SEVEN: THE *CORPORATIONS ACT 2001* (CTH), CORPORATE GOVERNANCE AND TERMINATION PAYMENTS TO SENIOR EMPLOYEES

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[This article presents an empirical study of the regulation of termination payments found in Part 2D.2 of the Corporations Act 2001 *(Cth) and Australian Securities Exchange ('ASX') Listing Rule 10.19, as well as limits endorsed in the Australian Council of Super Investors Inc ('ACSI')* Corporate Governance Guidelines*. Based on the termination payments contemplated by the executive service contracts of a sample of S&P/ASX 50 managing directors, the empirical results demonstrate the sheer magnitude of the thresholds contained in Part 2D.2 of the* Corporations Act 2001 *(Cth) and ASX Listing Rule 10.19, and highlight problems with classifying share-based remuneration payments according to the current* Corporations Act 2001 *(Cth) ss 200F–200G descriptions. This article also notes the prevalence of contractual or share plan terms that permit share-based payments to be made without reference to the underlying performance conditions.]*

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I INTRODUCTION

Publicly listed companies' payments to senior executives and directors are subject to much regulation. Regulation may take the form of mandatory rules requiring companies to disclose all forms of remuneration received by key management personnel.[1] Other rules require shareholders to approve particular payments or benefits, but do not allow shareholders to determine how much is paid or given.[2] Further regulation takes the form of advisory guidelines or principles that companies can choose to adopt or not, with a requirement to explain 'if not, why not' should the company choose to not adopt the practices recommended.[3] Further rules are provided by accounting standards that mandate how items are to be valued for the purposes of the company's financial statements.[4]

For the most part, private and unlisted public companies are spared this regulation. One notable exception is the requirement under Part 2D.2 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') — s 200B(1) of the Act makes it an

1 See, eg, *Corporations Act 2001* (Cth) s 300A ('*Corporations Act*'); *Corporations Regulations 2001* (Cth) reg 2M.3.03.

2 Approval of issues in relation to securities to directors is required under Australian Securities Exchange ('ASX') Listing Rule 10.14, approval of related party transactions is required under s 208 of the *Corporations Act* and approval of termination benefits is required under s 200E of the Act. A resolution to adopt the remuneration report is required at a publicly listed company's annual general meeting ('AGM') but is advisory only: *Corporations Act* ss 250R(2)–(3). A number of Investment and Financial Services Association ('IFSA') guidance notes stress the importance of disclosure to shareholders to enable them to make an informed vote on these resolutions: see IFSA, 'Non-Binding Shareholder Vote on Remuneration Reports' (Guidance Note Circular, 2005) 2–5; IFSA, 'Executive Equity Plan Guidelines' (Guidance Note No 12, 2007) 10–11.

3 ASX Listing Rule 4.10.3. For an overview of the practices recommended, see generally ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003). Principle 9 recommends fair and responsible remuneration by a company: at 51–7. See also Australian Council of Super Investors Inc ('ACSI'), *Corporate Governance Guidelines: A Guide for Superannuation Trustees to Monitor Listed Australian Companies* (2005) ('*Corporate Governance Guidelines*'); IFSA, 'Blue Book — Corporate Governance: A Guide for Fund Managers and Corporations' (Guidance Note No 2, 2004). For the purposes of this article, we have used the 2005 edition of the ACSI guidelines and the 2003 version of the ASX Corporate Governance Council's principles, as these were applicable to the period of our empirical study (March 2006). We note that ACSI released new guidelines in June 2007, although the guidance in relation to terminations is unchanged. The ASX Corporate Governance Council issued a revised statement in August 2007 — Principle 8 of the *Corporate Governance Principles and Recommendations* (2007) deals with remuneration-related issues, including termination payments (Box 8.1). The guidance covers termination payments 'if any'. This new wording implicitly advises boards and remuneration committees to consider whether a termination payment is actually required under the circumstances. The previous wording in Box 9.2 of the 2003 edition implied that termination payments were always paid.

