Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011

No. 42, 2011

An Act to amend the law relating to corporations, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

Contents

1 Short title 1
2 Commencement 2
3 Schedule(s) 2

Schedule 1—Amendment of the Corporations Act 2001 3

Part 1—Remuneration 3

Part 2—Limits on number of directors 20

Part 3—Voting by proxies as directed 26

Part 4—Application provisions 29

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An Act to amend the law relating to corporations, and for related purposes

[*Assented to 27 June 2011*]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011*.

2 Commencement

This Act commences on 1 July 2011.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendment of the Corporations Act 2001

Part 1—Remuneration

1 Section 9

Insert:

closely related party of a member of the key management personnel for an entity means:

(a) a spouse or child of the member; or

(b) a child of the member's spouse; or

(c) a dependant of the member or of the member's spouse; or

(d) anyone else who is one of the member's family and may be expected to influence the member, or be influenced by the member, in the member's dealings with the entity; or

(e) a company the member controls; or

(f) a person prescribed by the regulations for the purposes of this paragraph.

2 Section 9

Insert:

key management personnel for an entity has the same meaning as in the accounting standards.

3 Section 9

Insert:

remuneration committee has the meaning given by paragraph 206K(2)(b).

4 Section 9

Insert:

remuneration consultant means a person:

(a) who makes a remuneration recommendation under a contract for services with the company to whose key management personnel the recommendation relates; and

(b) who is not an officer or employee of the company.

5 Section 9

Insert:

remuneration recommendation has the meaning given by section 9B.

6 At the end of Division 1 of Part 1.2 of Chapter 1

Add:

9B Meaning of *remuneration recommendation*

(1) A ***remuneration recommendation*** is:

(a) a recommendation about either or both of the following:

(i) how much the remuneration should be;

(ii) what elements the remuneration should have;

for one or more members of the key management personnel for a company; or

(b) a recommendation or advice about a matter or of a kind prescribed by the regulations.

(2) None of the following is a ***remuneration recommendation*** (even if it would otherwise be covered by subsection (1)):

(a) advice about the operation of the law (including tax law);

(b) advice about the operation of accounting principles (for example, about how options should be valued);

(c) advice about the operation of actuarial principles and practice;

(d) the provision of facts;

(e) the provision of information of a general nature relevant to all employees of the company;

(f) a recommendation, or advice or information, of a kind prescribed by the regulations.

(3) Subsection (2) does not limit the things that are not remuneration recommendations, nor does it mean that something specified in that

subsection would otherwise be a remuneration recommendation within the meaning of subsection (1).

(4) ASIC may by writing declare that subsection (1) does not apply to a specified recommendation or specified advice, but may do so only if ASIC is satisfied that it would be unreasonable in the circumstances for the advice or recommendation to be a remuneration recommendation. The declaration has effect accordingly. The declaration is not a legislative instrument.

7 After section 111AN

Insert:

111ANA Requirements relating to remuneration recommendations in relation to key management personnel

There are special requirements in Part 2D.8 for remuneration recommendations in relation to key management personnel for disclosing entities that are companies.

8 At the end of Chapter 2D

Add:

Part 2D.7—Ban on hedging remuneration of key management personnel

206J No hedging of remuneration of key management personnel

(1) A member of the key management personnel for a company that is a disclosing entity, or a closely related party of such a member, must not enter into an arrangement (with anyone) if the arrangement would have the effect of limiting the exposure of the member to risk relating to an element of the member's remuneration that:

(a) has not vested in the member; or

(b) has vested in the member but remains subject to a holding lock.

(2) Without limiting paragraph (1)(a), remuneration that is not payable to a member until a particular day is, until that day, remuneration that has not vested in the member.

(3) In determining whether an arrangement has the effect described in subsection (1) in relation to an element of remuneration described in that subsection, regard is to be had to the regulations (if any) made for the purposes of this subsection.

(4) A member of the key management personnel for a company who contravenes subsection (1) commits an offence.

(5) An offence against subsection (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

(6) A person commits an offence if:

(a) the person is a member of the key management personnel for a company; and

(b) a closely related party of the member contravenes subsection (1) in relation to the member; and

(c) the person is reckless as to the contravention.

