JOHNSON WINTER & SLATTERY

LAWYERS

Partner: Stephen Walmsley +61 3 8611 1320
Email: stephen.walmsley@jws.com.au

20 January 2011

General Manager
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: executiveremuneration@treasury.gov.au

Dear Sir/Madam

SUBMISSION

We refer to the Exposure Draft – *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011* and the associated Explanatory Memorandum released by the Parliamentary Secretary to the Treasurer on Monday, 20 December 2010 and attach our Submission in relation to that draft Bill.

We have not sought to comment on all aspects of the draft Bill, but rather have focused on those issues which we believe we are in a position to make a meaningful contribution. The nature of our comments reflects our position as a legal adviser to a number of significant Australian companies who will be affected by the proposed rules.

We note that this Submission has been endorsed by several of our clients, including Wesfarmers Limited, Orica Limited, Asciano Limited and Adelaide Brighton Ltd.

A summary of our key recommendations in relation to Chapters 1, 2 and 5 of the Bill is set out below:

1 Two-strikes test

- We strongly oppose the proposal for a vote on remuneration policy to potentially trigger a board spill for the reasons set out in our Submission, including the real potential for the mechanism to be misused by substantial shareholders to trigger a board spill for reasons unrelated to remuneration.
- The issues identified by the Government in relation to this proposal can, in our view, be adequately addressed by enhanced disclosure to shareholders who already have recourse available under the Act to requisition a meeting or resolution to remove a director if considered necessary (see **Recommendation 1(a)** of the attached Submission).

- If a form of the proposed amendments is to be adopted, at a minimum, the threshold for the 'against' vote in relation to the remuneration report resolution should be increased. In practice, many leading widely-held ASX listed companies experience voter turn out (in person or by proxy) at AGMs of between 40% and 80% of shares on issue. If, for example, a company has only 50% of its shares actually voted at an AGM (which is not unusual), the threshold for triggering the board spill on the current proposal is in effect reduced to shareholders representing as little as 12.5% of the overall issued capital of the company.

  Given the consequences which flow from a 25% 'against' vote at the first AGM (necessitating inclusion of a presumptive spill resolution on the notice of meeting for the subsequent AGM) it is appropriate to increase the threshold, at least at the first AGM, from 25% to 50% of the votes cast in order to align to the proposed threshold which is required to actually trigger the 'spill meeting' (see **Recommendation 1(b)** of the attached Submission).

- If this limit is not increased, in order to limit the potential for abuse, we recommend introducing a requirement that a minimum number of shareholders have voted against the remuneration report (eg 100 members, regardless of shareholding). Alternatively, a 'proper purpose' test should be introduced (see **Recommendation 1(c)** of the attached Submission).

2 Remuneration consultants

- We support the introduction of increased disclosure requirements regarding external remuneration consultants in the Act, however not in the form proposed. We recommend development of a framework similar to (but simplified from) the current regime for external auditors (see **Recommendation 2(c)** of the attached Submission).
- All other matters regarding external remuneration consultants (including regulating engagement of the consultant, interaction with the board (or remuneration committee) and the provision of advice) should be dealt with in the ASX Corporate Governance Principles and Recommendations, which require companies to report on an 'if not, why not' basis (see **Recommendation 2(a)** of the attached Submission).

3 No-vacancy rule

- While we do not generally support the proposal to limit the board's ability to declare a no-vacancy, if such a limit is to be introduced, we recommend also introducing a requirement that a non-board endorsed candidate is required to have at least a minimum level of shareholder support (see **Recommendation 5(a)** of the attached Submission).

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Please contact Stephen Walmsley on (03) 8611 1320 if you have any queries or would like us to elaborate on any of the comments in the Submission.

Yours faithfully

Johnson Winter & Slattery

JOHNSON WINTER & SLATTERY

LAWYERS

Submission – Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
CHAPTER 1 – TWO-STRIKES TEST / SPILL MEETINGS		
Introductory comments – *The spill motion as a penalty for two consecutive 25%+ against votes on the remuneration report*	The proposal that a full board spill is triggered notwithstanding that the majority of shareholders (and potentially as many as 74.9% of votes cast) may have voted in favour of the company's remuneration report appears a disproportionate 'penalty' to an issue that can, in our view, be addressed by enhanced disclosure. By refining the disclosures in relation to matters of remuneration, investors (and particularly those in the minority) are better informed and empowered to exercise their (existing) right to: • requisition a meeting or resolution to remove a director (or directors);[1] and/or • show their protest at a failure to address perceived defects in a company's remuneration practices by selling their shareholding in a true market (in the same way that they may exercise their right to show their protest in relation to poor company performance or shareholder returns, for example). Australian companies are not even required to submit their *financial* statements to a non-binding vote – and yet a company's remuneration policy is seen as providing sufficient impetus to trigger a possible board spill. Remuneration is being elevated to a level above other matters which would, presumably from a shareholder's perspective, provide a better 'trigger' for a board spill – such as two successive years of negative or low underlying (not accounting) profit or two years of negative shareholder returns. We submit that the proposal unravels the progress that corporate Australia is making (and has made) in improving board composition and enhancing effectiveness. In our view, it effectively renders a board's efforts to strive towards diversity and complementary skills and experience, futile. We strongly propose that the already heightened regulation applying to remuneration reports (pursuant to which the majority of companies are already listening to shareholders and addressing their concerns) not be further regulated to address the poor practices of the few.	We strongly oppose this proposal as currently presented. At a minimum, the threshold for triggering the board spill resolution should be increased. **Recommendation 1(a):** In our view, the enhanced disclosure proposed by new section 300A(1)(g) will serve to highlight the poor practices of those companies that do not address shareholder concerns (noting that recourse is already available under the Corporations Act (**the Act**) should the removal of a director be considered appropriate). Instead of a board spill motion, we support consideration being given to: • requiring prominent disclosure of the past two years' vote on the remuneration report in the report itself; and • the requirement for the company to indicate in the report the steps being taken to address [minority] shareholder concerns regarding remuneration practices (or the board's rationale for not taking any action). If it is considered necessary for some form of director removal provisions to be introduced, **we recommend** that this be limited to an ASX 'best practice' recommendation that the chairman of the remuneration committee be replaced should two consecutive year 'no' votes on the report exceed 25%. In our opinion, such steps would appear a sufficient 'penalty' for a minority of shareholders voting against the remuneration report.

