



The Hon Chris Bowen MP,  
Minister for Financial Services,  
Superannuation and Corporate Law,  
Parliament House,  
CANBERRA ACT 2600.  
**By email: Chris.Bowen.MP@aph.gov.au**

Dear Minister,

## **MEMBERS' SCHEMES OF ARRANGEMENT**

The Corporations Committee of the Business Law Section of the Law Council of Australia (**Committee**) notes that the Corporations and Markets Advisory Committee (**CAMAC**) has recently presented you with a report (**Report**) dealing with Members' Schemes of Arrangement.

The Committee strongly supports the recommendations contained in this Report. The Committee believes CAMAC should be commended for initiating its own review of the scheme provisions of the Corporations Act and for proposing a number of very worthwhile legislative changes that would significantly improve the operation of those provisions.

While the scheme provisions of the Corporations Act may not have attracted a great deal of public attention in recent times, they are of central importance for a wide range of corporate reorganisations including, but not limited to, changes of corporate control. Consequently, deficiencies in the scheme provisions can have a material impact on transactions with significant economic implications.

In this regard, the Committee believes that CAMAC has correctly identified a number of material deficiencies in the current scheme provisions that can be fairly easily remedied without fundamentally changing those provisions or weakening the protections for shareholders or other affected parties. CAMAC consulted widely in relation to these issues and, as the Report clearly shows, its proposals have attracted widespread support. Accordingly, the Committee believes it would be highly desirable for the changes recommended by CAMAC to be implemented at the earliest practical date.

The Committee notes that one question considered by CAMAC in its Report was whether the information supplied in scheme documents should be subject to a stand-alone liability and defence regime modelled on that applicable to takeover bids (see 4.5.2 of the Report). On this question, CAMAC expressed support for "the principle of harmonization of liability and due diligence defences for information disclosures", but concluded it would

be more appropriate for there to be a broader review of the liability regime for all disclosure documents and explanatory materials produced by companies (whether in relation to schemes, takeover bids, fundraising, buy-backs, capital reductions or other proposals).

The Committee considers the broad outline of the liability regime for disclosure documents under Chapter 6D of the Corporations Act to be fairly well accepted. However, the Committee is also aware that there are significant discrepancies between the various liability regimes applicable to other disclosure documents that serve very similar purposes. For example, disclosures in some takeover documents attract stand-alone defences in Chapter 6B, but disclosures in many other documents ("including scheme booklets") attract no defences at all. The Committee is very strongly of the view that this patchwork of differing liability regimes is anomalous and inappropriate. Accordingly, the Committee recommends that you refer this topic back to CAMAC for review as a matter of urgency. However, we do not consider any review of this sort should in any way delay implementation of CAMAC's current recommendations.

In conclusion, the Committee requests that:

- o The Government implement CAMAC's recommendations in relation to members' schemes of arrangement as soon as is practical.
- o The Government request CAMAC to undertake a broad review of the liability regimes applicable to disclosure documents issued by companies with a view to harmonizing those regimes and applicable defences.

If you have any questions please contact either the Committee Chair, Guy Alexander, on [02] 92304000.

Thank you for giving the Committee the opportunity to Comment.

Yours sincerely,

A handwritten signature in black ink, appearing to read "W Grant". The signature is written in a cursive, flowing style.

Bill Grant  
Secretary-General

22 February 2010