(7) A closely related party of a member of the key management personnel for a company commits an offence if the party intentionally contravenes subsection (1) in relation to the member.

(8) ASIC may by writing declare that subsection (1) does not apply to a specified arrangement, but may do so only if ASIC is satisfied that the operation of that subsection would be unreasonable in the circumstances. The declaration has effect accordingly. The declaration is not a legislative instrument.

Note: A defendant bears an evidential burden in relation to the matter in subsection (8): see subsection 13.3(3) of the *Criminal Code*.

Part 2D.8—Remuneration recommendations in relation to key management personnel for disclosing entities

206K Board to approve remuneration consultants

(1) This section applies to a contract (a ***remuneration consultancy contract***):
  (a) that is for services that include making a remuneration recommendation in relation to one or more members of the key management personnel for a company that is a disclosing entity; and
  (b) that is between the company and a person (the ***proposed consultant***) who, by making the recommendation under the contract, will be a remuneration consultant.

(2) Before a company enters into a remuneration consultancy contract, the proposed consultant must be approved by:
  (a) the directors of the company; or
  (b) the members of a committee (the ***remuneration committee***) that:
    (i) is a committee of the board of directors of the company; and
    (ii) has functions relating to the remuneration of key management personnel for the company.

(3) A contravention of subsection (2):
  (a) is not an offence except as provided by subsection (4); and
  (b) does not affect the validity of the contract.

(4) The company commits an offence if, at the time the company enters into the contract, the proposed consultant has not been approved in accordance with subsection (2).

(5) An offence against subsection (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

206L Remuneration recommendation by remuneration consultants

(1) This section applies to a remuneration recommendation made by a remuneration consultant in relation to one or more members of the key management personnel for a company that is a disclosing entity.

(2) The remuneration consultant must provide the recommendation directly to either or both of the following:
   (a) the directors of the company;
   (b) the members of the remuneration committee (if any).

(3) However, the remuneration consultant must not provide the recommendation to a person who is an executive director of the company unless all the directors of the company are executive directors of the company.

(4) The remuneration consultant must not provide the recommendation to a person who is neither a director of the company nor a member of the remuneration committee.

(5) If the remuneration consultant contravenes subsection (2) the remuneration consultant is not guilty of an offence. This does not prevent the remuneration consultant from being guilty of an offence for contravening subsection (3) or (4).

Note: Subsection 1311(1) makes it an offence for the remuneration consultant to contravene subsection (3) or (4).

(6) This section does not prevent someone other than the remuneration consultant from providing the recommendation to a person who is neither a director of the company nor a member of the remuneration committee.

206M Declaration by remuneration consultant

(1) This section applies to a remuneration consultant who makes a remuneration recommendation in relation to one or more members of the key management personnel for a company that is a disclosing entity.

(2) The remuneration consultant must include with the recommendation a declaration about whether the consultant's recommendation is made free from undue influence by the member

or members of the key management personnel to whom the recommendation relates.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

(3) An offence based on subsection (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

9 Subsection 249L(2)

Repeal the subsection, substitute:

(2) The notice of the AGM of a listed company must also:

(a) inform members that the resolution referred to in subsection 250R(2) (resolution on remuneration report) will be put at the AGM; and

(b) if at the previous AGM at least 25% of the votes cast on a resolution that the remuneration report be adopted were against adoption of the report (but the same was not the case at the AGM before that):

(i) explain the circumstances in which subsection 250V(1) would apply; and

(ii) inform members that the resolution described in subsection 250V(1) as the spill resolution will be put at the AGM if that subsection applies.

Note: Subsection 250R(2) requires a resolution to adopt a remuneration report for a listed company to be put to the vote at the company's AGM.

10 Before section 250C

Insert:

250BD Proxy voting by key management personnel or closely related parties

(1) A person appointed as a proxy must not vote, on the basis of that appointment, on a resolution connected directly or indirectly with the remuneration of a member of the key management personnel for the company or, if the company is part of a consolidated entity, for the entity if:

(a) the person is either:

(i) a member of the key management personnel for the company or, if the company is part of a consolidated entity, for the entity; or

(ii) a closely related party of a member of the key management personnel for the company or, if the company is part of a consolidated entity, for the entity; and

(b) the appointment does not specify the way the proxy is to vote on the resolution.

