
Recommendations and findings

Recommendations

RECOMMENDATION 1

For the election of directors at a general meeting, where the board seeks to declare no vacancies and the number of directors is less than the constitutional maximum, approval should be sought from shareholders by way of an ordinary resolution at that general meeting.

Boards would retain their powers to appoint directors and fill or leave vacant casual vacancies throughout the year.

This recommendation should be effected through amendments to the Corporations Act 2001 and relevant regulations.

RECOMMENDATION 2

The ASX Corporate Governance Council should introduce an ‘if not, why not’ recommendation specifying that remuneration committees:

- have at least three members*
- comprise non-executive directors, a majority of whom are independent*
- be chaired by an independent director*
- have a charter setting out procedures for non-committee members attending meetings.*

RECOMMENDATION 3

In conjunction with recommendation 2, a new ASX listing rule should specify that all ASX300 companies have a remuneration committee and that it should comprise solely non-executive directors.

RECOMMENDATION 4

The Corporations Act 2001 should specify that company executives identified as key management personnel and all directors be prohibited from voting their shares on remuneration reports and any resolutions related to those reports.

RECOMMENDATION 5

The Corporations Act 2001 should specify that companies prohibit their executives from hedging unvested equity remuneration or vested equity subject to holding locks.

RECOMMENDATION 6

The Corporations Act 2001 and relevant ASX listing rules should be amended to prohibit company executives identified as key management personnel and all directors from voting undirected proxies on remuneration reports and any resolutions related to those reports.

RECOMMENDATION 7

The Corporations Act 2001 should be amended to require proxy holders, except in exceptional circumstances, to cast all of their directed proxies on remuneration reports and any resolutions related to those reports.

RECOMMENDATION 8

The usefulness of remuneration reports to investors has been diminished by their complexity and by crucial omissions. Remuneration reports should include:

- *a plain English summary statement of companies' remuneration policies*
- *actual levels of remuneration received by the individuals named in the report*
- *total company shareholdings of the individuals named in the report.*

The Australian Government should establish an expert panel under the auspices of the Australian Securities and Investments Commission to advise it on how best to revise the architecture of section 300A of the Corporations Act 2001 and the relevant regulations to support these changes.

The convened expert panel should take account of the Commission's:

- detailed guidance on the requirements for recommendation 8 (see chapter 8).
- 'check list' of information which should, where relevant, be reflected in remuneration reports (section 11.5).

RECOMMENDATION 9

Section 300A of the Corporations Act 2001 should be amended to reflect that individual remuneration disclosures be confined to key management personnel. The additional requirement for the disclosure of the top five executives should be removed.

RECOMMENDATION 10

The ASX Corporate Governance Council should make a recommendation that companies disclose the expert advisers they have used in relation to the remuneration of directors and key management personnel, who appointed them, who they reported to and the nature of other work undertaken for the company by those advisers.

RECOMMENDATION 11

The ASX listing rules should require that, where an ASX300 company's remuneration committee (or board) makes use of expert advisers on matters pertaining to the remuneration of directors and key management personnel, those advisers be commissioned by, and their advice provided directly to, the remuneration committee or board, independent of management. Confirmation of this arrangement should be disclosed in the company's remuneration report.

RECOMMENDATION 12

Institutional investors — particularly superannuation funds — should disclose, at least on an annual basis, how they have voted on remuneration reports and other remuneration-related issues. Initially this should be progressed on a voluntary basis by institutions in collaboration with their industry organisations. The Australian Securities and Investments Commission should monitor progress in relation to superannuation funds regulated under the Superannuation Industry (Supervision) Act 1993.

RECOMMENDATION 13

The Australian Government should make legislative changes to remove the cessation of employment trigger for taxation of equity or rights that qualify for tax deferral and are subject to risk of forfeiture. These equity-based payments should be taxed at the earliest of: the point at which ownership of, and free title to, the shares or rights is transferred to the employee, or seven years after the employee acquires the shares.

RECOMMENDATION 14

The Australian Securities and Investments Commission should issue a public confirmation to companies that electronic voting is legally permissible without the need for constitutional amendments — as recommended in 2008 by the Parliamentary Joint Committee on Corporations and Financial Services.