1 Section 249D and 249N (respectively), *Corporations Act 2001* (Cth).

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
1.1 The two-strikes test **Section 250U** provides that the Division will apply where at least 25% of the votes cast are against the company's remuneration report at both the first and second AGMs.	JWS does not support the proposal that two consecutive 25% against votes trigger the board spill for the following reasons: • (**Power of minority shareholders**) The proposal provides the minority of shareholders with substantial power over the majority. A 25% 'no' vote would mean that the substantial majority (akin to those required to pass a special resolution in other circumstances) are in favour of the remuneration report. This power imbalance is further exacerbated by the requirement for 25% of *the votes cast* on the resolution (as opposed to 25% of *shares on issue*). In practice many leading widely-held ASX listed companies experience voter turn out (in person or by proxy) at AGMs of between 40% and 80% of shares on issue.[2] Accordingly, if a company has only 50% of its shares actually voted at an AGM (which is not unusual), the threshold for triggering the board spill is, in effect, reduced to shareholders representing as little as 12.5% of the overall issued capital of the company. To further illustrate this, at its 2010 AGM, AGL Energy Ltd had voter turn out of only 39.56% – meaning that the 29% 'no vote' in actual fact only represented 11.5% of the shares on issue. Legislating to provide a (potentially very small) minority of shareholders with an ability to direct the funds of the company towards holding a meeting which, on the current proposal, could be called for reasons unrelated to executive remuneration would be counterproductive and an unnecessary intrusion into the operation of companies. • (**Influence of proxy advisers**) The proposal provides proxy advisers with a substantial level of influence over company remuneration practices, given that a majority of institutional investors, who generally hold the balance of votes, routinely vote in accordance with recommendations from these bodies. Larger institutional investors rely heavily on the recommendations of these proxy advisers – indeed, institutional investors often have formal or informal impediments to departing from these recommendations (we are aware of a number of institutional investors who are required to obtain board approval to vote other than in accordance with the recommendations). We have often seen proxy advisory bodies (such as CGI Glass Lewis, ISS, ACSI and the Australian Shareholders Association) issuing voting recommendations 'against' the company's remuneration report based on a perceived failure by the company to comply with that body's policy or position statement (many of which are incongruous as between these bodies). For example, in relation to the 2010 AGM season, the ASA issued a 'no' vote in relation to 106 of the 200 companies it monitors.[3]	**Recommendation 1(b):** As noted above, we do not support the board spill proposal. If, however, a form of the proposal is to be introduced, we strongly believe that the threshold required to trigger a board spill must be increased. At a minimum, to warrant a presumptive spill resolution to be put to members, it should require a 50% against vote (at least at the first AGM). This is reasonable given: • the consequences which flow from having 25% of votes cast against the remuneration report resolution at the first AGM – that is, necessitating inclusion of a presumptive spill resolution on the notice of meeting for the subsequent AGM, which, in addition to increased costs of compliance, has a negative reputational impact on the company, notwithstanding that the 'second strike' may never even eventuate; • the potential for this to be actually triggered by significantly less than 25% of the shares on issue; and • that the threshold required to actually trigger the 'spill meeting' (ie by passing the 'spill resolution' at the subsequent AGM) is 50% of votes cast.

[2] For the 2010 AGM season, the average voter turn out for companies in the ASX Top 100 was shareholders representing 56% of the shares on issue.

[3] The no votes were, in large part, the result of companies not complying with ASA policy of having a 4 year 'performance period' in relation to their long term incentive plans (even though the vast majority of companies maintain, having given the issue due consideration, that 3 years is an appropriate time frame to measure performance).