Note 1: Examples of resolutions connected directly or indirectly with the remuneration of a member of the key management personnel for the company or entity include:

(a) resolutions that must be put to the vote under subsection 250R(2) (about a resolution that the remuneration report for a listed company be adopted); and

(b) resolutions that must be put to the vote under subsection 250V(1) (about fresh elections for directors at meetings arising from concerns about remuneration reports); and

(c) resolutions determining directors' remuneration as mentioned in section 202A; and

(d) resolutions for the purposes of Chapter 2E (about public companies and entities they control giving financial benefits to related parties of public companies) affecting directors' remuneration.

Note 2: Subsections 250R(4) and 250V(2) also prevent the person from voting on the resolution if it is a resolution that must be put to the vote under subsection 250R(2) or 250V(1).

Note 3: Section 224 may also prohibit the person from voting on the resolution if it is a resolution for the purposes of Chapter 2E.

Note 4: Failure to comply with this subsection is an offence: see subsection 1311(1).

(2) Subsection (1) does not apply if:

(a) the person is the chair of the meeting at which the resolution is voted on; and

(b) the appointment expressly authorises the chair to exercise the proxy even if the resolution is connected directly or indirectly with the remuneration of a member of the key management personnel for the company or, if the company is part of a consolidated entity, for the entity.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

(3) ASIC may by writing declare that:

(a) subsection (1) does not apply to a specified resolution; or

(b) subsection (1) does not prevent the casting of a vote, on a specified resolution, by or on behalf of a specified entity;

but may do so only if satisfied that the declaration will not cause unfair prejudice to the interests of any member of the company. The declaration has effect accordingly. The declaration is not a legislative instrument.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the *Criminal Code*.

(4) A vote cast in contravention of subsection (1) is taken not to have been cast. This subsection has effect for the purposes of this Act except subsection (1) and subsections 250R(4) and (7), and section 1311 and Schedule 3 so far as they relate to any of those subsections.

Note: This means the vote is not counted in working out a percentage of votes cast or whether the resolution is passed, and does not affect the validity of the resolution.

11 Subsection 250R(2) (note)

Omit "subsection 249L(2)", substitute "paragraph 249L(2)(a)".

Note: The following heading to subsection 250R(2) is inserted "*Advisory resolution for adoption of remuneration report*".

12 At the end of section 250R

Add:

Voting on advisory resolution by key management personnel or closely related parties

(4) A vote on the resolution must not be cast (in any capacity) by or on behalf of either of the following persons:

(a) a member of the key management personnel details of whose remuneration are included in the remuneration report;

(b) a closely related party of such a member.

(5) However, a person described in subsection (4) may cast a vote on the resolution if:

(a) the person does so as a proxy appointed by writing that specifies how the proxy is to vote on the proposed resolution; and

(b) the vote is not cast on behalf of a person described in subsection (4).

(6) ASIC may by writing declare that:

(a) subsection (4) does not apply to a specified resolution; or

(b) subsection (4) does not prevent the casting of a vote, on a specified resolution, by or on behalf of a specified entity;

but may do so only if satisfied that the declaration will not cause unfair prejudice to the interests of any member of the listed company. The declaration has effect accordingly. The declaration is not a legislative instrument.

(7) A person described in subsection (4) contravenes this subsection if a vote on the resolution is cast by or on behalf of the person in contravention of that subsection (whether or not the resolution is passed).

Note: A contravention of this subsection is an offence: see subsection 1311(1).

(8) A vote cast in contravention of subsection (4) is taken not to have been cast. This subsection has effect for the purposes of this Act except subsections (4) and (7) and subsection 250BD(1), and section 1311 and Schedule 3 so far as they relate to any of those subsections.

Note: This means the vote is not counted in working out a percentage of votes cast or whether the resolution is passed, and does not affect the validity of the resolution.

(9) For the purposes of this section, a vote is cast on behalf of a person if, and only if, it is cast:

(a) as proxy for the person; or

(b) otherwise on behalf of the person; or

(c) in respect of a share in respect of which the person has:

(i) power to vote; or

(ii) power to exercise, or control the exercise of, a right to vote.

