



Australian Government  
Productivity Commission

# Regulation of Director and Executive Remuneration in Australia

Productivity Commission  
Issues Paper

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Initial public hearings	mid–late June 2009
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Public hearings	mid November 2009
Final report:	19 December 2009

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***The Productivity Commission***

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long-term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website or by contacting the Media and Publications section on (03) 9653 2244 or email: [maps@pc.gov.au](mailto:maps@pc.gov.au).

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# Executive remuneration in Australia

The Productivity Commission has been asked to report within 9 months (by 19 December 2009) on the framework and structures around the remuneration of directors and executives of those companies (known as disclosing entities) regulated under the *Corporations Act 2001* (Cwlth).

Specifically, the Commission is requested to consider:

- trends in director and executive remuneration in Australia and internationally (TOR 1)
- the effectiveness of the existing framework for the oversight, accountability and transparency of director and executive remuneration practices (TOR 2)
- the role of institutional and retail shareholders in the development, setting, reporting and consideration of remuneration practices (TOR 3)
- any mechanisms that would better align the interests of boards and executives with those of shareholders and the wider community (TOR 4)
- the effectiveness of the international responses to remuneration issues arising from the global financial crisis (TOR 5).

In undertaking the inquiry, the Commission is to liaise with the Australia's Future Tax System Review and the Australian Prudential Regulation Authority (TOR 6).

The Commission is to make recommendations on how the existing framework governing remuneration practices in Australia could be improved (TOR 7). The full terms of reference are reproduced in attachment A.

## **Commissioners**

Heading this inquiry are Productivity Commission Chairman Gary Banks (presiding), Commissioner Robert Fitzgerald, and Professor Allan Fels from the Australia and New Zealand School of Government, who has been appointed as a part-time Associate Commissioner for the duration of the inquiry.

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### **This issues paper**

- The purpose of this paper is to guide inquiry participants by elaborating the questions that the Commission is seeking information on, consistent with its Terms of Reference. However, the list of matters is not exhaustive and participants are free to include in their submissions any information and views that they consider relevant. **Participants should not feel obliged to answer all questions or address all issues raised here.**
- The issues paper is structured around the five key terms of reference summarised above and set out in attachment A.
- The Commission is also to liaise with Australia's Future Tax System Review and the Australian Prudential Regulation Authority's review of domestic policy actions on executive remuneration to avoid inappropriate risk-taking in Australia's financial institutions (TOR 6).
- The Commission will make recommendations as to how the existing framework governing remuneration practices in Australia could be strengthened (TOR 7).
- Administrative information related to making a submission or registering interest in the inquiry is provided in attachment B.
- **Participants are encouraged to provide data, examples, case studies or other evidence to support their arguments.**

## **Background to the inquiry**

In the press release announcing this inquiry, Ministers stated that 'unrestrained greed in the financial sector has led to the biggest global recession since World War II' and that 'there is significant community concern about excessive pay practices'. The Ministers signalled the Government's desire 'to ensure that regulation of executive pay keeps pace with community expectations'.

Community concern about the magnitude and nature of executive remuneration is evident from a number of perspectives:

- the level and growth of director and executive remuneration are seen to have become increasingly out of step with average wages, widening the gap between executives and other employees
- executive base salaries, bonuses and particularly termination payments have sometimes appeared to be rewarding failure. Community concern on this issue is heightened where companies are receiving government support, for example

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taxpayer funded bailouts (such as AIG in the United States) and industry assistance (such as Pacific Brands in Australia)

- company directors, executives and board committees, together with remuneration consultants, are perceived to have both the motivation and capacity to inflate director and executive remuneration beyond what is warranted based on their performance
- the dominant role of institutional investors in shareholder voting are said to be providing an insufficient check to align the interests of companies and shareholders
- remuneration structures are seen as encouraging a short-term approach by senior executives, including undue risk-taking of a kind that helped precipitate the global financial crisis.

At the other end of the spectrum, however, there are a range of contrasting views, including:

- executive remuneration levels are said to emerge from an international marketplace for a limited pool of talented and mobile executives
- executives are seen as taking on a level of risk in their employment considerably higher than that faced by other employees
- executives in listed companies are said to be subject to intense scrutiny relative to executives in other business structures
- executive remuneration is claimed to have increased broadly in line with rapid increases in companies' market capitalisation and returns to shareholders, and thus could be expected to fall as executives face a more challenging environment
- corporate excesses are reported by some as mainly a foreign phenomenon — particularly in the United States — with Australia's regulatory framework ensuring greater restraint.

Notwithstanding this diversity of views, governments clearly face pressure to respond to perceived corporate excesses. While corporate governance arrangements are intended to resolve such issues at the company level in the interests of shareholders, failures can impact more widely on the community. For example, if poorly structured remuneration packages have encouraged inappropriate risk-taking within the finance sector, this can have effects on the operation of the financial system as a whole, with flow-on effects to the wider economy and community. More generally, if entrepreneurial effort is diverted to unproductive 'rent-seeking' behaviour as executives seek ways to maximise and camouflage their remuneration, this can affect not only the performance of a company, but also inhibit the productivity and growth prospects of the economy. Executive remuneration that is

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many multiples of average earnings may also impact on workers' productivity and make wage restraint more difficult to achieve in periods of economic downturn.

The Commission's task is to work systematically through the evidence in order to come to its own view. Primarily, it will assess executive remuneration in terms of its effects on the productivity and performance of Australia's economy and community wellbeing. The Commission will then consider any appropriate regulatory responses, taking into account the likely costs and benefits of any such actions including the potential costs and benefits of unintended consequences.

## **Definitions and scope**

It is necessary to distinguish between the remuneration of directors and other executives (see box 1). Executive directors are generally not paid for being on a company's board over and above their executive pay. Where non-executive directors are paid for their services, this usually takes the form of a fixed fee.

Components common to many executive pay arrangements include base salary (including superannuation) and other short and long-term payments. However, these general categories mask considerable complexity and diversity. Salaries need not entirely consist of cash, and other rewards can include bonuses, equity/shares, options, non-recourse loans, and termination payments.

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## Box 1      **Key terms and definitions**

*Executive remuneration* may be made up of the following components:

- *Base pay/salary*: usually cash remuneration, including superannuation, not related to performance.
- *Short-term payments*: such as annual cash bonuses that are linked to performance hurdles.
- *Long-term payments*: for example shares and stock options that are also linked to performance hurdles.
- *Non-recourse loans*: are usually interest free loans extended to executives to purchase shares in the company. 'Non-recourse' means that the company has a claim to the shares purchased, but the executive's other assets are not used as collateral.
- *Termination payments*: are made when employment ceases for any reason. Ideally payments would be agreed in advance and include provision for early termination.

The structure of *non-executive director* remuneration is usually distinguished from that of senior executives and executive directors. Under Australian Securities Exchange (ASX) listing rules, a paid non-executive director can only receive a fixed sum. The ASX recommends against directors receiving options or bonus payments, or retirement benefits other than superannuation.

A *director* of a company has a position on the board of that company.

*Executive* is not defined in the Corporations Act, but for the purposes of this inquiry can be taken to include those executives that are covered in the remuneration report, hence including managing and executive directors, company secretaries and senior managers. The Australian Government recently announced it would expand the range of recipients whose termination payments are subject to shareholder approval to all those named in the remuneration report (Swan and Sherry 2009).

- The *remuneration report*, specified by the Corporations Act, requires disclosure of information on the key management personnel of the company and the five most highly remunerated officers (if different). Key management personnel are defined in accordance with the accounting standards as 'those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity'.

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Box 1 (continued)

*Disclosing entity* is defined in section 111AC of the Corporations Act and generally captures listed companies and managed investment schemes (trusts) as long as there are 100 investors in the company or trust (unless an exemption is given under the Corporations Act or Corporations Regulations 2001). Once the number of investors falls below 100, the company or trust ceases to be a disclosing entity. The definition also includes unlisted companies that have issued debentures, but excludes other entities such as private companies, sole traders and partnerships.

