

APRA TO ISSUE EXECUTIVE REMUNERATION GUIDELINES

In conjunction with the Federal Government, APRA has examined what domestic policy actions on executive remuneration would be appropriate to avoid excessive risk taking in Australia's financial institutions.

APRA is developing a principles based framework for executive remuneration structures that would apply to APRA regulated institutions. These institutions cover a range of corporate structures including listed and unlisted companies, mutually owned organisations, locally owned and foreign owned companies and branches of foreign companies.

The proposed framework would be an extension of the governance, risk management and capital requirements to which APRA regulated institutions are already subject.

'GREEN' WHITE PAPER

The Australian Government released its White Paper, *Carbon Pollution Reduction Scheme: Australia's Low Pollution Future*, on 15 December. The Paper outlines the medium-term target range for reducing carbon pollution and the final design of the Carbon Pollution Reduction Scheme.

The key points for business in the climate change plan include:

- a target range of a 5–15% reduction in emissions by 2020 has been set;
- Australia will select a 15% reduction if an effective global pact on climate is signed;
- Australia will select a 5% reduction in any other case;
- emissions trading will commence on 1 July 2010 (and will be more favourable to business than first anticipated by industry);
- electricity and gas charges to rise; and
- where certain criteria are met, select industries will receive some level of compensation.

ASX REVIEW OF DIRECTORS' TRADING

Earlier in 2008, ASX announced that it would periodically review trades by directors and the timing of when directors' interest notices are lodged. If the notices are lodged outside the time limit set in ASX Listing Rule 3.19A, ASX will write to the entity requesting an explanation and also confirmation of the arrangements which the entity has with its directors to ensure compliance. This correspondence and the response from the entity are then placed on the Company Announcements Platform.

ASX has recently examined compliance in trading by directors with published blackout periods. Blackout periods are typically outlined in a share trading policy which entities have pursuant to *Corporate Governance Principle 3*. ASX acknowledges that trading by directors during a blackout period does not necessarily contravene either the Listing Rules or the Corporations Act. Nevertheless, ASX sees the issue as one of good corporate governance practice and as such, will request an explanation from an entity where it observes trading by directors during a blackout period.

In its review, ASX noted that the usual explanation has been that "the Chairman authorised the trading pursuant to the entity's Share Trading Policy". ASX's stance here is that the entity should provide *additional explanation* in relation to the trading where it occurs during a blackout period. This additional explanation may be provided either within, or accompanying, the Appendix 3Y.

DISCLOSURE OF MARGIN LOAN POSITIONS BY COMPANY DIRECTORS

ASX Companies Update 09/08 reiterated guidance from earlier in the year with respect to the disclosure of margin loan positions entered into by company directors.

Where a director has entered into margin loan or similar funding arrangements for a material number of securities, ASX Listing Rule 3.1 may require the entity to disclose the key terms of the arrangements, including the number of securities involved, the trigger points, the right of the lender to sell unilaterally and any other pertinent details.

Whether a margin loan arrangement is "material" under Listing Rule 3.1 is a matter which the entity must decide

having regard to the nature of its operations and the particular circumstances of the entity and its officers. In determining materiality, factors for the entity to consider should include:

- the percentage of the issued shares held by the director which are subject to a margin loan;
- whether the margin loan arrangement relates to a single stock holding held by the director;
- the capacity and intention of the director to meet any margin calls; and
- the liquidity of the company's stock.

S&P/ASX 100: BOARD COMPOSITION AND NON-EXECUTIVE DIRECTOR PAY

ISS Australia was commissioned by ACSI to conduct an analysis of key corporate governance features of entities in the S&P/ASX 100 during FY2007. The findings can be summarised as follows:

- appointments from within the pool of S&P/ASX 100 existing directors continue to dominate new director appointments;
- the proportion of board seats held by women is stagnant (approximately 12%);
- most directors are aged between 60 and 69;
- approximately 65% of all directorships were held by "independent" directors;
- average NED pay increased 7.4% from 2006 to \$174,296;
- the average remuneration for a non-executive chairperson also increased (4.6% to \$390,142).

SHARE & UNIT PURCHASE PLANS

Existing ASIC *Class Order 02/831* permits relief for the offer of shares by ASX listed companies to existing shareholders under a share purchase plan subject to a number of conditions, including that each issue may only be up to a value of \$5,000 in a 12 month period.

In an attempt to enable listed entities to raise capital quickly and without the requirement to produce a prospectus or PDS, ASIC has recently issued *Consultation Paper 103, Review of share purchase plan threshold*. The proposed extension of relief would also apply to the issue of interests in an ASX listed managed investment scheme under an interest purchase plan.