(10) Subject to Part 1.1A, subsections (4), (5), (6), (7), (8) and (9) have effect despite:

(a) anything else in:

(i) this Act; or

(ii) any other law (including the general law) of a State or Territory; and

(b) anything in the company's constitution.

13 At the end of Part 2G.2

Add:

Division 9—Meetings arising from concerns about remuneration reports

250U Application

This Division applies in relation to a listed company if:

(a) at an AGM (the ***later AGM***) of the company, at least 25% of the votes cast on a resolution that the remuneration report be adopted were against adoption of the report; and

(b) at the immediately preceding AGM (the ***earlier AGM***) of the company, at least 25% of the votes cast on a resolution that the remuneration report be adopted were against adoption of the report; and

(c) a resolution was not put to the vote at the earlier AGM under an earlier application of section 250V.

Note: Subsection 250R(2) requires a resolution to adopt a remuneration report for a listed company to be put to the vote at the company's AGM.

250V Resolution to hold fresh elections for directors at special meeting to be put to vote at AGM

(1) At the later AGM, there must be put to the vote a resolution (the ***spill resolution***) that:

(a) another meeting (the ***spill meeting***) of the company's members be held within 90 days; and

(b) all the company's directors who:

(i) were directors of the company when the resolution to make the directors' report considered at the later AGM was passed; and

(ii) are not a managing director of the company who may, in accordance with the listing rules for a prescribed financial market in whose official list the company is

included, continue to hold office indefinitely without being re-elected to the office;

cease to hold office immediately before the end of the spill meeting; and

(c) resolutions to appoint persons to offices that will be vacated immediately before the end of the spill meeting be put to the vote at the spill meeting.

(2) Subsections 250R(4), (5), (6), (7), (8), (9) and (10), and other provisions of this Act so far as they relate to any of those subsections, apply in relation to the spill resolution in the same way as they apply in relation to a resolution that a remuneration report be adopted.

(3) To avoid doubt, section 203D does not apply in relation to the spill resolution.

250W Consequences of spill resolution being passed

(1) This section applies if the spill resolution is passed.

Deadline for holding spill meeting

(2) The company must hold the spill meeting within 90 days after the spill resolution was passed.

(3) Nothing in subsection (2) authorises any person to disregard:

(a) section 249HA (Amount of notice of meetings of listed company); or

(b) if a person intends to move a resolution relating to the appointment of a director of the company—any provision of the company's constitution that requires a minimum period of notice for such a resolution.

Note: Division 3 (which includes section 249HA) deals with giving notice of the spill meeting. Division 5 contains rules relevant to holding the spill meeting.

If relevant directors cease to hold office before deadline

(4) The company need not hold the spill meeting within 90 days after the spill resolution was passed if, before the end of that period, none of the company's directors described in paragraph 250V(1)(b) remain as directors of the company.

Consequences of failure to hold spill meeting in time

(5) If the company does not hold the spill meeting within 90 days after the spill resolution was passed, each person who is a director of the company at the end of those 90 days commits an offence.

Note: A person who is a director at the end of those 90 days may commit an offence even if he or she was not a director when the spill resolution was passed.

(6) An offence against subsection (5) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

(7) Subsection (5) does not apply if the company need not hold the spill meeting because of subsection (4).

Note: A defendant bears an evidential burden in relation to the matter in subsection (7): see subsection 13.3(3) of the *Criminal Code*.

(8) Subsection (5) does not apply to a person who was not a director of the company at any time during the period:

(a) starting when the spill resolution was passed; and

(b) ending at the last time notice of the spill meeting could have been given to hold the spill meeting within 90 days after the spill resolution was passed and comply with section 249HA (Amount of notice of meetings of listed company).

Note: A defendant bears an evidential burden in relation to the matter in subsection (8): see subsection 13.3(3) of the *Criminal Code*.

Cessation of relevant directors and commencement of newly-appointed directors

(9) All the company's directors described in paragraph 250V(1)(b) cease to hold office immediately before the end of the spill meeting and the directors appointed by the meeting commence to hold office at the end of that meeting. This subsection has effect despite anything else in this Act and the company's constitution.