4 For more information on the accounting standards issued by the Australian Accounting Standards Board ('AASB') that were relevant for the period covered by this empirical study, see AASB, 'Related Party Disclosures' (Accounting Standard No 124, 2005) ('AASB 124 (2005)'); AASB, 'Share-Based Payment' (Accounting Standard No 2, 2004) ('AASB 2'); AASB, 'Director and Executive Disclosures by Disclosing Entities' (Accounting Standard No 1046, 2004) ('AASB 1046'). The amendments to reg 2M.3.03 of the *Corporations Regulations 2001* (Cth) in 2007 have introduced into the regulations the detailed disclosure requirements that were previously found in AASB 124 (2005) (which were to apply from 30 June 2007). The AASB subsequently revised AASB 124 (2005) in June 2008 by excluding disclosing entities that are companies from the application of paragraphs Aus25.2–Aus25.6, Aus25.7.1, Aus25.7.2: AASB, 'Amendments to Australian Accounting Standard — Key Management Personnel Disclosures by Disclosing Entities' (Accounting Standard No 124, 2008).

offence for any company registered under the Act to give benefits without prior shareholder approval to officers upon retirement, unless the benefit falls within one of the limited exceptions in s 200F(1) or the total benefits given fall below the threshold specified in ss 200F(3)–(4)[5] and ss 200G(2)–(3).[6] Regulation of this particular remuneration practice is longstanding,[7] but has received little attention empirically in Australia.[8] As far as we are aware, this is the first study to empirically explore the operation of the thresholds sanctioned by Part 2D.2 of the *Corporations Act* ('Part 2D.2 thresholds'), ASX Listing Rule 10.19 ('ASX threshold') and guideline 14.1 of the ACSI *Corporate Governance Guidelines* ('ACSI threshold').

We draw a sample of 28 managing directors from the S&P/ASX 50 index as at 1 July 2005, and use details of the remuneration, service contracts and relevant share plan rules (where available) for each managing director to explore the nature and size of payments that would have been made if that managing director's employment was terminated by the company on 1 March 2006. We then compare the size of these payments to the Part 2D.2, ASX and ACSI thresholds. This comparison highlights the large termination benefits which companies can give while remaining below both the Part 2D.2 thresholds and the ASX threshold. Only four of the 28 termination payments would require prior shareholder approval under Part 2D.2 of the *Corporations Act*, with payments as large as $129 million sanctioned by the Part 2D.2 thresholds. We find that the ASX threshold is unlikely to be breached by the termination of one executive, but could be triggered if there is some larger-scale termination of a number of senior executives, possibly as the result of takeover or merger and acquisition ('M&A') activities. In contrast, the ACSI threshold would be exceeded by all but one payment. Based on these findings, we question whether a threshold-based approach to deciding which payments are acceptable (in the sense that prior shareholder approval is not required) and which payments should be approved by shareholders in advance may prove unworkable in practice.[9]

[5] This threshold applies if the benefit given falls under s 200F(2) of the *Corporations Act*: see below Part III(B).

[6] This threshold applies if the benefit is a lump sum payment for past services or pension that falls within the ambit of s 200G(1) of the *Corporations Act*.

[7] The first statutory provisions are contained in the various state statutes regulating companies: see, eg, *Companies Act 1938* (Vic) s 150(1), which was based on the United Kingdom's *Companies Act 1928*, 18 & 19 Geo 5, c 45, s 82 and *Companies Act 1929*, 19 & 20 Geo 5, c 23, s 150. Thresholds were first introduced into the Victorian legislation in the 1950s: see *Companies Act 1958* (Vic) s 108(5)(d).

[8] Geof Stapledon's study on termination payments is the only prior Australian empirical study on this point: see Geof Stapledon, 'Termination Benefits for Executives of Australian Companies' (2005) 27 *Sydney Law Review* 683.

