

John,

further to my earlier comments, you may have seen the front page article in the Australian today "Executive option scams exposed".

This makes the point, inter alia, that option deals which dispose of the economic or legal interest prior to exercise need not be disclosed under s205G.

In my view, Professor Fels is correct in suggesting the failure to disclose is misleading-rather than the Trade Practices Act, it is contrary to s995 or post FSR, s1041H of the Corporations Act.

Although s205G technically does not require disclosure, the case GPG v GIO [2001] FCA 1761 demonstrates that even where the continuous disclosure laws (to which s205G is analogous) do not require disclosure, there may be a civil contravention of those sections where there is a reasonable expectation that the information would be disclosed.

SA

Executives secretly cash in bonuses

By Michael West
November 22, 2002

AUSTRALIA'S business leaders have been cashing in their lavish incentive payments – without telling their shareholders – under loopholes in the stock exchange rules.

A document from leading investment bank UBS Warburg – obtained by *The Australian* – shows how corporate executives can reap millions of dollars from their shares and option plans, while giving the appearance there have been no changes to their bonus deals.

These payment arrangements are achieved through complex financial transactions sometimes called protection schemes.

But the Australian Stock Exchange said such schemes were misleading and against the spirit of good corporate governance.

"They are potentially misleading, inasmuch as senior executives have exposure to upside or downside in the stock and, as it turns out, that executive might be quarantined from any upside or downside," ASX spokesman Gervaise Green told *The Australian*.

Under the schemes, an executive with employee share options awarded by the company will pay an investment bank to structure a mix of "call options", "collars", "forwards" and "equity swaps" over the company stock to lock in the value of the share price at a certain point and protect capital gains, while retaining legal ownership of the stock.

The executive maintains voting rights and dividends but defers legal disposal of the shares.

The scheme means executives are protected from share price falls and have less incentive to drive the share price up, as they get little reward for a higher share price.

In the case of One.Tel, executives could have locked in the value of their options regardless of the performance of the shares and the company itself.

Australian Competition and Consumer Commission chairman Allan Fels said last night the scheme may breach the Trade Practices Act.

"There could be issues under the misleading and deceptive conduct provisions of the Trade Practices Act," he said. "The fact that there are no active forms of misleading behaviour is one thing, but silence can constitute misleading conduct."

Stock and stock option plans are supposed to give executives incentives to perform and therefore align their interests with those of their company's shareholders. If the share price goes up, the executives are rewarded and shareholders get a gain on their investment. Under Australian Stock Exchange disclosure laws, executives are required to inform the exchange and their shareholders when they buy or sell their employee stock.

However, the UBS document _ and similar schemes are offered by Macquarie Bank, Salomon Smith Barney, JB Were and other leading banks _ shows how corporate chiefs can capture the value of their incentive bonuses without necessarily telling the ASX, while maintaining legal ownership of the assets. The Australian surveyed the top 18 companies on the ASX _ the top 20 minus Telstra, which remains 50.1 per cent-owned by the Government, and Telecom New Zealand.

Of those 18 companies, just one, Westfield Holdings, conceded that its executives had participated in protection deals, and only one, National Australia Bank, ruled out any involvement in protection schemes by its top executives.

Foster's, Westpac, Woodside, Coles Myer, AMP, Qantas, St George Bank, News Corporation (parent of News Limited, publisher of The Australian), Commonwealth Bank, BHP, Singtel (Optus), Woolworths, ANZ, Rio Tinto, Wesfarmers and WMC Resources all declined to rule out that their top brass had cashed in stock incentives at some time in the past five years. ASX chairman Richard Humphrey said: ``The spirit of the rules is about being transparent and about disclosure, and these schemes would appear to work against that philosophy.

``There seems little point in aligning the management of directors' interests with those of the shareholders if that nexus can be quietly broken immediately afterwards."`