*Corporate performance* is not universally defined. Companies will highlight and target different measures of corporate performance through selected key performance indicators. Measures include profit, share price performance and total shareholder returns, return on equity, return on assets, return on investment, and strategy implementation.

Sources: ASX Corporate Governance Council (2007); *Corporations Act 2001* (Cwlth); Swan and Sherry (2009).

The terms of reference require the Commission to consider the relationship between remuneration and corporate performance — that is, the degree to which incentives have been built into the remuneration structure to align the interests of directors and executives with those of shareholders. As well as this relationship, there is also a question as to the links between remuneration and individual performance — that is, there may often be a distinction between individual performance of a director or executive and corporate performance.

There is no universally accepted standard for performance (whether individual or corporate), particularly in setting benchmarks for incentive payments. Measures of performance could include profit, share price performance and total shareholder returns, return on equity and other measures of investment return. Many businesses will target ‘Key Performance Indicators’ (KPIs). While ideally these should be easily quantifiable — for instance, unit sales — some KPIs can be harder to measure, such as product quality. Each industry is likely to have a different mix of KPIs, and companies within an industry will typically highlight different sets of indicators from their peers. Further, there are no established rules for how any of these indicators can be applied in the context of remuneration, especially where a long-term view of performance is sought.

*What is an appropriate definition of ‘remuneration’? What aspects or elements of remuneration should be included?*

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*What is an appropriate definition of ‘executive’? Does the remuneration report required under the Corporations Act and its coverage of key management personnel provide a suitable definition? Should the Commission’s coverage of executives go beyond this, and if so, why?*

*How should ‘corporate performance’ and ‘individual performance’ be defined? Is it possible to define them in general terms that are applicable across most businesses? Or is transparency in performance hurdles for incentive payments the more important issue? To what extent do external performance indicators ‘net out’ underlying market growth factors from entrepreneurial and managerial performance?*

## **TOR 1: Trends in remuneration**

The first term of reference requires the Commission to obtain information on trends in executive remuneration in Australia and internationally, including the growth in levels of remuneration, the types of remuneration being paid and the relationship between remuneration packages and corporate performance.

It is well known that executive incomes in Australia have trended upwards over the last couple of decades (as they have internationally), increasing at a faster rate than the market capitalisation of companies. For example, while the S&P/ASX200 accumulation index increased by 60 per cent between 1999-2000 and 2004-05, average chief executive officer (CEO) cash remuneration at some of Australia’s largest companies doubled (Shields 2005).

Box 2 details a more recent study of CEO remuneration in Australia, commissioned by the Australian Council of Superannuation Investors.

While executive salaries have increased greatly, it has been argued that levels of remuneration in Australia need to be competitive internationally (at least in some instances) in order to attract suitable candidates to executive positions. By the same token, Australian executives are also in demand internationally. Therefore, it may be expected that trends in executive remuneration overseas will exert some influence on remuneration levels in Australia (Adams 2006).

The Commission is therefore interested in considering the extent to which existing remuneration levels may be required to encourage an adequate supply of suitable candidates for director and executive positions. It is also interested in understanding how remuneration relativities within companies may influence director and executive remuneration — that is, any relationship between levels of director and executive remuneration and remuneration for other company employees.

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**Box 2      Australian Council of Superannuation Investors analysis of top CEO remuneration**

The Australian Council of Superannuation Investors (ACSI) recently commissioned RiskMetrics – ISS Governance Services to undertake an analysis of CEO remuneration of 69 companies in the top 100 listed Australian companies for 2006-07 (ACSI 2008b). This analysis suggests that:

- *median fixed remuneration* (those elements of pay that do not vary with performance, such as base salary, superannuation and motor vehicle allowance) increased by 96 per cent between 2000-01 and 2006-07. *Median total remuneration* (including short and long-term incentives) grew at a similar rate. The growth in CEO remuneration was much stronger than growth over the same period in average adult weekly ordinary time earnings (32 per cent) and the CPI (18 per cent). Between 2005-06 and 2006-07, median fixed remuneration declined by 3 per cent whereas median total remuneration rose by 27 per cent
- in terms of the average structure of remuneration packages:
  - *base salary* as a proportion of total pay declined from 38 per cent in 2000-01 to 28 per cent in 2006-07
  - *short-term incentives* (an annual cash or shares bonus) were paid to 88 per cent of CEOs in 2006-07. Short-term incentives as a proportion of total pay increased from 26 per cent in 2000-01 to 35 per cent in 2006-07
  - *long-term incentives* (including cash, options, performance rights and deferred shares) accounted for 32 per cent of total pay in 2006-07. Long-term incentives fluctuated significantly as a proportion of total pay over time, ranging from 23 per cent in 2002-03 and 2005-06 to 34 per cent in 2001-02. There appears to be a trend away from using options as long-term incentives, and towards performance rights and deferred shares.

*Source:* ACSI (2008b).

The studies noted above reveal relatively strong growth in executive remuneration. This has taken place during a period of strong economic growth and particularly strong sharemarket performance. Clearly the economic environment has changed recently and there are likely to be consequences for director and executive remuneration from the downturn, at least in the short term.

As well as analysing information on remuneration levels and growth within Australia and internationally, the Commission will consider the extensive academic literature on the subject. Box 3 illustrates some differences.

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### Box 3 Findings from the academic literature

Economic issues surrounding executive remuneration have received considerable attention in academic literature over many years. However, there is no consensus about the key drivers of executive remuneration. For example, Bebchuk and Fried (2003) and Murphy and Zabojnik (2004) provide commonly cited contrasting explanations of remuneration increases:

- Bebchuk and Fried (2003) argue that, although community and shareholder ‘outrage’ can limit executive remuneration (by, for example, damaging a company’s reputation), executives use their managerial influence to obtain remuneration more favourable than otherwise by ‘camouflaging’ pay increases.
- Murphy and Zabojnik (2004) argue that the composition of managerial skills required to manage a company has changed, with a greater emphasis placed in recent decades on general managerial skills, as opposed to company specific skills. Higher demand for general managerial skills has resulted in higher remuneration.

Sources: Bebchuk and Fried (2003); Murphy and Zabojnik (2004).

*How are levels of director and executive remuneration determined? What constraints exist, and what is the market’s role in determining remuneration levels? What are the major drivers of negotiated outcomes? Have they changed over time?*

*What growth in the level of director and executive remuneration has taken place over recent decades, both within Australia and internationally? What factors contributed to this growth? Has the experience differed across different industries or sectors of the economy?*

*Is there any relationship between director and executive remuneration, and the remuneration of other company employees? How important are relativities between executives and other employees? Are there flow-on effects from executives to other employees? Do big disparities serve to motivate or de-motivate other employees?*

*Are current director and executive remuneration levels justified? Have increases over recent years been justified? How should the Commission determine what is ‘justified’ — what tests should be applied?*

*What relationship exists between levels of remuneration and individual and corporate performance? To what extent are remuneration levels required to generate an adequate supply of suitable directors and executives; that is, are they primarily aimed at hiring and retaining the right person, rather than influencing their performance?*

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## Remuneration structures and incentives

Remuneration structures can potentially play a significant role in creating incentives for performance. The forms of payment discussed below may each provide differing incentives for executives (further forms of remuneration and performance measures are provided in box 4). There may be other drivers of performance, however, and it will be important to explore these.

### *Bonus payments*

Bonuses are a common feature of executive remuneration. Such payments have increased significantly over the period covered in the ACSI study. Bonus payments have come under increasing scrutiny recently, given the financial crisis (see further discussion below, under International developments).

#### **Box 4      Additional forms of remuneration and performance measures**

*Performance rights* provide for the issue of shares on achievement of negotiated performance hurdles, with the shares usually provided at no cost.

*Share options* provide the buyer (or receiver) the right to buy or sell shares at a specified price within a certain period or on a certain date. For executive remuneration purposes, the option to buy shares is usually provided as an incentive measure.

*Total shareholder return (TSR)* combines share price movements and dividends paid to measure the total return to a shareholder. It can be used to compare the performance of different companies.

