The Australian Institute of Company Directors (AICD) appreciates the opportunity to respond to Treasury on the Insider Trading position and consultation paper (Paper).

AICD is the principal professional body representing directors in Australia and has over 21,000 individual members. Our members are directors of a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, and government and semi-government bodies.

We have adopted the recommendation numbers in the Paper in responding below.

**Recommendation 2 – Restrict the on-selling exemption for underwriters**

Under current law, the insider trading prohibition does not apply to the on-selling of securities under an underwriting agreement or a sub-underwriting agreement. CAMAC recommends that the exemption permitting the on-selling of securities under an underwriting agreement should be confined to sales to other underwriters or sub-underwriters.

AICD considers that the current exemption should stand as it promotes market efficiency. It should not be changed unless there is evidence of abuse by underwriters or sub-underwriters.

**Recommendation 3 – Repeal the exemption for external administrators**

Under current law, the insider trading offence in relation to trading and procuring does not apply to transactions entered into by liquidators or other external administrators.
AICD agrees with CAMAC that the exemption be repealed. We cannot see any rationale for the exemption.

We note that there is a technical difficulty in that the knowledge of the liquidator or the administrator is currently imputed to the company. The repeal of the exemption could create a problem for the company itself. This is a drafting problem which should be remedied.

**Recommendation 11 – Exercising options with inside information**

Under current law the insider trading prohibition applies upon entering into an option and also upon any decision to exercise it. A majority of CAMAC recommended that there be an exemption for the exercise of fixed exercise price physical delivery option contracts where the option holder did not have inside information at the time they entered into the option contract.

AICD supports this proposition. If the option holder did not have inside information at the time of entry into the option contract, the option holder should be able to complete the contract in accordance with its terms. This exemption should apply to both grantors and grantees of options (writers/takers).

**Recommendation 14 – Entity making an individual securities placement**

The CAMAC majority recommended that neither an issuer when making equity placements to wholesale investors, nor any of those wholesale investors, should be subject to the insider trading provisions.

AICD does not support this position. If there is a risk that the investors will be in possession of inside information, then the issuer should disclose that information to the market. If the Government were minded to proceed with this exemption, then there should at least be a condition that the issuer release the relevant inside information to the market at the time of the placement.

**Recommendation 15 - Share buy-backs – as it relates to issuers**

The CAMAC majority recommended that the insider trading provisions should apply to a company buying back its own shares, except where the law requires the company to make a full prior disclosure to shareholders. This would mean that insider trading laws would apply to minimum holding buy-backs, employee share scheme buy-backs and on market buy-backs.

AICD agrees that the insider trading laws should not apply to the company in other forms of buy-backs (selective buy-backs and equal access buybacks). We consider that the
insider trading laws should not apply to the company for an employee share scheme buy-back if the buy-back is part of the original employee share scheme. In that case, it should be permissible for the company to fulfil the buy-back as foreshadowed in the employee share scheme.

We consider that the insider trading laws should not apply to minimum holding buy-backs as this is a de minimus transaction that does not need extra regulation. The exemption will facilitate the transaction and aid an efficient market.

We agree that the insider trading laws should apply to on market buy-backs.

**Recommendation 38 – Focus the prohibition**

CAMAC noted that there were difficulties in the application of the insider trading legislation to the trading in products on the over-the-counter markets. The majority of CAMAC recommended restructuring of the definition of "information". The minority of CAMAC recommended that there should be specific defences applicable for the OTC markets.

We disagree with the majority CAMAC recommendation. It will aid the certainty of the law for the current definitions to be retained with as little change as possible. Change in the definitions will create further anomalies and further difficulties. We would recommend bringing in specific defences for OTC products as and when required, which is likely to be an evolving process.

As a general comment, we consider that the insider trading regime was designed to provide confidence in the integrity of the securities markets. Accordingly, the regime should be limited to securities and derivatives over securities. For example, the laws should not be applicable to the trading of insurance policies, mortgages, pork bellies and other such "financial products".

**Recommendation 10 - Amend the test of "generally available information"**

The majority of CAMAC noted that there are difficulties with the current definition of "generally available information" and suggested amendments. The minority of CAMAC considered that there should only be an amendment to the "readily observable matter" test.

AICD is not in favour of any amendments to the current definition of "generally available information". To aid certainty in the law, the current definition should be retained and these questions should be referred to the courts when required. Any changes will only risk creating further anomalies. We note that the whole notion of "readily observable
matter" is changing rapidly due to technological advances. The current definition adequately addresses the issue.

Please contact Gabrielle Upton on (02) 8248 6635 should you have any queries in relation to our submission.

Yours sincerely

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