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The Secretary
Parliamentary Joint Committee on Corporations
And Financial Services
Parliament House
Canberra

Dear Sir

Submission on CLERP 9

I understand that the Bill that is currently before Parliament amends both the ASIC Act and the Trade Practices Act 1974 to ensure that proportionate liability applies to economic loss for misleading or deceptive conduct. I enclose a paper on CLERP 9 written for the Institute of Chartered Accountants in Australia. This states that these changes will significantly increase the level of protection available to auditors.

I believe that the level of protection will only be affected because people that have been damaged will be less inclined to commence proceedings. This is because there are likely to be more defendants in the court, and it will be more difficult to bring about an out of court settlement because the lawyers will be unwilling to get to a resolution on behalf of their clients. Many more cases will be dragged through a full hearing under the court system. The cost of litigation with many litigants before the court will make the prospect of litigation very daunting.

Under the present system most cases are settled out of court. The legal costs are therefore restricted. The accounting profession should be against this proposed change as the type of publicity associated with a HIH enquiry or some major court case is very damaging to the image of the profession. However I understand that the Institute of Chartered Accountants of Australia supports this proposed change in the legislation.

I understand that the plaintiff can involve other parties at the present time. This is done under State legislation. For instance the Law Reform (Miscellaneous Provisions Act) 1943 provides the basis for accountants or other defendants to involve other responsible parties in New South Wales. In other states there is similar legislation. I think of the action taken by ASIC in New South Wales against Permanent Trustee Company Limited in the mid 1990's. Permanent soon filled the court with other parties who Permanent said were also liable. I went to one of the hearings. There certainly were a very large number of barristers and solicitors in the Court.

It is my understanding that proportionate liability is based on the concept that liability totals 100% and that the various parties have only a portion of that 100%. What happens when one of the parties is in liquidation? It is a well understood principle that the liquidator of a company cannot be involved in a court action unless the court is willing to grant leave. In the past, the court has been unwilling to grant leave except for example:

- Where there is an insurance claim and the insurance company takes the responsibility and pays the costs.
- Where a plaintiff who wishes to recover his asset as a result of a breach of the Trade Practices Act involving misleading or deceptive conduct brings the action. (refer John Fielding v Vagrand (1993) 10 ACSR 373; 113 ALR 128; 41 FCR 550.)

How is it envisaged that this legislation is going to properly work when one of the parties responsible for the loss cannot be brought before the court? Often in these situations the directors of the company have compromised their position and voided their directors insurance policy because of fraudulent actions. Are these directors to represent themselves in court or are they to declare themselves bankrupt and if they do can the court compel them to appear?

It is normal for a liquidator to consider that his main task is to realise the assets. He is not greatly concerned who receives the distribution and is not likely to put much effort into defending an action brought against the company in liquidation.

Legislation of this kind is fundamentally flawed. I have examined the New South Wales Civil Liability Amendment (Personal Responsibility) Act 2002 and its 2003 amendments in coming to this conclusion.

I speak from some experience in these matters as in the period between 1992 and 1996 I was deeply involved in an action that I brought on behalf of myself and other plaintiffs against the auditor of Westmex Limited, a company that was at that time in liquidation. We settled with the liquidator of Vagrand Pty Ltd so that the issues could be resolved between the plaintiffs and the insurers for the auditor. If we had not resolved the issue with one of the parties the court case might have dragged on for a six to twelve week court hearing. As it was the proceeding took only one day in court before the solicitors for the insurers agreed to reimburse our loss.

MATTER OMITTED

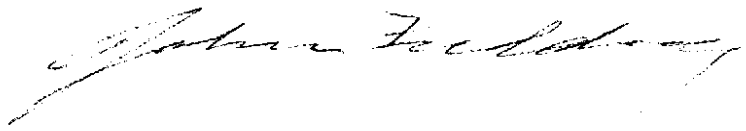
If the proposed legislation had been in place I would not have been prepared to commence my litigation. Is this what parliament wants? Are those who are responsible for the loss that investors incur to walk away because investors have no practical recourse? I put the savings of a lifetime at risk when I took my court action.

I spent $500,000 on legal costs and expert accounting reports before the matter was resolved.

