AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS
ABN 11 008 484 197

26 September 2008

Mr John Kluver
Executive Director
Corporations and Markets Advisory Committee

By email to john.kluver@camac.gov.au

Dear Mr Kluver

CAMAC DISCUSSION PAPER – MEMBERS' SCHEMES OF ARRANGEMENT

Thank you for the opportunity to make a submission to CAMAC in relation to the Discussion Paper.

The Australian Institute of Company Directors (AICD) is a member institute for directors that is dedicated to making a positive impact on the economy and society by promoting professional directorship and good governance. AICD delivers education, information and advocacy to enrich the capabilities of directors, influence the corporate governance environment in Australia and promote understanding of the role of directors. With offices in each state and more than 23,000 members, AICD represents a diverse range of corporations, from the top 200 publicly listed companies to not for profits, public sector entities and smaller private family concerns.

In this letter we highlight the issues in the Discussion Paper which are of particular significance to directors.

SIGNIFICANT DIRECTOR ISSUES
Section 3.3 - Liability and defences for disclosure breaches

AICD supports the proposal that the information supplied in an explanatory statement under a scheme should be subject to a stand-alone liability and defence regime modelled on that applicable to bids.

The Discussion Paper does not suggest who would bear the liability under such a scheme. However, we note that Mr Alan Cameron AM in his CAMAC submission makes the point that "those responsible for the statements are frequently not the commercial movers of the transaction." We agree with Mr Cameron's submission that it is not sensible that the directors of the scheme company are responsible for "material being put forward by the promoter of the scheme, who would otherwise have been the bidder under a takeover."

Accordingly, AICD considers that any liability and defence regime should allow explanatory statements to identify who takes responsibility for the various sections of that statement, and for liability to be attributed accordingly.

Section 6.2 - Managed investment schemes

The scheme provisions should extend to managed investment schemes (MIS). MIS are a very common investment vehicle in Australia and a large number of directors sit on the boards of responsible entities. Such an extension would logically align with the extension of the takeover provisions to listed MIS and would have a number of benefits:

- the supervisory role for the Courts and ASIC would better protect the interests of members;
- it would significantly reduce the complexity of the current use of informal "trust schemes" and would increase certainty and efficiency in such transactions;
- with the significant presence of stapled entities in the market, extension of the scheme provisions to MIS would end the artificial situation which presently exists, where courts considering a proposed scheme are strictly limited to looking to the company and not the MIS (unless a concurrent trust advisory declaration is also sought).

The scheme provisions should be extended to unlisted MIS as well as listed MIS, where an unlisted MIS has 50 members or more. We agree with the view set out in section 6.2.2 that there is no rationale for limiting the extension of the scheme provisions to listed MIS. The rationale for limiting the extension to unlisted MIS with 50 members or more would align with the takeover provisions.

Given that unlisted MIS are not within the purview of the Takeovers Panel and so do not receive the protection of Guidance Note 15 (Listed Trust & Managed Investment Scheme Mergers), the protections offered by such an extension are of greater significance to unlisted MIS than to listed MIS.

Section 6.4 - Schemes opposed by the company

The scheme provisions should certainly not be adapted to facilitate their use where a target board opposes the proposal. Where a potential controller is making a hostile approach to an entity, a bid is the appropriate vehicle to be used. The availability of a "hostile" scheme is inconsistent with the character of a scheme as emanating from the entity. The alterations to the scheme process required for hostile schemes would be significant and entirely unnecessary given that an appropriate mechanism already exists under the bid provisions.

The creation of hostile schemes would likely lead to lower premiums being offered to members. Presently, where a potential controller is proposing a scheme there is a significant incentive to make it attractive to encourage directors to put the proposal to members. This would no longer be the case, if potential controllers were able to circumvent target boards. AICD accepts that a contrary argument can be made that members ultimately decide and that permitting hostile schemes provides a greater opportunity for member democracy. However, AICD submits that the reason that schemes have a lower threshold than takeovers is due to the

combination of regulatory, court **and target** supervision of the proposal and the process. Where all elements of that supervision are not present, a takeover is the appropriate route for a control transaction.

If you have any questions in relation to our submission, please contact Gabrielle Upton (02) 8248 6635 or myself.

Yours sincerely

[SIGNED]

John H. C. Colvin
CEO

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