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General Manager
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: corporations.amendments@treasury.gov.au

Dear Sir / Madam

SUBMISSION

We refer to the Exposure Draft – *Corporations Legislation Amendment (Remuneration Disclosures and Other Measures) Bill 2012 (Bill)* and the associated Explanatory Memorandum (**EM**) released by the Parliamentary Secretary to the Treasury on Friday, 14 December 2012, and make this Submission in relation to those draft amendments.

We have only commented on four aspects of the draft Bill which we believe require amendment and/or clarification – specifically, the proposed disclosures regarding ‘remuneration outcomes’ and ‘termination benefits’.

1 DISCLOSURE OF REMUNERATION OUTCOMES

We refer to draft section 300A(1)(ca), which will require that details of past, current and future remuneration be disclosed for each member of the KMP.

1.1 Remuneration ‘paid’

The draft provision refers to remuneration that was ‘paid’ to the person during the year. However, no guidance is given as to the meaning of the term ‘paid’.

As you would no doubt be aware, most companies provide some form of equity compensation as part of their remuneration packages. Equity compensation is, of course, not *paid* to an executive – the shares, options or rights that are granted to executives are usually subject to either vesting conditions (which are normally performance or service based conditions that must be satisfied prior to an executive becoming entitled to the resultant share) and/or restrictions on disposal for a period of time.

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In our view, it would be preferable to clarify when disclosure of equity instruments as having been 'paid' (to use the term in the draft legislation) would be expected. The Government's intent is to require disclosure of 'take home' or 'realised' pay (paragraph 2.32 of the EM). If so, the relevant time for showing the value of equity instruments should be when the executive becomes entitled to deal freely with the share, option or right (ie when the relevant instrument has vested and is free of trading restrictions).

In addition, the ordinary sense of the term 'paid' suggests that payment would have to occur before disclosure is required under this provision. This is inconsistent with the current disclosure requirements as set out in the Accounting Standards and the Corporations Act which require disclosure of amounts *paid* or *payable*. As an example, an annual cash bonus that is *earned* in the current year for performance during the year is often not physically *paid* until the following year (usually after the directors sign off on the financial statements for the period, as the company's financial results normally form the basis for a large part of the bonus). Under the current disclosure regime, as the entitlement to the bonus arises in the current year (such that it is an amount *payable*) it is disclosed in the same year, in the same report as the relevant company performance – thereby demonstrating the link between executive reward and how the company has performed.

However, under the draft provision, where a bonus is not physically paid until the following year, the current year Annual Report will contain all of the information relevant to a shareholder regarding company performance, while the bonus to which that performance relates would not be disclosed until the following year. To compound the confusion, the previous year's bonus (granted in relation to the previous year's performance) but which is only *paid* during the current financial year, would be disclosed as 'past' remuneration paid during the year, resulting in the bonus shown as paid in the current year report bearing no relationship to the company performance reported upon that year.

In our view, the draft provisions could potentially confuse shareholders by requiring amounts earned in relation to past year performance to be disclosed in the current year (and amounts earned in relation to current year performance to be disclosed in future years). This not only impedes the usefulness and understanding of the disclosures, but is likely to mislead shareholders. It also appears to be inconsistent with the intention of the provisions.

This result (which we assume was not the Government's intent) is counterintuitive, and is also inconsistent with the existing disclosure framework and market practice. It also makes it difficult for shareholders to determine how remuneration outcomes link to company performance.

To avoid this result, the requirement should be amended to refer to remuneration to which key management personnel (**KMP**) become *entitled* in respect of the current financial year. 'Entitled' can then be defined as amounts 'payable' (if in cash or in kind) and as the value of equity instruments granted as remuneration that the executive becomes able to deal with (ie that vests and is free of restrictions) during the current year.

On this basis we submit:

<p>Submission 1:</p>	<p>In draft section 300A(1)(ca) in each of subparagraphs (i) and (ii), delete the words '<i>paid to the person</i>' and insert the words '<i>to which the person becomes entitled</i>'.</p> <p>In draft section 300(1)(ca)(iii), delete the words '<i>that is not to be paid to the person</i>' and insert the words '<i>to which the person does not become entitled</i>'. (however see our Submission 2, below).</p>
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	At the end of section 300A, add the following subsection:
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	<i>'(6) For the purposes of paragraph (1)(ca), a person is entitled to an amount of remuneration if the amount is due and payable to the person, or, if the amount relates to underlying securities, the person is free to dispose of the underlying securities.'</i>
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1.2 Future remuneration

We also note the likelihood for confusion with regard to the required disclosures regarding 'future' pay. The nature of future pay is that it is as yet 'unearned' or 'unrealised' – in other words, it is subject to further conditions which may or may not be satisfied. It appears this is inconsistent with the Government's intention for companies to report on 'realised pay' for KMP (as noted in paragraph 2.32 of the EM).