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
	As the Government's intent is to give *shareholders*, and not proxy advisers who have no direct economic interest in the relevant companies (beyond the fees they are paid for preparing their research and voting recommendations for the institutional investors), a stronger say in relation to remuneration practices, we submit that this mechanism will not fulfil its desired function. Clearly this has the potential to lead to a voting outcome that is not representative of the views of shareholders (even a minority), but rather, the views or policies of proxy advisers in relation to certain remuneration practices.[4] • (**Elevation of remuneration as proposed is unwarranted**) Predicated on the presumption that greater transparency in relation to corporate governance practices relates to investors being better placed to make informed investment decisions,[5] the introduction and development of the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations regime (first introduced in 2003) (**ASX Principles**), has generally been considered to be a 'success'. The vast majority of listed companies now provide detailed disclosures against the core ASX Principles on an 'if not, why not'[6] basis, which recognises that companies should adopt practices that are appropriate for them, rather than a 'tick the box' approach, as 'it is for the market to pass judgement on the corporate governance practices of Australian companies, not the [ASX Corporate Governance] Council or ASX'.[7] It is submitted that current concerns around executive remuneration can be addressed by enhanced disclosure requirements in respect to remuneration policy, thus better informing the market so that it is equipped to 'pass judgement' on remuneration policy and practices in the same way that it does corporate governance practices more broadly. To elevate the 'response' to remuneration above that which applies to other fundamentals critical to company performance (such as auditor independence, and establishing and disclosing appropriate policies in respect of business and financial risk) in the manner proposed is unwarranted and, in our view, will only serve to encourage a 'tick a box' approach to remuneration (as outlined above), undermining the recent developments in corporate governance which recognise that 'one size *does not* fit all'.	

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[4] We are, in fact, aware of at least one proxy advisory body who does not support the two-strikes proposal.

[5] ASX Corporate Governance Principles and Recommendations (with 2010 amendments), page 2.

[6] That is, if a company considers that a Recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it, and explain why.

[7] ASX Corporate Governance Principles and Recommendations (with 2010 amendments), page 2

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
	• (**Conditional resolution and increased costs of compliance**) As drafted, the Bill requires a company that has received a 'first strike' to include the 'spill resolution' as a conditional resolution in the notice of meeting for the second AGM. To enable a representative vote on this issue, the 'spill resolution' would also need to be included on proxy forms for those shareholders unable to attend the meeting to cast their vote. The requirement to include a conditional spill resolution arises because the outcome of the non-binding vote at the second AGM will *not be known* at the time the notice of meeting and proxy forms are sent to shareholders. This resolution (which may or may not ultimately be put) is potentially confusing for retail investors and work on the basis of 'guilty until proven innocent' for company remuneration practices. Including such a resolution on the notice of meeting for the second AGM may, in fact, lead a number of shareholders to believe that the company will receive the 'second strike' at the AGM. The negative reputational impact for the company in including this conditional resolution is also significant. It unnecessarily (and unfairly) implies that the company is a 'bad corporate citizen' – even where an against vote in one year is followed by a positive vote, signifying that the company has indeed worked hard to address shareholder concerns. By way of example, Wesfarmers received a strong against vote on its remuneration report in 2008 (49.14%) – whereas every other year since 2005, the against vote has been less than 10% (and on average, only 7.3%). • (**Potential for abuse**) The mechanism is open to being misused by individual substantial shareholders to advance their own interests which may be wholly unrelated to the company's remuneration policy. A 'board spill' could, in certain cases, be triggered by a single substantial shareholder. To illustrate this, as a result of a takeover bid that was blocked by the ACCC, Adelaide Brighton Ltd for a number of years had a major competitor (Boral Limited) on its share register as a 19.9% shareholder. This shareholder could theoretically trigger the 'spill resolution' by voting against the remuneration report for two consecutive years. As illustrated above, based on levels of shareholder voting at AGMs, it is very likely that a 19.9% shareholding (and often something short of that level) may, by itself, exceed 25% of the votes cast at an AGM on the resolution.	**Recommendation 1(c):** As noted above, we do not support the board spill proposal. If, however, a form of the proposal is to be introduced, in order to limit the potential for abuse, we recommend that consideration be given to requiring a **minimum number** of shareholders to have voted against the remuneration report resolution (ie. require 100 members to have voted against, regardless of shareholding). This will ensure that shareholder funds are not directed towards funding a meeting supported by, for example, one major shareholder. **Alternatively**, consideration should be given to introducing a form of proper purpose test (similar to section 249Q) with appropriate guidance / regulations.