250X Ensuring there are at least 3 directors after spill meeting

(1) This section applies if there would be fewer than 3 directors of the company immediately after the spill meeting apart from this section.

Note: Subsection 201A(2) requires the company to have at least 3 directors.

(2) Enough directors to ensure that the company has 3 directors immediately after the spill meeting are taken to have been appointed, by resolution passed at the spill meeting, from the persons who:

(a) gave the company signed consents to act as directors of the company in anticipation of being appointed by such a resolution; and

(b) were not appointed as directors by such a resolution apart from this section.

Note: The number of directors taken under subsection (2) to have been appointed is the difference between 3 and the number of directors holding office immediately after the spill meeting apart from this section.

(3) The persons taken to have been appointed are those with the highest percentages of votes favouring their appointment cast at the spill meeting on the resolution for their appointment (even if less than half the votes cast on the resolution were in favour of their appointment).

Example: Suppose that, under subsection (2), 2 directors are taken to have been appointed, and the percentages of votes favouring appointment were 50% for Jean, 40% for Karl and 30% for Lionel. Jean and Karl would both be taken to have been appointed directors, but Lionel would not.

(4) For the purposes of this section, if 2 or more persons have the same percentage of votes favouring their appointment, the one of those persons chosen by the director or directors who hold office apart from this subsection is taken to have a higher percentage than the rest of those persons.

Note: A director who holds office apart from subsection (4) could make a series of choices if 3 or more persons all have the same percentage of votes favouring their appointment and it is necessary to work out which 2 of those persons are taken to be appointed as directors.

(5) If a person is taken to have been appointed because of a choice under subsection (4), the company must confirm the appointment by resolution at the company's next AGM. If the appointment is not confirmed, the person ceases to be a director of the company at the end of the AGM.

(6) This section has effect despite anything else in this Act and the company's constitution.

250Y Term of office of director reappointed at spill meeting

If a director who ceased to hold office immediately before the end of the spill meeting is appointed as director by resolution passed at the spill meeting, his or her term of office runs as if the cessation and appointment had not happened.

Note: This section is subject to subsection 250X(5).

14 Paragraph 300A(1)(a)

Repeal the paragraph, substitute:

(a) discussion of board policy for determining, or in relation to, the nature and amount (or value, as appropriate) of remuneration of the key management personnel for:

(i) the company, if consolidated financial statements are not required; or

(ii) the consolidated entity, if consolidated financial statements are required; and

15 Subparagraph 300A(1)(c)(i)

Omit “and”, substitute “or”.

16 Subparagraphs 300A(1)(c)(iii) and (iv)

Repeal the subparagraphs.

17 Paragraph 300A(1)(da)

Repeal the paragraph.

18 Paragraph 300A(1)(f)

Omit “regulations.”, substitute “regulations; and”.

19 After paragraph 300A(1)(f)

Insert:

(g) if:

(i) at the company’s most recent AGM, comments were made on the remuneration report that was considered at that AGM; and

(ii) when a resolution that the remuneration report for the last financial year be adopted was put to the vote at the

company's most recent AGM, at least 25% of the votes cast were against adoption of that report;

an explanation of the board's proposed action in response or, if the board does not propose any action, the board's reasons for inaction; and

(h) if a remuneration consultant made a remuneration recommendation in relation to any of the key management personnel for the company or, if consolidated financial statements are required, for the consolidated entity, for the financial year:

(i) the name of the consultant; and

(ii) a statement that the consultant made such a recommendation; and

(iii) if the consultant provided any other kind of advice to the company or entity for the financial year—a statement that the consultant provided that other kind or those other kinds of advice; and

(iv) the amount and nature of the consideration payable for the remuneration recommendation; and

(v) the amount and nature of the consideration payable for any other kind of advice referred to in subparagraph (iii); and

(vi) information about the arrangements the company made to ensure that the making of the remuneration recommendation would be free from undue influence by the member or members of the key management personnel to whom the recommendation relates; and

(vii) a statement about whether the board is satisfied that the remuneration recommendation was made free from undue influence by the member or members of the key management personnel to whom the recommendation relates; and

(viii) if the board is satisfied that the remuneration recommendation was made free from undue influence by the member or members of the key management personnel to whom the recommendation relates—the board's reasons for being satisfied of this.