RECOMMENDATION 15

The Corporations Act 2001 should be amended such that:

- *where a company’s remuneration report receives a ‘no’ vote of 25 per cent or more of eligible votes cast at an annual general meeting (AGM), the board be required to explain in its subsequent report how shareholder concerns were addressed and, if they have not been, the reasons why*
- *where the subsequent remuneration report receives a ‘no’ vote of 25 per cent or more of eligible votes cast at the next AGM, a resolution be put that the elected directors who signed the directors’ report for that meeting stand for re-election at an extraordinary general meeting (the re-election resolution). Notice of the re-election resolution would be contained in the meeting papers for that AGM. If it were carried by more than 50 per cent of eligible votes cast, the board would be required to give notice that such an extraordinary general meeting will be held within 90 days.*

Definitions and machinery

- ‘Elected directors’ — excludes any director not required to submit for election (managing directors) under ASX listing rules.
- ‘Eligible votes cast’ — directors and executives identified as key management personnel would be ineligible to vote their own shares, or undirected proxies held by them, in relation to remuneration reports or the re-election resolution. Normal voting protocols would apply to the re-election of directors.
- ‘Director re-election’ — if the re-election resolution is carried, all board members would continue in their positions until the EGM, at which time elected directors would present individually for re-election. The terms of appointments for re-elected directors would continue as if uninterrupted.
- Re-setting the mechanism — If the re-election resolution is activated, irrespective of whether or not it is carried, the entire process would be re-set. However, the requirement to explain how shareholder concerns were addressed in the subsequent remuneration report would stand.

If the Australian Securities Exchange does not give effect to recommendations 3 or 11 and/or the Australian Securities Exchange Corporate Governance Council does not give effect to recommendations 2 or 10, the Australian Government should give consideration to putting into effect the intent of those recommendations through legislative means.

There should be a review of the corporate governance arrangements that emanate from the Australian Government's response to this report. The review should be conducted no later than five years from the introduction of the new arrangements. In particular, the review should consider:

- *the effectiveness and efficiency of the reforms in meeting their objectives both individually and as a package, including recent legislative reforms to termination payments and employee share schemes*
- *any changes to the regulatory architecture that affects the operations of, or the balance of responsibilities between, the Corporations Act 2001, the Australian Securities Exchange listing rules and the Australian Securities Exchange Corporate Governance Council's principles and recommendations.*

Findings

The continuing marked under-representation of women on boards indicates that boards are not drawing sufficiently widely from available talent. Given the lack of progress in addressing this, the Commission strongly endorses the initiatives by the ASX Corporate Governance Council:

- *to require companies to adopt and disclose, on an 'if not, why not' basis, their progress against gender objectives set by their boards*
- *to encourage nomination committees to review the proportion of women at all levels in the company and disclose annually the skills and diversity criteria used for board appointments.*

Outcomes should be reviewed three years after the measures have been introduced, including to determine whether the principles and recommendations should be upgraded to a listing rule by the Australian Securities Exchange.

FINDING 2

Remuneration structures are company and context-specific and a matter for boards to resolve rather than being amenable to prescriptive direction. That said, some key dimensions often warrant being explained clearly to shareholders and, where appropriate, could usefully be addressed in companies' treatment of their remuneration policies in the remuneration report:

- how the remuneration policy aligns with the company's strategic directions, its desired risk profile and with shareholder interests*
- how the mix of base pay and incentives relates to the remuneration policy*
- how comparator groups for benchmarking executive remuneration and setting performance hurdles and metrics were selected, and how such benchmarks have been applied*
- how incentive pay arrangements were subjected to sensitivity analysis to determine the impact of unexpected changes (for example, in the share price), and how any deferral principles and forfeiture conditions would operate*
- whether any 'incentive-compatible' constraints or caps apply to guard against extreme outcomes from formula-based contractual obligations*
- whether alternatives to incentives linked to complex hurdles have been considered (for example, short-term incentives delivered as equity subject to holding locks)*
- whether employment contracts have been designed to the degree allowable by law, to inoculate against the possibility of having to 'buy out' poorly performing executives in order to avoid litigation*
- whether post-remuneration evaluations have been conducted to assess outcomes, their relationship to the remuneration policy and the integrity of any initial sensitivity analysis.*