

EXPOSURE DRAFT

2010

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT

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

No. , 2011

(Treasury)

**A Bill for an Act to amend the law relating to
corporations, and for related purposes**

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1 **A Bill for an Act to amend the law relating to**
2 **corporations, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Corporations Amendment (Improving*
6 *Accountability on Director and Executive Remuneration) Act 2011.*

7 **2 Commencement**

8 This Act commences on 1 July 2011.

9 **3 Schedule(s)**

10 Each Act that is specified in a Schedule to this Act is amended or
11 repealed as set out in the applicable items in the Schedule

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concerned, and any other item in a Schedule to this Act has effect according to its terms.

2 *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011* No. , 2011

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Amendment of the Corporations Act 2001 **Schedule 1**
Remuneration **Part 1**

1 **Schedule 1—Amendment of the Corporations**
2 **Act 2001**

3 **Part 1—Remuneration**

4 **1 Section 9**

5 Insert:

6 *closely related party* of a member of the key management
7 personnel for an entity means:

- 8 (a) a spouse or child of the member; or
9 (b) a child of the member's spouse; or
10 (c) a dependant of the member or of the member's spouse; or
11 (d) anyone else who is one of the member's family and may be
12 expected to influence the member, or be influenced by the
13 member, in the member's dealings with the entity; or
14 (e) a company the member controls; or
15 (f) a person prescribed by the regulations for the purposes of this
16 paragraph.

17 **2 Section 9**

18 Insert:

19 *key management personnel* for an entity has the same meaning as
20 in the accounting standards.

21 **3 Section 9**

22 Insert:

23 *remuneration consultant* means a person:

- 24 (a) who, under a contract for services with a company, provides
25 advice relating to the nature and amount or value of
26 remuneration for one or more members of the key
27 management personnel for the company; and
28 (b) who is not an officer or employee of the company.

29 **4 After section 111AN**

30 Insert:

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Schedule 1 Amendment of the Corporations Act 2001

Part 1 Remuneration

1 **111ANA Requirements relating to advice on remuneration of key**
2 **management personnel**

3 There are special requirements in Part 2D.8 relating to advice from
4 remuneration consultants on remuneration of key management
5 personnel for disclosing entities that are companies.

6 **5 At the end of Chapter 2D**

7 Add:

8 **Part 2D.7—Ban on hedging remuneration of key**
9 **management personnel**
10

11 **206J No hedging of remuneration of key management personnel**

- 12 (1) A member of the key management personnel for a company, or a
13 closely related party of such a member, must not enter into an
14 arrangement (with anyone) that has the effect of limiting the
15 exposure of the member to risk relating to an element of the
16 member's remuneration that depends on the satisfaction of a
17 performance condition.
- 18 (2) In determining for the purposes of this section whether an
19 arrangement has the effect of limiting the exposure of a member of
20 the key management personnel for a company to risk relating to an
21 element of the member's remuneration that depends on the
22 satisfaction of a performance condition, regard is to be had to the
23 regulations (if any) made for the purposes of this subsection.
- 24 (3) A member of the key management personnel for a company who
25 contravenes subsection (1) commits an offence.
- 26 (4) An offence against subsection (3) is an offence of strict liability.
27 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 28 (5) A person commits an offence if:
29 (a) the person is a member of the key management personnel for
30 a company; and
31 (b) a closely related party of the member contravenes
32 subsection (1) in relation to the member; and
-

4 Corporations Amendment (Improving Accountability on Director and Executive
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Amendment of the Corporations Act 2001 **Schedule 1**
Remuneration **Part 1**

- 1 (c) the person is reckless as to the contravention.
- 2 (6) A closely related party of a member of the key management
3 personnel for a company commits an offence if the party
4 intentionally contravenes subsection (1) in relation to the member.

5 **Part 2D.8—Advice on remunerating key** 6 **management personnel for disclosing** 7 **entities** 8

9 **206K Engaging remuneration consultants to provide advice**

- 10 (1) This section applies to a contract:
11 (a) that is for the provision of advice relating to the nature and
12 amount or value of remuneration for one or more members of
13 the key management personnel for a company that is a
14 disclosing entity; and
15 (b) that is between the company and a person who, by providing
16 the advice under the contract, will be a remuneration
17 consultant.
- 18 (2) A person must not execute the contract for the company if the
19 person:
20 (a) is not a director of the company; or
21 (b) is an executive director of the company.
- 22 (3) An offence based on subsection (2) is an offence of strict liability.
23 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 24 (4) A contravention of subsection (2) does not affect the validity of the
25 contract.