*Return on equity* equals net income as a percentage of shareholder's equity. It is a measure of profitability and can be compared with other companies.

*Return on assets* equals net income as a percentage of total assets. It is a measure of how efficient management is at using its assets to generate earnings.

*Return on investment* equals an investment's return (gains less costs) as a percentage of its costs, and measures the efficiency of an investment.

There have been some moves in recent times towards 'deferred' bonuses, to give executives a longer term focus (Tarrant 2009). A 'deferred' bonus may be contingent on the executive remaining with a company for a defined period of time, or on the company or executive meeting agreed performance targets over successive years. Such arrangements are intended to help discourage inappropriate risk-taking or other actions simply to meet short-term performance hurdles, which would otherwise be considered detrimental to a business's long-term performance, and hence shareholders' long-term returns.

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## Options

Options are another common form of incentive payment. However, a survey by Mercer (2007) reveals that options have tended to play a far lesser role in the remuneration of Australian executives than for their counterparts overseas. The recent performance of the stockmarket is also likely to have made options less attractive for the purposes of executive remuneration. In some cases, options that were negotiated before the global financial crisis are unlikely to be exercised (unless renegotiated), with strike prices well in excess of current market values (Minter Ellison 2009).

## Non-recourse loans

Non-recourse loans have attracted attention in the recent debate over executive remuneration, with the inquiry's terms of reference explicitly requesting the Commission to consider their use as part of remuneration arrangements. These interest-free loans are extended to executives to purchase shares in the company, with dividends earned being used to pay off the loan. As such, the acquisition of shares comes at no monetary cost to the executive. The Australian Institute of Company Directors (AICD) notes 'such loans weaken the link between performance and rewards by diluting the "at risk" aspect of share ownership' (AICD 2008b, p. 2). Specifically, the executive benefits considerably when the share price increases, but is insulated from the downside in the event of share price falls.

While the Commission will be considering the use of non-recourse loans as part of executive remuneration packages, it does note that it is relatively common for companies to use these loans as a remuneration method for all employees, not just executives.

*What are the key drivers of performance for directors and executives? Are there factors other than remuneration that influence their performance?*

*What changes have taken place in the type and structure of remuneration over recent decades? What has driven these changes? Have changes to the structure of remuneration resulted in inappropriate risk-taking or other forms of director and executive behaviour inconsistent with the interests of the company? Are particular types of remuneration more likely to produce these outcomes? Has the experience differed across sectors (for example, the finance sector relative to other areas of business)? Who should determine what is an appropriate level of risk-taking or an appropriate corporate strategy, and how should this be done?*

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*Why and/or when are the dealings between shareholders and companies on remuneration issues a matter of public interest?*

*What relationship exists between the structure of remuneration and individual and corporate performance? What are the key drivers of performance for directors and executives? What arguments, for and against, are there for linking remuneration and the share price?*

### **Data sources?**

The Commission will be investigating potential data sources through organisations such as RiskMetrics, Towers Perrin and Fairfax Business Research, as well as from other remuneration consultants and executive recruitment companies. The Commission is also interested in receiving information about other data sources, both for Australia and internationally.

*Are there other useful data sources on director and executive remuneration over time in addition to those noted above?*

## **TOR 2: Effectiveness of regulatory arrangements**

Existing regulatory arrangements for director and executive remuneration are primarily set out in the *Corporations Act 2001* (Cwlth). Australian Securities Exchange (ASX) listing rules establish additional arrangements for those companies that are listed on the ASX together with a ‘comply or explain’ regime under the ASX Corporate Governance Principles and Recommendations. Voluntary arrangements also exist, for example through position papers and guidelines released by the Australian Institute of Company Directors (AICD) and the Australian Shareholders’ Association (ASA).

The Australian Government recently announced some changes to be made to the *Corporations Act 2001* (Cwlth) affecting termination payments (box 5). Box 6 details the key existing regulatory and voluntary arrangements. These arrangements include director responsibility for engaging the managing director (the Chief Executive Officer), the role of shareholders in approving some termination payments, and requirements for a ‘remuneration report’.

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**Box 5      Termination payments: changes to the Corporations Act**

In March 2009, the Australian Government announced measures to:

- reduce the threshold at which a termination payment must be approved by shareholders. Currently, shareholder approval is required for a director's termination payment only when it exceeds seven times the annual average of the total remuneration package over the past three years. This is to be reduced to one year's base salary
- extend the range of executives whose termination payments are subject to approval. Currently this only applies to directors. This is to be extended to all executives listed in a company's remuneration report
- broaden the definition of 'termination benefit', capturing all types of payment and reward given at termination.

The Government stated that the amendments will not be retrospectively applied. As such, existing contractual arrangements for directors and executives will not be affected by the proposed changes.

*Source:* Swan and Sherry (2009).

In summary, key regulatory arrangements affecting director and executive remuneration in Australia include:

- directors' remuneration is established by the company through resolution and can only be increased with the approval of shareholders (note approval is not required if remuneration is 'reasonable')
- directors have responsibility for appointing the managing director, and the terms and conditions (including remuneration) of that appointment, and are generally responsible for determining the remuneration arrangements of all key executives
- in some instances, shareholders are required to approve termination benefits — as noted, the Australian Government has recently announced changes that will see shareholder approval required for termination payments above one year's average base salary (Swan and Sherry 2009)
- the annual directors' report must include a remuneration report, which amongst other things must discuss the relationship between remuneration policy and company performance, performance conditions, where these are an element of key management personnel remuneration, and remuneration details for key management personnel and the five highest paid company executives.
  - The remuneration report is voted on by shareholders at the AGM, though the vote is non-binding



- ASX listing rules limit the instances where termination payments may be made, and the level of those payments
- companies may form remuneration committees
- voluntary guidelines have been issued by organisations, such as the AICD and ASA.

#### **Box 6      Existing regulatory and voluntary arrangements**

##### ***Corporations Act 2001 (Cwlth)***

Section 202A establishes that directors are paid the remuneration that the company determines by resolution (note member/shareholder approval is not required if remuneration is 'reasonable'). Section 202A is a replaceable rule.

Section 201J establishes that the directors appoint the managing director of the company, and determine the terms and remuneration of that appointment.

Subsection 200B(1) establishes that a company must not give benefits associated with a person's retirement from a board or managerial office without shareholders approval. There are some exceptions to this rule. For example, subsection 200B(1) does not apply if the payment is less than seven times the average of the executive's total remuneration package over the past three years (the Australian Government has recently announced its intention to reduce the threshold to one year's base salary (Swan and Sherry 2009)).

Section 300A establishes that all disclosing entities that are companies are to prepare an audited remuneration report containing information on director and executive remuneration, including: the board of directors' policy on director and executive remuneration; the link between that policy and company performance; and details of remuneration paid to directors and certain senior executives during the year.

Section 202B supplements the information provided in the remuneration report by providing powers for members (which includes shareholders) to obtain information about directors' remuneration (given particular voting thresholds are met). The company must disclose all remuneration paid to the director, regardless of whether it is paid to the director in relation to their capacity as director or another capacity.

As noted above, section 300A sets out requirements for a remuneration report in the annual directors' report. Under section 250R, the remuneration report must be put to a vote of shareholders at the company's annual general meeting (AGM). This vote is non-binding, and directors are under no legal responsibility to accept the outcome of the vote. At the AGM, reasonable opportunity must be given to shareholders to ask questions about the remuneration report.

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Box 6 (continued)

***Listing rules and guidelines***

Guidelines developed by the ASX Corporate Governance Council and its listing rules, also provide elements of the framework for director and executive remuneration. The Council is made up of 21 business, shareholder and industry groups, including the Australian Council of Superannuation Investors, the Business Council of Australia, CPA Australia and the Law Council of Australia.

Listing rule 4.10 requires that if any recommendation contained in the ASX Governance Principles is not followed, an explanation must be placed in the company's annual report (the 'if not, why not' rule).

Listing rule 10.14 requires shareholder approval for the new issue of shares granted to directors off-market, and rule 10.17 requires that total director remuneration may not be increased without shareholder approval.

