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9 November 2009

Executive Remuneration Inquiry
Productivity Commission
Locked Bag 2
Collins Street East
MELBOURNE VIC 8003

by email exec_remuneration@pc.gov.au

Dear Sir,

Executive Remuneration in Australia

The Council congratulates the Productivity Commission on the excellent work that has gone into the production of its Discussion Draft on Executive Remuneration in Australia dated September 2009. The Discussion Draft has supported and assisted the essential debate around the successful resolution of the publicly expressed concerns over the levels of executive remuneration.

The ASX Corporate Governance Council (Council) has considered the Discussion Draft and set out below are the Council's views in relation to those Recommendations in which the Council's Principles and Recommendations are referenced.

I have attached for ease of reference a copy of our previous response to the Productivity Commission dated May 2009 which sets out the background to the Council and its Principles and Recommendations, as well as the background to the Remuneration provisions in the Principles and Recommendations and outcomes from the ASX review of the reporting levels with the Principles and Recommendations.

Productivity Commission Draft Recommendations 2 and 3

- "2. A new ASX listing rule should specify that all ASX300 companies have a remuneration committee of at least three members, all of whom are non-executive directors, with the chair and a majority of members being independent
3. The ASX Corporate Governance Council's current suggestion on the composition of remuneration committees should be elevated to a 'comply or explain' recommendation which specifies that remuneration committees:
 - have at least three members
 - be comprised of a majority of independent directors
 - be chaired by an independent director."

The Council has decided to adopt Draft Recommendation 3 by elevating the existing suggested composition of the remuneration committee referenced in the commentary to Recommendation 8.1 to an "if not, why not" recommendation. Council's approach is consistent with its long-held view that it is appropriate to review from time to time, on the basis of levels of adoption of Council's suggestions, whether any of those suggestions can usefully be elevated to "recommendations".

Australian Securities Exchange

Australian Stock Exchange
Sydney Futures Exchange

Australian Clearing House
SFE Clearing Corporation

ASX Settlement and Transfer Corporation
Austraclear

The Council also has been advised by the ASX that it envisages making listing rule amendments applying to the ASX 300 companies which are consistent with the above approach which the Council intends to adopt in relation to composition requirements for listed companies generally. The overall result is that the larger listed companies will be required to adopt the same approach as that recommended by the Council for smaller listed companies.

Productivity Commission Draft Recommendations 10 and 11

- "10. The ASX listing rules should require that, where an ASX300 company's remuneration committee (or board) makes use of expert advisers, those advisers be commissioned by, and their advice provided directly to, the remuneration committee or board, independent of management.*
- 11. The ASX Corporate Governance Council should make a recommendation that companies disclose the expert advisers they have used in relation to remuneration matters, who appointed them, who they reported to and the nature of other work undertaken for the company by those advisers."*

Council considers it is preferable that the issues contained in both draft Productivity Commission recommendations 10 and 11 be the subject of Council Principles and Recommendations, with associated commentary and "if not, why not" obligations. This approach will enable an appropriate alignment of the recommendations with the potential conflicts associated with commissioning of expert advice by executive management. More prescriptive approaches are likely to have difficulty avoiding the creation of restrictions around the commissioning of advice that extend to situations where no such conflict exists.

Whilst the draft Productivity Commission recommendation 10 is couched as a listing rule, Council considers it is more appropriate as a Council recommendation for reasons including:

- there is greater scope to be more expansive in respect of the issues concerned within the Council's published materials than in the listing rules;
- a "black letter" requirement would prove difficult to draft for the desired effect given the multitude of possible circumstances;
- greater consistency with the approach regarding other corporate governance matters; and
- there are clear benefits to an integrated approach concerning draft Productivity Commission recommendations 10 and 11.

Furthermore, in Council's view, draft Productivity Commission recommendations 10 and 11, as currently written, are couched too broadly and should be restricted to remuneration advisers appointed when determining remuneration for directors or key management personnel. Council also notes that careful wording of the proposed Council recommendations will be required in order to avoid unintended consequences (e.g. a greater tendency not to employ remuneration advisers; or conversely a de facto requirement to engage advisers) and, as a result, further consideration will need to be given by the Council to the precise form of the new recommendations.

Productivity Commission Draft Recommendation 5

- "5. 'The Corporations Act 2001 should prohibit all company executives from hedging unvested equity remuneration and vested equity remuneration that is subject to holding locks.'"*

While not specifically referred to by the Productivity Commission as a recommendation for consideration by the Council, the Council notes that in Box 3.2 of the existing Council Recommendation 3.2 "Suggestions for the content of a trading policy", at point 8, the Council suggests that a company's trading policy should, "Specify that the company prohibits designated officers from entering transactions in associated products which operate to limit the economic risk of security holdings in the company over unvested entitlements".

Next Steps

One of the key objectives of the Council's Principles and Recommendations is to seek to complement the direction taken by Government in a particular area (such as remuneration) and provide support and guidance to the legislative framework, where necessary. For this reason, Council has determined that it will engage in a public consultation process in early 2010 in relation to the proposed changes to the ASX Corporate Governance Principles and Recommendations. However any redraft prior to consultation will necessarily need to take into account the final conclusions from the Productivity Commission and any additional recommendations that might be directed at the Council. Additionally, should the Government choose to continue to provide further legislative clarity or direction in relation to executive remuneration, Council will consider any further implications of this to any redraft of the ASX Corporate Governance Principles and Recommendations

Should the Productivity Commission wish to discuss any aspect of this letter or the issue of director and executive remuneration more generally please contact either Ms Luise Elsing on 02 9227 0612 or me on 02 9227 0405.

Yours sincerely,

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cc Minister Bowen