26 **206L Advice from remuneration consultants**

- 27 (1) This section applies to advice from a remuneration consultant
28 relating to the nature and amount or value of remuneration for one
29 or more members of the key management personnel for a company
30 that is a disclosing entity.

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Schedule 1 Amendment of the Corporations Act 2001

Part 1 Remuneration

- 1 (2) The remuneration consultant must give the advice directly to either
2 or both of the following:
3 (a) the directors of the company;
4 (b) the members of a committee (the *remuneration committee*)
5 that:
6 (i) is a committee of the board of directors of the company;
7 and
8 (ii) has functions relating to the remuneration of key
9 management personnel for the company.
- 10 (3) However, the remuneration consultant must not give the advice to
11 a person who is an executive director of the company unless all the
12 directors of the company are executive directors of the company.
- 13 (4) The remuneration consultant must not give the advice to a person
14 who is neither a director of the company nor a member of the
15 remuneration committee.
- 16 (5) If the remuneration consultant contravenes subsection (2) the
17 remuneration consultant is not guilty of an offence. This does not
18 prevent the remuneration consultant from being guilty of an
19 offence for contravening subsection (3) or (4).
- 20 Note: Subsection 1311(1) makes it an offence for the remuneration
21 consultant to contravene subsection (3) or (4).
- 22 (6) An offence based on subsection (3) or (4) is an offence of strict
23 liability.
- 24 Note: For strict liability, see section 6.1 of the *Criminal Code*.

6 After subsection 249L(2)

- 25 Insert:
26
- 27 (2A) Also, if subsection 250V(1) could apply as a result of a vote on the
28 resolution referred to in subsection 250R(2) at the AGM of a listed
29 company, the notice of the AGM must:
30 (a) explain the circumstances in which subsection 250V(1)
31 would apply; and
32 (b) inform members that the resolution described in subsection
33 250V(1) as the spill resolution will be put at the AGM if that
34 subsection applies.

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Amendment of the Corporations Act 2001 **Schedule 1**
Remuneration **Part 1**

7 After subsection 250A(5A)

Insert:

(5B) A person appointed as a proxy must not vote, on the basis of that appointment, on a resolution connected directly or indirectly with the remuneration of a member of the key management personnel for the company or, if the company is part of a consolidated entity, for the entity if:

(a) the person is either:

(i) a member of the key management personnel for the company or, if the company is part of a consolidated entity, for the entity; or

(ii) a closely related party of a member of the key management personnel for the company or, if the company is part of a consolidated entity, for the entity; and

(b) the appointment does not specify the way the proxy is to vote on the resolution.

Note 1: Examples of resolutions connected directly or indirectly with the remuneration of a member of the key management personnel for the company or entity include:

(a) resolutions that must be put to the vote under subsection 250R(2) (about a resolution that the remuneration report for a listed company be adopted); and

(b) resolutions that must be put to the vote under subsection 250V(1) (about fresh elections for directors at meetings arising from concerns about remuneration reports); and

(c) resolutions determining directors' remuneration as mentioned in section 202A; and

(d) resolutions for the purposes of Chapter 2E (about public companies and entities they control giving financial benefits to related parties of public companies) affecting directors' remuneration.

Note 2: Subsections 250R(4) and 250V(2) also prevent the person from voting on the resolution if it is a resolution that must be put to the vote under subsection 250R(2) or 250V(1).

Note 3: Section 224 may also prohibit the person from voting on the resolution if it is a resolution for the purposes of Chapter 2E.

(5C) ASIC may by writing declare that:

(a) subsection (5B) does not apply to a specified resolution; or

(b) subsection (5B) does not prevent the casting of a vote, on a specified resolution, by or on behalf of a specified entity;

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Schedule 1 Amendment of the Corporations Act 2001

Part 1 Remuneration

1 but may do so only if satisfied that the declaration will not cause
2 unfair prejudice to the interests of any member of the company.
3 The declaration has effect accordingly. The declaration is not a
4 legislative instrument.