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
1.2 Spill meeting **Section 250V(1)(b)** requires that all directors (except the managing director) cease to hold office immediately before the 'spill meeting'. **Section 250V(2)** imposes a voting restriction on any key management personnel (or their closely related parties) voting on the 'spill resolution'.	JWS does not support this proposal for the following reasons: • (**Appropriate majority to effect the spill**) The 'spill resolution' must be passed by 50% of the votes cast at the second AGM to require the 'spill meeting' to be held. Again, this highlights the inappropriateness of the 25% threshold for the first and second strike when the consequence of the 'spill resolution' and 'spill meeting' is not actually triggered unless a significantly higher threshold of shareholders vote for this. Should this not be a consistent level of votes?	
	• (**Directors to stand for election**) It does not appear appropriate for directors who were elected at either the first or second AGM (and therefore have not held office during the full two year period in relation to which the two remuneration report votes have been cast) to be required to vacate office on the basis of remuneration decisions and policies they may have had little or no involvement in setting. • (**Chairing the spill meeting**) It seems incongruous that the Managing Director, who is in most cases the major beneficiary of company remuneration practices, is the only director not subject to the spill. Ironically, this may result in the Managing Director (or a non-director, including the recently vacated chairman) having to chair the relevant spill meeting.	**Recommendation 1(d):** While we do not support the proposal, if a spill meeting is to be held, we submit that only those directors who have held office throughout the full two years in relation to which the relevant Remuneration Reports relate be subject to the spill. This will ensure that only those directors involved in the remuneration decisions at issue may be held accountable for them. It may also assist in maintaining a level of board stability.
	• (**Voting exclusion**) We query the need to prohibit key management personnel generally from voting relation to the 'spill resolution' where those persons hold shares in the company and have a right to exercise this proprietary right. We also query what the potential conflict of interest is in this scenario. • (**Use of shareholder funds**) There are substantial costs associated with holding a separate 'spill meeting', particularly for companies with tens or hundreds of thousands of shareholders – in some cases, with costs equal to or exceeding the amount of remuneration being criticised. NAB, for example has more than 460,000 shareholders; and Telstra more than 1.4 million. On the current proposal, this cost can be 'incurred' by a potentially very small minority of shareholders – as noted above, this could see one major shareholder directing the funds of all shareholders to hold a meeting for reasons unrelated to remuneration.	**Recommendation 1(e):** The voting exclusion should be limited to the directors voting in relation to the 'spill resolution' (and not the company's other KMP).

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
1.3 Disclosure requirements **Section 300A(1)(g)** proposes additional disclosure in the subsequent remuneration report where the company received a ‘no’ vote of 25 per cent or more – setting out whether shareholders’ views have been taken into account (and if not, why).	JWS does not support the proposal in its current form for the following reasons: • (**Skewed views**) Requiring companies to set out the comments made by shareholders *at the AGM* in the next remuneration report will result in a skewed representation of views. The vast majority of institutional investors and proxy advisory bodies (with the exception of the Australian Shareholders Association) do not physically attend the meeting, nor do they in some cases even articulate a reason for voting against a company’s remuneration report. As drafted, only those concerns raised by the minority of retail shareholders (and the ASA) who actually attend and speak at the meetings will be captured. This may also lead to companies either adopting (or defending why they have not adopted) the simplistic ‘cookie-cutter’ remuneration policies reflective of the policies of a very small number of proxy advisory bodies.[8] Further, requiring the company to disclose how these comments have been addressed creates a significant additional burden and raises a number of practical issues – does the company have to consider all comments (regardless of relevance or size of shareholding represented)? Does an independent consultant need to be engaged to advise on the matters raised? • (**Difficulty in ensuring shareholder views representative**) In our experience, a strong ‘against’ vote on the remuneration report is often not reflective of shareholder dissatisfaction with the company’s actual remuneration policy – often, there is a strong correlation between share price, company performance and dividend policy and the level of no vote received. A company is more likely to receive a higher ‘no’ vote if, for example, dividends are reduced and less likely if the share price is performing well (as the remuneration report non-binding resolution is often used to send a message to the board). For example, Asciano received a 41.5% ‘against’ vote in relation to its remuneration report, while the two resolutions put to shareholders dealing with director and executive remuneration received votes in favour of 97.7% (in relation to the Managing Director’s options) and 94.9% (in relation to non-executive director remuneration).	**Recommendation 1(f):** If this proposal is retained, the company should have some level of flexibility to determine: • which concerns to respond to (given that a single comment made at an AGM may not be representative of shareholder concerns generally); and • the appropriate form of disclosure (which could, for example, include comments received from institutional investors before the AGM).

[8] Based on current ASA policy, we may well end up with a situation where every listed company has to set out the rationale for not having a deferred share component for the short term incentive plan (irrespective of the company’s broader remuneration framework and the board’s determination as to whether such a component is necessary and/or desirable in this context); or not moving to a four-year performance period for the long-term incentive plan.