Listing rules 10.18 and 10.19 establish some limits on termination benefits.

ASX guidelines recommend that termination payments be agreed in advance, and that there be no payment (beyond statutory obligations) for termination due to misconduct. The Australian Institute of Company Directors make similar recommendations (AICD 2008a).

The ASX Corporate Governance Council (2007) recommends some remuneration information to be disclosed in the annual report, for example the existence and terms of any retirement benefit schemes (other than superannuation) for non-executive directors, and also recommends that companies establish a remuneration committee. AICD's Executive Remuneration Guidelines also suggest the formation of a remuneration committee (AICD 2009).

AICD guidelines also suggest that remuneration consultants must be commissioned by the board, and the advice is provided directly to the board, independent of management. Good practice also suggests that if the consultant has been commissioned by an executive, that the board commissions a different consultant. These guidelines are to uphold the integrity of the board and avoid conflicts of interest (AICD 2009).

*Sources: Corporations Act 2001 (Cwlth); Swan and Sherry (2009); ASX Corporate Governance Council (2007); AICD (2008a, 2009).*

The Commission has been asked to consider the effectiveness of the existing framework for the oversight, accountability and transparency of remuneration practices in Australia. Some key questions that arise include:

*Given that it is ultimately the responsibility of the board to engage a managing director and other key executives, including associated terms and conditions, what changes would assist the board in fulfilling this role, consistent with shareholder interests?*

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*How effective are arrangements for director and executive remuneration under the Corporations Act and ASX listing rules and guidelines? Do arrangements provide sufficient transparency and accountability on remuneration arrangements and practices? How might transparency be increased, and what might be the impacts of this?*

*Are the current disclosure requirements in the remuneration report too complex? Is the coverage of executives in the remuneration report appropriate? Would shareholders benefit from access to readily accessible, consolidated information, on director and executive remuneration?*

*Is there an appropriate balance between legislated requirements and voluntary guidelines? What is the role of voluntary guidelines in governance of director and executive remuneration?*

*Is the case for regulation stronger where government is an active participant in company activities, for example through the use of taxpayer funds to bailout companies in financial difficulty or through other ongoing support activities?*

*Are there any voluntary, good practice guidelines or codes applying internationally that may be of interest in an Australian context? Should Australia consider the adoption of a code of practice?*

*To what extent have remuneration committees been used in Australia? What effect have these had on the linkages between remuneration levels and individual and corporate performance?*

*Do conflicts of interest arise in the arrangements by which remuneration consultants advise on director and executive remuneration? If so, how significant are they and how might they be addressed?*

### **TOR 3: The role of institutional and retail shareholders**

The terms of reference require the Commission to consider the role of large local institutional (such as superannuation funds) and retail shareholders in the development, setting, reporting and consideration of remuneration practices.

There are only a few areas where shareholders are involved in remuneration matters:

- for a director of the company to obtain equities, under an incentive scheme, that are not purchased on the market
- if the value of director fees in total increases (this does not apply to executive directors)

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- for the approval of the remuneration report (a non-binding vote)
  - if the value of a termination payment exceeds a threshold (which the Australian Government has recently announced will be reduced from seven times the annual average of the total remuneration package over the past three years to one year's average base salary).

The ASX also recommends that companies submit to a vote any equity-based plans that involve the issue of new shares to senior executives (ASX Corporate Governance Council 2007).

Otherwise, formal shareholder approval is not needed to approve remuneration if remuneration is 'reasonable', given the circumstances of the entity and the related party. This in part may reflect that directors (who are elected by shareholders) are responsible for setting the remuneration of the managing director.

More generally, a fundamental principle underlying Australia's corporate governance system is that directors are responsible to shareholders for managing all aspects of the company's operations. Accordingly, Australia's approach to executive remuneration has been to provide a regulatory framework that encourages shareholder involvement through the transparent disclosure of remuneration details.

Institutional investors issue votes on behalf of their members. Given the relatively large size of their shareholdings and their role in managing members' investments, they may be better placed to participate and provide input to the remuneration practices of companies in which they invest compared to retail investors. Institutional investors are often advised by organisations such as the ACSI, which provided recommendations on 1267 resolutions by S&P/ASX 200 companies in 2007 (ACSI 2008a, p. 6), and 1231 resolutions in 2008 (ACSI 2009).

If there is a case for increasing the role of shareholders, therefore, the key consideration will be how to achieve this for institutional investors. However, it is first necessary to understand how they are currently utilising their voting powers.

Recent years have seen increased involvement by shareholders in company decisions. In 2007, two S&P/ASX 50 companies (AGL Energy and Telstra) saw their remuneration reports voted against, both by margins of greater than 20 per cent. There were also substantial 'no' votes at other company meetings. Further, activity has not been confined to remuneration reports, with institutional shareholder opposition seeing two management-backed private equity takeovers at Flight Centre and APN News and Media defeated (ACSI 2008a). Similarly, the proposed takeover of Qantas by the private equity consortium Airline Partners Australia was defeated when it failed to garner sufficient shareholder support.

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*What degree of influence should shareholders have in their own right in determining remuneration practices? Do current regulatory arrangements enable shareholders to be adequately involved? If not, why?*

*Does the current non-binding vote require strengthening? Is it appropriate for directors and executives that are named in the remuneration report, and who hold shares in the company, to be able to participate in the non-binding vote?*

*To what extent have large institutional investors used their voting rights to influence remuneration practices and other areas where they have voting powers? Are there areas where their rights should be strengthened? Does institutional voting typically align with the broader interests of shareholders?*

*In what aspects of remuneration practices and setting remuneration levels would it be appropriate to increase shareholder involvement? How would this be best achieved — without, for example, diluting the intended function of the board in engaging the managing director/chief executive officer?*

## **TOR 4: Aligning interests**

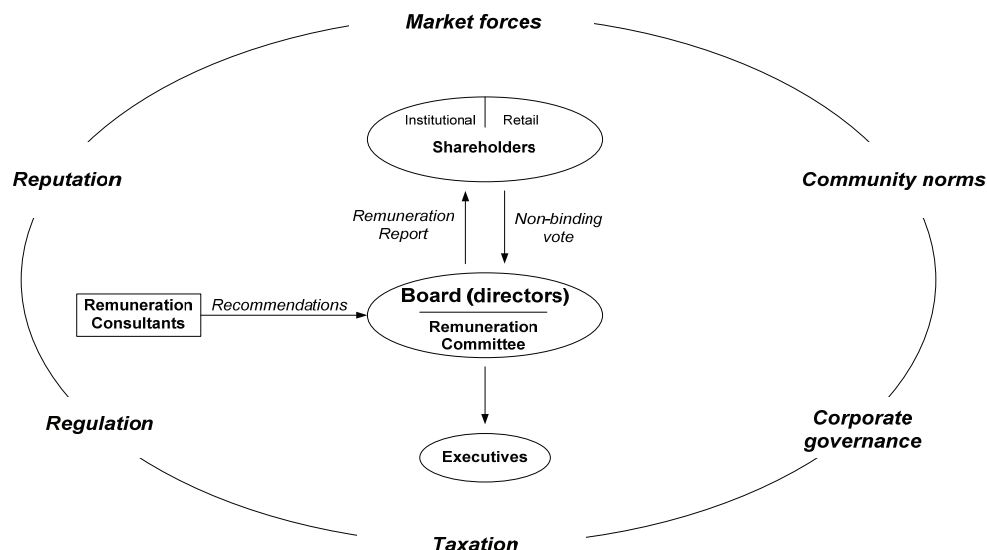
The terms of reference require the Commission to consider any mechanisms that would better align the interests of boards and executives with those of shareholders and the wider community. It is contended that current contractual remuneration arrangements do not always promote alignment of these interests. Further, it will be important to consider the extent to which shareholder and wider community interests align.

The alignment of board and executive interests with those of shareholders has been a fundamental issue of corporate governance dating back to the first joint stock companies in the 17th Century. What is known as a ‘principal–agent problem’ arises when the interests of boards and executives do not accord with those of shareholders and the wider community. Shareholders (the ‘principal’) have an interest in their company maximising returns over time, and the board and executives (the ‘agent’) are tasked with running the company to achieve this goal. However, executives — like any worker — have their own interests to consider, which can potentially conflict with those of the company’s shareholders.

