CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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Mr John Kluver
Executive Director
CAMAC
Level 16
60 Margaret Street
SYDNEY NSW 2000

By mail
and by email: john.kluver@camac.gov.au

Dear Mr Kluver

Long-tail personal injury claims

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the proposal referred to the Corporations and Markets Advisory Committee (CAMAC) for review by The Parliamentary Secretary to the Treasurer in relation to strengthening protection for future unascertained personal injury claimants where the solvency of the responsible company may be in question.

CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. We are an independent, widely-respected influencer of governance thinking and behaviour in Australia. We represent over 8,500 governance professionals working in public and private companies, a number of whom have been involved in class actions. We have drawn on their experience in the formulation of this submission.

General comments

CSA recognises that it is difficult to determine how to provide for adequate recognition of the existence of long-tail liabilities arising in the case of unascertained future creditors, and that this is a matter of some concern. CSA firmly believes that these issues should be the subject of further consideration and, in principle, has no objections to the proposals as outlined in relation to future eligible claimants, extension of creditor protection provisions, external administration and anti-avoidance provisions.

However, CSA is concerned that any proposed extension of creditor protections under the *Corporations Act* should not interfere with existing creditors' or shareholders' rights.

Areas of concern

CSA has three principal concerns in this respect:
1 First, that whatever steps are taken, the rights of shareholders as they exist under present insolvency laws should not be further delayed or compromised.
2 Second, it is essential that certainty for creditors is not undermined by any reform in this area.
3 Third, that any extension of claimants' rights should not unintentionally disadvantage either creditors or shareholders, or create undue delays in winding up of companies.

Potential disadvantage to shareholders

In the experience of CSA's members who have been involved, class actions can take many years to resolve. If, in a winding-up situation, payments to shareholders under any proposals were to be delayed for, say, up to ten years, the situation would, in CSA's opinon, become unworkable. Many companies have tens of thousands of shareholders. Compounding any such disadvantage would be the difficulties inherent in locating 'lost' shareholders or their estates after a period of many years to ensure they receive their payment.

Furthermore, if shareholders have to wait many years before receiving payment, the delay may also affect their capacity to claim a tax loss, thus doubling the disadvantage to them. Shareholders will not be able to claim a tax loss as, while amendments were introduced last March to enable deed administrators and liquidators to issue a certificate under the *Income Tax Assessment Act* when there are reasonable grounds to believe there will be no further distribution in the winding up of the company, when there is a long-tail claim afoot (or the possibility of one) then the administrator or liquidator cannot issue such a certificate.

CSA notes that any reform to existing creditors' rights under the *Corporations Act* should not disadvantage shareholders.

Potential for uncertainty for creditors

CSA believes that establishing a contingency fund in any winding up of a company where there is strong likelihood of mass future claims is not only prudent but also essential to ensuring that any such claims are dealt with in the most appropriate and equitable manner at the time.

CSA notes that any such contingency fund carries with it the risk that the funding required has been underestimated. Given that the company cannot know to whom payments may be due or quantify such payments, any contingency fund can only be the best possible estimate of future claims at a given point in time. CSA believes that it is not practicable or desirable for the legislation to regulate such a risk.

CSA suggests that, where either preliminary steps have been taken toward certifying a class action or a class action involving mass personal injury claims has been certified, the judge dealing with such a class action should be granted the power to take into account the amount to be set aside in a contingency fund. The fund could then be administered by the court, or other court-approved body, such as an insurance company or an external fund administrator, long after the winding-up is completed.

CSA believes that, while there is a risk that the amount required for the contingency fund may have been underestimated, this risk is balanced by the certainty granted to creditors and shareholders that they need not wait for many years for payment (potentially, given the nature of some personal injury claims, for up to 50 years as evidenced by current asbestos related-litigation). The reverse position, where there is a surplus over claims, may also eventuate, but this again is a matter CSA believes should be left to the determination of the fund administrator at the appropriate time.

CSA also notes that financial institutions, from whom companies raise finance, would also be concerned that creditors' rights are not undermined. Any such uncertainty would have implications for solvent companies, not only for those subject to external administration.

Potential undue delays in winding up procedures

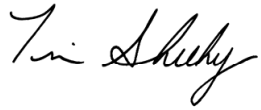
Further to the risk inherent in establishing any contingency fund, any reform to the *Corporations Act* must ensure that it does not create any undue delay in the winding up of the company. Any delay in winding up procedures would disadvantage creditors and shareholders. For example, the establishment of a contingency fund should not interfere with the liquidator's decision as to how to deal with assets.

CSA notes that any extension of creditors' protections to future unascertained creditors where a mass future claim is afoot should not interfere with the winding up of the company but be one more matter that is attended to as efficaciously as possible in the winding-up procedures.

Conclusion

CSA notes that the proposal referred to CAMAC for review in relation to long-tail liabilities has highlighted concerns that any proposed reform protect the interests of future unascertained creditors without compromising current corporate and insolvency law principles. CSA hopes that by identifying and giving further consideration to particular areas of concern, no such compromise takes place.

Yours sincerely



Tim Sheehy
CHIEF EXECUTIVE