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Chartered Secretaries Australia Limited

Appearance before the

Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003

12:50pm on 18 March 2004; Legislative Council Committee Room; Parliament House, Spring Street, Melbourne

Members of the PJC:
Senator Chapman – Lib. (Chair); Senator Wong – ALP (Deputy Chair); Senators Brandis – Lib., Conroy - ALP and Murray – Dem., and Mr Byrne – ALP., Mr Ciobo – Lib., Mr Griffin – ALP., Mr Hunt – Lib. and Mr McArthur – Lib.

Appearing for CSA:
Mr. Richard Jones (Chairman, National Legislation Review Committee); Mr. Doug Gration (Member, National Legislation Review Committee); Mr. Tim Sheehy (Chief Executive, CSA)

Thank-you for inviting Chartered Secretaries Australia to appear before this inquiry.

Chartered Secretaries Australia is pleased to contribute to the inquiry as our mission is the promotion of effective governance and administration of Australian organisations. CSA is the Australian Division of the Institute of Chartered Secretaries and Administrators, an international professional association with over 46,000 members worldwide.

In general, CSA believes that the proposed legislation will make a significant contribution to improving investor confidence in the Australian capital markets. The proposals generally reinforce existing good practices and we urge the Committee to recommend the passage of the proposed legislation into law.

CSA would also like to note that it believes many of the provisions outlined in the proposed legislation should apply to all disclosing entities (eg property trusts), not just listed public companies. This is particularly in regard to the provisions for audit reform, CEO and CFO sign-off, disclosure of executive and director remuneration and shareholder participation.

CSA has not provided detailed comment on all aspects of the proposed legislation; other professionals dealing with particular matters on a day-to-day basis are best able to address a number of these. Instead we have focused on:

- Continuous disclosure
- Shareholder participation
- Whistleblowing, and
- Executive remuneration

as our members have significant responsibilities in these areas. We would like to take this opportunity to add to what was outlined in our 11 November submission to the Parliamentary Joint Committee and to comment on developments since that submission was made.

- **Continuous disclosure:** Continuous disclosure is a core responsibility of the Company Secretary. CSA strongly supports the principle that good disclosure is essential to efficient and fair capital markets. The current continuous disclosure framework has served Australia well and we support reforms that strengthen that framework.

    - However, CSA believes that the proposed power to issue "infringement notices" or on-the spot-fines for breaches of the continuous disclosure is misconceived. Day-to-day continuous disclosure decisions require judgements on genuinely difficult questions including share price impact, the expectations of reasonable investors and when a proposal is sufficiently advanced to require disclosure. These are judgements on which different people acting in good faith may reach different conclusions. They are not a black and white speeding offence.

      CSA does support an alternative dispute resolution mechanism via a 'Corporations Panel' to provide guidance in relation to compliance with continuous disclosure obligations and, if necessary, to recommend penalties.

      CSA first circulated this initiative for public comment in September 2002.

      It is noted that in the proposed legislation many of the principles of a 'peer-review-panel' have been adopted for use by the Financial Reporting Panel and are currently in use for the Takeovers Panel. CSA is of the view that the same mechanisms can be put in place for disputes over a company's potential breach of continuous disclosure obligations.

      It is unlikely that costs of convening a panel would be great as meetings can be held by teleconference and would be few as the panel would only be necessary after the ASX had been in discussion with the company.

      The 'expert' membership of a panel would ensure that interpretations of continuous disclosure obligations were evaluated in accordance with accepted market understanding of what a reasonable person would expect and would reflect current market practice.

    - If the infringement notice regime is introduced, CSA again requests that the legislation include a provision for review of the operation of the regime 18 months after enactment. We note that CSA's request that a provision for a review in the proposed legislation has not been adopted and we urge the Committee to recommend this.

- Finally, CSA also does not support the increase of the penalties for breaches of continuous disclosure obligations. CSA does not believe that inadequacy of penalty has lead to systemic failure to comply with continuous disclosure obligations.

  We note from the second reading of the Bill before the House of Representatives on 16 February that the Treasurer advised the Government would move amendments to the Bill in the Senate to make it clear that a due diligence defence is available to individuals in relation to alleged contraventions of continuous disclosure requirements.

  CSA wishes to take this opportunity to support this proposed amendment. In our submission we called for this protection and we urge the Committee to recommend supporting this amendment.

- **Shareholder participation:** CSA welcomes the proposed reforms to improve shareholders' ability to participate in company meetings, particularly by removing legislative obstacles to the use of modern technology to facilitate this. However, CSA is disappointed that the proposed legislation does not:
  - Address the issue of requiring that proxy holders, who attend a company meeting and vote, must vote all the proxies they hold and vote them in accordance with the instructions of their appointor. There has been significant media coverage of potential abuses in this regard.
  - Limit the ability of 100 shareholders to convene an extraordinary general meeting of the company, potentially at great cost to the company with no prospect of success for the shareholders concerned. CSA considers that the ability of 100 shareholders to require a company to put a resolution to the annual general meeting sufficiently protects the interests of minority shareholders and special interest groups.

- **Whistleblowing:** In many companies, Company Secretaries will be responsible for implementing whistleblower protection policies. Australian and overseas experience shows that whistleblowers will often be invaluable in identifying wrongdoing within a company and it is essential that genuine whistleblowers can air their concerns confident that they will be free from undue discrimination and detriment. CSA welcomes the whistleblower protections included in the proposed legislation but urges the Committee to consider extending the protection offered to whistleblowers to include other legislation (for example the Trade Practices Act) and regulations (for example accounting standards).

- **Executive remuneration:** CSA recognises that there is genuine and valid public concern with instances of excessive executive remuneration, particularly where there is a perception of reward for failure. CSA supports initiatives to further improve disclosure of director and executive remuneration and the policy by which the remuneration is set. However, CSA has reservations as to the proposed non-binding vote at AGMs on the remuneration report.
  - Firstly, it seems that it will be very difficult for a Board to determine what to do if the report is not accepted. The report will normally cover non-executive director, executive director and senior executive remuneration. It may well be close to impossible for a Board to determine which particular aspect, if any, lead the shareholders to reject the report.

- Secondly**,** this approach does seem to give questions of remuneration undue prominence. While the remuneration report is important, it is difficult to see that it is more important than the financial statements as a whole - on which there is no resolution, binding or otherwise.

CSA notes the comments made by the Treasurer that according to Government legal advice, the failure of directors to abide by a non-binding vote could not, of itself, constitute a breach of directors' duties. While CSA welcomes this statement it simply emphasises the degree of confusion this proposal will create without achieving any meaningful outcome.

In regard to the disclosure of executive remuneration we note current developments in the preparation of accounting standards and ask that disclosure requirements for executive remuneration in the Corporations Act be consistent with current accounting standards so that no confusion exists.