There are many potential forces affecting alignment of interests — product and capital market competition, the desire of executives to maintain and enhance their reputation, as well as contractual arrangements through remuneration packages, corporate governance and shareholder oversight. An important issue for this inquiry is the extent to which remuneration packages promote alignment of interests.

Figure 1 illustrates some of the relationships between shareholders, the board and executives, as well as other factors impacting on these parties.

**Figure 1      Aligning interests: shareholders, board and executives**



Mechanisms that are relevant to the objective of aligning interests include:

- equity-based payments and incentive schemes
- the source and approval processes for equity-based payments
- the role played by the tax treatment of equity-based remuneration
- accelerated equity vesting arrangements
- the use of hedging over incentive remuneration.

A broader consideration will include the incentives the tax system provides for particular remuneration structures, and what changes may be warranted to promote improved remuneration outcomes.

*To what extent do current taxation arrangements influence the level and structure of executive remuneration? To what extent should bonuses be an allowable tax deduction for companies? Should bonuses be subject to special/higher taxation rates?*

The Australian Shareholders' Association (ASA), which has a strong interest in corporate governance and company performance, has put forward several proposals (box 7).

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**Box 7 Views of the Australian Shareholders' Association**

The Australian Shareholders' Association (ASA) was established to protect and advance the interests of investors. The ASA recently released an updated position paper on executive remuneration. In that document, key positions include:

- it is appropriate for the remuneration package of a CEO to include a substantial 'at risk' component. As a guide, ASA recommends an incentive award equal to base pay for a CEO who achieved significantly superior performance
- long-term incentives are seen as an appropriate means of providing senior executives with reward for superior performance. Short-term incentives are questionable and should be used only where performance targets support the company's long-term goals
- termination payments to failed executives above statutory requirements and golden parachutes are regarded as unacceptable.

*Source: ASA (2009).*

In considering the effectiveness of the existing framework governing director and executive remuneration, and in identifying possible areas for improvement, the Commission will assess the mechanisms noted above and other possible mechanisms. Some could involve increased powers for shareholders in regard to remuneration practices, and/or enhanced guidelines for, or regulation of, remuneration levels and structures. The Commission will also consider potential tensions between different options and approaches to regulating director and executive remuneration. For example, moves to encourage greater use of long-term incentives may be influenced by the announced changes to reduce the threshold for requiring shareholder approval of termination payments.

In assessing options, their various potential costs and benefits need to be taken into account. Given the complexities and strong interests involved, it is particularly important to consider the potential for unintended consequences. Following its assessment, the Commission will make recommendations on strengthening the existing framework governing remuneration practices in Australia (TOR 7).

As well as this Commission inquiry, there are other concurrent reviews that have the potential to make recommendations that will alter at least some of the above mechanisms. The Australian Prudential Regulation Authority review and Australia's Future Tax System Review are discussed in box 8.

Further, while the current global financial crisis has been a catalyst for the current consideration of director and executive remuneration, it is important that any adjustment to the existing regulatory framework in Australia establishes a

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framework that can remain appropriate and effective throughout the economic cycle.

**Box 8 TOR 6: Other government reviews of remuneration issues**

***APRA review of executive remuneration and risk-taking***

The Australian Prudential Regulation Authority (APRA), the prudential regulator of the Australian financial services industry, is currently developing a framework for executive remuneration to apply to institutions that it regulates. APRA's focus will be on the structure (as opposed to level) of executive remuneration, and will seek to encourage managerial behaviour that protects and supports the interests of depositors, policyholders and superannuation fund members (APRA 2008). APRA anticipates releasing a discussion paper in the second quarter of 2009, and a final report by the end of 2009.

***Review of Australia's Taxation System***

The terms of reference for the review, chaired by Treasury Secretary Dr Ken Henry, require it to consider issues such as:

- the appropriate balance between taxing the returns from work, investment and savings, consumption (with the exception of the GST), and the role played by environmental taxes
- improvements to the tax and transfer system for individuals and families
- enhancing the taxation of savings, assets and investment, including company taxation
- simplifying the tax system.

The review's final report is due to be delivered to the Treasurer in December 2009.

Sources: APRA (2008); Department of the Treasury (2008).

*What evidence or examples indicate that the interests of boards and executives may not be adequately aligned with those of shareholders and the wider community? What factors have contributed to any misalignment?*

*What are the interests of the wider community in relation to director and executive remuneration within a company? To what extent do the interests of shareholders and the wider community align? In what circumstances will they not be aligned? Can cost cutting by companies, including by sacking workers, align with the public interest? Is it reasonable to reward executives for actions that promote shareholder interests but which may not align with the public interest?*

*What types of performance measures/hurdles could be used to accurately measure performance and align interests of executives and shareholders?*



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*How can opportunities for executives to ‘game’ incentives be minimised?*

*Are boards properly exercising their functions on behalf of shareholders? Are they being unduly influenced by chief executive officers? If so, why?*

*Are some forms of remuneration more likely than others to promote a misalignment between the interests of boards and executives and those of shareholders and the wider community?*

*Are taxation considerations, either from the company’s or executive’s perspective, driving the design of remuneration packages? If so, what changes are required? How should bonuses be treated for taxation purposes — should they be an allowable tax deduction for companies? Should bonuses be subject to special/higher taxation rates?*

*Is it appropriate that there be separate treatment of financial institutions? If so, why and in what way? Are there any risks from such an approach? Are there other sectors that would require a differentiated approach?*

*If current mechanisms are not serving to align the interests of the board and executives to those of shareholders and the wider community, how could regulatory arrangements and remuneration practices better secure this? For example:*

- should shareholder votes on remuneration reports be (more) binding?*
- are the current approval processes for equity-based remuneration appropriate?*
- what effect does hedging have on aligning interests, and should this practice be permitted?*
- is the current regulation of non-recourse loans appropriate?*
- what is the role of remuneration consultants and what has been their influence on remuneration practices, including levels, growth and structures of remuneration? Do any conflicts of interest exist?*
- should government have a greater role in regulating remuneration?*

*What are the costs and benefits of any options/mechanisms to more closely align the interest of boards and executives with those of shareholders and the wider community? What could be some unintended consequences of limiting or more closely regulating executive remuneration in Australia?*

## **TOR 5: International developments**

The Commission has been asked to examine the regulatory frameworks governing director and executive remuneration in other countries, and the effectiveness of

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international responses to remuneration issues arising from the global financial crisis.

Regulatory frameworks differ widely. Recent international developments in executive remuneration governance include:

- *Disclosure of remuneration practices*: many countries — including the US, Canada, UK, Japan, Germany and France — require by law some disclosure of director or executive pay. This generally involves outlining executive compensation program objectives and providing details on total payments to directors and executives. In 2006, the US Securities and Exchange Commission (SEC) released strengthened requirements to provide investors with a clearer and more complete picture of executive and director remuneration (SEC 2006). In 2005, Germany passed legislation requiring disclosure of executive remuneration. However, companies can opt out of this obligation with a majority of three quarters of shareholder votes.
- *Voluntary codes of conduct*: it is common for countries to have codes of conduct for good governance. In some cases, codes are supported by law that requires companies to report on how they have applied the code. (For example, the UK's 2006 Combined Code.) In France, a voluntary code of conduct was released by industry groups in 2008. On its release, French Cabinet Ministers called on company boards to adopt this code before the end of 2008. However no legislative requirements were instigated (AMF 2009).
- *'Say-on-pay'*: in 2002 the UK became one of the first countries to enact a non-binding shareholder vote on director pay. (Sweden has a similar advisory vote.) Subsequently, the Netherlands and Norway instituted a binding annual vote on executive remuneration (Davis 2007). In Canada there are currently no legal requirements for a shareholder vote to approve executive remuneration. However, in early 2009, all six of Canada's major banks agreed to give shareholders an advisory and non-binding vote from 2010 (Reuters 2009).
- *Prohibiting certain types of executive remuneration*: the Companies Act 2006 in the UK prohibits 'payments for loss of office' unless approved by a resolution of the members of the company. Released in 2008, a voluntary code of conduct in France prohibits payments for loss of office for executives of failed companies, and places a cap on the size of payments for loss of office for other executives at two years of compensation (AFEP and Medef 2008). In the US, a new law limits how 'non-qualified deferred compensation' can be structured (Internal Revenue Service 2007).