5 (5D) A vote cast in contravention of subsection (5B) is taken not to have
6 been cast. This subsection has effect for the purposes of this Act
7 except subsection (5B) and subsections 250R(4) and (7), and
8 section 1311 and Schedule 3 so far as they relate to any of those
9 subsections.

10 Note: This means the vote is not counted in working out a percentage of
11 votes cast or whether the resolution is passed, and does not affect the
12 validity of the resolution.

13 **8 At the end of section 250R**

14 Add:

15 (4) A vote on the resolution must not be cast (in any capacity) by or on
16 behalf of either of the following persons:

- 17 (a) a member of the key management personnel details of whose
18 remuneration are included in the remuneration report;
19 (b) a closely related party of such a member.

20 (5) However, a person described in subsection (4) may cast a vote on
21 the resolution if:

- 22 (a) the person does so as a proxy appointed by writing that
23 specifies how the proxy is to vote on the proposed resolution;
24 and
25 (b) the vote is not cast on behalf of a person described in
26 subsection (4).

27 (6) ASIC may by writing declare that:

- 28 (a) subsection (4) does not apply to a specified resolution; or
29 (b) subsection (4) does not prevent the casting of a vote, on a
30 specified resolution, by or on behalf of a specified entity;
31 but may do so only if satisfied that the declaration will not cause
32 unfair prejudice to the interests of any member of the listed
33 company. The declaration has effect accordingly. The declaration
34 is not a legislative instrument.

35 (7) A person described in subsection (4) contravenes this subsection if
36 a vote on the resolution is cast by or on behalf of the person in

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Amendment of the Corporations Act 2001 **Schedule 1**
Remuneration **Part 1**

1 contravention of that subsection (whether or not the resolution is
2 passed).

3 (8) A vote cast in contravention of subsection (4) is taken not to have
4 been cast. This subsection has effect for the purposes of this Act
5 except subsections (4) and (7) and subsection 250A(5B), and
6 section 1311 and Schedule 3 so far as they relate to any of those
7 subsections.

8 Note: This means the vote is not counted in working out a percentage of
9 votes cast or whether the resolution is passed, and does not affect the
10 validity of the resolution.

11 (9) For the purposes of this section, a vote is cast on behalf of a person
12 if, and only if, it is cast:

13 (a) as proxy for the person; or

14 (b) otherwise on behalf of the person; or

15 (c) in respect of a share in respect of which the person has:

16 (i) power to vote; or

17 (ii) power to exercise, or control the exercise of, a right to
18 vote.

19 (10) Subject to Part 1.1A, subsections (4), (5), (6), (7), (8) and (9) have
20 effect despite:

21 (a) anything else in:

22 (i) this Act; or

23 (ii) any other law (including the general law) of a State or
24 Territory; and

25 (b) anything in the company's constitution.

26 Note: The following heading to subsection 250R(2) is inserted "*Advisory resolution for*
27 *adoption of remuneration report*".

28 **9 At the end of Part 2G.2**

29 Add:

30 **Division 9—Meetings arising from concerns about** 31 **remuneration reports**

32 **250U Application**

33 This Division applies in relation to a listed company if:

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Part 1 Remuneration

- 1 (a) at an AGM (the *later AGM*) of the company, at least 25% of
2 the votes cast on a resolution that the remuneration report be
3 adopted were against adoption of the report; and
4 (b) at the immediately preceding AGM (the *earlier AGM*) of the
5 company, at least 25% of the votes cast on a resolution that
6 the remuneration report be adopted were against adoption of
7 the report; and
8 (c) a resolution was not put to the vote at the earlier AGM under
9 an earlier application of section 250V.

10 Note: Subsection 250R(2) requires a resolution to adopt a remuneration
11 report for a listed company to be put to the vote at the company's
12 AGM.

13 **250V Resolution to hold fresh elections for directors at special** 14 **meeting to be put to vote at AGM**

- 15 (1) At the later AGM, there must be put to the vote a resolution (the
16 *spill resolution*) that:
17 (a) another meeting (the *spill meeting*) of the company's
18 members be held within 90 days; and
19 (b) all the company's directors who:
20 (i) were directors of the company when the resolution to
21 make the directors' report considered at the later AGM
22 was passed; and
23 (ii) are not a managing director of the company who may,
24 in accordance with the listing rules for a prescribed
25 financial market in whose official list the company is
26 included, continue to hold office indefinitely without
27 being re-elected to the office;
28 cease to hold office immediately before the spill meeting; and
29 (c) resolutions to appoint persons to offices vacated immediately
30 before the spill meeting be put to the vote at the spill
31 meeting.
- 32 (2) Subsections 250R(4), (5), (6), (7), (8), (9) and (10), and other
33 provisions of this Act so far as they relate to any of those
34 subsections, apply in relation to the spill resolution in the same
35 way as they apply in relation to a resolution that a remuneration
36 report be adopted.