If parliament wants to do something practical to reduce the litigation against auditors they should consider bringing back the laws against champerty. Most of the litigation against auditors is brought by liquidators and it is financed by people who may not be directly involved. I see nothing wrong with creditors or shareholders financing litigation where a company is in liquidation. However there are people who specialise in financing litigation including some members of the legal profession. Bring back champerty and the amount of litigation and the fees earned by the legal profession would be substantially reduced. So too would the level of claims cost borne by insurers. As a result, the insurance premiums for professional negligence would fall.

With the proposed changes involving proportionate liability the cost of litigation will rise substantially and the cost of insurance is unlikely to fall. What is the real objective of the change?

Yours sincerely



The Institute of Chartered Accountants in Australia

Business Forum 2004

CLERP 9 – Audit Reform and Corporate Disclosure

CLERP 9 – Audit Reform and Corporate Disclosure: the Australian Government's Response to Corporate Collapse

Introduction

The Commonwealth Government's Corporations Law Economic Reform Program (CLERP) continues apace. Draft legislation, the ***CLERP (Audit Reform and Corporate Disclosure) Bill*** – 220 pages of legislation and 148 pages of commentary – was issued on 10 October 2003. On 4 December 2003, the government issued a bill of 259 pages and 214 pages of commentary. This paper will review those proposed provisions which may significantly impact accountants and auditors.

Audit reform

The major thrust of CLERP 9 is in the area of audit reform. The key reforms are outlined below.

Auditing standards

- Auditing standards will be given the force of law on the same basis as AASB standards. To this end, the Auditing and Assurance Standards Board (AuASB) will be reconstituted in the same manner, and with broadly the same powers, as the AASB;
- the FRC will have a similar oversight role for the AuASB as it has for the AASB although it will also be given extensive monitoring functions – and information gathering powers – in relation to auditor independence;
- audits of a financial report for a financial year, and audits or reviews of a financial report for a half-year, must be conducted in accordance with auditing standards;
- in interpreting an auditing standard, a construction that would promote a purpose or object of the standard is to be preferred to a construction that would not promote that purpose or object, even if the object is not expressly stated in the standard; and
- audit working papers must be retained for **7 years**. If the audit working papers are held in electronic form, they are taken to be retained only if they are convertible into hard copy.

Qualifications of auditors

- The practical experience requirement for registration as an auditor may be satisfied either by completing all the components of an **auditing competency standard** or by having the practical experience in auditing prescribed in the regulations;
- ASIC may impose conditions on an auditor's registration, but only after the auditor has been given the opportunity to make submissions before a hearing into the matter;
- registered company auditors will be required to lodge an annual statement rather than the presently required triennial statement;
- ASIC may refer an auditor to the CALDB for failing to lodge an annual statement, failing to comply with a condition of registration and ceasing to have the practical experience necessary for carrying out audits. This would be demonstrated by failing to perform any significant audit work during a continuous five year period; and

- a person will **play a significant role** in the audit of a company or scheme where they act as the auditor, prepare an audit report or, where an audit firm or company is the auditor, they act as either lead partner or review partner for the audit.

Auditor independence and rotation

- An individual auditor, an **audit firm** or an **audit company** will be prohibited from engaging in audit activity if a **conflict of interest** exists in relation to the audited body, the auditor is aware of that conflict of interest and the auditor does not take all reasonable steps to ensure that the conflict of interest situation ceases to exist as soon as possible after the auditor becomes aware of it;
- where an auditor is not aware that a conflict of interest exists, the auditor must not engage in audit activity where the auditor would have been aware of it if the auditor had in place a **quality control system** reasonably capable of making the auditor aware of the conflict of interest. Having such a quality control system is an essential element of the defence against inadvertent breaches of the conflict of interest requirement;
- 19 specific **relevant relationships** that may impair auditor independence are set out in the proposed legislation;
- there will be a **two year waiting period** – down from a proposed four year period – before retiring partners of audit firms, retiring directors of audit companies and retiring professional members of an audit team may become officers of an audited body;
- no more than one former partner of an audit firm or former director of an audit company may become a director of or take a senior management position with an audited body;
- an auditor must give the directors of an audited body a written declaration that the auditor has complied with the auditor independence requirements of the law and the professional bodies. The independence declaration must be given when the audit report is delivered;
- **rotation** obligations will be imposed on auditors. Essentially, a person must not play a significant role as auditor for more than five out of any seven successive financial years. The rotation is of individuals, not of audit firms or authorised audit companies; and
- the directors' report for a listed company must include details of amounts paid to the auditor for non-audit services provided during the financial year, a statement that the directors are satisfied that the provision of those non-audit services is compatible with the auditor independence requirements and a statement of the directors' reasons for being satisfied that the provision of those non-audit services did not compromise auditor independence.