More recently, there has been a range of developments in executive remuneration governance, many in response to the global financial crisis. Several high profile

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‘bailouts’ of financial institutions and other companies, where governments have expended significant sums of public funds, have instigated increased regulation of executive remuneration. This has reflected a view that public funds should not flow to executives in the form of bonuses and termination payments when performance has been poor (box 9).

**Box 9      Government assistance initiatives for companies and executive remuneration**

***United States***

The Emergency Economic Stabilization Act 2008 provided for up to US\$700 billion for the purchase of assets and equity from financial institutions through the Troubled Asset Relief Program (TARP). This Act includes conditions on executive remuneration practices in companies electing to participate significantly in TARP. These conditions were strengthened in the American Recovery and Reinvestment Act 2009 (enacted 17 February 2009) and include: a prohibition on signing new ‘golden parachute’ contracts; provision for forced repayment of bonuses; a requirement that recipients meet standards to eliminate compensation structures that encourage ‘unnecessary and excessive’ risk-taking by executives; and a prohibition on TARP recipients paying or accruing any bonus, retention award, or incentive compensation to senior executives during the period that obligations from assistance remain outstanding.

On 19 March 2009, in response to controversy about bonuses paid to executives from American International Group, the House of Representatives passed a bill (now being considered by the Senate) imposing a 90 per cent tax on some bonuses paid by companies that received TARP assistance (Bloomberg 2009).

***United Kingdom***

In October 2008, the UK government announced a £400 billion rescue package for the banking system. Recipients under the Bank Recapitalisation Fund must sign agreements with the Treasury which generally stipulate no board bonuses for 2008. Banks must also comply with the Association of British Insurers best practice code on remuneration — where a board member loses the confidence of the board they should ‘be dismissed at a cost that is reasonable and perceived as fair’ (HM Treasury 2008).

In March 2009, the Financial Services Authority (FSA) released the Turner Review, a regulatory response to the global banking crisis, which examined the events that led to the financial crisis and recommended reforms. The report concluded that in future the FSA will have ‘a strong focus on the risk consequences of remuneration policies within its overall risk assessment of firms, and will enforce a set of principles which will better align remuneration policies with appropriate risk management’ (FSA 2009, p. 80). The FSA has commenced the development of a Code of Practice on Remuneration.

(Continued next page)

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**Box 9** (continued)**France**

In March 2009, there was significant negative publicity in France regarding bonuses paid to executives from banks receiving funds in 2008 through the government's bank rescue plan, and in particular bonuses paid to directors at Société Générale, which received €1.7 billion from the government. Responding to significant pressure from the government, the four most senior Société Générale directors handed back stock options granted for the 2008 period (AFP 2009a). Subsequently, the French Prime Minister has issued a government decree curbing executive bonuses and banning stock options until the end of 2010 at companies assisted through the government's bank rescue plan (AFP 2009b).

**Germany**

Banks accessing funds through Germany's €400 billion Financial Market Stabilisation Fund must comply with a range of conditions, including: reviewing remuneration systems such that they are transparent, based on long-term and sustainable goals and do not induce excessive risk-taking and ensuring that the remuneration for board members is not excessive (a total remuneration of more than €500,000 per annum is, as a rule, considered excessive) (Freshfields Bruckhouse Deringer 2008).

*Sources:* Bloomberg (2009); HM Treasury (2008); FSA (2009); AFP (2009a, 2009b); Freshfields Bruckhouse Deringer (2008).

## Activities of international organisations

Work on executive remuneration governance is underway in several international forums. For example, the OECD, as part of its Strategic Response to the Financial Crisis, plans to develop a set of recommendations for improvements in priority areas of corporate governance, including the remuneration process (OECD 2009).

The Financial Stability Forum (FSF), which includes representatives of national financial authorities, international financial institutions and international regulatory and supervisory groupings, delivered a report to the G-7 Finance Ministers in April 2008. This report recommended that regulators and supervisors should work with market participants to mitigate the risks arising from remuneration policies and that problems can be reduced where businesses closely relate the incentives in their compensation model to long-term, company-wide profitability (FSF 2008a).

The FSF has identified compensation issues as meriting further analysis and will report back to the G-7 on its discussions in April 2009. The Central Bank Governors and Finance Ministers of the Group of Ten will also discuss the implications of compensation and other incentives for financial stability at its upcoming meeting in

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October (FSF 2008b). In its meeting in March 2009, the G-20 outlined principles for a cooperative and consistent approach by national authorities to programmes addressing impaired assets. These principles included a reminder that ‘government support is a privilege and must come with strong conditions’, including improving governance and executive remuneration caps (G-20 2009b, p. 2).

Some key themes emerging from international approaches to executive remuneration include moves to:

- curb remuneration levels
- link remuneration incentives to long-term, company-wide profitability
- review and implement remuneration structures to encourage only reasonable risk-taking, including stock-based remuneration vesting over extended periods of time
- promote disclosure and board responsibility.

On 2 April 2009, the G-20 endorsed principles developed by the FSF on pay and compensation in significant financial institutions (G-20 2009a, p. 4). The three principles require company boards to play an active role in the design, operation and evaluation of compensation schemes; that compensation arrangements properly reflect risk and better match payments with risk profiles; and that companies publicly disclose clear, comprehensive and timely information about compensation, in particular to assist shareholders to exercise effective monitoring. Some of the principles would seem consistent with existing Australian arrangements (for example, disclosure requirements for executive remuneration), but just how they will be translated to policy remains to be determined.

*Are there any international approaches particularly applicable to Australia?*

*Are there particular lessons for Australia from international approaches and experience — both successes and failures?*

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## References

- ACSI (Australian Council of Superannuation Investors) 2008a, *Annual Activities Statement — Financial Year Ended 30 June 2008*, Melbourne.
- 2008b, *CEO Pay in the Top 100 Companies: 2007*, Research paper prepared by RiskMetrics — ISS Governance Services, Melbourne.
- 2009, *Voting Alert Service*, [www.acsi.org.au/voting-alert-service.html](http://www.acsi.org.au/voting-alert-service.html) (accessed 25 March 2009).
- Adams, G. 2006, *CEO Salaries: What's Happening and Why*, CEO Forum Group, [www.ceoforum.com.au/article-detail.cfm?cid=7717&t=/Garry-Adams--Mercer-Human-Resource-Consulting/CEO-salaries-whats-happening-and-why/](http://www.ceoforum.com.au/article-detail.cfm?cid=7717&t=/Garry-Adams--Mercer-Human-Resource-Consulting/CEO-salaries-whats-happening-and-why/) (accessed 25 March 2009).
- AFEP (Association Française des Entreprises Privées) and Medef (Mouvement des Entreprises de France) 2008, *Recommendations Concerning the Compensation of Executive Directors of Companies whose Shares are Admitted to Trading on a Regulated Market*, October.
- AFP 2009a, *Bank bonuses fuel French outrage*, 26 March 2009, [www.google.com/hostednews/afp/article/ALeqM5hwXAM4gmJreqZihFBEzwT1lgQOXg](http://www.google.com/hostednews/afp/article/ALeqM5hwXAM4gmJreqZihFBEzwT1lgQOXg) (accessed 31 March 2009).
- 2009b, *France curbs bonuses at bailed-out firms*, 31 March 2009, [www.google.com/hostednews/afp/article/ALeqM5gkC1-G1y55ILQLlxbxMVW a8YSpW5Q](http://www.google.com/hostednews/afp/article/ALeqM5gkC1-G1y55ILQLlxbxMVW a8YSpW5Q) (accessed 31 March 2009).
- AICD (Australian Institute of Company Directors) 2008a, *Executive Termination Payments*, Position Paper no. 13, Sydney.
- 2008b, *Non-Recourse Loans Provided to Executives*, Position Paper no. 8, Sydney.
- 2009, *Executive Remuneration: Guidelines for Listed Company Boards*, Sydney.
- AMF (Autorité des Marchés Financiers) 2009, *Review of Disclosures by Listed Companies Pursuant to the AFEP/MEDEF Recommendations on Executive Compensation*, Paris.
- APRA (Australian Prudential Regulation Authority) 2008, *APRA outlines approach on executive remuneration*, Media release, 9 December.
- ASA (Australian Shareholders' Association) 2009, *Executive Remuneration*, ASA Policy Statement, 23 March, Sydney.
- ASX (Australian Securities Exchange) Corporate Governance Council 2007, *Corporate Governance Principles and Recommendations*, Sydney.