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
CHAPTER 2 – REMUNERATION CONSULTANTS		
Introductory comments	The proposed new laws seem to point to a perceived lack of independence amongst remuneration advisers as having led to the escalation of executive remuneration. We believe a fair part of the reason for remuneration escalation needs to be levied at the globalisation of the senior executive 'job market', the rewards being offered by comparable private equity businesses to management teams (which are not subject to public scrutiny), the Government's own actions in requiring the specific identification of remuneration of KMP-level individuals within remuneration reports (which has lead to many executives and boards using that information as the benchmark for remuneration negotiations) and some poor practices around executive termination payments by a small number of high profile companies. While we acknowledge that some remuneration consultants may have facilitated or been part of this escalation by highlighting comparative international and private equity remuneration levels, and perhaps have not adequately advised companies around the appropriateness of performance-related pay and termination payments for poor performance, we have seen no systemic evidence of a *lack of independence* of remuneration consultants, nor any reluctance amongst boards to seek second or indeed third opinions independently of management when they are not satisfied with the information being provided to them or the level of independence from management. The spotlight on remuneration shone by the public disclosures in the remuneration report have led good boards to be cautious and considered in relation to setting remuneration and to be open and transparent as to the manner in which remuneration is disclosed. Of course, it is necessary for the board or remuneration committee to have the ability to engage independent remuneration consultants in relation to particular matters (for example, benchmarking of CEO remuneration). Where this is the case, we agree that the directors should engage such consultants directly and receive that advice directly. Not all aspects of KMP remuneration, however, are controversial or require the level of input or involvement from the board that is being proposed. The mandated procedures and processes in the Bill go too far and fail to reflect the division of responsibility between management in devising, proposing and administering a company's remuneration policy and the board in approving the policy and overseeing its effectiveness. Both roles require outside remuneration consultants to assist. Enhanced disclosure (in a similar manner to the current regime for external auditors) would, in our view, go most if not all the way in overcoming the issues identified by the Government. We have, for example, seen a dramatic decrease in the types and quantum of non-audit services provided by the company's external auditors following the introduction of disclosure requirements in section 300(11B) of the Act	Overall, we support introducing increased disclosure requirements regarding remuneration consultants in the Corporations Act, however the level of disclosure proposed is unnecessary. In our view, a similar (yet slightly less complex) framework to the current disclosure regime for external auditors in the Act – both as to the auditor's independence and the level of 'non-audit' services provided to the company – could be developed for external remuneration consultants. All other matters regarding the engagement of external remuneration consultants and the provision of advice should be dealt with in the ASX Principles – which companies are required to report against on an 'if not, why not' basis. This could include, for example, further guidance around: • the composition of the remuneration committee (eg. comprised solely of independent non-executive directors with an independent chair (who is not the chair of the board)); • the remuneration committee's ability to engage external consultants directly and meet without management present; and • the circumstances in which the remuneration committee must engage the remuneration consultant directly (eg. in relation to the quantum of remuneration of the CEO or KMP).

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	in 2004. In addition, a particularly useful mechanism, which we would support being introduced in relation to remuneration consultants, is the requirement for the auditor to 'self-assess' its own independence and provide a written declaration to the company.[9] Similarly in the context of remuneration, just as the board is required to assess whether the provision of non-audit services is compatible with standards of independence, the board should be required to include a statement in the company's remuneration report as to the independence of the remuneration consultants used by the board and outline the reasons for the board being so satisfied.[10]	
2.1 Engagement **Section 206K(1)-(2)** provides that only a non-executive director may execute a contract to engage a remuneration consultant to provide advice relating to the nature and amount or value of remuneration for any of the key management personnel.	JWS does not support the proposal to limit the engagement of external remuneration consultants to the non-executive directors (to the exclusion of management) for the following reasons: • (**Categories of advice**) Mandating that the board directly engage remuneration consultants in *all circumstances* to the exclusion of management fails to distinguish between 'ordinary' remuneration arrangements and potentially controversial arrangements (eg. benchmarking for a CEO position). It is difficult to see how, for example, advice regarding the structure of short and long term incentive arrangements (which senior executive KMP participate in, generally together with a large number of lower level executives), which is line with the broader board-approved policy, should be elevated to the realm of the board. • (**Execution of the contract**) Prescribing who can formally execute a contract is, in our view, too prescriptive – nowhere else in the Act does the Government limit or prescribe who can execute a document (not even in relation to related party transactions, where the potential for a conflict of interest is arguably greater). • (**Role of the board**) The fundamental role of the board has long been regarded as one of oversight – directors are not required to be involved in the day to day management of the company. In this regard, we note the comments of Rogers J in *AWA v Daniels* that "companies today are too big to be supervised and administered by a board of directors… It is something of an anachronism to expect non-executive directors meeting once a month to contribute anything much more than decisions on questions of major policy". This is also recognised by the ASX Principles, which clearly set out that the board is responsible for 'overseeing the company'.[11]	**Recommendation 2(a):** Rather than mandating engagement in the Act, we recommend revising the ASX Principles to provide that the remuneration committee has the right to engage external remuneration consultants directly and to meet without management present.[12] The ASX Principles could also include a requirement that the non-executive directors obtain advice from an independent remuneration consultant in relation to particular categories of advice (eg. relating to the quantum of remuneration for the CEO or member of the KMP), and if not, why not. **Alternatively**, at a minimum, the proposed amendments to the Act should be limited in this way (that is, they should only apply to particular categories of advice).

[9] Section 307C, *Corporations Act 2001* (Cth).

[10] Such as that required in relation to auditors under section 300(11B), *Corporations Act 2001* (Cth).

[11] Recommendation 1.1, ASX Corporate Governance Principles and Recommendations (with 2010 amendments).