20 Subsection 300A(1)

Omit the second sentence.

21 Subsections 300A(1AAA) and (1B)

Repeal the subsections.

22 Schedule 3 (after table item 49)

Insert:

49A	Subsections 206J(4), (6) and (7)	60 penalty units.
49B	Subsection 206K(4)	60 penalty units.
49C	Subsections 206L(3) and (4)	60 penalty units.
49D	Subsection 206M(2)	60 penalty units.

23 Schedule 3 (after table item 66)

Insert:

66A	Subsection 250BD(1)	200 penalty units or imprisonment for 5 years, or both.

24 Schedule 3 (table item 68A) (the table item 68A inserted by item 16 of Schedule 5 to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*)

Repeal the item.

25 Schedule 3 (before table item 68B)

Insert:

68AA	Subsection 250R(2)	5 penalty units.
68AB	Subsection 250R(7)	200 penalty units or imprisonment for 5 years, or both.

26 Schedule 3 (after table item 70)

Insert:

70A	Subsection 250W(5)	10 penalty units.

Part 2—Limits on number of directors

27 Section 9

Insert:

board limit means a limit described in section 201N.

28 Section 9

Insert:

board limit resolution means a resolution described in paragraph 201P(1)(a).

29 Before section 201A

Insert:

Subdivision A—General rules

30 At the end of Division 1 of Part 2D.3

Add:

Subdivision B—Limits on numbers of directors of public companies

201N Application of Subdivision

(1) This Subdivision applies in relation to a public company if its constitution allows its directors to set a limit (a ***board limit***) whose effect is to restrict the number of directors of the company to a number less than the maximum number of directors specified in the constitution.

Note: This Subdivision applies however the constitution or board limit is expressed.

(2) If a company's constitution provides that the maximum number of directors is either a specified number or another number determined by the directors:

(a) any number determined by the directors that is lower than the specified number is a ***board limit***; and

(b) any lowering by the directors of that lower number is also a ***board limit***.

(3) Subsection (2) does not limit, and is not limited by, subsection (1).

201P Directors must not set board limit unless proposed limit has been approved by general meeting

(1) The directors must not set a board limit unless:

(a) a resolution (a ***board limit resolution***) approving the proposal to set the limit specified in the resolution has been passed by a general meeting of the company; and

(b) the notice of the meeting set out an intention to propose the board limit resolution and stated the resolution; and

(c) the notice was accompanied by a statement explaining the resolution and meeting the requirements in section 201Q.

Note 1: Subsection 249L(3) requires information in the notice of meeting to be presented clearly, concisely and effectively.

Note 2: Section 201U specifies the consequences of a contravention of subsection (1) of this section. Also, section 1324 provides for injunctions to enforce subsection (1) of this section.

(2) A board limit resolution has effect until immediately before the start of the first AGM of the company after the general meeting by which the resolution was passed.

(3) A board limit resolution does not prevent the appointment of a person as a director of the company by the other directors of the company between general meetings of the company.

(4) However, if a person is appointed by the other directors as a director of the company while a board limit resolution has effect, the company must confirm the appointment by resolution at the company's next AGM. If the appointment is not confirmed, the person ceases to be a director of the company at the end of the AGM.

(5) Subsections (1), (2) and (4) have effect despite the company's constitution.

Note: Although subsection (4) is like subsection 201H(3) in many ways, it is not a replaceable rule like subsection 201H(3).

201Q Requirements for explanatory statement to members

The statement accompanying the notice of a general meeting stating an intention to propose the board limit resolution must be in writing and set out clearly, concisely and effectively:

(a) the directors' reasons for proposing the board limit resolution; and

(b) all other information that:

(i) is reasonably required by members in order to decide whether or not it is in the company's interests to pass the proposed board limit resolution; and

(ii) is known to the company or to any of its directors.

Note: Section 1309 creates offences where false and misleading material relating to a corporation's affairs is made available or furnished to members.

201R Records of voting on board limit resolution if poll demanded

(1) This section applies if a poll is duly demanded on the question that the board limit resolution be passed.

