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**DODD – FRANK WALL STREET REFORM AND  
CONSUMER PROTECTION ACT  
THE VIEW FROM AUSTRALIA**

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**Background**

1. The primary source of regulation of Australian listed entities is the *Corporations Act 2001* (**Corporations Act**).
2. Administration of the Corporations Act is undertaken by the Australian Securities and Investments Commission (**ASIC**), a regulator established by, and holding powers under the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**).
3. Australia's primary stock exchange, the Australian Securities Exchange Limited (**ASX**) also governs corporations issuing securities through its ASX Listing Rules (which regulate listing and market conduct) and the ASX Corporate Governance Council Conduct guidelines (which require the implementation of a broad and growing range of internal corporate governance guidelines by listed entities).
4. Under the Corporations Act, important legislative provisions of general application turn upon the definition "*Corporations legislation*", in particular, the concept of a "contravention" (in other words a civil or criminal breach) of Corporations legislation. Pursuant to s9 of the Corporations Act, Corporations legislation means the Corporations Act, the ASIC Act and any related instruments, taken together.

**Provisions of the Corporations legislation**

5. There are many hundreds of sections of the Corporations Act and the ASIC Act the breach of which will amount to a contravention of Corporations legislation. Some examples of the types of matters include:
  - 5.1 under s184 of the Corporations Act a director or other officer of a corporation recklessly or dishonestly:
    - 5.1.1 failing to exercise his or her powers and discharge his or her duties in good faith in the best interests of the corporation or for a proper purpose;

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- 5.1.2 using his or her position with the intention of gaining an advantage for himself or herself or someone else or to cause detriment to the corporation; or
- 5.1.3 using information obtained because the person is or has been a director, officer or employee of a corporation with the intention of directly or indirectly gaining an advantage for himself or herself or someone else or causing detriment to the corporation;
- 5.2 under s 209(3) of the Corporations Act being a person dishonestly involved in an agreement with a public company or a subsidiary of a public company to give a financial benefit to a related party to the public company (such as a director, officer or an entity related to such persons) without obtaining shareholder approval;
- 5.3 under s 588G(3) of the Corporations Act dishonest failure by a director or other officer in preventing a company incurring a debt at a time the company is insolvent where the person suspected that at the time the company incurred the debt it was insolvent;
- 5.4 under s674(2) of the Corporations Act failure by a listed disclosing entity to comply with continuous disclosure requirements concerning information which ASX requires it to disclose which a reasonable person would expect, if it were generally available, would have a material effect on the price or value of its listed securities;
- 5.5 under ss1043A(1) and (2) of the Corporations Act – insider trading offences; and
- 5.6 under s 12GB(1) of the ASIC Act dishonestly engaging in or assisting with:
  - 5.6.1 the making of false representations in connection with the supply or possible supply of financial services (a very broad term that includes dealing in shares and other corporate securities); and
  - 5.6.2 conduct liable to mislead the public as to the nature, characteristics or suitability for their purpose of financial services.

### The CLERP 9 proposals

- 6. In around 2001 Australian business experienced a number of large corporate collapses, including that of the HIH Insurance Group (Australia's second largest insurer), Ansett Airlines (Australia's second largest airline), One.Tel (Australia's fourth largest telco) and Harris Scarfe (at one time Australia's third largest department store retailer).
- 7. Interest in these collapses led to the establishment and subsequently reports of a series of Australian Government inquiries. At the same time, the Australian government's ongoing Corporate Law Economic Reform Program prepared a set of recommendations which were set out in its paper *Corporate Disclosure: Strengthening the Financial Reporting Framework (Proposals for Reform: Paper No 9)* (**CLERP 9**).
- 8. The CLERP 9 proposals, some of which overlap the types of subjects which ultimately became part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (**Dodd-Frank Act**), later formed the basis of the Australian *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (**Amending Act**).

9. The remainder of this paper will discuss changes made to the Corporations Act by the Amending Act which deal with issues similar to a number of those addressed in the Dodd-Frank Act and we comment upon some subsequent proposals:
  - 9.1 the whistleblower protection provisions introduced by the Amending Act;
  - 9.2 the infringement notice provisions introduced by the Amending Act;
  - 9.3 changes to listed entity executive remuneration disclosure and approval processes arising from and since CLERP 9; and
  - 9.4 the Australian Government's recent proposal to introduce clawback provisions.