Authorised audit companies

- Auditors will be allowed to incorporate. ASIC will be able to register **authorised audit companies**;
- similar provisions apply to authorised audit companies as apply to individuals registered as company auditors;

- audit reports issued by an authorised audit company must be signed by a director of the authorised audit company or the lead auditor or the review auditor in both the audit company's name and the individual's own name; and
- **professional members of an audit team** are any registered company auditor who participates in the conduct of an audit, any person who exercises professional judgment during the conduct of the audit on the application of accounting standards, auditing standards and the Corporations Act provisions dealing with financial reporting and audits, and any person who may directly influence the outcome of the audit because of their role in the design, planning, management, supervision or oversight of the audit.

Auditors and AGMs

- The auditor of a listed company must attend the AGM of that company;
- members of a company will be able to submit written questions on the content of the auditor's report or the conduct of the audit;
- questions, which may be submitted via the internet, must be lodged by the same time that proxies must be lodged;
- the auditor must give the company the **question list** which the auditor considers relevant to the specified matters;
- the company must make the question list reasonably available to members attending the AGM at or before the start of the AGM; and
- there is no requirement that the auditor provide answers to written questions either at or following the AGM.

Qualified privilege

- The existing provisions on qualified privilege applying to individual auditors will be extended to registered company auditors acting on behalf of audit companies; and
- qualified privilege will also apply to answers to questions asked before or during an AGM.

Expansion of auditors' duties

- Existing sec. 311 requires an auditor to report to ASIC where the auditor has reasonable grounds to suspect a contravention of the Corporations Act;
- sec. 311 will be extended to require an auditor to notify ASIC in writing as soon as practicable, but in any case within 28 days – up from the proposed 7 – days after the auditor becomes aware of any circumstances that amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit or that amount to an attempt to otherwise interfere with the proper conduct of the audit; and
- a person involved in the conduct of the audit means the auditor, the lead auditor, the review auditor, a professional member of the audit team and any other person involved in the conduct of the audit.

CALDB

- Membership of the CALDB will be expanded from the present three (from a panel of five) to an overall 12;
- two five member panels of the CALDB will be able to sit simultaneously;
- a five member panel will consist of a chairman with legal qualifications, an experienced auditor member from both the ICAA and CPA Australia and two members from the business community (i.e. non-accountants).
- a three person panel may sit, comprising a chairman with legal qualifications, an experienced auditor member from either the ICAA and CPA Australia and one member from the business community; and
- there is no requirement that CALDB hearings be conducted in public.

Proportionate liability for auditors

The Bill amends the both **ASIC Act** and the **Trade Practices Act 1974** to ensure that **proportionate liability** applies to damages for economic loss for misleading or deceptive conduct. This will significantly increase the level of protection available to auditors.

Under the proposed legislation, in applying proportionate liability to a claim, a Court will be able to consider the comparative responsibility of any wrongdoer who is not a party to the proceedings. A defendant to a claim to which proportionate liability can apply must notify the plaintiff in writing, at the earliest possible time, of the identity and alleged role of any other person of whom the defendant is aware who could be held liable for any part of the plaintiff's loss.

Where a defendant fails to discharge the disclosure obligation, the Court will have a discretion to order that the defendant pay any or all of the plaintiff's costs, on an indemnity basis or otherwise. Intentional torts – and claims involving fraud – will be excluded proportionate liability. The law governing contributory negligence, vicarious liability, the liability of partners and the liability of a principal for acts of an agent will not be affected.

