Business Law Section

General Manager
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: corporations.amendments@treasury.gov.au

15 March 2013

Dear Sir or Madam,

Corporations Amendments – Improving disclosure requirements

This submission by the Corporations Committee of the Business Law Section of the Law Council of Australia ("**the Committee**") is made in response to the Exposure Draft issued on 14 December 2012 of the *Corporations Legislation Amendment (Remuneration Disclosures and Other Measures) Bill 2012* ("**the Bill**"). It relates to the parts of the Bill relating to executive remuneration.

A separate submission will be made by the Committee in relation to dividends and s 254T of the *Corporations Act 2001*.

Executive summary

Executive Remuneration

The Committee agrees that the remuneration report disclosure requirements in the Corporations Act need revisiting. In this submission we make the following key points.

1. We agree with many of the proposed remuneration reporting provisions in the Bill. We have suggested a number of minor amendments.

2. The proposed new provisions requiring disclosure of remuneration outcomes along lines of past, present and future remuneration[1] should be deferred for the time being. The underlying concepts are being considered in other jurisdictions and we think the Australian position would benefit from looking at their experience before being entrenched in legislation.

3. We believe that the proposed new provisions relating to clawback of remuneration following a material misstatement[2] should be removed from the Bill and instead incorporated into the ASX Corporate Governance Council's Principles and Recommendations.

[1] Section 300A(1)(ca).
[2] Section 300A(1)(i).

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Submissions – Executive remuneration

1 Disclosure of remuneration outcomes

The proposed provision on disclosure of remuneration outcomes along lines of past, present, and future pay[3] is a good concept. However, we believe that the drafting will be likely to result in overstatement and so confuse readers.

For example, under the current drafting of the provision, if an annual bonus is deferred into equity (which is a relatively common practice) the same remuneration may end up being disclosed up to three times in the same report. This is because the provision relies on the concepts of remuneration '*granted*' and '*paid*', which are unclear and will be difficult for companies to implement. Provisions which impose legal obligations should be framed in precise terminology. A useful way to present the difficulties with the current terminology is with a worked example, as set out on the final page of this submission – see page 5.

The Committee recommends that the Government awaits the outcome of consideration underway on similar issues in the United Kingdom. The Financial Reporting Lab in June 2012 published a report on the measurement and presentation of a 'single figure' for the total remuneration of each director.[4] The Department of Business Innovation and Skills then set out more detail on the proposed disclosure requirements for consultation closing in September 2012.[5] This UK project looks promising and we suggest awaiting these results before implementing a new requirement in Australian law.

In our view there would be no harm in waiting. The Committee notes that:

- many companies are already voluntarily providing such information by including 'actual remuneration' tables in their remuneration reports, which break down remuneration outcomes in a way that is clear and well described; and
- one of the underlying purposes of this provision (to enable comparison of remuneration figures on a like with like basis between companies) is already being satisfied by the accounting standards total remuneration table.

We propose that this provision be removed from the Bill to be reconsidered at a later time.

2 Clawback following material misstatement

We consider that the Corporations Act is not the best place to include a requirement to state the details of any reduction, repayment or other alteration of remuneration following the discovery of a material misstatement.[6]

[3] Section 300A(1)(ca).
[4] http://frc.org.uk/Our-Work/Publications/Financial-Reporting-Lab/A-single-figure-for-remuneration.aspx.
[5] https://www.gov.uk/government/consultations/directors-pay-revised-remuneration-reporting-regulations.
[6] Section 300A(1)(i).

We propose that this provision be removed from the Bill and the concept instead be included in the ASX Corporate Governance Council's Principles and Recommendations.

The provision is already phrased in terms of an 'if not why not' disclosure. Such a principles-based disclosure provision needs to be read in context. That context will change with time and developments in market practice. We consider that the ASX Corporate Governance Council's Principles and Recommendations are best suited to setting out the underlying context (in commentary to the relevant recommendation) and updating that context from time to time. This provides greater flexibility than the explanatory memorandum to the Bill, which is a one-off document catering to a single point in time.

