



MEMO

To: Board of Directors
From: Company Secretary
Subject: **REMUNERATION ACCOUNTABILITY**

In response to your enquiry about the current requirements under the Corporations Act governing the rules surrounding Director and Executive remuneration for stock exchange listed companies*, I address various aspects below.

The objective of these provisions is to strengthen Australia's remuneration framework, empower shareholders to hold directors accountable for their decisions relating to executive remuneration, and eliminate conflict of interest in the remuneration setting process.

Remuneration Report

Section 300A(1) of the Act requires a Remuneration Report to be included in the annual Directors' Report detailing remuneration, payments, policies, etc for directors and key management personnel.

That Remuneration Report must then be voted on by shareholders at the Annual General Meeting – s.250R(2) – but, under s.250R(3) the decision is 'advisory' only and is not binding on the directors.

Voting on Remuneration Report

Directors and key management personnel (and their closely related parties who hold shares) are not allowed to vote on the Remuneration Report at the AGM – s.250R(4). This is to avoid conflicts of interest with key management personnel voting on their own remuneration.

'Two-strikes' Test

The Act strengthens the voting process by setting out consequences in the event that the shareholders vote against the Remuneration Report – ss.250U~Y.

The 'first-strike' occurs where the Remuneration Report receives a 'no' vote of 25% or more at the AGM. If this happens, the company's next subsequent Remuneration Report must explain whether and the extent to which shareholders' concerns have been taken into account.

The 'second-strike' occurs if the company's subsequent Remuneration Report receives a 'no' vote of 25% or more. If this happens, the shareholders will vote at the



same AGM whether the directors will need to stand for re-election within 90 days ('spill resolution'). Directors and key management personnel and their 'closely related parties' (i.e., controlled entities, spouse, children, etc) will not be allowed to vote on this resolution. If the resolution is passed with 50% or more of votes, then a 'spill meeting' must take place within 90 days.

And just in case it is needed.....notice of the spill resolution must be included in the notice of meeting for that AGM to ensure due notice has been given in the event that the second-strike is triggered. The notice must explain the circumstances in which the resolution will apply and invite shareholders to appoint a proxy to vote on the spill resolution (i.e., included on the Proxy Form with the other resolutions).

Spill Meeting

The company will then need to provide the minimum notice period for holding the spill meeting and comply with any minimum notice period in its constitution for the nomination of candidates (to ensure shareholder nominated candidates can seek endorsement at the spill meeting).

At the spill meeting, the directors required to vacate their positions are those directors (other than the managing director) who were directors when the Directors' Report was presented at the most recent AGM. These directors cease to hold office immediately before the end of the spill meeting (although if none of these directors are still on the board at that time, then the spill meeting is abandoned).

If the company fails to hold the spill meeting within 90 days after the spill resolution is passed, each director of the company at the end of those 90 days (other than any appointed after the last day on which notice of a meeting must be given) will have committed an offence under the Act.

Proxy Voting

A vote must be cast for all directed proxies, if there is a call for a poll. So, when voting on the Remuneration Report or a spill resolution, if a nominated proxy holder does not vote the proxy will default to the chairman who is required to vote all directed proxies.

Remuneration Consultants

Companies are required to disclose in their Remuneration Report any detail relating to the use of remuneration consultants to allay concerns that remuneration consultants may be placed in a position of conflict if asked to express an opinion on the remuneration of officers that are in the position to determine if the consultant's services will be retained.

And to avoid conflicts of interest, remuneration consultants must be hired by non-executive directors and report to non-executive directors or the remuneration committee, rather than to the company executives.



See s.206L-M on these points.

Hedging of Incentives

S.206J of the Act prohibits key management personnel (and their closely related parties) from hedging remuneration that depends on the satisfaction of a performance condition, as otherwise might defeat the purpose of having incentive remuneration.

* Note: s.300A(2) requires all Disclosing Entities, whether listed or not, to provide a Remuneration Report - although unlisted companies are not governed by the voting/spill motion provisions.

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.