The final form of the legislative provisions implementing proportionate liability is subject to discussions within the Commonwealth, State and Territory Treasury Ministers, the Standing Committee of Attorneys-General and the Ministerial Council for Corporations

Expanded FRC role in relation to auditor independence

The FRC will oversee auditor independence requirements in Australia. The FRC will:

- monitor and report on the nature and adequacy of the systems and processes used by Australian auditors to deal with issues of auditor independence;
- monitor and report on the nature and adequacy of the systems and processes used by the professional bodies for planning and performing quality control reviews [QARs] of audit work **to the extent to which those reviews relate to auditor independence requirements**;
- monitor and report on actions taken by auditors in response to such QARs and actions taken by the professional accounting bodies to ensure that auditors respond appropriately;

- monitor and assess the adequacy of the disciplinary procedures of the accounting bodies;
- monitor and report on the response of companies in complying with audit-related disclosure requirements;
- give the Minister and the professional accounting bodies reports and advice on the above matters;
- monitor international developments in auditor independence and advising on any additional measures needed to enhance Australian requirements; and
- promote and monitor on the adequacy of the teaching of professional and business ethics by the professional accounting bodies – tertiary institutions have been omitted – **to the extent to which they relate to auditor independence**..
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All these tasks are to be carried out by a part-time body whose members receive only daily sitting fees. The FRC secretariat is located in Canberra as part of The Treasury, a body not renowned for its skill and experience in monitoring the operations of professional auditors, their disciplinary procedures and assessing how auditing is taught at universities and in the Professional Year program.

Independence impairing situations

The relevant relationships that are listed in sec. 324CH as impairing auditor independence are where the auditor:

1. is an officer of the audited body;
2. is an audit-critical employee of the audited body;
3. is a partner of an officer or an audit-critical employee of the audited body;
4. is an employer of an officer or an audit-critical employee of the audited body;
5. is an employee of an officer or an audit-critical employee of the audited body;
6. is a partner or employee of an employee of an officer or an audit-critical employee of the audited body;
7. provides remuneration to an officer or an audit-critical employee of the audited body for acting as a consultant to the auditor;
8. was an officer of the audited body at any time during the period to which the audit relates, the 12 months immediately preceding that period, or the period during which the audit is being conducted or the audit report is being prepared;
9. was an audit-critical employee of the audited body at any time during the period to which the audit relates, the 12 months immediately preceding that period, or the period during which the audit is being conducted or the audit report is being prepared;
10. has an investment in the audited body;
11. has a beneficial interest in an investment in the audited body and has control over that asset;
12. has a beneficial interest in an investment in the audited body that is a material interest;
13. has a material investment in an entity that has a controlling interest in the audited body;
14. has a material beneficial interest in an investment in an entity that has a controlling interest in the audited body;

15. owes more than $5,000 to the audited body, a related body corporate or an entity that the audited body controls;
16. is owed an amount by the audited body, a related body corporate or an entity that the audited body controls;
17. is liable under a guarantee of a loan made to the audited body, a related body corporate or an entity that the audited body controls;
18. owes an amount to the audited body, a related body corporate or an entity that the audited body controls that is not a disregarded loan; and
19. is entitled to the benefit of a guarantee given by the audited body, a related body corporate or an entity that the audited body controls in relation to a loan unless the guarantee is disregarded.

There are the normal carve outs for audits of small proprietary companies, housing loans, ordinary commercial loans and ordinary commercial loan guarantees.

True and fair view proposals omitted

The Exposure Draft of the Bill proposed that where an entity's directors consider that compliance with an accounting standard would result in the financial statements not giving a true and fair view, sec. 295(3)would require that the directors include additional information in the notes to the accounts so as to give a true and fair view. Where the directors had taken this course of action, they would have been required to include in their directors' report:

- their reasons for forming the view that additional information was required to give a true and fair view in accordance with sec. 297; and
- where that additional information is located in the financial report.

Where the directors had provided additional information in the notes under sec. 295(3), the auditor would have been required to form an opinion as to whether the additional information is needed to give a true and fair view in accordance with sec. 297 and to report his or her opinion on whether the additional information is needed to give such a view.

These proposals have been omitted from the Bill.

Directors' declaration

Under existing sec. 295, the directors' declaration is a declaration that:

- the financial statements and notes comply with accounting standards: sec. 295(4)(a);
- the financial statements and notes give a true and fair view: sec. 295(4)(b);
- whether, in the directors' opinion, there are reasonable grounds to believe that the company et al will be able to pay its debts as and when they become due and payable: sec. 295(4)(c); and
- whether, in the directors' opinion, the financial statements and notes are in accordance with the law, including:
  - sec. 296 (which requires the financial report to comply with accounting standards); and

- sec. 297 (which requires the financial report to give a true and fair view of the company's financial position and performance): sec. 295(4(d).

