

Institute comments on the draft CLERP 9 Bill

Is the Government's proposed approach to improving transparency, disclosure and corporate governance going too far? How does ASIC propose to implement the legislation?

In its response to the draft Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, the Institute generally endorsed the principles-based approach to improve transparency, disclosure and accountability in financial reporting.

Our submission primarily focused on three of the proposals we made in our initial response to CLERP 9 in late 2002.

1. Creating a Financial Reporting Panel (FRP)
2. Establishing processes for CEO/CFO sign-off of financial statements
3. Requiring a Management Discussion and Analysis (MD&A) to be contained in the company annual report.

Financial Reporting Panel

We supported the establishment of a FRP and advocated a model that would function in a similar way to the existing Takeovers Panel. However, we raised concern that the FRP decision-making procedures and processes were not particularly detailed in the Commentary to the draft Bill and therefore sought clarification on some practical matters.

CEO/CFO Sign-off

We commended the proposal to introduce the additional certification measure of CEO/CFO sign-off of the financial statements as a credible means of ensuring the integrity of reported information and of reinforcing accountability. However, the Institute expressed concern that the draft Bill does not cover the situation where there is a qualification to the sign-off by the CFO/CEO, and suggested that guidance be provided as to how a

qualified certification would work in practice.

Management Discussion and Analysis

In supporting the requirement to prepare a Management Discussion and Analysis (MD&A) commentary in the directors' report, we emphasised that the crucial issue was not the mere provision, but the quality and reliability of the information provided. The MD&A should be reconciled with the data presented in the financial statements, to give context to the financial performance and position of the reporting company.

Other issues

The Institute also provided comment on proposals regarding infringement notices for breaches of the continuous disclosure requirements, disclosure in fundraising documents, and conflicts management for licensees.

The Institute continues to oppose granting ASIC the power to issue infringement notices for breaches of the continuous disclosure provisions. We reiterated our fundamental concern as to whether it is appropriate to extend these powers to ASIC (rather than to ASX as the front-line regulator) and allow ASIC to be charged with the roles of investigator, judge and jury – thereby setting an unsettling precedent for law reform.

The Institute fully supports the proposals aimed at providing improved disclosure in fundraising documents so that investors can make informed investment decisions. We emphasised the need to have offer documents contain accurate information presented in a non-ambiguous manner. However, we expressed concern with the

subjective nature of the power that ASIC has to stop a prospectus.

In relation to the obligation for all licensees to manage conflicts of interest, we expressed our concern about the classification of conflicts and how the draft Bill would apply. We suggested that further consideration needed to be given to the proposal, particularly regarding the distinction between 'financial' and 'non-financial' services.

Since making our submission on the draft Bill, the Institute has also responded to ASIC Policy Proposal Paper Licensing: Managing Conflicts of Interest. We endorsed ASIC's principles-based approach. However, we maintained that without further investigation and consultation the proposed 'Conflict Management Obligation' should not apply to all licensees. It is apparent that due to the legislative timetable, ASIC has not had the opportunity to consider the impact of the obligation on all facets of the financial services sector.

Upcoming dialogue on CLERP 9 reforms

In February 2004 ASIC announced its timetable for releasing policy proposal papers and other guidelines for implementing the CLERP 9 Bill. ASIC plans to issue policy papers and consult with the industry on a range of issues including auditor registration and rotation, insurance requirements for authorised audit companies, ASIC's discretionary powers relating to audit and financial reporting, product disclosure and how ASIC intends to apply the proposed infringement notice regime. The Institute will evaluate these papers and respond as appropriate.