

Update for An Introduction to CLERP 9- April 2005

Developments in Directors' Duties and Corporate Governance Government Referral to CAMAC on Directors Duties to Stakeholders

On 23 March 2005, the Parliamentary Secretary to the Commonwealth Treasurer, the Hon Chris Pearce MP, referred an interesting issue to the Corporations and Markets Advisory Committee (CAMAC) for consideration and advice. As noted in the letter from the Parliamentary Secretary to the CAMAC:

The issue concerns the extent to which the duties of directors under the *Corporations Act 2001* (the Corporations Act) should include corporate social responsibilities or explicit obligations to take account of the interests of certain classes of stakeholders other than shareholders.¹

The Parliamentary Secretary asked that CAMAC consider and report on the following matters:

1. Should the *Corporations Act 2001* (Cth) ("*Corporations Act*") be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?
2. Should the Corporations Act be revised to require directors to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?
3. Should Australian companies be encouraged to adopt socially and environmentally responsible business practices and if so, how?
4. Should the Corporations Act require certain types of companies to report on the social and environmental impact of their activities?

This reference to the CAMAC is in part a response by the federal government to James Hardie's controversial reconstruction and movement of corporate headquarters to The Netherlands, which had adverse implications for victims of asbestos-related diseases caused by James Hardie's once subsidiary companies.² Following a Special Commission of Inquiry set up to investigate the events surrounding James Hardie's corporate reconstruction, which handed down its report in September 2004 (the "Jackson Report"),³ in December 2004 the company entered into an agreement with the NSW Government and the Australian Council of Trade Unions to guarantee that the company would compensate asbestos victims for at least 40 years (the agreement has been estimated to be worth as much as \$4.5 billion). The events involving James Hardie and its asbestos victims raised for consideration to what extent companies and their directors can disregard the interests of company stakeholders without running foul of the law. Following the Special Commission of Inquiry and the December 2004 agreement, in March 2005, James Hardie's chairwoman, Meredith Hellicar, called for

¹ The letter of referral to CAMAC, is available on-line at:

<<http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewDirectors%27+duties+and+corporate+social+responsibility?openDocument>> (last accessed: 12 April 2005).

² See Ian Ramsay, 'Pushing the Limit for Directors', *The Australian Financial Review*, 5 April 2005, 63. In this article, Professor Ramsay also notes that on 17 March 2005, the 'British Secretary of State for Trade and Industry presented to the UK parliament a white paper on company law reform together with a draft Company Law Reform Bill. The bill proposes changes to the UK law of directors' duties to incorporate into directors' duties the concept of "enlightened shareholder value". ... The noteworthy feature of the UK bill is that the primary duty of directors is still to shareholders, but directors may take account, where appropriate, of the interests of other stakeholders".

³ See D F Jackson QC, 'Report of the Special Commission of Inquiry Into the Medical Research and Compensation Foundation', September 2004. The report is available on-line at:
<<http://www.cabinet.nsw.gov.au/hardie/PartA.pdf>> (last accessed: 12 April 2005).

an extension of directors' duties under the Corporations Act to include a broad duty of fairness to all stakeholders- with a view to protecting directors from potential lawsuits brought by shareholders for breaching their duties through take into account stakeholder interests rather than focusing on the company's immediate bottom line. According to Ms Hellicar:

What one needs is a safe harbour for directors to be able to integrate corporate social responsibility into their decision making without fear that they are going to be sued both personally, and as a company, by their shareholders.⁴

At the time of writing, it was unclear when a discussion paper or report would be delivered by CAMAC.

Managing Conflict of Interests within Investment Brokers

On 4 April 2005, it was reported in *The Australian Financial Review* that the government has backed away from a proposal to regulate conflicts of interests between research and advisory arms of investment brokers.

CLERP 9 introduced a new requirement on financial services licensees to manage conflicts of interest, and ASIC has subsequently issued guidance (principally in the form of Policy Statement 181) on how brokers should go about identifying, managing and/or avoiding conflicts.

See Chapter 13 of *An Introduction to CLERP 9* for further discussion, as well as CLERP 9 updates on the Lexis Nexis website.

The article in *The Australian Financial Review* in April 2005 by Stewart Oldfield, titled "Brokers Win Reprieve on Disclosure" notes that:

The government rejected a recommendation from the joint parliamentary committee on corporations and financial services for a tightening of rules on analyst independence, preferring to rely on a model of "managing" conflicts, for example, through the disclosure of any potential conflicts of interest to potential investors.

It represented a backdown from the hardline stance flagged by the government in the wake of a string of corporate collapses that cost small investors billions of dollars and a crackdown in the United States that substantially increased compliance costs for stockbroking firms.

⁴ See Bill Phesant, 'Directors Need a Safe Harbour: Hellicar', *The Australian Financial Review*, 17 March 2005, 3.