PROPOSED APPROACH	DISCUSSION	RECOMMENDATION
	Mandating that *only* the non-executive directors may engage external remuneration consultants for the provision of *all* advice regarding KMP remuneration is simply unworkable in the context of large listed companies. The majority of boards meet, at most, once a month – the remuneration committee even less (on average, 4 times a year). Expecting non-executive directors (who may well sit on a number of listed company boards) to be across the often complex detail underpinning KMP remuneration and have the necessary level of information and insight to engage remuneration consultants in a useful and efficient manner is not only unrealistic, but fails to recognise the function of the human resources or remuneration team within companies. It also risks diverting the board's focus from its core role of approving company strategy and maintaining oversight of company performance. • (**Role of the CEO**) The proposal also fails to recognise a key role of the CEO to have input into setting the remuneration for his or her direct reports. This is crucial to ensure the senior executive team – who are in most companies ultimately responsible for driving the company's performance (and in turn, creating shareholder wealth) – are appropriately motivated, incentivised and rewarded for superior performance. While the board is ultimately responsible for setting the remuneration *policy* for senior executive KMP, it is the role of the CEO to make recommendations to the board in this regard. It is untenable to expect the board to be involved in the detail of setting the remuneration for all senior executive KMP – this is especially so in the context of large listed companies who may have 10 or more executives across a range of industries. The need for the 'cloak and dagger' regime being proposed is not only unnecessary, but it will have unintended consequences of creating a serious 'disconnect' between the CEO and his or her core team. • (**Appropriate checks already in place**) We submit that checks and balances are already in place to ensure KMP remuneration is appropriately 'self-regulated' and not easily open to abuse. That is, the non-executive directors are responsible for setting the CEO's remuneration as well as the policy for senior executive remuneration, while the shareholders set the level of fees for the board. No member of a company's KMP is responsible for approving his or her own remuneration. There are mechanisms already in place within the existing regulatory framework to deal with excessive or inappropriate remuneration arrangements – notably, the shareholder vote on the remuneration report. Further, the new	

[12] This is similar to the existing requirements in relation to the Audit Committee (as set out in Recommendations 4.2 and 4.3 of the ASX Principles).

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	termination payments provisions in Part 2D.2 of the Act are specifically designed to limit the amount companies can pay outgoing executives. These provisions have barely come into effect before the Government is attempting to further regulate executive remuneration. We therefore query the need for such extensive and onerous measures. • (**Comparison to other external advisers**) In no other circumstances is there such a limitation on who can engage external advisers. In relation to the external auditor, who carries a far greater responsibility than remuneration consultants in verifying and signing off the company's financial statements, it is management who instructs the auditor even though the Audit Committee has ultimate oversight of this function (and obviously has direct access to the auditor in the absence of management *should the need arise*).	
2.2 Provision of advice **Section 206L(2)-(3)** provides that a remuneration consultant must give the advice directly to the directors and/or members of the remuneration committee (excluding executive directors). **Section 206L(4)-(5)** provides that it is an offence for the remuneration consultant to provide the advice to any other person.	JWS does not support the proposal to restrict to whom the advice may be provided. Even if the board endorses the remuneration consultant's advice, management will ultimately be responsible for implementing those recommendations. It is impractical to suggest that management be 'cut out of the loop' and not have access to remuneration consultants or their advice. Companies hire experienced and well qualified remuneration executives who are best placed to work with external consultants to ensure the advice is workable and appropriate in the particular circumstances of the company – ultimately driving a more efficient outcome and better product. The directors are often not (and cannot be expected to be) across the nuances and complexities which must necessarily inform the remuneration consultant's advice and recommendations. In our view, the proposal will create an artificial situation where the board is acting as the 'gatekeeper' or intermediary between the external remuneration consultant and management – clearly an inefficient use of the board's time, skills and experience.	**Recommendation 2(b):** If the proposal is retained, there should be a carve out to allow the remuneration consultant to provide the advice to management where that advice has also been provided to the board.

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2.3 Disclosure **Section 300A(1)(h)** provides that where the company has engaged a remuneration consultant to provide advice on the remuneration of any of the key management personnel, additional disclosures are required in the remuneration report.	We support increased disclosure regarding remuneration consultants (in a similar manner as currently requirement for external auditors, as outlined above). However, JWS does not support the extent of the current proposal. The required disclosures are extensive and, in our view, go much further than is necessary or appropriate in the interests of ensuring shareholder transparency. In particular, we have serious reservations in relation to the proposed disclosures set out in section 300A(1)(h)(ii), (iii) and (iv) which require disclosure, respectively, of: • the name of the each director who executed the contract – it is difficult to see the relevance or value of specifying this arbitrary detail, and it is not necessarily reflective of the role of the particular director (it may, for example, simply be a matter of convenience as to who executes the contract); • the name of each director to whom the consultant directly gave the advice – again, the relevance and value of this detail is questionable (particularly given the limitations on provision of the advice in new section 206L). It also fails to recognise the board as a whole (or at least the full remuneration committee) will likely be provided with a copy of advice, even if not directly, in discharging *its responsibility* in setting the company's remuneration policy; • a summary of the nature of the advice and the principles on which it was prepared – this is mandating disclosure of potentially extremely commercially sensitive information (both internally and externally) – for example, a director who has engaged a remuneration consultant to provide 'benchmarking' advice for a KMP position with a view to replacing an incumbent executive.	**Recommendation 2(c):** In lieu of the proposals outlined in sections 2.1 and 2.2 above, we recommend introducing alternative disclosure requirements which would require the confirmation of: • the name of the remuneration consultant; • whether they are independent and on what basis that was determined; • what other services have been provided other than to the board or the remuneration committee and how much revenue was received; and • whether all independent advice has been provided to the board or the remuneration committee directly and has the board (or committee) had direct access to the remuneration consultant in the absence of management. **Alternatively**, in the context of the proposals, at a minimum, we recommend removing disclosure requirements set out in section 300A(1)(h)(ii), (iii) and (iv) as unnecessarily prescriptive.
CHAPTER 3 – PROHIBITING KMP FROM VOTING ON REMUNERATION MATTERS		
Section 250R(4) provides that a KMP or their closely related parties must not cast a vote on the non-binding resolution on the remuneration report.	JWS does not support the proposal to prohibit KMP from voting on the remuneration report. We submit that the proposal fails to recognise the fundamental right of key management personnel who hold shares in the company to exercise what are, in effect, personal property rights. Case law indicates that a shareholder does not owe any fiduciary duties to the company and can vote in accordance with his or her personal interests. This is so even where the shareholder is a director.[13] The Takeovers Panel has directly opined on this issue – the Panel considers that it is only appropriate to deprive shareholder-directors of their proprietary right to vote with other shareholders where their interests are "so different to other shareholders	**Recommendation 3(a):** We support **Option A** as outlined in the regulation impact statement. That is, we recommend maintaining the status quo on the basis that the current voting restrictions contained in the ASX Listing Rules and the Corporations Act are sufficient to counter potential conflicts of interest.