- 
- Bebchuk, L. and Fried, J. 2003, 'Executive Compensation as an Agency Problem', *Journal of Economic Perspectives*, vol. 17, no. 3, pp. 71–92.
- Bloomberg 2009, *AIG Bonus Tax Bill May Be Delayed in U.S. Senate*, 23 March, [www.bloomberg.com/apps/news?pid=20601103&sid=aY7wiXlRs9fk&refer=nws](http://www.bloomberg.com/apps/news?pid=20601103&sid=aY7wiXlRs9fk&refer=nws) (accessed 24 March 2009).
- Davis, S. 2007, *Does 'Say On Pay' Work? Lessons on Making CEO Compensation Accountable*, Millstein Center for Corporate Governance and Performance, Yale School of Management, Policy Briefing no. 1.
- Department of the Treasury 2008, *Australia's Future Tax System Papers*, [taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs\\_reports.htm](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm) (accessed 23 March 2009).
- Freshfields Bruckhouse Deringer 2008, *Financial Market Stabilisation Act and Financial Market Stabilisation Fund Regulation come into force*, October, [www.freshfields.com/publications/pdfs/2008/oct08/24372a.pdf](http://www.freshfields.com/publications/pdfs/2008/oct08/24372a.pdf) (accessed 24 March 2009).
- FSA (Financial Services Authority) 2009, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, London.
- FSF (Financial Stability Forum) 2008a, *Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience – Follow up on Implementation*, Basel, Switzerland.
- 2008b, *Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience*, [www.fsforum.org/publications/r\\_0804.pdf](http://www.fsforum.org/publications/r_0804.pdf) (accessed 24 March 2009).
- G-20 2009a, *Declaration on Strengthening the Financial System – London*, 2 April.
- 2009b, *Restoring Lending: a Framework for Financial Repair and Recovery*, Communiqué Annex, Meeting of Finance Ministers and Central Bank Governors, 14 March, United Kingdom.
- HM Treasury 2008, *The Placing and Open Offer Agreements for the Recapitalisation of RBS, HBOS and Lloyds TSB*, [www.hm-treasury.gov.uk/d/combined\\_rbs\\_hbos\\_lloydstsb.pdf](http://www.hm-treasury.gov.uk/d/combined_rbs_hbos_lloydstsb.pdf) (accessed 24 March 2009).
- Internal Revenue Service 2007, *Notice of Additional 2008 Transition Relief under Section 409A*, Notice 2007-86.
- Mercer 2007, *Perfecting Long-term Incentive Remuneration*, Executive Remuneration Perspective, Toronto.
- Minter Ellison 2009, *Alert — Executive remuneration: surviving the global financial crisis*, [www.minterellison.com/public/connect/Internet/Home/Legal+](http://www.minterellison.com/public/connect/Internet/Home/Legal+)

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Insights/Alerts/NAExecutive+remuneration:+surviving+the+global+financial+crisis (accessed 23 March 2009).

Murphy, K.J. and Zabochnik, J. 2004, 'CEO Pay and Appointments: A Market-Based Explanation for Recent Trends', *The American Economic Review*, vol. 94, no. 2, pp. 192–6

OECD 2009, Corporate Governance and the Financial Crisis, [www.oecd.org/document/48/0,3343,en\\_2649\\_34813\\_42192368\\_1\\_1\\_1\\_37439,00.html](http://www.oecd.org/document/48/0,3343,en_2649_34813_42192368_1_1_1_37439,00.html) (accessed 24 March 2009).

Reuters 2009, TD agrees to say-on-pay for shareholders in 2010, 18 March, [www.ca.reuters.com/article/domesticNews/idCATRE52H6V420090318](http://www.ca.reuters.com/article/domesticNews/idCATRE52H6V420090318) (accessed 23 March 2009).

SEC (Securities and Exchange Commission) 2006, *Executive Compensation and Related Person Disclosure; Final Rule and Proposed Rule 17*, CFR Parts 228, 229 et al. Federal Register, vol. 71, no. 174.

Shields, J. 2005, 'Setting the Double Standard: Chief Executive Pay the BCA Way', *Journal of Australian Political Economy*, vol. 56, pp. 299–324.

Swan, W. (Treasurer) and Sherry, N. (Minister for Superannuation and Corporate Law) 2009, *Action on Golden Handshakes*, Media release, 18 March.

Tarrant, D. 2009, *Payday paralysis*, INTHEBLACK, CPA Australia, March, vol. 79, no. 2, pp. 28–31.



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## Attachment A: Terms of reference

### **Review into the Regulation of Director and Executive Remuneration in Australia**

I, CHRIS BOWEN, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, pursuant to parts 2 and 3 of the *Productivity Commission Act 1998* hereby request that the Productivity Commission undertake an inquiry into the current Australian regulatory framework around remuneration of directors and executives, as it applies to companies which are disclosing entities regulated under the *Corporations Act 2001* and report within nine months of the date of receipt of this reference.

This review is intended to complement the work already underway in relation to executive remuneration practices by regulated financial institutions. Last year, the Prime Minister announced that the Australian Prudential Regulation Authority would develop a template that links capital adequacy requirements to executive remuneration practices in order to limit excessive risk-taking in financial institutions.

#### *Background*

The remuneration of company directors and executives is an issue which has attracted considerable interest from shareholders, business groups and the wider community. Concerns have been raised over excessive remuneration practices, particularly as we face almost unprecedented turmoil in global financial and equity markets.

The current global financial crisis has highlighted the importance of ensuring that remuneration packages are appropriately structured and do not reward excessive risk-taking or promote corporate greed. The crisis has also highlighted the need to maintain a robust regulatory framework that promotes transparency and accountability on remuneration practices, and better aligns the interests of shareholders and the community with the performance and reward structures of Australia's corporate directors and executives.

It is also important to recognise that internationally competitive reward structures for company directors and executives continue to provide incentives for directors and executives to assume leadership responsibilities within corporations.

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Internationally, remuneration practices have been identified by various forums as a contributing factor to the global financial crisis. The Group of Twenty (G-20) and the Financial Stability Forum are both examining remuneration issues to ensure effective governance and oversight of executive remuneration is part of their responses to the crisis. In addition, the United Kingdom and the United States have imposed conditions on remuneration for entities that have received the benefit of recent corporate bailouts and government assistance packages.

### *Scope of the Review*

In undertaking the review the Commission should:

1. Consider trends in remuneration in Australia, and internationally, including, among other things, the growth in levels of remuneration, the types of remuneration being paid, including salary, short-term, long-term and equity-based payments and termination benefits and the relationship between remuneration packages and corporate performance.
2. Consider the effectiveness of the existing framework for the oversight, accountability and transparency of remuneration practices in Australia including:
  - the role, structure and content of remuneration disclosure and reporting
  - the scope of who should be the subject of remuneration disclosure, reporting and approval
  - the role of boards and board committees in developing and approving remuneration packages
  - the role of executives in considering and approving remuneration packages
  - the role of other stakeholders, including shareholders, in the remuneration process
  - the role of, and regulatory regime governing, termination benefits
  - the role of, and regulatory regime governing, remuneration consultants, including any possible conflicts of interest
  - the issue of non-recourse loans used as part of executive remuneration and
  - the role of non-regulatory industry guidelines and codes of practice.
3. Consider, in light of the presence of large local institutional shareholders in Australia, such as superannuation funds, and the prevalence of retail shareholders, the role of such investors in the development, setting, reporting and consideration of remuneration practices.