### **Australia's whistleblower protection provisions**

10. The Amending Act introduced protections for corporate whistleblowers into the Corporations Act as a new Part 9.4AAA.
11. The primary features of the provisions are:
  - 11.1 to be protected the person making the disclosure must:
    - 11.1.1 be an officer or employee of the company or a person with a contract to supply goods or services to the company;
    - 11.1.2 make the disclosure to ASIC, the company's auditors, a director, senior manager or secretary of the company or a person authorised by the company to receive such disclosures;
    - 11.1.3 inform the person to whom the disclosure is made of his or her name before making the disclosure;
    - 11.1.4 have reasonable grounds upon which he or she suspects that the information disclosed indicates that the company, or one of its officers or employees has or may have contravened a provision of the corporations legislation; and
    - 11.1.5 be acting in good faith;
  - 11.2 once a qualifying disclosure is made:
    - 11.2.1 the person making it is immune from any criminal or civil liability for making the disclosure;
    - 11.2.2 no contractual or other remedy may be enforced against the person on the basis of the disclosure;
    - 11.2.3 the person has qualified privilege with respect to the content of the disclosure;
    - 11.2.4 a contract to which the person making disclosure is party may not be terminated on the basis that the disclosure is a breach of contract; and
    - 11.2.5 where an employer purports to terminate a contract of employment based on a protected disclosure the court may order

that the employee be reinstated to his or her position or a position at a comparable level;

- 11.3 it is an offence for a person to cause detriment to or threaten to cause detriment to a person who has made a protected disclosure because the disclosure has been made;
- 11.4 if a person causes detriment to or threatens to cause detriment to a person who has made a protected disclosure and the victim suffers damage, then the person in contravention is liable to compensate the victim for the damage; and
- 11.5 criminal liability may arise where a protected disclosure is made to company auditors, a director, senior manager or secretary of the company or a person authorised by the company to receive such disclosures and the confidential information disclosed, or its source, is passed on to any person other than
  - 11.5.1 with his or her consent; or
  - 11.5.2 to the appropriate investigating authorities (which include ASIC and the Australian Federal Police).
- 12. Sanctions for criminal breach of the whistleblower provisions include imprisonment for up to five years.
- 13. To date the Australian Courts have not ruled upon any applications made under the whistleblower protection provisions.
- 14. The main differences from the provisions under the Dodd-Frank Act are:
  - 14.1 The provisions in the Corporations Act apply to all corporations (including privately held companies and subsidiaries of foreign parent companies) and not only listed entities;
  - 14.2 ASIC is not involved in providing any financial incentive to persons making a protected disclosure;
  - 14.3 The protected disclosure may relate to any contravention of corporations legislation; and
  - 14.4 There is no requirement that the information provided lead to any enforcement action by the ASIC or any other party.
- 15. We confirm that whilst the making of a disclosure protects the person making it against victimisation or civil or criminal action based on the making of the disclosure itself, it does not in any way provide immunity from either criminal or civil liability based upon the wrongdoing disclosed or which may later come to light.

#### **The infringement notice provisions**

- 16. Under the Corporations Act, liability for contraventions of the Act can be enforced through:
  - 16.1 what are known as “civil penalty” proceedings brought by ASIC, which attract only the civil burden of proof; and