The proposal:

- increases the monetary limit for share purchase plan disclosure relief from the current \$5,000 in any consecutive 12 month period to \$15,000; and
- makes it a condition of the relief that a cleansing notice be lodged with the ASX.

ASX REVIEW OF CORPORATE GOVERNANCE STATEMENTS

Earlier this year, ASX reviewed governance statements monitoring compliance with ASX Listing Rule 4.10.3. The most recent review identified 333 entities with disclosure that was "unhelpful in certain ways".

The ASX has identified areas of focus for the 2008 review which include:

- blanket statements;
- director independence
- trading policies;
- risk management, including the reporting of management of environmental and sustainability risks.

The ASX Corporate Governance Council released the *Corporate Governance Principles and Recommendations (Revised Principles)* in August 2007 and those entities with a 31 December 2008 year end will be the first mandated to report against the *Revised Principles*.

STANDING COMMITTEE OF ATTORNEY GENERALS

At their meeting last month, numerous improvements and simplifications for Australian businesses and consumers were identified by each of the State and Territory Attorney-Generals. Key agreements in principle made include:

- (powers of attorney): improving the mutual recognition of powers of attorney between jurisdictions, including the consideration of a nationally recognised form;
- (statutory declarations): establishing a uniform approach to statutory declarations replacing the current eight different forms in use across Australia and eight different legislative regimes regulating who can witness a statutory declaration; and
- (anti-discrimination): creating a website which will provide a one-stop shop for all Australians to access information relevant their discrimination specific issue.

ELECTRONIC TRANSACTIONS

A discussion paper on proposed amendments to State and Territory *Electronic Transaction Acts* to enable Australia to accede to the *UN Convention on Electronic Contracting* has been released. The *Convention* aims to facilitate the use of electronic means of communication in the

formation or performance of international business contracts between parties in different countries. Implementation would require legislative amendments to extend and update Australia's current uniform electronic transactions regime.

ARE YOU AWARE?

- The 2009 ASX reporting calendar for the 2009 calendar is now available on: http://www.asx.com.au/research/pdf/company_reporting_dates_2009.pdf
- The first schedule of the *Corporations Amendment (Short Selling) Act 2008* received Royal Assent on 11 December and gives effect to three key governance measures:
 - to clarify ASIC's powers to regulate and ban short selling of financial products;
 - to amend the *Corporations Act 2001* to prohibit naked short selling; and
 - to increase disclosure requirements related to covered short sale transactions.
- ASIC has issued guidance for 31 December year-end reporting entities. The key concepts highlighted by ASIC include the application of the going concern assumption, write-downs of impaired assets, fair values, explanations for off balance sheet arrangements and disclosures of new financial instruments.
- ASIC Regulatory Guide 43: *Financial reports and audit relief* has been updated. It provides guidance about when the statutory pre-conditions for relief will be satisfied, in particular, when compliance with the relevant provisions of Chapter 2M of the *Corporations Act* would impose an unreasonable burden.
- The ATO's *Compliance Program 2008/09* indicates that the Commissioner will expand the review of executives and directors to include senior executives of private and foreign owned companies, focusing on their remuneration packages and any failure to report equity benefits and cash or share bonuses.
- CAMAC has released a detail report on *Issues in External Administration*. The report considers those matters which were referred to CAMAC following the Government's enactment of the *Corporations Amendment (Insolvency) Act 2007*.
- Foreign Exempt companies listed on the ASX are now eligible for S&P/ASX index inclusion.
- The *Trade Practices Amendment (Clarity in Pricing) Bill 2008* has been passed (and a new section of the *TPA* inserted), requiring a single figure price to be stated in respect of the supply or possible supply or promotion of goods or services in certain circumstances. This is achieved through the insertion of a new section 53C of the *TPA*.
- There is no express requirement for proxy forms to be returned only or directly to the company under the *Corporations Act*, although for practical reasons, the Federal Court of Australia has suggested that proxy forms should be returned directly to the company not via a third party – *Portman Iron Ore Ltd; Re Golden West Resources Ltd (2008) 26 ACLC 1,047*.

MERRY CHRISTMAS

2008 has been another busy year for everyone, including those of us at Company Matters. Company Matters was fortunate to partner with our **100th** client in October and after only 2.5 years of operation, we are proud of this collective achievement.

We would like to take this opportunity to thank each and every one of our clients for their continued support.

Wish everyone a safe festive season and look forward to working together in 2009. ~ THE TEAM AT COMPANY MATTERS.