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Amendment of the Corporations Act 2001 **Schedule 1**
Remuneration **Part 1**

- 1 (3) To avoid doubt, section 203D does not apply in relation to the spill
2 resolution.

3 **250W Consequences of spill resolution being passed**

- 4 (1) This section applies if the spill resolution is passed.
5 (2) The company must hold the spill meeting within 90 days after the
6 spill resolution was passed.

7 Note: Division 3 deals with giving notice of the spill meeting. Division 5
8 contains rules relevant to holding the spill meeting.

- 9 (3) All the company's directors described in paragraph 250V(1)(b)
10 cease to hold office immediately before the spill meeting. This
11 subsection has effect despite anything else in this Act and the
12 company's constitution.
13 (4) The company need not hold the spill meeting within 90 days after
14 the spill resolution was passed if, before the end of that period:
15 (a) none of the company's directors described in paragraph
16 250V(1)(b) remain as directors of the company; and
17 (b) all of them have been replaced by the appointment of other
18 persons as directors of the company.
19 Disregard subsection (3) in working out whether the condition in
20 paragraph (a) is met.

21 *Consequences of failure to hold spill meeting in time*

- 22 (5) If the company does not hold the spill meeting within 90 days after
23 the spill resolution was passed, each person who is a director of the
24 company at the end of those 90 days commits an offence.

25 Note: A person who is a director at the end of those 90 days may commit an
26 offence even if he or she was not a director when the spill motion was
27 passed.

- 28 (6) An offence against subsection (5) is an offence of strict liability.

29 Note: For strict liability, see section 6.1 of the *Criminal Code*.

- 30 (7) Subsection (5) does not apply if the company need not hold the
31 spill meeting because of subsection (4).

32 Note: A defendant bears an evidential burden in relation to the matter in
33 subsection (7): see subsection 13.3(3) of the *Criminal Code*.

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Schedule 1 Amendment of the Corporations Act 2001

Part 1 Remuneration

- 1 (8) Subsection (5) does not apply to a person who was not a director of
2 the company at any time during the period:
3 (a) starting when the spill resolution was passed; and
4 (b) ending at the last time notice of the spill meeting could have
5 been given to hold the spill meeting within 90 days after the
6 spill resolution was passed and comply with section 249HA
7 (Amount of notice of meetings of listed company).

8 Note: A defendant bears an evidential burden in relation to the matter in
9 subsection (8): see subsection 13.3(3) of the *Criminal Code*.

10 **250X Ensuring there are at least 3 directors after spill meeting**

- 11 (1) This section applies if there would be fewer than 3 directors of the
12 company immediately after the spill meeting apart from this
13 section.

14 Note: Subsection 201A(2) requires the company to have at least 3 directors.

- 15 (2) Enough directors to ensure that the company has 3 directors
16 immediately after the spill meeting are taken to have been
17 appointed, by resolution passed at the spill meeting, from the
18 persons who:

- 19 (a) gave the company signed consents to act as directors of the
20 company in anticipation of being appointed by such a
21 resolution; and
22 (b) were not appointed as directors by such a resolution apart
23 from this section.

24 Note: The number of directors taken under subsection (2) to have been
25 appointed is the difference between 3 and the number of directors
26 holding office immediately after the spill meeting apart from this
27 section.

- 28 (3) The persons taken to have been appointed are those with the
29 highest proportions of votes favouring their appointment cast at the
30 spill meeting on the resolution for their appointment (even if less
31 than half the votes cast on the resolution were in favour of their
32 appointment).

33 Example: Suppose that, under subsection (2), 2 directors are taken to have been
34 appointed, and the proportions of votes favouring appointment were
35 50% for Jean, 40% for Karl and 30% for Lionel. Jean and Karl would
36 both be taken to have been appointed directors, but Lionel would not.