The last sub-clause of the directors' declaration was a last minute amendment made by the Senate. Given that the declaration already states that the financial statements and notes comply with accounting standards and give a true and fair view, it seems otiose also to require the directors to declare whether in their opinion the financial statements and the notes are in accordance with the law, "including (i) sec. 296 (compliance with accounting standards) and (ii) sec. 297 (true and fair view)." Indeed ASIC PN 68 states that there is no need to make duplicate declarations to comply with the requirements of secs. 295(4)(d) and 295(4)(a) and (b). It is sufficient for the directors' declaration to contain a single declaration concerning these matters.

The commentary on CLERP 9 notes that the similarity of the requirements has been an ongoing source of confusion for many companies and their professional advisers since the legislation was amended in 1998. The proposed legislation repeals sec. 295(4)(a) and sec. 295(4)(b). It also adds sec. 295(4)(e). This is a declaration that if the company is listed, the directors have been given the declarations required by sec. 295A. These declarations are the CEO and CFO signoff.

CEO and CFO signoff

The Bill requires the chief executive officer (CEO) and chief financial officer (CFO) to certify to the directors of a listed entity that:

- the financial records of the entity for the financial year have been properly maintained in accordance with sec. 286;
- the financial statements, and the notes referred to in paragraph 295(3)(b), for the financial year comply with the accounting standards;
- the financial statements and notes for the financial year give a true and fair view (the sec. 297 requirement);
- any other matters prescribed by regulation for the financial statements and notes are satisfied.

While there is no current intention to prescribe any matters, the regulations may prescribe additional matters that need to be covered in the declarations by the CEO and CFO. This requirement adds long-term flexibility to the provision.

Directors' report for listed companies

The directors' report requirements will be amended by requiring the inclusion of an operating and financial review as part of the annual report. The operating and financial review will not be subject to audit *per se*. The additional requirement will be that the directors' report must contain information that members of a company would reasonably require to make an informed assessment of:

- the operations of the entity;
- the financial position of the entity; and

- the entity's business strategies and its prospects for future financial years.

Commentary to CLERP 9 states that directors should have regard to the best practice guidelines for reviews published by the Group of 100. These suggest that the reviews should cover corporate overview and strategy, review of operations, investments for future performance and review of financial conditions.

Financial Reporting Panel

A Financial Reporting Panel (FRP) will be established to resolve disputes between ASIC and companies concerning accounting treatments in financial reports. The FRP will represent an alternative to court proceedings. The FRP will be a less expensive method of resolving disputes and will allow matters to be heard by people with particular and relevant expertise. This will overcome concerns about the unfamiliarity of courts with the application of accounting standards and the true and fair view.

Where a company's financial report does not comply with sec. 296 (accounting standards) and sec. 297 (true and fair view), ASIC may refer the financial report to the FRP. Before the referral, ASIC must notify the company of its intention to refer the matter and explain how the report fails to comply and the changes that should be made. Within 14 days of receiving this notice, the company must respond and indicate what action, if any, it proposes to take. During this period, ASIC is not able to initiate proceedings against the company in relation to the report. The information in the company's response cannot be used against the company if the matter later proceeds to court.

On receipt of the company's response, ASIC has 14 days in which to refer the matter to the FRP. If ASIC refers the matter to the FRP, ASIC is again not able to initiate proceedings against the company until after the FRP has reported.

The Bill now permits a company or scheme – described as the lodging entity – to refer its financial report to the FRP but only with ASIC's consent. ASIC must first have informed the company or scheme that ASIC believes that the financial report does not comply with one or more financial reporting requirements.

Within seven days after a financial report is referred to the FRP, the FRP must notify ASIC and the company of the cut-off date – which must be at least 14 days after the notice – by which written submissions must be made. Wherever possible, the FRP will resolve matters on the basis of the written submissions.

The FRP must report – generally within 60 days – as to whether the financial report complies with the relevant reporting requirements. If the financial report does not, the FRP must indicate what changes are necessary in order for the financial report to comply with those requirements. The FRP's report must not include any confidential commercial information obtained in its proceedings. The FRP may provide its report within 90 days if it gives notice to ASIC and the company.