3 Disclosure of lapsed options

The Committee supports the removal of the requirements to disclose the value of lapsed options and the percentage of the value of a person's remuneration that consists of options.[7]

4 Additional changes

We believe that the Bill could go further and delete or amend other requirements that result in bulky remuneration reports without providing significant assistance to readers. Further amendments could include:

- clarifying that detailed disclosure of performance hurdles (s300A(1)(ba)) only applies to grants made in the current financial year, and that it is not necessary to repeat disclosures made in previous financial years in relation to previous grants that remain on foot;

- keeping the obligation to disclose '*a summary of the methods used in assessing whether the performance condition is satisfied*' but removing the follow on obligation to disclose '*an explanation of why those methods were chosen*' (s300A(1)(ba)(iii)) – as the disclosure invariably reads along the lines of 'because it is the most appropriate method'; and

- changing the obligations in sections 300A(1)(e)(ii) and (iii) to refer to the *number* of options granted and exercised – rather than the *value* of options granted and exercised – this would correspond with the proposed amendment to s300A(1)(e)(iv). Also the value of equity granted during the financial year is already disclosed in the statutory remuneration table under s300A(1)(c) – Reg 2M.3.03 Item 11 and in the general description of remuneration granted to each member of KMP under s300A(e)(i) and s300A(1)(c) – Reg 2M.3.03 Item 12(h).

5 Termination benefits

The Committee supports disclosure of termination benefits and the direction Treasury is heading with the proposed provision.[8]

[7] Section 300A(1)(e)(iv) – (vi).

However, clarity is needed on the difference between a company expense and remuneration. For example, the Committee considers that relocation costs would be classified as an expense of the company rather than remuneration and therefore should not need to be disclosed as a ‘benefit’ in connection with cessation of office.

We also anticipate that it will be difficult to put into practice the disclosure of arrangements ‘*to be entered into*’,[9] and propose alternate wording as follows:

> ‘(iii) *details of any other benefits to be given to the person, or any arrangement~~s~~ or understanding entered into ~~or to be entered into~~ with the person, by the company or a related body corporate, that relate ~~or that will relate~~ to a period beginning after the person’s retirement* …’

6 Relief from obligation to prepare a remuneration report

We agree that unlisted entities ought to be relieved of the obligation to prepare a remuneration report.[10]

We suggest that the relief be broadened to also exclude entities that have debt quoted on the ASX, but that do not have any listed equity. We consider that investors in listed debt are not investing in the internal workings of the business of the company but rather in the company’s ability to pay a coupon. It is therefore not necessary to require such companies to disclose their internal remuneration practices.

Conclusion and further contact

Thank you for the opportunity to comment on the draft Bill. The Committee would be pleased to discuss any aspect of this submission.

Please contact the Chair of the Committee Marie McDonald on (03) 9679 3264, or Priscilla Bryans on (03) 9288 1779, if you would like to do so.

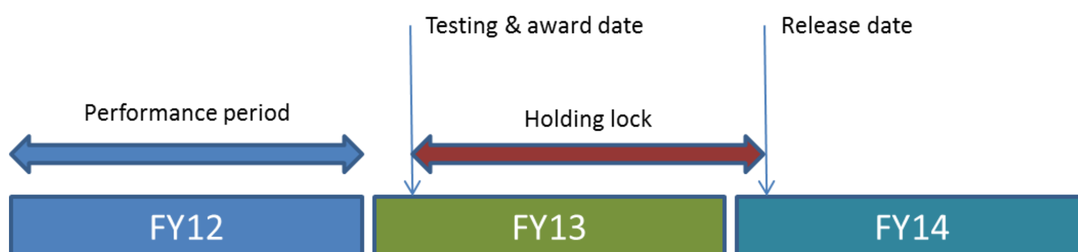
Yours faithfully,

Frank O’Loughlin
Section Chairman

[8] Section 300A(1)(ea).
[9] Section 300A(1)(ea)(iii).
[10] Section 300A(2).

Worked example (refer page 2)

Typical deferred short term incentive (STI)



FY13 Annual Report
short-term incentive
Performance period: 1 Jul 2011 to 30 Jun 12
Testing & award date: 1 Aug 12
Half deferred into equity, 12-month holding lock
Share component released 1 Aug 13

Description of process

STI opportunity is 'granted' in FY12 (or earlier).

STI performance is measured and final determination of full STI award is made in FY13.

Cash portion of STI (50%) is 'paid' in FY13.

Equity is 'granted' in FY13 (but may in limited circumstances be forfeited).

Equity is released in FY14.

Difficulties with disclosure under proposed provision

Use of words 'granted' and 'paid' could see the same STI disclosed as:

Prior-year grant to be paid in FY13

100% granted in FY12 (the 'opportunity' was granted)

Granted and paid in FY13

100% of STI (tested and awarded), comprising:

- 50% of STI (tested, awarded in cash in FY13)
- 50% of STI (tested, awarded and issued as equity in FY13 but subject to forfeiture)

Granted in FY13 and paid in future

50% of STI (released from holding lock in FY14)

Therefore the same STI amount could appear in three tables and confuse shareholders (appearing as though the executive is entitled to a 250% higher number than the actual amount available to the executive).