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Amendment of the Corporations Act 2001 **Schedule 1**
Remuneration **Part 1**

1 (4) For the purposes of this section, if 2 or more persons have the same
2 proportion of votes favouring their appointment, the one of those
3 persons chosen by the director or directors who hold office apart
4 from this subsection is taken to have a higher proportion than the
5 rest of those persons.

6 Note: A director who holds office apart from subsection (4) could make a
7 series of choices if 3 or more persons all have the same proportion of
8 votes favouring their appointment and it is necessary to work out
9 which 2 of those persons are taken to be appointed as directors.

10 (5) If a person is taken to have been appointed because of a choice
11 under subsection (4), the company must confirm the appointment
12 by resolution at the company's next AGM. If the appointment is
13 not confirmed, the person ceases to be a director of the company at
14 the end of the AGM.

15 (6) This section has effect despite anything else in this Act and the
16 company's constitution.

17 **250Y Term of office of director reappointed at spill meeting**

18 If a director who ceased to hold office immediately before the spill
19 meeting is appointed as director by resolution passed at the spill
20 meeting, his or her term of office runs as if the cessation and
21 appointment had not happened.

22 Note: This section is subject to subsection 250X(5).

23 **10 Paragraph 300A(1)(a)**

24 Repeal the paragraph, substitute:

25 (a) discussion of board policy for determining, or in relation to,
26 the nature and amount (or value, as appropriate) of
27 remuneration of the key management personnel for:

28 (i) the company, if consolidated financial statements are
29 not required; or

30 (ii) the consolidated entity, if consolidated financial
31 statements are required; and

32 **11 Subparagraph 300A(1)(c)(i)**

33 Omit "and", substitute "or".

34 **12 Subparagraphs 300A(1)(c)(iii) and (iv)**

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Schedule 1 Amendment of the Corporations Act 2001

Part 1 Remuneration

1 Repeal the subparagraphs.

2 **13 Paragraph 300A(1)(da)**

3 Repeal the paragraph.

4 **14 Paragraph 300A(1)(f)**

5 Omit “regulations.”, substitute “regulations; and”.

6 **15 After paragraph 300A(1)(f)**

7 Insert:

8 (g) if:

9 (i) at the company’s most recent AGM, comments were
10 made on the remuneration report that was considered at
11 that AGM; and

12 (ii) when a resolution that the remuneration report for the
13 last financial year be adopted was put to the vote at the
14 company’s most recent AGM, at least 25% of the votes
15 cast were against adoption of that report;

16 an explanation of whether those comments have been taken
17 into account and of either how they have been taken into
18 account or why they have not been taken into account; and

19 (h) if a remuneration consultant provided advice on the
20 remuneration of any of the key management personnel for the
21 company for the financial year:

22 (i) the name of the consultant; and

23 (ii) the name of each director who executed the contract
24 under which the consultant was engaged; and

25 (iii) the name of each person to whom the consultant directly
26 gave the advice; and

27 (iv) a summary of the nature of the advice and the principles
28 on which it was prepared; and

29 (v) the amount and nature of consideration provided under
30 the contract for the advice; and

31 (vi) the nature of any other work the consultant did during
32 the financial year for the company; and

33 (vii) the amount and nature of consideration for any work
34 described in subparagraph (vi).

35 **16 Subsection 300A(1)**

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Remuneration **Part 1**

1 Omit the second sentence.

2 **17 Subsections 300A(1AAA) and (1B)**

3 Repeal the subsections.

4 **18 Schedule 3 (after table item 49)**

5 Insert:

6

49A	Subsections 206J(3), (5) and (6)	60 penalty units.
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49B	Subsection 206K(2)	60 penalty units.
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49C	Subsections 206L(3) and (4)	60 penalty units.
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7 **19 Schedule 3 (table items 65 and 65A)**

8 Repeal the items, substitute:

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64A	Subsections 249L(1), (2) and (2A)	5 penalty units.
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65	Section 249Z	5 penalty units.
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10 **20 Schedule 3 (after table item 66)**

11 Insert:

12

66A	Subsection 250A(5B)	200 penalty units or imprisonment for 5 years, or both.
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13 **21 Schedule 3 (table item 68A) (the table item 68A inserted by**
14 **item 16 of Schedule 5 to the *Corporate Law Economic***
15 ***Reform Program (Audit Reform and Corporate***
16 ***Disclosure) Act 2004)***