For publicly listed companies, the FRP must also give a copy of its report to the relevant market operator. Once the report is lodged with the market operator, the market operator must take reasonable steps to make the information available to the market. ASIC must also

take reasonable steps to publicise the report and the company's response to the FRP's findings. If the company amends its financial report, it may be re-lodged the documents under existing sec. 322.

For unlisted companies, the FRP's report will only be given to ASIC and the company. After ASIC has received the report, it must take reasonable steps to publicise the report, along with information as to whether the company has made the recommended changes to its financial report. ASIC may publish the relevant information on the internet.

The FRP's hearings will be expeditious and informal; parties will not require legal representation. Following a hearing, if the FRP considers it warranted, it will encourage companies to voluntarily restate their financial reports consistent with requirements in accounting standards and the true and fair view. Such consensual agreements will overcome concerns with costly and slow judicial proceedings which may result in the market being misinformed about a company's financial situation for prolonged periods.

The FRP's findings will not be binding on either ASIC or the company. The dispute may ultimately be pursued in the Court. Where a company does not accept an FRP determination and ASIC subsequently initiates court proceedings, the Court may have regard to the findings of the FRP.

Whistle-blowers

Part 9.4AAA – Protection for whistleblowers will prohibit employers from victimising employees, officers or sub-contractors when they report a suspected breach to:

- ASIC;
- the company's auditor or a member of the audit team conducting an audit of the company;
- a director, secretary or senior manager of the company; or
- a person authorised by the company to receive disclosures of that kind.

The whistleblower must give his or her name to the person to whom the disclosure is made and the disclosure must be made in good faith and on reasonable grounds. The whistleblower will also have qualified privilege in relation to protected disclosure of information provided to ASIC regarding a suspected breach of the law.

Disqualification of directors

The Bill will increase the maximum period of disqualification of persons from managing corporations for insolvency and non-payment of debts from 10 years to 20 years. Sec. 206B currently provides an automatic 5 year disqualification period from managing corporations for persons convicted of offences specified in that section. Sec. 206BA will allow courts to disqualify persons for up to a **further** 15 years on application by ASIC.

Remuneration of directors and executives

Existing sec. 300A requires disclosure of the remuneration of directors and executives of a listed company. Sec. 300A will be amended to require disclosure of the remuneration of directors and senior managers in relation to both the listed company and consolidated entity. The intent is to provide a better picture of remuneration practices across the corporate group and to prevent corporate structures being used as a way of circumventing the reporting requirements.

The amendments will retain the current requirement for the disclosure of remuneration in relation to the five most highly remunerated senior managers and all the directors of the listed company and will extend the disclosure requirements to the top five senior managers in the consolidated entity.

This may lead to the disclosure of the remuneration of up to 10 senior managers where the top five managers in the listed company are not also in the top five within the corporate group. In determining a person's remuneration, all sources of their remuneration from within the group must be taken into account. Disclosure of the remuneration of all directors on a group wide basis will not be required.

The remuneration disclosures must be made in a clearly dedicated section of the annual directors' report. Shareholders should be placed in a position whereby they can understand the nature of the remuneration including any performance hurdles or contingencies on which the payment is based. This will ensure shareholders are informed about the framework and main components of remuneration and understand the relationship between performance and remuneration. The disclosure framework will limit the element of surprise in the event of a payment being made, especially where that payment accrued over a number of years.

The Bill retains the current requirements relating to the discussion of board policy and the relationship between remuneration and company performance. The disclosures should explain the qualitative aspects of remuneration, the basis on which remuneration packages are structured and how this relates to corporate performance. The regulations will require disclosure of information such as performance hurdles to which the payment of options or long term incentives of directors and executives are subject; why such performance hurdles are appropriate and the methods used to determine whether performance hurdles are met.

AASB 1046: Director and Executive Disclosures by Disclosing Entities requires the following information be disclosed:

- primary benefits including cash and other incentive and base remuneration;
- post-employment benefits, including retirement benefits and contributions by, or changes in the liability of, the entity to pension or superannuation plans and other arrangements to benefit employees following cessation of employment;
- equity compensation; and
- other compensation benefits not disclosed under the above categories.

The chair of the AGM must allow reasonable opportunity for discussion by shareholders of the remuneration section of the directors' report at the AGM The directors must also put, and allow shareholders to vote on, a non-binding resolution as to whether the members adopt the remuneration report. The notice of meeting must inform members that the resolution on the remuneration report will be voted upon.