[13] *Peters' American Delicacy Co v Heath* (1939) 61 CLE 457 at 504; *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 439.

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	that it would have given rise to unacceptable circumstances to allow the directors' votes to be cast".[14] The potential for shareholder-directors to be conflicted in a takeover scenario, where they have a *direct financial interest* in the value of the shares, is significantly greater than where directors are voting on the company's general remuneration policy. We recognise there are situations where it would be inappropriate for directors to vote on a resolution – for example, where it directly affects their individual remuneration. The proposal, however, is concerned with a non-binding vote on the company's remuneration report – a document which outlines a broad remuneration policy and historical data only. The KMP do not stand to directly benefit from approving the report. Accordingly, in our view, there is no direct conflict of interest and KMP should not be prohibited from voting in line with other shareholders of the company.	
CHAPTER 4 – PROHIBITING HEDGING OF INCENTIVE REMUNERATION		
Section 206J prohibits KMP (and closely related parties) from hedging remuneration that depends on the satisfaction of a performance condition.	JWS does not oppose this proposal (noting that many companies already have such arrangements in place).	No recommendation.
CHAPTER 5 – NO VACANCY RULE		
5.1 Declaration of no-vacancy **Section 201P** provides that a board must not declare a 'no vacancy' unless the company has sought shareholder approval of that declaration at a general meeting.	JWS does not support the proposal to limit the board's ability to declare a 'no vacancy' for the following reasons: • (**Director selection process**) Boards put considerable time, effort and resources into the director selection process to ensure a candidate has the requisite skill set to augment those of the current directors. For example, a director with more targeted industry knowledge may be a hugely beneficial addition to a board dominated by directors with professional services backgrounds. External candidates nominating for directorship do not necessarily have the relevant experience or the skill set required of a non-executive director of the particular company in the context of the skills of the board as a whole. We are aware of a number of examples of companies receiving nominations for directorship from shareholders who are not only unqualified for the role, but are in fact seeking election to advance a personal interest – far removed from being interested in the running of a listed corporation. For example, Mervyn Vogt who sought election to the Telstra Board at its 2006 AGM.[15]	**Recommendation 5(a):** We support **Option A** as outlined in the regulation impact statement. That is, we recommend maintaining the status quo. However, if a limit on the board's ability to declare a 'no vacancy' is to be introduced, we recommend imposing a requirement that a non-board endorsed candidate is required to have at least a minimum level of shareholder support to be able to nominate for directorship. We consider that the current threshold required for shareholders to requisition a resolution in section 249N of the Act (ie. members holding at least 5% of the votes that may be cast or 100 members) is appropriate.

[14] Takeovers Panel decision – *Re Coopers Brewery Ltd (Nos 3R and 4R)* (2006) 57 ACSR 348.

[15] Mr Vogt was an ex-employee of Telstra who had previously sued the company for unfair dismissal.