17 Repeal the item.

18 **22 Schedule 3 (before table item 68B)**

19 Insert:

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68AA	Subsection 250R(2)	5 penalty units.
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Schedule 1 Amendment of the Corporations Act 2001

Part 1 Remuneration

68AB	Subsection 250R(7)	200 penalty units or imprisonment for 5 years, or both.
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1 **23 Schedule 3 (after table item 70)**

2 Insert:

3

70A	Subsection 250W(5)	10 penalty units.
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Amendment of the Corporations Act 2001 **Schedule 1**
Limits on number of directors **Part 2**

1 **Part 2—Limits on number of directors**

2 **24 Section 9**

3 Insert:

4 *board limit* means a limit described in section 201N.

5 **25 Section 9**

6 Insert:

7 *board limit resolution* means a resolution described in paragraph
8 201P(1)(a).

9 **26 Before section 201A**

10 Insert:

11 **Subdivision A—General rules**

12 **27 At the end of Division 1 of Part 2D.3**

13 Add:

14 **Subdivision B—Limits on numbers of directors of public**
15 **companies**

16 **201N Application of Subdivision**

17 This Subdivision applies in relation to a public company if its
18 constitution allows its directors to set a limit (a *board limit*) whose
19 effect is to restrict the number of directors of the company to a
20 number less than the maximum number of directors specified in the
21 constitution.

22 Note: This Subdivision applies however the constitution or board limit is
23 expressed.

24 **201P Directors must not set board limit unless proposed limit has**
25 **been approved by general meeting**

26 (1) The directors must not set a board limit unless:

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Schedule 1 Amendment of the Corporations Act 2001

Part 2 Limits on number of directors

- 1 (a) a resolution (a *board limit resolution*) approving the proposal
2 to set the limit has been passed by a general meeting of the
3 company; and
4 (b) the notice of the meeting set out an intention to propose the
5 board limit resolution and stated the resolution; and
6 (c) the notice was accompanied by a statement explaining the
7 resolution and meeting the requirements in section 201Q.

8 Note 1: Subsection 249L(3) requires information in the notice of meeting to be
9 presented clearly, concisely and effectively.

10 Note 2: Section 201U specifies the consequences of a contravention of
11 subsection (1) of this section. Also, section 1324 provides for
12 injunctions to enforce subsection (1) of this section.

13 (2) A board limit resolution has effect until immediately before the
14 start of the first AGM of the company after the general meeting by
15 which the resolution was passed.

16 (3) A board limit resolution does not prevent the appointment of a
17 person as a director of the company by the other directors of the
18 company between general meetings of the company.

19 (4) However, if a person is appointed by the other directors as a
20 director of the company while a board limit resolution has effect,
21 the company must confirm the appointment by resolution at the
22 company's next AGM. If the appointment is not confirmed, the
23 person ceases to be a director of the company at the end of the
24 AGM.

25 (5) Subsections (1), (2) and (4) have effect despite the company's
26 constitution.

27 Note: Although subsection (4) is like subsection 201H(3) in many ways, it is
28 not a replaceable rule like subsection 201H(3).

29 **201Q Requirements for explanatory statement to members**

30 The statement accompanying the notice of a general meeting
31 stating an intention to propose the board limit resolution must be in
32 writing and set out clearly, concisely and effectively:

- 33 (a) in relation to each director of the company:
34 (i) if the director wanted to make a recommendation to
35 members about the proposed board limit resolution—the
36 recommendation and his or her reasons for it; or
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Amendment of the Corporations Act 2001 **Schedule 1**
Limits on number of directors **Part 2**

- 1 (ii) if not—why not; or
2 (iii) if the director was not available to consider the
3 proposed board limit resolution—why not; and
4 (b) all other information that:
5 (i) is reasonably required by members in order to decide
6 whether or not it is in the company's interests to pass
7 the proposed board limit resolution; and
8 (ii) is known to the company or to any of its directors.

9 Note: Sections 180 and 181 require an officer of a corporation to act
10 honestly and to exercise care and diligence. These duties extend to
11 preparing a statement under this section. Section 1309 creates offences
12 where false and misleading material relating to a corporation's affairs
13 is made available or furnished to members.

