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OF AUSTRALIA

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Mr John Kluver  
Executive Director  
Corporations and Markets Advisory Committee  
GPO Box 2967  
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Dear Mr Kluver,


**CAMAC Discussion Paper *Corporate Social Responsibility***

I have pleasure in enclosing a submission in response to the CAMAC discussion paper on *Corporate Social Responsibility*.

The submission has been prepared by the Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia. Please note that this submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been considered by the Council of the Law Council of Australia.

If you would like to discuss any issues raised in the submission, please contact Philip Stern on [02] 9253 9999.

Yours sincerely,

  
Peter Webb  
**Secretary-General**

23 February 2006

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**Submission by the Insolvency and Reconstruction Committee of the Law Council of Australia  
to the Corporations and Markets Advisory Committee**

**Corporate Social Responsibility**

**Discussion Paper**

**November 2005**

For the purpose of this submission, the terms listed below have the following definitions:

**'insolvency administrator'** includes a receiver, or a receiver and manager of a corporation, an administrator of a corporation, an administrator of a deed of company arrangement executed by the corporation, a liquidator of a corporation, a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

**Introduction**

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1. The Corporations and Markets Advisory Committee ('CAMAC') in the Corporate Social Responsibility ('CSR') Discussion Paper fails to recognise or make any reference to the impact that the matters raised in the Paper may have on the administration of insolvent corporations. The Insolvency and Reconstruction Committee believes this is an important oversight as these matters, if legislated, would have an immense impact on the practice of insolvency as outlined below.

**Officer of a corporation**

2. While there is no express reference to insolvency administrators in the CAMAC Discussion Paper, by implication the issues raised in the Paper extend to cover such persons since sections 9 and 179 of the Corporations Act 2001 (*Cth*) defines 'officer of a corporation' to include:

- 2.1 a receiver or receiver and manager of the property of the corporation or a controller;  
or
  - 2.2 voluntary administrator of the corporation; or
  - 2.3 an administrator of a deed of company arrangement executed by the corporation; or
  - 2.4 a liquidator or provisional liquidator of the corporation
3. As such the matters raised by the CAMAC Discussion Paper have direct impact upon the duties, obligations and liabilities of insolvency administrators.

**Principles of Insolvency law**

- 4. Insolvency law is primarily concerned with efficient procedures for the winding up of companies, the orderly realisation of the available assets of companies and the equitable distribution of the proceeds to creditors and shareholders.
- 5. The Harmer Report considered that the overriding objectives of insolvency law were:
  - 5.1 insolvency law should provide mechanisms that enable both debtor and creditor to participate with the least possible delay and expense;
  - 5.2 insolvency administrations should be impartial, efficient and expeditious;
  - 5.3 insolvency law should provide a convenient means of collecting or recovering property that should be applied toward payment of the debts and liabilities of the insolvent person (11 ALRC Report No 45, para 33).
- 6. In addition to the objectives outlined above, the Insolvency and Reconstruction Committee submits that the objectives of insolvency administrators in performing their function is to:
  - 6.1 protect the interests of creditors and shareholders;
  - 6.2 ensure debts are satisfied and maximise the value of an insolvent company's assets with the minimum of expense and delay.

7. Based on these fundamental principles, it is submitted that the matters raised in the Discussion Paper by CAMAC would impair the objectives and functions of insolvency administrators for the reasons set out below.

#### **Concept of 'stakeholders'**

8. The Discussion Paper considers the notion of expanding the current duties under the Corporation Act to include taking into account the interests of 'stakeholders'. As discussed above, sections 180-183 of the Act apply to 'officers' as well as directors. Therefore this proposal extends to potentially affect the duties of insolvency administrators.
9. The Insolvency and Reconstruction Committee submits that if insolvency administrators were required to take into account the interests of stakeholders this would displace their primary function of ensuring the protection of creditors and maximising the recovery of debts owed to them.
10. Additionally, these expanded duties would conflict with the explicit duties of insolvency administrators under the Corporations Act, for example the controller's duty of care in exercising a power of sale pursuant to section 420A of the Act; an administrator's duty to maximise business existence or creditor returns under section 435A.

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11. Taking the principles of insolvency into account, it would not be suitable in the administration of a company for an administrator to take into account any other interest aside from the creditors, and in the event of any surplus, the members.
  12. It is submitted that if the legislation was amended to expand the duties of directors and other officers, then insolvency administrators should be expressly excluded by the legislation.

#### **Triple bottom line ('TBL')/sustainability reporting**

13. The CAMAC Paper discusses TBL reporting which includes the concept of companies publishing information on environmental, social and economic aspects of their company.

14. The Insolvency and Reconstruction Committee submits that to require insolvency administrators to comply with such reporting requirements would instead of providing any useful benefit, only create an increase in costs and delay in the administrative process.
15. Additionally, it is inappropriate for insolvency administrators to be required to report on non-financial and intangible aspects of a company in an insolvency administration, when their expertise is the financial aspects of a company.
16. Further relevant is the situation where a company is still a going concern yet an insolvency administrator has been appointed. He/she may be exposed to the costs of bringing the company's TBL reporting up to date. Further the ongoing costs of maintaining a company's TBL reporting would only act to further drain the company's finances.
17. The Insolvency and Reconstruction Committee submits that should TBL reporting be included in the Corporations Act as a mandatory requirement, an express exemption should be made for insolvency administrators as such reporting would be an expensive and time consuming distraction from the proper objectives involved in the administration of a company.

#### **Class actions**

18. As discussed above, the Discussion Paper introduces the concept of expanding the Corporations Act to include a duty to take into account the interests of 'stakeholders'. As the concept of 'stakeholder' is broad and far-reaching, the Committee is concerned that this would act to create a monumental increase in liabilities. This may also have the result of exposing insolvency administrators to class actions, or diminishing available returns for traditional shareholders, being employees or general creditors.

#### **Conclusion**

19. It is submitted that the issues raised above must be considered by CAMAC before making provision for any integration of CSR into the Corporations Act.