MALLESONS STEPHEN JAQUES

By email

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Dear Mr Miller,

Submissions: Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill

We are a leading Australian commercial law firm, with an extensive practice advising listed companies on directors duties and employment matters, including remuneration, superannuation, employee share plans, termination, termination benefits, and related taxation issues.

These submissions focus on those provisions of the Bill concerning:

- the "two strikes" rule for a board spill;
- remuneration consultants; and
- voting by proxies.

The "two strikes" rule for board spills.

The Bill proposes to implement the recommendation of the Productivity Commission concerning the consequences of non-binding shareholder votes in 2 consecutive years, of at least 25% against the resolution to adopt a company's remuneration report.

The Bill proposes that in that event, a spill resolution must be put at the meeting at which the second vote on the remuneration report occurs - sections 250U, 250V, 250W and 250X.

This proposal gives rise to a number of issues:

- First, where less than 50% of votes are cast against the remuneration report, the requirement for a spill resolution disregards the views of the majority of shareholders who voted in favour of the remuneration report.

  If the requirement to put a spill resolution is to be retained, then it should only be triggered by two consecutive votes of more than 50% against the remuneration report.

- Second, there are already procedures in place under the Corporations Act by which shareholders can call for a board spill (eg s249D). The proposed process is unnecessary, and places undue focus on remuneration issues rather than the business, financial position and governance of the company.

- Third, the requirement to put a spill resolution at the same meeting at which the second vote on the remuneration report occurs will mean that shareholders who cast votes by proxy are being asked to vote on the spill resolution before they have been given the essential information to enable them to make an informed vote - ie the result of the second vote on the remuneration report. The vast majority of shareholder votes at listed company meetings are made by proxy, before the meeting, and those shareholders will not know the outcome of the second remuneration vote.

  This breaches a fundamental principle of company law, that shareholder votes are not valid if shareholders have not been given all material information. For example, a shareholder may well decide to vote against the spill resolution if the remuneration vote is 25% against, but to vote for the spill resolution if the remuneration vote is 90% against. Under this proposal, a shareholder will not have the information necessary to make that decision.

  We submit that a preferable process would be to require a spill resolution to be put at the following AGM (ie the third AGM) if there has been a 50% vote against the remuneration resolution at two consecutive AGM's. Affected directors would be required to resign, but could stand for re-election, at the third AGM if the spill resolution is passed.

- Fourth, we submit that the forced continuation of directors in office even if they have been voted out, in order to satisfy a minimum number requirement, is unnecessary (section 250X). That risk already exists when companies vote to remove directors, and there are procedures in place that empower the company to appoint directors to fill vacancies to address the issue.

Remuneration consultants

The Bill proposes a number of measures in relation to remuneration consultants and their advice concerning key management personnel (KMP) - sections 206K, 206L and 300A.

We have no objection to the fundamental issue, that companies that obtain advice on remuneration matters relating to KMP should disclose the general nature of the advice they accept, and the fees paid for that advice, in the remuneration report.

However, we oppose the following aspects of the proposals in the Bill:

- The proposal that remuneration advice can only be obtained by non-executive directors, and that contracts for retaining remuneration advice can only be signed by non-executive directors, is unduly restrictive and impractical.

  Non-executive directors are not involved in the day-to-day management of listed companies. It is not their role, and in many cases they will not be able to discharge it.

The very broad definition of remuneration consultants and remuneration advice means that the proposed provisions would be of wide application. They would not be limited to advice on the "package" of a particular individual manager. Rather, the provisions would extend to advice about broader issues such as superannuation, bonus plans, income deferral policies, employee share plans, termination and redundancy policies, and taxation issues, that relate to a large number of employees, including KMP. The law should not require non-executive directors to deal with advice on those issues, to the exclusion of the chief executive and the human resources management team who have the expertise to do so.

This is particularly so for companies that operate in multiple jurisdictions, where local advice is required and non-executive directors are not present.

For these reasons, we believe that these requirements are misconceived and should not be implemented. However, we would have no objection to a requirement for all remuneration advice concerning KMP to be copied to the Chairman or senior non-executive director of the company, and (as noted above) for the general nature of advice accepted by the company, and the fees paid for that advice, to be disclosed in the annual remuneration report.

- It should not be an offence for a company employee to obtain remuneration advice that relates to KMP, and nor should it be an offence for a remuneration consultant to give such advice to a company employee. For example, there is no justification for prohibiting a CEO from obtaining advice about the remuneration of the executives who report to the CEO, and there is certainly no justification for making it an offence to do so. Nor is there any justification for making it an offence for an HR executive to obtain advice about employee share plans, superannuation, and taxation issues that may affect KMP.

- Finally, there does not seem to be any justification for disclosing the nature of advice and the fees paid for advice received from "remuneration consultants" that does not relate to remuneration of KMP - section 300A(h)(vi) and (vii).

  The definition of "remuneration consultant" is wide and will apply to the company's lawyers and accountants (including firms like Mallesons) who give advice about a broad range of matters, not just remuneration advice. The proposals would require our clients to disclose the nature and fees payable for all advice given by the firm, including advice given about matters entirely unrelated to remuneration, irrespective of whether that advice is confidential or privileged. There is presently no obligation on companies to disclose that information at present, and we submit that it is clearly not in the company's interests to do so.

These aspects of the proposals concerning remuneration consultants should be removed.

Voting by proxies.

The Bill picks up recommendations by the Productivity Commission relating to voting by proxies, but in a way that applies to all votes, not just votes on remuneration.

Our main objection to these provisions is that they effectively make it obligatory for a person appointed as a proxy to attend and vote at the relevant shareholders meeting.

This is completely impracticable, and unjustified. Voting at shareholders meetings is not compulsory. It should not be compulsory for a person appointed as a proxy, which can occur without the person's consent, to attend and vote at company meetings.

The main issue here concerns the voting of proxies given to the Chairman of the meeting, which has already been addressed in section 250A(4) of the Act. No further amendment of that section is necessary.

Yours sincerely

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