14 **201R Records of voting on board limit resolution if poll demanded**

- 15 (1) This section applies if a poll is duly demanded on the question that
16 the board limit resolution be passed.
- 17 (2) For each member of the company who votes on the poll in person,
18 the company must record in writing:
19 (a) the member's name; and
20 (b) how many votes the member casts for the resolution and how
21 many against.
- 22 (3) For each member of the company who votes on the poll by proxy,
23 or by a representative authorised under section 250D, the company
24 must record in writing:
25 (a) the member's name; and
26 (b) in relation to each person who votes as proxy, or as such a
27 representative, for the member:
28 (i) the person's name; and
29 (ii) how many votes the person casts on the resolution as
30 proxy, or as such a representative, for the member; and
31 (iii) how many of those votes the person casts for the
32 resolution and how many against.
- 33 (4) If the board limit resolution is passed, the company must retain the
34 records made under this section in relation to the poll for 7 years
35 after the day the resolution is passed.

EXPOSURE DRAFT

Schedule 1 Amendment of the Corporations Act 2001

Part 2 Limits on number of directors

1 (5) An offence based on subsection (2), (3) or (4) is an offence of strict
2 liability.

3 Note: For strict liability, see section 6.1 of the *Criminal Code*.

4 **201S Notice of resolution to be lodged**

5 The company must lodge a notice setting out the text of the board
6 limit resolution within 14 days after the resolution is passed.

7 **201T Declaration by court of substantial compliance**

8 (1) The Court may declare that a requirement set by section 201Q,
9 201R or 201S has been satisfied if the Court finds that it has been
10 substantially satisfied.

11 (2) A declaration may be made only on the application of an interested
12 person.

13 **201U Consequences of setting board limit in breach of section 201P**

14 *Application*

15 (1) This section applies if the directors of the company set a board
16 limit in contravention of subsection 201P(1).

17 *Board limit etc. ineffective*

18 (2) The board limit and anything done in reliance on it have no effect
19 for the purposes of:

- 20 (a) the company's constitution; or
21 (b) this Act, except this section.

22 Note: If a board limit resolution is not passed, the number of directors of a
23 company that can be appointed (for example by a general meeting)
24 depends on the maximum number of directors specified by the
25 company's constitution. This is so even if the directors purport to set a
26 board limit despite the fact the board limit resolution was not passed.

27 (3) If:
28 (a) one or more directors are appointed by one or more
29 resolutions passed at a particular general meeting of the
30 company; and

EXPOSURE DRAFT

Amendment of the Corporations Act 2001 **Schedule 1**
Limits on number of directors **Part 2**

1 (b) because of the board limit, the general meeting was not given
2 the opportunity to pass one or more resolutions appointing a
3 number of directors such that the number of directors of the
4 company would (if those resolutions had been passed) have
5 exceeded the board limit;

6 every appointment of director made by a resolution passed at the
7 general meeting is invalid.

8 Note: This subsection does not apply if a shortage of persons consenting to
9 be appointed director was the reason the general meeting was not
10 given the opportunity to pass one or more resolutions appointing a
11 number of directors such that the number of directors of the company
12 would (if those resolutions had been passed) have exceeded the board
13 limit.

14 (4) Subsections (2) and (3) have effect despite anything else in this
15 Act, except sections 128 and 129, and the company's constitution.

16 Note: Sections 128 and 129 deal with assumptions a person dealing with the
17 company may make, including assumptions about the due
18 appointment of directors.

19 *Company and candidates for directors may seek compensation*

20 (5) Subsection (6) applies if either of the following (the **suffering**
21 **party**) suffers loss or damage because of the setting of the board
22 limit in contravention of subsection 201P(1):

23 (a) the company;

24 (b) a person for whom both the following conditions are met:

25 (i) the person had given the company a written indication
26 that he or she would be a candidate to be appointed
27 director at a general meeting;

28 (ii) because of the board limit, the general meeting was not
29 given the opportunity to consider passing a resolution to
30 appoint the person as director.

31 (6) The suffering party may institute a proceeding in the Court for the
32 contravention.

33 Note: Section 1325 deals with the orders the Court may make to compensate
34 the suffering party for the loss.

35 *Contravention does not give rise to an offence*

36 (7) A person is not guilty of an offence because of the contravention.