Further, the value of equity instruments (which represent the majority of future remuneration) ultimately depends upon the market value of the company's shares at the point the executive becomes *entitled* to the equity. Accordingly, the current disclosure regime requires the 'accounting value' of the award on the grant date (eg using a fair value calculation) to be shown, even though it may bear little or no resemblance to the actual 'remuneration value' the executive receives in the future. In our experience, this disclosure has led to a lot of confusion for shareholders, with media often reporting the 'accounting value' as part of the 'take home pay' of executives.

In our view, the proposed requirement to assign an artificial and potentially misleading remuneration value to unvested equity instruments as part of the 'realised pay' table under 'future' pay should be removed. In our view, the current requirements relating to the disclosure of grants made during the year (as required under Regulation 2M.2.03 of the Corporations Regulations) are sufficient.

Submission 2:	In draft section 300A(1)(ca), delete subparagraph (iii).
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Alternatively, we submit that the current requirements to disclose the number of equity instruments granted during the year and their key terms (see for example Item 12 of Regulation 2M.3.03(1) of the Corporations Regulations) provide shareholders with sufficient details of 'future' pay and could be repeated under remuneration outcomes if considered necessary.

2 DISCLOSURE OF TERMINATION BENEFITS

In our view, there are two issues with the current drafting which require clarification.

2.1 Departing KMP

We refer to draft section 300A(1)(ea), which requires disclosure of 'benefits **to be given** in connection with a person's retirement from an office or position of employment' for **each member** of the company's KMP. As drafted, this section appears to technically require disclosure of all entitlements on termination for all of the KMP, not just KMP level executives who depart during the financial year.

It appears from the EM that the Government's intention is to limit disclosure to payments made (or benefits given) to departing executives only. We specifically refer to paragraph 2.21 of the EM, which refers to the additional requirement to disclose detail of amounts paid 'to all KMP *upon their retirement or termination*' (our emphasis).

On this basis we submit:

Submission 3:	At the end of draft paragraph 300A(1)(ea) which currently reads 'for each person referred to in paragraph (c)', insert the words ' <i>that retired from an office or position during the year</i> '.
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2.2 Disclosure and meaning of 'benefits'

We refer to paragraph 2.23 of the EM, which refers to the intention behind draft subparagraph 300A(1)(ea)(i) to cover details of 'any benefits paid that reflect statutory and other accumulated payments (for instance, annual and long service leave and superannuation payments)'.

It appears that these disclosures overlap in some part with the new 'past, present and future' remuneration disclosure requirements, as the benefits contemplated in this section will largely be shown as 'past' remuneration payable in the current year (eg payments made in respect to accrued annual and long service leave). This is likely to confuse shareholders.

On this basis we are of the view that paragraphs (i) and (ii) of draft section 300A(1)(ea) are not necessary and, accordingly, we submit that it is sufficient to include paragraph (iii) of that draft section as an additional disclosure.

Submission 4:	In draft section 300A(1)(ea), delete paragraphs (i) and (ii) and renumber paragraph (iii) accordingly.
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We also refer to draft section 300A(5), which provides that for the purposes of paragraph (1)(ea), a reference to a '**benefit** given in connection with a person's retirement from an office or position of employment' has the same meaning as in section 200A.

We note that while section 200A sets out the general rules for determining when a benefit is given in connection with retirement from office, the meaning of 'benefit' is set out in section 200AB. Section 200AB, when read together with the relevant Corporations Regulations, essentially deems certain items to be 'benefits' and *expressly excludes* others for the purposes of the termination payments provisions. For example, Regulation 2D.2.02(2) of the Corporations Regulations expressly sets out items that are **not** 'benefits' for the purposes of the termination payments provisions (such as accrued benefits payable under the law – eg annual leave, long service leave or sick leave).

We then refer to paragraph 2.23 of the EM, which refers to the intention behind draft subparagraph 300A(1)(ea)(i) to cover details of 'any benefits paid that reflect statutory and other accumulated payments (for instance, annual and long service leave and superannuation payments)'.

Confusion appears to have arisen from the attempt to cross reference the definition of 'benefits' from the termination payments provisions of the Corporations Act.

Further, on the basis that certain statutory and other accumulated payments (such as annual and long service leave) are expressly *excluded* from the definition of the benefit for the purposes of the termination payments provisions, and therefore do not count towards the statutory limit, in our view this disclosure will further confuse shareholders when considering payments in the context of the limit.

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Please contact Erin O'Connor on (03) 8611 1317 or me if you have any queries or would like us to elaborate on any of the comments in this Submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Walmsley', with a stylized flourish at the end.

Stephen Walmsley

Managing Director

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