



**CHARTERED SECRETARIES
AUSTRALIA**

Keeping good companies

1 June 2004

Ms Ruth Smith
Manager
Market Integrity Unit
Corporations and Financial Services Division
Department of The Treasury
Parkes Place
PARKES ACT 2600

By email: rsmith@treasury.gov.au

Dear Ms Smith,

**The introduction of a due diligence defence for a breach
of proposed sections 674(2A) and 675(2A) of the Corporations Act**

Chartered Secretaries Australia (CSA) is Australia's peak membership body for corporate governance and compliance, and firmly consider ourselves as fully qualified to respond to this matter. In Australia CSA has over 8,000 members representing the majority of public companies listed on the Australian Stock Exchange. Members of CSA regularly deal on a day-to-day basis with the ASX, ASIC and the ACCC and have a thorough working knowledge of the operations of the markets, the needs of investors and the law and regulation dealing with market practices and independence. In addition, representatives from the ASX, ASIC and the ACCC regularly address members at our seminars and conferences.

Whilst CSA continues to have reservations about the introduction of a penalty regime for continuous disclosure, it is supportive of and welcomes the introduction of a due diligence defence for a breach of proposed sections 674(2A) and 675(2A) of the Corporations Act.

CSA does however have a concern in relation to proposed sections 674(2B) and 675(2B) in relation to a person (such as a company secretary or inhouse counsel) who has participated in the discussion of whether disclosure on a particular matter is required, and who has put the arguments in favour of disclosure, but the final decision-maker has decided not to make disclosure. While the person may have taken all reasonable steps under paragraph (a) to make sure that the company disclosed the information, the person may not satisfy paragraph (b) of the defence.

CSA understands that whether the person will have liability in this case will depend on whether the person is "involved in the contravention", but also understands that the case law on this matter is not clear in its application to these circumstances.

Accordingly, CSA requests either the deletion of proposed paragraph (b) or, alternatively, clarity (eg in the legislation such as through a note to the section or in the explanatory memorandum) that a person in the circumstances described above will not be regarded as "involved in the contravention".

Yours sincerely,

Tim Sheehy
CHIEF EXECUTIVE