EXPOSURE DRAFT

Schedule 1 Amendment of the Corporations Act 2001

Part 2 Limits on number of directors

1 **28 Subsections 1325(1), (2) and (3)**

2 Before “Chapter” (wherever occurring), insert “subsection 201P(1),”.

3 **29 Schedule 3 (after table item 39)**

4 Insert:

5 39A Subsections 201R(2), (3) and (4) 5 penalty units.

6

22 *Corporations Amendment (Improving Accountability on Director and Executive
Remuneration) Bill 2011* No. , 2011

EXPOSURE DRAFT

EXPOSURE DRAFT

Amendment of the Corporations Act 2001 **Schedule 1**
Voting by proxies as directed **Part 3**

1 **Part 3—Voting by proxies as directed**

2 **30 Paragraphs 250A(4)(c) and (d)**

3 Repeal the paragraphs, substitute:

4 (c) the proxy must vote on a poll, and must vote that way.

5

Corporations Amendment (Improving Accountability on Director and Executive Remuneration)

Bill 2011 No. , 2011 23

EXPOSURE DRAFT

EXPOSURE DRAFT

Schedule 1 Amendment of the Corporations Act 2001

Part 4 Application provisions

1 **Part 4—Application provisions**

2 **31 At the end of Chapter 10**

3 Add:

4 **Part 10.17—Transitional provisions relating to the**
5 **Corporations Amendment (Improving**
6 **Accountability on Director and Executive**
7 **Remuneration) Act 2011**
8

9 **1517 Application of Subdivision B of Division 1 of Part 2D.3**

10 Subdivision B of Division 1 of Part 2D.3 applies in relation to the
11 setting of board limits on or after the commencement of that
12 Subdivision.

13 **1518 Application of sections 206J, 206K and 206L**

14 (1) Section 206J applies to entry into arrangements on or after the
15 commencement of that section, whether the remuneration was for
16 services rendered before, on or after that commencement.

17 (2) Section 206K applies to the execution of contracts on or after the
18 commencement of that section.

19 (3) Section 206L applies to advice given under contracts executed on
20 or after the commencement of that section.

21 **1519 Application of subsection 249L(2A)**

22 Subsection 249L(2A) applies in relation to AGMs held on or after
23 the commencement of that subsection.

24 **1520 Application of paragraph 250A(4)(c)**

25 The amendment of subsection 250A(4) by the *Corporations*
26 *Amendment (Improving Accountability on Director and Executive*
27 *Remuneration) Act 2011* applies to polls demanded on or after the

EXPOSURE DRAFT

Amendment of the Corporations Act 2001 **Schedule 1**
Application provisions **Part 4**

1 commencement of the amendment, whether the proxy was
2 appointed before, on or after that commencement.

3 **1521 Application of subsections 250A(5B), (5C) and (5D)**

4 Subsections 250A(5B), (5C) and (5D) apply in relation to voting
5 on or after the commencement of those subsections, whether the
6 matter that is the subject of the resolution relates to a time before,
7 on or after that commencement.

8 **1522 Application of subsections 250R(4) to (10)**

9 Subsections 250R(4), (5), (6), (7), (8), (9) and (10) apply in
10 relation to voting on or after the commencement of those
11 subsections (whether the remuneration report concerned relates to a
12 financial year starting before, on or after that commencement).

13 **1523 Application of Division 9 of Part 2G.2**

14 Division 9 of Part 2G.2 applies in relation to AGMs held on or
15 after the commencement of that Division.

16 Note: This has the effect that the Division can apply in relation to a company
17 only if both of its 2 most recent AGMs have been held after the
18 commencement of the Division.

19 **1524 Application of amendments of section 300A**

20 (1) The amendments of section 300A made by the *Corporations*
21 *Amendment (Improving Accountability on Director and Executive*
22 *Remuneration) Act 2011* apply in relation to remuneration reports
23 for financial years starting on or after the commencement of those
24 amendments.

25 (2) Subsection (1) does not apply to the repeal of subsection
26 300A(1AAA).

27 *Saving of regulations made for paragraph 300A(1)(f)*

28 (3) The amendment of paragraph 300A(1)(f) made by the
29 *Corporations Amendment (Improving Accountability on Director*
30 *and Executive Remuneration) Act 2011* does not affect the validity
31 of any regulations in force for the purposes of that paragraph
32 immediately before that amendment.