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	Limiting the board's power to (1) determine the appropriate board size; and (2) give preference to a candidate who has been through a rigorous selection and vetting process, in our view, undermines corporate convention. It is now common practice for candidates seeking election (even where they are board-endorsed) to address shareholders at the AGM as to their relevant experience and what they bring to the company. Shareholders have the opportunity to question prospective directors and have the power not to support the election where they do not consider the appointment to be appropriate or in the best interests of the company. Accordingly, shareholders already have a significant level of input into the composition of the board. • (**Unnecessary if 'two strikes' test is adopted**) The regulation impact statement states that the recommendation is not aimed at improving board diversity, but rather intends to address the '*strong perception that shareholders do not have a mechanism that enables practical action where there is a concern that boards may be identifying too closely with executives when determining their compensation*' and that the recommendation is '*primarily targeted at shareholders who have lost confidence in their board*'. In our view, the risks to upsetting board effectiveness identified above outweigh the advantages in this objective, particularly if some form of the 'two strikes' test proceeds. The proposed changes will have a much broader impact than responding to remuneration (and may extend to candidates nominating for personal interests, as noted above). If the true objective of the recommendation is to provide shareholders a mechanism to act where they have lost confidence in their board in respect of remuneration (ie it is *not* aimed at improving board diversity as stated in the regulation impact statement) – then does the two strikes test not address this? • (**Likelihood of non-board endorsed candidates being elected**) It is extremely unlikely (and has historically been proven to be the case) that non-board endorsed candidates will be elected – regardless of whether the candidate only requires a 50% majority or it is a contested election. For example, at Telstra's 2006 AGM – the average level of shareholder support for 5 non-board endorsed candidates was 8% of votes cast (as compared to an average of 92% for the board-endorsed candidates); similarly, at Fairfax Media's 2009 AGM – the 3 non-board endorsed candidates received an average 'for' vote of 6% in comparison to 97% for the incumbent director seeking re-election. As the Government has pointed out in paragraph 8.28 of the regulation impact statement, '*there does not appear to be a credible threat of someone the board considers unsuitable obtaining enough votes to get onto the board*.' Given the significant incremental cost to the company and waste of resources in considering outside nominations (and putting those to shareholders) where there is little likelihood of the candidate actually being successful, we query the usefulness of this mechanism.	

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5.2 Requirements for explanatory notes **Section 201Q** provides that the explanatory statement accompanying the board limit resolution must set out the recommendation of each director (and their reasons) or if the director makes no recommendation, why.	While a general statement by the board setting out the reasons for proposing the board limit resolution may be of some use, JWS does not support the proposal to canvass the individual views of each director. It is difficult to see the value in providing this level of detail. Ultimately, the decision of the board to propose the board limit resolution is exactly that – a decision of the board as a whole. In our view, this proposal is unnecessary, inappropriate and potentially divisive. This level of detail is not required in relation to any other resolutions put to shareholders at a company's AGM.	**Recommendation 5(b):** On the basis that the requirement for shareholders to approve a declaration of no-vacancy rule is retained, we recommend amending this to require a general statement of the reasons why the board is proposing the resolution (as opposed to individual directors).
5.3 Record of voting **Section 201R(1)-(3)** provides that, where a poll is demanded on the board limit resolution, the company must record each member's name and the number of votes cast for/against the resolution (whether the member is voting in person, by proxy or by representative).	JWS does not support this proposal. We query the relevance and usefulness of specifying the names of individual members and recording how they have voted. This also raises serious concerns from a shareholder privacy perspective, not to mention the significant administrative burden companies will face in recording individual votes – particularly large listed companies who have tens or hundreds of thousands of shareholders.	**Recommendation 5(c):** On the basis that the requirement for shareholders to approve a declaration of no-vacancy rule is retained, we recommend removing the requirement to record individual votes on the basis that the current disclosure requirements in section 251AA of the Act are sufficient.
CHAPTER 6 – CHERRY PICKING		
Section 250A(4)(c) provides that proxy holders must exercise all directed proxies on all resolutions (on a poll).	While we support the requirement for a chairman to vote directed proxies (which is reasonable given the 'default' appointment of the chairman as proxy on the vast majority of proxy forms), we do not support the extension to non-chairman proxies. This is so for the following reasons: • (**Overlap with 'direct voting'**) A large number of listed companies have the ability for shareholders to submit a 'direct vote' in advance of a general meeting where they are unable to attend that meeting. The proposed amendments seem to confuse proxy voting with the function served by direct voting. • (**Role of a proxy**) A proxy is appointed to 'stand in the member's shoes' and vote at a general meeting in the interests of the appointor. Just as a shareholder may change their voting intentions at the meeting (for example after hearing shareholder comment or debate on a resolution), a non-chairman proxy should have the flexibility to abstain from voting notwithstanding a previous direction. Case law supports the proposition that 'whatever a person may do himself, the person may do by agent'.[16] It does not necessarily follow that, where the proxy does not vote in accordance with a direction (ie. by abstaining), the proxy is 'cherry picking' or acting in their own self-interest. In our view, the proposed amendments undermine a	**Recommendation 6(a):** We support **Option A** as outlined in the regulation impact statement. That is, we recommend limiting the requirement for proxies to vote all directed proxies to where the proxy is the chair.

[16] *Christie v Permewan Wright & Co Ltd* (1904) 1 CLR 693 at 700.

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	fundamental purpose served by company annual general meetings – that is, to allow shareholder views to be canvassed and debated and, potentially, to influence the votes of shareholders present (whether in person or by proxy). • (**Limited 'mischief'**) A proxy is bound by the laws of agency to act in the interests of the appointor, failing which, the appointor may take action. Accordingly, a proxy may not *vote against* a direction given by the member. In our view, there is limited risk or exposure in retaining the current position – not to mention the limited circumstances where this so-called 'cherry picking' would actually occur.	
CHAPTER 7 – PERSONS REQUIRED TO BE NAMED IN THE REMUNERATION REPORT		
Amendments to **section 300A(1)** will confine remuneration disclosures to KMP of the consolidated entity.	JWS supports this proposal.	No recommendation.