” regulation are frequently used in relation to legal instruments in Europe: see Dickens L, “Problems of Fit: Changing Employment and Labour Regulation” (2004) 42 *British Journal of Industrial Relations* 59.

<sup>8</sup> Gunningham N and Grabosky P (with Sinclair D), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, Oxford, 1998), p 70; Ogus A, “New Techniques for Social Regulation”; in Collins H, Davies P, and Rideout R (eds.), *Legal Regulation of the Employment Relation* (Kluwer Law International, London, 2000).

<sup>9</sup> See further Parker C, Scott C, Lacey N and Braithwaite J, “Introduction”, in Parker *et.al.*, *Regulating Law* (OUP, Oxford, 2004).

<sup>10</sup> Howse, “Retrenchment, Reform or Revolution”, at 471.

<sup>11</sup> *The Victorian Government’s Ethical Purchasing Policy: Supporting Fair and Safe Workplaces* (Department of Treasury and Finance, State of Victoria, December 2003).

entity is meeting “its obligations to its employees under *applicable industrial instruments and legislation* at the time a contract is awarded and continues to meet such obligations during the term of that contract”.<sup>12</sup>

### **Limitations of these approaches**

15. The availability of these different instruments, and their apparent advantages, cannot be taken to mean that they have no disadvantages. Although such instruments may appear to be examples of *responsive* regulation in the sense that they avoid some of the problems associated with sanctions-based legal regulation, it is also necessary to consider whether they can also be *effective* regulatory mechanisms, especially where legal and non-legal forms of regulation interact.<sup>13</sup>
16. There is also a question about the transparency and *accountability* of deployment of government wealth as a form of regulation which must be addressed.<sup>14</sup> For example, even if these forms of regulation can be justified on the basis that they are effective in achieving policy objectives, questions can be raised about whether the ends to be achieved justify the means employed. Regulation of this character often avoids accountability mechanisms which would otherwise apply to legal instruments, mechanisms which are fundamental elements of a representative democracy.<sup>15</sup>
17. Part of the difficulty here is that State Governments often see themselves as being in competition to attract new investment or retain existing industries and businesses within their respective jurisdictions. Governments do not want there to be a perception that they impose more conditions on businesses than other States. This explains why governments often claim that contracts underpinning these sorts of arrangements cannot be released on the basis of ‘commercial in confidence’, when business is at times ambivalent about the release of some contractual details.
18. These issues must be addressed if government deployment of wealth is to be a legitimate mechanism for achieving greater corporate public accountability. However, assuming such problems (and I am sure there are others which must be addressed) can be overcome, these regulatory approaches can (and already do) have an important role in the effective achievement of greater corporate public accountability.

### **Concluding Remarks**

19. There is evidence that the regulatory initiatives outlined above are already used to secure greater corporate accountability to public interest goals. However, there is a need for empirical research to be conducted which examines the incidence of social regulation through such approaches, and which is able to assess the

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<sup>12</sup> *Ibid* (emphasis in document).

<sup>13</sup> Parker, Scott, Lacey and Braithwaite (eds.), *Regulating Law*; Parker and Braithwaite, ‘Regulation’.

<sup>14</sup> See, for example, Baragwanath C and Howe J, *Corporate Welfare: Public Accountability for Industry Assistance* (The Australia Institute, Discussion Paper No. 34, Canberra, 2000).

<sup>15</sup> Parker and Braithwaite, “Regulation”, p 124.

effectiveness of these approaches in changing corporate practices. Once this is done, it will be possible to identify ways in which these initiatives could be better utilised for promoting greater corporate social responsibility.

20. One obstacle preventing such research is a key problem confronting these initiatives – a lack of transparency and accountability. This frequently makes it difficult to determine the nature of conditions imposed or negotiated through such instruments, the extent of monitoring and evaluation of the effectiveness of these approaches in securing social goals, and the availability and use of sanctions in the event of non-compliance with conditions.
21. In conclusion, the initiatives discussed in this submission allow governments to play a role in securing greater corporate social responsibility and accountability without necessarily requiring prescriptive legal regulation. Greater attention needs to be given to such approaches, and how to resolve their limitations, in the debate over corporate social responsibility.

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