



CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

12 March 2009

Senator the Hon Nick Sherry
Minister for Superannuation and Corporate Law
Parliament House
CANBERRA ACT 2600

Dear Minister Sherry

Sons of Gwalia: CAMAC report

Chartered Secretaries Australia (CSA) has reviewed the Corporations and Markets Advisory Committee (CAMAC) report, *Shareholder Claims Against Insolvent Companies — Implications of the Sons of Gwalia decision*, released to the government in December 2008, and to the public earlier this year.

CSA has strong reservations concerning the findings of the CAMAC report, which is that the government not undertake action to overturn the effect of the High Court decision in *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 (Sons of Gwalia).

CSA remains of the firm belief that it is in the best interests of providing an orderly market that the Corporations Act be amended to reverse the High Court decision in *Sons of Gwalia* and strongly urges the government to undertake this action.

Our reasons for this recommendation relate to the potential that the current law as determined in light of the High Court decision has to:

- diminish existing creditors' rights
- create uncertainty for external administrators in adjudicating the claims of aggrieved investors and risk substantial delay in distributions while those claims are adjudicated
- split the rights of shareholders, favouring some to the disadvantage of others
- create a climate conducive to speculative claims, which in turn could encourage class actions based on mere possibilities rather than substantiated claims
- create uncertainty for insurers, with a commensurate negative impact on insurance premiums
- create increased cost or reduced availability of finance for companies
- overturn the debt/equity distinction.

We attach our submission to CAMAC where these concerns are set out in more detail.

Potential to split the rights of shareholders

We note that the CAMAC report did not deal with one of the issues we raised in our submission, which is that the *Sons of Gwalia* decision creates the potential to split the rights of shareholders, favouring some to the disadvantage of others.

CSA is concerned that privileging the claims of aggrieved investors over those of other shareholders would lead to ongoing uncertainty concerning shareholders' rights. The decision in *Sons of Gwalia* may afford recent purchasers of shares with a claim because of inadequate disclosure, when longer-term shareholders, who may have sold if such information was disclosed, may have no such claim.

CSA opposes the differentiating of shareholders and their rights based on how or when they purchased shares and cannot point to any compelling public interest that would justify such a splitting of shareholder rights.

The relationship of the CAMAC recommendation to the global financial crisis
CSA remains deeply concerned that, by affecting the opportunities for Australian companies to obtain debt finance or credit in the United States, or have the cost of doing so significantly increase, the law thereby disadvantages Australian shareholders, as increased cost or reduced availability of finance would have implications for solvent companies, not only for those subject to external administration.

CSA opposes any law that reduces the opportunity for Australian shareholders and the companies in which they invest to compete with shareholders from other jurisdictions in relation to securing finance. Our opposition to any such reduction in opportunity is strengthened by the very real difficulties currently facing Australian shareholder and the companies in which they invest in attracting finance due to the global financial crisis.

Conclusion

CSA believes that shareholders should continue to be required to absorb the risk of insolvency as part of the risks they take in acquiring shares, that is, they should be liable for their equity investment if a company fails for whatever reason. Companies fail for multiple reasons, including fraud, corporate misconduct, currency collapses and changes in markets. CSA does not believe that non-disclosure by directors of price-sensitive information should be singled out as requiring creditors to underwrite investors' speculative risks.

We strongly urge the government to overturn the *Sons of Gwalia* decision.

Yours sincerely\

A handwritten signature in black ink, appearing to read "Tim Sheehy". The signature is fluid and cursive, with a large initial "T" and a long, sweeping underline.

Tim Sheehy
CHIEF EXECUTIVE