(2) For each member of the company who votes on the poll in person, the company must record in writing:

(a) the member's name; and

(b) how many votes the member casts for the resolution and how many against.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

(3) For each member of the company who votes on the poll by proxy, or by a representative authorised under section 250D, the company must record in writing:

(a) the member's name; and

(b) in relation to each person who votes as proxy, or as such a representative, for the member:

(i) the person's name; and

(ii) how many votes the person casts on the resolution as proxy, or as such a representative, for the member; and

(iii) how many of those votes the person casts for the resolution and how many against.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

201S Notice of resolution to be lodged

The company must lodge a notice setting out the text of the board limit resolution within 14 days after the resolution is passed.

201T Declaration by court of substantial compliance

(1) The Court may declare that a requirement set by section 201Q, 201R or 201S has been satisfied if the Court finds that it has been substantially satisfied.

(2) A declaration may be made only on the application of an interested person.

201U Consequences of setting board limit in breach of section 201P

Application

(1) This section applies if the directors of the company set a board limit in contravention of subsection 201P(1).

Board limit etc. ineffective

(2) The board limit and anything done in reliance on it have no effect for the purposes of:
   (a) the company's constitution; or
   (b) this Act, except this section.

Note: If a board limit resolution is not passed, the number of directors of a company that can be appointed (for example by a general meeting) depends on the maximum number of directors specified by the company's constitution. This is so even if the directors purport to set a board limit despite the fact the board limit resolution was not passed.

(3) If:
   (a) one or more directors are appointed by one or more resolutions passed at a particular general meeting of the company; and
   (b) because of the board limit, the general meeting was not given the opportunity to pass one or more resolutions appointing a number of directors such that the number of directors of the

company would (if those resolutions had been passed) have exceeded the board limit;

every appointment of director made by a resolution passed at the general meeting is invalid.

Note: This subsection does not apply if a shortage of persons consenting to be appointed director was the reason the general meeting was not given the opportunity to pass one or more resolutions appointing a number of directors such that the number of directors of the company would (if those resolutions had been passed) have exceeded the board limit.

(4) Subsections (2) and (3) have effect despite anything else in the company's constitution or in this Act, except sections 128, 129 and 201M.

Note: Sections 128 and 129 deal with assumptions a person dealing with the company may make, including assumptions about the due appointment of directors. Section 201M deals with effectiveness of acts by a director in circumstances where the director's appointment is invalid for certain reasons.

Company and candidates for directors may seek compensation

(5) Subsection (6) applies if either of the following (the ***suffering party***) suffers loss or damage because of the setting of the board limit in contravention of subsection 201P(1):

(a) the company;

(b) a person for whom both the following conditions are met:

(i) the person had given the company a written indication that he or she would be a candidate to be appointed director at a general meeting;

(ii) because of the board limit, the general meeting was not given the opportunity to consider passing a resolution to appoint the person as director.

(6) The suffering party may institute a proceeding in the Court for the contravention.

Note: Section 1325 deals with the orders the Court may make to compensate the suffering party for the loss.

Contravention does not give rise to an offence

(7) A person is not guilty of an offence because of the contravention.

31 Subsections 1325(1), (2) and (3)

Before “Chapter” (wherever occurring), insert “subsection 201P(1),”.

32 Schedule 3 (after table item 39)

Insert:

39A	Subsections 201R(2) and (3)	5 penalty units.

Part 3—Voting by proxies as directed

33 Subsections 250A(4), (5) and (5A)

Repeal the subsections.

34 After section 250BA

Insert:

250BB Proxy vote if appointment specifies way to vote

(1) An appointment of a proxy may specify the way the proxy is to vote on a particular resolution. If it does:

(a) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and

(b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution—the proxy must not vote on a show of hands; and

(c) if the proxy is the chair of the meeting at which the resolution is voted on—the proxy must vote on a poll, and must vote that way; and

(d) if the proxy is not the chair—the proxy need not vote on the poll, but if the proxy does so, the proxy must vote that way.

If a proxy is also a member, this subsection does not affect the way that the person can cast any votes they hold as a member.