- 16.2 the laying of criminal charges by the Commonwealth Director of Public Prosecutions.
17. Both types of proceedings can be expensive and slow, particularly where liability is denied.
18. In order to provide a faster and more effective remedy for minor contraventions of the continuous disclosure obligations contained in the Corporations Act, the Amending Act introduced the concept of infringement notices, sometimes referred to, in the vernacular, as “speeding fines”.
19. In outline, the features of the infringement notice system are as follows:
  - 19.1 in the course of its activities ASIC may investigate an alleged breach of the continuous disclosure provisions (for example s574 of the Corporations Act), including through processes requiring interviews upon oath and compulsory production of documents;
  - 19.2 if ASIC forms a view that the issue of an infringement notice may be appropriate, an ASIC delegate (who must be a person not previously involved in the investigation) is briefed and is required to form a view as to whether or not there has been a breach;
  - 19.3 if the ASIC delegate forms a view there has been a breach, a hearing notice, which sets out the reasons for believing there has been a breach, will be issued to the company;
  - 19.4 the ASIC delegate will then hold a hearing, at which the company may give evidence and make submissions, to determine whether to issue an infringement notice;
  - 19.5 if there are reasonable grounds to believe there has been a breach, having taken into account all of the evidence and submissions, the ASIC delegate will issue an infringement notice, which remains private, which will specify a compliance period of 28 days and which will specify the amount of the penalty (up to \$100,000);
  - 19.6 within the period for compliance the company may:
    - 19.6.1 seek an extension of time within which to comply;
    - 19.6.2 make written representations seeking withdrawal of the notice;
    - 19.6.3 decline to satisfy the notice; or
    - 19.6.4 satisfy the notice by paying the penalty nominated and disclosing to the market the infringement described in the notice. This does not, however, amount to an admission of liability or a finding that the Corporations Act has been breached. ASIC will also publish details of the notice and compliance;
  - 19.7 where the infringement notice is satisfied and the fine paid, ASIC cannot take any further criminal or civil action against the company for the matter alleged in the infringement notice. Civil actions by other persons, however, are not barred; and
  - 19.8 where the infringement notice is not complied with, ASIC may bring civil penalty proceedings and seek related relief, withdraw the notice or simply

cease considering the matter. Where proceedings are later brought, the material generated by the hearing process will play no part in the Court trial.

20. Since the infringement notice provisions have been introduced, a number of failures to comply with continuous disclosure requirements have been dealt with by ASIC using the notices, including in relation to prominent companies such as Rio Tinto Limited, Commonwealth Bank of Australia and NuFarm Ltd.

### **Executive remuneration**

21. Under the Amending Act provisions were introduced into Australian law providing that:
  - 21.1 the annual report of a listed entity is required to include a compulsory section known as the remuneration report, which clearly discloses details of directors' and executives' remuneration. These remuneration reports have become notoriously complex, in no small part due to the requirement that companies comply strictly with the legislative requirements; and
  - 21.2 shareholders have an opportunity to vote on a non-binding resolution to adopt the remuneration report at a listed entity's annual general meeting.
22. Since the provisions in the Amending Act were introduced, numerous annual general meetings of Australian listed companies have seen remuneration reports rejected by shareholders by majority votes. The voting down of a remuneration report does not bind the company to take any particular action, but it is an unwise board of directors that ignores a substantial negative vote.
23. On 20 December 2010 the Australian Government published the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (Bill)* which was stated by the Government to be designed to "strengthen Australia's remuneration framework".
24. The key measure included in the Bill is a "two strikes and re election" process, which would operate as follows:
  - 24.1 where a listed company's remuneration report receives a "no" vote of 25% or more, the company's next annual remuneration report must explain whether shareholders' concerns have been taken into account and either how they have been taken into account or why they have not been taken into account;
  - 24.2 if the next annual remuneration report receives a "no" vote of 25% or more, then a resolution must be put to the shareholders at the same annual general meeting to the effect that a "spill meeting" be convened. If a motion to call the spill meeting passes with 50% or more of shareholders voting for it then the company must within 90 days hold another general meeting at which an election for the board will occur; and
  - 24.3 the directors who were directors at the most recent prior annual general meeting (other than the managing director) will cease to hold office immediately before the spill meeting and will be required to stand for re-election if they wish to continue in office. The regime does not affect a new director appointed in the intervening period.

## **Clawback of executive remuneration**

25. On the same day that the Bill was published, the Australian Government also issued a discussion paper entitled "*The clawback of executive remuneration where financial statements are materially misstated*".
26. Whilst the discussion paper specifically refers to the Dodd-Frank Act, it primarily consists of a list of issues for further discussion including whether there is a need for clawback provisions at all, the seniority levels of executives to which such provisions would apply, the benefits of such provisions as against the potential costs and the alternative legislative and other regulatory mechanisms by which such a policy could be implemented.
27. The discussion paper seeks submissions by 30 March 2011.
28. Whilst it appears from the Government's general approach that it is likely that some form of clawback measure will be introduced in Australia, the discussion paper suggests that the Government will seriously examine implementing provisions which differ significantly from those in the Dodd-Frank Act in both policy and operational terms.