While the resolution will not be binding, the process provides an avenue for shareholders to actively express any views they may have regarding decisions taken in relation to remuneration.

Continuous disclosure: infringement notices

The Bill permits ASIC to issue an **infringement notice** for an alleged contravention of the continuous disclosure provisions of the Corporations Act. Where ASIC considers that an entity has contravened those provisions, ASIC will notify the entity in writing of the case against it. ASIC will then hold a hearing at which the entity may give evidence and make submissions. If, following the hearing, ASIC forms an opinion that a contravention has occurred, it may issue an infringement notice indicating that the breach may be addressed by complying with the infringement notice.

Compliance with the infringement notice requires payment of the financial penalty and remedying any inadequate disclosure specified in the notice within a certain period of time. The financial penalty will be specified as either $33,000, $66,000 or $110,000, depending on whether the entity is listed or unlisted and whether it had previously contravened the continuous disclosure provisions. If the entity is listed, the penalty will depend on the entity's market capitalisation.

These penalties are substantially less than the $1 million maximum civil penalty that may be imposed by a court for a contravention of the continuous disclosure provisions. Compliance with an infringement notice is not an admission of liability or a contravention of the Act. Furthermore, if it complies, the entity will not be subject to existing or further civil or criminal proceedings for the alleged contravention.

The use of publicity by ASIC in conjunction with infringement notices is strictly limited to compliance with a notice. ASIC may only publish a copy or an accurate summary of the notice of the notice if it includes express statements that compliance is not an admission of liability by the entity and that the entity is not regarded as having contravened the provisions. ASIC may not publish that a notice has been issued, or that an entity has failed to comply with a notice.

If the entity fails to comply with the infringement notice within the specified period of time, ASIC cannot enforce the infringement notice. Rather, ASIC may bring civil proceedings in relation to the same alleged contravention. If the court is satisfied that the entity contravened the provisions, it must make a declaration of contravention. The court has discretion to make an order, on ASIC's application, to disclose information or publish advertisements against the entity. The court must also impose a pecuniary penalty against the entity.

The infringement notice mechanism will only be used for less serious contraventions of the continuous disclosure regime. Where an entity fails to comply with an infringement notice and a court subsequently determines that a contravention has occurred, the maximum penalty that the court can impose is $1 million.

If an entity fails to comply with an infringement notice and ASIC cannot satisfy the burden of proof in subsequent civil proceedings, ASIC cannot issue another infringement notice for the alleged contravention.

ASIC has the power to both issue and withdraw an infringement notice. Prior to compliance with the notice, and whether or not the entity makes representations seeking withdrawal, ASIC may withdraw an infringement notice where it considers it appropriate. The entity may then be subject to civil or criminal proceedings in relation to the alleged contravention.

The infringement notice system will supplement existing criminal and civil court procedures. It will facilitate imposition of a relatively small penalty and require information disclosure for relatively minor contraventions of the continuous disclosure provisions that would not otherwise be pursued through the courts. It allows ASIC to signal its views concerning appropriate disclosure practices more effectively than through court action alone.

The process is not intended to reflect the imposition of a financial penalty by ASIC. Instead, it will provide a mechanism through which an entity may forestall an application to the courts by ASIC for a financial penalty and the disclosure of specified information in relation to the contravention. The mechanism will strike an balance between enhancing ASIC's capacity to deal with relatively minor contraventions of the continuous disclosure provisions and ensure that there are adequate procedural safeguards.

The process under which ASIC investigates an alleged contravention and then holds a hearing to determine whether it believes that a contravention had occurred – and that an infringement notice should be issued – is similar to ASIC's current role in relation to certain licences granted under the Corporations Act and directors involved in multiple insolvent companies.

An entity that receives an infringement notice after an ASIC hearing may decide for itself whether to comply and end the matter or whether it will leave ASIC to decide whether to take court action.

The limitation on the size of the financial penalty and restrictions preventing ASIC from taking other action in relation to the contravention will ensure that it is not used for more serious contraventions as an alternative to existing court processes. ASIC's decision to issue an infringement notice cannot be reviewed by the Administrative Appeals Tribunal (AAT).

Conclusion

The CLERP 9 requirements are extensive, particularly in relation to auditors. They are still in the form of a bill and are open to amendment by Parliament. One needs to lobby one's MP reasonably quickly!.