Note: A company's constitution may provide that a proxy is not entitled to vote on a show of hands (see subsection 249Y(2)).

(2) If the chair contravenes subsection (1), the chair commits an offence if the appointment as a proxy resulted from:

(a) the company sending to members:

(i) a list of persons willing to act as proxies; or

(ii) a proxy appointment form holding the chair out as being willing to act as a proxy; or

(b) the operation of section 250BC.

(3) If a person other than the chair contravenes paragraph (1)(a) or (d), the person commits an offence if the person:

(a) agreed to the appointment; or

(b) held himself or herself out, or caused another person to hold him or her out, as being willing to act as a proxy in relation to the appointment.

(4) If a person other than the chair contravenes paragraph (1)(b), the person commits an offence if, in relation to at least 2 of the different ways of voting specified by the appointments, the person:

(a) agreed to at least one of the appointments specifying that way of voting; or

(b) held himself or herself out, or caused another person to hold him or her out, as being willing to act as a proxy in relation to at least one of the appointments specifying that way of voting.

(5) An offence against subsection (2), (3) or (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

250BC Transfer of non-chair proxy to chair in certain circumstances

If:

(a) an appointment of a proxy specifies the way the proxy is to vote on a particular resolution at a meeting of the company's members; and

(b) the appointed proxy is not the chair of the meeting; and

(c) at the meeting, a poll is duly demanded on the question that the resolution be passed; and

(d) either of the following apply:

(i) if a record of attendance is made for the meeting—the proxy is not recorded as attending;

(ii) the proxy does not vote on the resolution;

the chair of the meeting is taken, before voting on the resolution closes, to have been appointed as the proxy for the purposes of voting on the resolution at that meeting.

35 Section 250H (note)

Omit "250A(4)", substitute "250BB(1)".

36 Schedule 3 (table item 66)

Omit “Subsection 250A(5)”, substitute “Subsections 250BB(2), (3) and (4)”.

Part 4—Application provisions

37 At the end of Chapter 10

Add:

Part 10.17—Transitional provisions relating to the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011

1517 Application of Subdivision B of Division 1 of Part 2D.3

Subdivision B of Division 1 of Part 2D.3 applies in relation to the setting of board limits on or after 1 July 2011.

1518 Application of sections 206J, 206K, 206L and 206M

(1) Section 206J applies to entry into arrangements on or after 1 July 2011, whether the remuneration was for services rendered before, on or after that day.

(2) Section 206K applies to contracts entered into on or after 1 July 2011.

(3) Sections 206L and 206M apply to recommendations made under contracts entered into on or after 1 July 2011.

1519 Application of subsection 249L(2)

Subsection 249L(2) as substituted by the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* applies in relation to AGMs held on or after 1 July 2011.

1520 Application of section 250BB

Section 250BB applies to voting on or after 1 August 2011, whether the proxy was appointed before, on or after that day.

1521 Application of section 250BC

Section 250BC applies to appointments of proxies made on or after 1 August 2011.

1522 Application of section 250BD

Section 250BD applies in relation to voting on or after 1 August 2011, whether the matter that is the subject of the resolution relates to a time before, on or after that day.

1523 Application of subsections 250R(4) to (10)

Subsections 250R(4), (5), (6), (7), (8), (9) and (10) apply in relation to voting on or after 1 August 2011, whether the remuneration report concerned relates to a financial year starting before, on or after that day.

1524 Application of Division 9 of Part 2G.2

Division 9 of Part 2G.2 applies in relation to AGMs held on or after 1 July 2011.

Note: This has the effect that the Division can apply in relation to a company only if both of its 2 most recent AGMs have been held on or after 1 July 2011.

1525 Application of amendments of section 300A

(1) The amendments of section 300A made by the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* apply in relation to remuneration reports for financial years starting on or after 1 July 2011.

(2) Subsection (1) does not apply to the repeal of subsection 300A(1AAA).

Saving of regulations made for paragraph 300A(1)(f)

(3) The amendment of paragraph 300A(1)(f) made by the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* does not affect the validity of any regulations in force for the purposes of that paragraph immediately before that amendment.

[*Minister's second reading speech made in—*
House of Representatives on 23 February 2011
Senate on 14 June 2011]