

19 January 2011

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Dear Parliamentary Secretary to the Treasurer,

Thank you for the opportunity to provide a submission on the exposure draft of the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (“the draft legislation”).

We have reviewed the draft legislation and associated explanatory material and are generally supportive of the legislation. We consider the draft legislation to be consistent with the policy position set out by the Government in its April 2010 response to the Productivity Commission’s inquiry on executive remuneration in Australia.

However, Westpac believes there are some elements of the draft legislation which could lead to impractical and unintended consequences in the management of executive remuneration by corporations. We therefore offer our comments and recommendations, by exception, for improving the draft legislation (our comments are referenced according to the Chapters in the Explanatory Memorandum).

### **Chapter 1: Strengthening the non-binding vote - the “two-strikes” test**

Westpac accepts that the proposal is consistent with the Productivity Commission’s recommendation and the Government’s response to that proposal.

Westpac remains of the view, however, that a 25% threshold allows a minority of shareholders to prevail over the wishes of the majority and may therefore be open to abuse. We recommend that the voting threshold be set at 50%, in line with other ordinary resolutions.

### **Chapter 2: Improving Accountability on the use of remuneration consultants**

Westpac understands the intent of the draft legislation to promote independent advice by remuneration consultants. We have two key concerns with the drafting of this proposal:

1. The broad definition of Remuneration Consultants; and
2. The implications of engaging a Remuneration Consultant.

## **Broad definition of Remuneration Consultants**

The draft legislation will include any person (other than an officer or employee of the company) who, under a contract for services with a company, provides “advice relating to the nature and amount or value of remuneration for one or more members of the key management personnel for a company that is a disclosing entity” (s206K(1)(a)).

We understand the provisions are designed to promote independent advice being provided to non-executive directors to enable them to assess remuneration for the Managing Director and other key management personnel (KMP).

Westpac considers this definition of a “remuneration consultant” to be too broad, potentially capturing external accountants and other consultants engaged by Westpac to advise on issues such as employee equity plans or remuneration structures.

Westpac believes it is appropriate and necessary for a company’s Human Resources function and other management to seek advice on remuneration in preparing recommendations to the Board and implementing Board decisions. The current definition would prevent that advice being obtained except through non-executive directors.

The explanatory memorandum states that the key concern is *“that remuneration consultants may be placed in a position of conflict if they are asked to provide advice on the remuneration of officers who might have the capacity to affect whether or not that consultant’s services will be retained again.”* The risk arising from any conflict only materialises where the advice is used to provide the non-executive directors with independent advice on remuneration of the Managing Director and KMP.

Therefore, Westpac recommends that the scope of the provisions be targeted at engagements requested by the non-executive directors. That is, engagements where the Board is seeking independent advice relating to KMP remuneration. The provisions should not preclude the engagement of remuneration consultants by management (e.g. human resources, risk management, or internal audit) from conducting valid benchmarking / operational reviews of KMP remuneration.

## **Implications of engaging a Remuneration Consultant**

Westpac considers the proposed disclosure requirements to be excessive, even with the assumption that the definition will be narrowed to engagements requested by the non-executive directors. Given that the procedures for engaging the remuneration consultant are designed to ensure their independence, there is no clear reason to require the detailed disclosure of each contract given there are no other equivalent disclosures for other consultants/advisers under the Corporations Act.

Westpac recommends that the disclosure provisions operate on an aggregate basis only in a similar way to the current disclosure requirements for auditor’s remuneration (e.g. total fees and general categories of services), Westpac considers that the level of detail proposed in the draft legislation may further confuse the users of the remuneration report because remuneration consultants’ advice is only one facet of the decision-making process used for determining KMP remuneration.

## Other Issues

### *Administrative support*

Westpac considers the requirement for remuneration consultants to be engaged by non-executive directors and provide advice directly to the remuneration committee or non-executive directors may create an unintended administrative burden on non-executive directors.

Westpac recommends including an explicit provision which allows the remuneration committee and non-executive directors to access administrative support from the company when engaging and dealing with remuneration consultants, similar to the provision in APRA Prudential Practice Guide PPG 511 Remuneration paragraph 15:

*“The Board Remuneration Committee may rely on administrative support from internal or external parties when conducting reviews. The Committee, in performing its duties, would typically seek information from relevant internal parties including, but not limited to, those responsible for risk management, human resource management and internal audit. APRA expects the Committee to ensure that there are processes in place to ensure advice from such parties is not influenced by conflicts of interest.”*

Such a provision would improve the practical implementation of the legislation and not contravene the proposed legislation under Schedule 1, Item 5, sub-sections 206K and 206L, as remuneration consultants would still be required to be engaged and report directly to the remuneration committee/non-executive directors.

### *Definition of “Executive Director”*

In response to section 2.9 of the Explanatory Memorandum, Westpac does not believe that a statutory definition of “executive director” is required.

## **Chapter 4: Prohibiting hedging of incentive remuneration**

In response to section 4.8 of the Explanatory Memorandum, Westpac is of the view that a “hedge” should be defined broadly as a principles-based provision (as per 206J(2)), rather than through a prescribed list of arrangements. The evolution of modern financial markets would quickly render a prescribed list redundant.

Westpac is of the view that the definition of “risk relating to an element of the member’s remuneration that depends on the satisfaction of a performance condition” requires clarification. The legislation could be clarified by specifying that the prohibition relates to both unvested remuneration and any vested remuneration subject to a holding lock (given vested remuneration subject to a holding lock only may not be considered “at risk”). The legislation could be further clarified to specify that performance conditions include time-based conditions (i.e. for remuneration where the only vesting condition is time).

Westpac is of the view that any arrangements relating to life or income protection insurance, where the insurable risk event relates to the death or illness of the KMP, should be excluded from the definition of a “hedge”. However, in the case of insurance contracts where the insurable risk event relates to the financial value of remuneration or equity/equity-related instruments, these insurance contracts should be considered hedges. In other words, the relevant test is the insurable risk event rather than the arrangement or instrument itself.

## **Chapter 6: Cherry picking**

Westpac supports the underlying proposition that, where a proxy is in attendance at a meeting, the proxy should be required to vote all proxy votes as directed. Additional clarification is required to make clear that proposal will not apply to proxies not in attendance at the meeting.

The explanatory memorandum indicates the Government is concerned that *“cherry-picking impairs the transparency and effectiveness of shareholder voting. In essence, it enables the wishes of shareholders to be ignored and can result in outcomes that do not clearly reflect shareholder views on a resolution”*

In Westpac’s view, an even better approach to support shareholder participation is to amend the Corporations Act to encourage direct voting, which enables shareholders who are not present at the meeting to cast their votes directly, rather than appointing a proxy to cast those votes.

The Corporations Act has been amended to permit direct voting, but the take-up has to date been relatively limited. One factor for the limited take-up is the requirement to circulate both a direct voting form and a proxy voting form. The circulation of two very similar forms for substantively the same purpose is potentially confusing to shareholders and creates potential difficulties in administering the voting process if (as will inevitably occur in some cases) both forms are returned. Amending the Corporations Act to remove the requirement for a proxy form if a direct voting form is provided would encourage direct voting. This removes potential proxy voting issues altogether and increases shareholders’ control over their voting.

Thank you for the opportunity to submit our views. If you have any further queries in relation to this matter or require any further information, please feel free to contact Christine Parker, Group General Manager, Human Resources on (02) 8253-8692.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Hanlon', written in a cursive style.

**Peter Hanlon**  
Group Executive, People and Transformation