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4. Consider, any mechanisms that would better align the interests of boards and executives with those of shareholders and the wider community, including but not limited to:
    - the role of equity-based payments and incentive schemes
    - the source and approval processes for equity-based payments
    - the role played by the tax treatment of equity-based remuneration
    - the role of accelerated equity vesting arrangements and
    - the use of hedging over incentive remuneration.
  5. Consider the effectiveness of the international responses to remuneration issues arising from the global financial crisis, and their potential applicability to Australian circumstances.
  6. Liaise with the Australia's Future Tax System Review and the Australian Prudential Regulation Authority in relation to, respectively, any taxation and financial sector remuneration issues arising out of this Review.
  7. Make recommendations as to how the existing framework governing remuneration practices in Australia could be strengthened.

The Commission is to undertake an appropriate public consultation process including the invitation of public submissions.

CHRIS BOWEN

[Received 19 March 2009]

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## **Attachment B: How to make a submission and register interest**

This is a public inquiry and the Commission invites all interested individuals and organisations to register an interest (see attached registration of interest form). Anyone can participate in the inquiry by lodging written submissions and/or through appearance at public hearings or other discussion forums. The Commission will also have early informal discussions with individuals, companies and other organisations to seek their views and to identify issues and relevant sources of information.

### *There is no specific format*

Submissions may range from a short letter outlining your views on a particular topic to a much more substantial document covering a range of issues. There is no specified format for a submission (for example, it may be in written or audio format). Where possible, you should provide evidence, such as relevant data and documentation, to support your views. While every submission is welcome, multiple, identical submissions do not carry any more weight than the merits of an argument in a single submission.

### *Submissions should be public documents*

Submissions will become publicly available documents once placed on the Commission's website, which will normally occur shortly after receipt of the submission, unless it is marked confidential or accompanied by a request to delay release for a short period of time. Confidential material, which will not be made publicly available, should be provided under a separate cover and clearly marked 'IN CONFIDENCE'. The Commission generally accepts such material as confidential if it is commercially sensitive or affects privacy, not views or other evidence. Note that copyright in submissions sent to the Commission resides with the author(s), not with the Commission.

As this is a public inquiry, the Commission will make all submissions available for others to read, in accordance with sections 9(d) and 16(b) of the *Productivity Commission Act 1998* (Cwlth).

Each submission should also be accompanied by a cover sheet on which submitting individuals and organisations can provide personal and organisational details. For submissions received from individuals, personal contact details (for example, home address, phone and fax number) in the text of the submission will be removed

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before it is made publicly available. Only the submitter's name and State or Territory of residence will appear in the published submission in order to ensure compliance with privacy laws. The submission cover sheet is attached to this issues paper or is available from the inquiry home page at [www.pc.gov.au/projects/inquiry/executive-remuneration](http://www.pc.gov.au/projects/inquiry/executive-remuneration).

*Email lodgement is preferred*

If possible, submissions should be lodged by email or as a text or Microsoft Word document (.txt, .rtf, .doc), rather than in Adobe Portable Document Format (pdf), to ensure screen readers can read them. (Submissions may also be sent by mail, fax or audio cassette, and arrangements can be made to record oral submissions over the telephone.)

Submissions will be published on the Commission's website in pdf format. Please ensure that the version sent to the Commission is the final version and that you have removed any drafting notes, track changes, annotations and other hidden text and marked revisions. Please also remove any internal links and large logos and decorative graphics (to keep file sizes down). This will enable the submission to be easily viewed and downloaded from the website. Submissions remain on the Commission's website indefinitely.

Submissions will continue to be accepted throughout the inquiry, but initial submissions should be received by the Commission by **29 May 2009** to ensure their adequate consideration in preparing the draft report. If a submission is to be presented at a public hearing, it should be received by the Commission a week prior to the hearing. Key dates, submission addresses and contact details are at the front of this paper.

*Availability of submissions and transcripts*

Unless marked and accepted as confidential or other timing issues arise, submissions will be posted to the Commission's website as soon as they can be processed.

Submissions and transcripts from public hearings can be viewed on the Commission's website at [www.pc.gov.au](http://www.pc.gov.au).

If you do not have access to the Internet, submissions and transcripts can be viewed online in the libraries of the Commission's offices, Monday to Friday, from 8.30am to 5.00pm. It is preferable, though not crucial, to make an appointment.

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The Libraries are located at:

***Melbourne***

Level 28

35 Collins St

MELBOURNE VIC 3000

Ph: 03 9653 2277

***Canberra***

Level 2

15 Moore Street

CANBERRA CITY ACT 2600

Ph: 02 6240 3344

Submissions and transcripts can be accessed at State Reference Libraries or may be purchased from Flash Photobition in Canberra. Please contact the Commission if you require a form.

# Productivity Commission SUBMISSION COVER SHEET

(not for publication)

## *Executive Remuneration Inquiry*

**Please complete and submit this form with your submission:**

By email: [exec\\_remuneration@pc.gov.au](mailto:exec_remuneration@pc.gov.au) OR By fax: (03) 9653 2305

Or by post: Executive Remuneration Inquiry  
Productivity Commission  
Locked Bag 2, Collins St East  
Melbourne Vic 8003

**Organisation:** \_\_\_\_\_

**Street address:** \_\_\_\_\_

**Suburb/city:** \_\_\_\_\_ **State & Postcode:** \_\_\_\_\_

**Postal address:** \_\_\_\_\_

**Suburb/city:** \_\_\_\_\_ **State & Postcode:** \_\_\_\_\_

**Principal contact:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

**Position:** \_\_\_\_\_ **Fax:** \_\_\_\_\_

**Email address:** \_\_\_\_\_ **Mobile:** \_\_\_\_\_

**Please indicate if your submission:**

- ☐ contains NO confidential material
- ☐ contains SOME confidential material (provided under separate cover and clearly marked)
- ☐ contains confidential material and the WHOLE submission is provided 'IN CONFIDENCE'

*Please note:*

- For submissions made by individuals, all personal details other than your name and the State or Territory in which you reside will be removed from your submission before it is published on the Commission's website.
- Submissions will be placed on the Commission's website, shortly after receipt, unless marked confidential or accompanied by a request to delay release for a short period of time, where they will remain indefinitely.
- Confidential material should be provided under a separate cover and clearly marked 'IN CONFIDENCE'.
- Copyright in submissions resides with the author(s), not with the Productivity Commission.





# REGISTRATION OF INTEREST Executive Remuneration Inquiry



Australian Government  
Productivity Commission

**To register your interest please complete and return this form to:**

Executive Remuneration Inquiry  
Productivity Commission  
Locked Bag 2, Collins St East  
Melbourne Vic 8003

OR

**By fax to:**

Yvette Goss (03) 9653 2305

**By email to:**

[exec\\_remuneration@pc.gov.au](mailto:exec_remuneration@pc.gov.au)

**To register online:**

[www.pc.gov.au/projects/inquiry/executive-remuneration](http://www.pc.gov.au/projects/inquiry/executive-remuneration)

*Please print and complete in full*

**Name of organisation  
or individual:**

**Postal address:**

**State & Postcode**

**Street address:**

**State & Postcode**

**Principal contact:**

**Position:**

**Phone:**

( )

**Fax:** ( )

**Mobile:**

**E-mail :**

**We will generally distribute inquiry material (circulars) by email.**

*Please indicate if you would prefer material in an alternative format:*

☐

Post

☐

Other (please specify).....

**What is your likely involvement in the inquiry?**

☐

I intend to make a submission to this inquiry.

☐

I intend to participate in a public hearing.

☐

At this stage, I only wish to be kept informed of the inquiry's progress.

☐

I give permission for the Commission to use my personal details to advise me of related inquiries/reports. This information will NOT be provided to third parties.