[9] In 2004, the Parliamentary Joint Committee on Corporations and Financial Services conducted a review of the CLERP (Audit Reform and Corporate Disclosure) Bill 2003 (Cth): see Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *CLERP (Audit Reform and Corporate Disclosure) Bill 2003 Part 1: Enforcement, Executive Remuneration, Continuous Disclosure, Shareholder Participation and Related Matters* (2004). In its review the Joint Committee stated at 95:

> The difficulty for the Committee is in endorsing the threshold set by the proposed legislation. It is concerned that the provision sets down a formula that establishes a relatively high benchmark — a payment above this point requires shareholder approval, a payment below it is exempt from approval.

In a further contribution to the corporate governance literature, we undertake an empirical analysis of the termination provisions of executive service contracts. Given a hypothetical termination date of 1 March 2006, nine of the 28 companies examined would have made a contractual termination payment of at least 18 months' cash remuneration. These companies would have also permitted some of the accumulated share-based payments to vest. While the remaining contracts allowed for lower levels of cash remuneration to be paid upon termination, these contracts also permitted some, if not all, of the accumulated share-based payments to vest. Shareholders should be interested in how such vesting occurs, especially when no adjustment is made to recognise the reduced period over which performance is measured. If no adjustment occurs, an executive who is in effect sacked is rewarded for performance that has either not actually occurred (because the performance conditions are waived or deemed to be satisfied) or is yet to occur (because the original vesting period is maintained). Hence, the executive reaps the benefits of performance that occurs after they have left the company.

These empirical findings, while shedding light on current practices, raise serious questions about the operation of the Part 2D.2 thresholds. The causal link between a benefit received and the termination is established when paying the benefit is regarded as 'having to do with'[10] the retirement or termination.[11] Merely entering into an agreement that contemplates giving such a benefit does not trigger the requirement for shareholder approval; only the act of payment itself does so.[12] That the payment and the executive's retirement are contemporaneous is relevant to, but not determinative of, the existence of the requisite connection.[13] Establishing this causal link is difficult for share-based payments: does earlier vesting provide a sufficient causal link for the purposes of Part 2D.2? If it does, how should the payment be valued, given that current accounting standards expense share-based payments on a fair value basis measured at the date of grant?[14]

This article is structured as follows. In Part II, we examine some of the existing empirical literature on termination payments, including Geof Stapledon's empirical study of termination payments conducted over the period 1999–2004.[15] Part III explores the nature of termination payments and outlines

ACSI also expresses concerns about the Part 2D.2 thresholds in guideline 14.1 of its *Corporate Governance Guidelines*, above n 3.

10 *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239, 280 (Wilcox J), relying on his Honour's earlier reasoning on the meaning of the phrase 'in connection with' as it appears in s 25B of the *Broadcasting Act 1942* (Cth): see *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465, 479–80.

11 The legislation uses the term 'retirement', which is defined in s 200A(1)(e) of the *Corporations Act* as including loss of office. Throughout this article, we will use 'termination', which falls within the meaning of retirement in s 200A(1)(e) of the Act.

12 *Fox v GIO Australia Ltd* (2002) 56 NSWLR 512, 533 (Walton J). The decision was recently endorsed by both the Supreme Court of New South Wales and the Supreme Court of Victoria: see *Silver v Dome Resources NL* (2007) 62 ACSR 539, 561 (Hamilton J); *Orrong Strategies Pty Ltd v Village Roadshow Ltd* (2007) 207 FLR 245, 398 (Habersberger J).

13 *Whitlam v Insurance Australia Group Ltd* (2005) 52 ACSR 470, 531 (Einstein J).

14 AASB 2, above n 4, [10]–[15].

15 See above n 8 and accompanying text.

the operation of the Part 2D.2 provisions of the *Corporations Act*. We also explore briefly the history of the Part 2D.2 thresholds in an attempt to understand how a threshold based on seven years' remuneration was adopted. The methodology of our study is outlined in Part IV. Part V presents the results of our analysis of executive service contracts and current remuneration practices. Part VI models the thresholds that would apply under Part 2D.2 of the *Corporations Act* and compares those thresholds with the actual termination payments identified in Part V. Two alternatives to the Part 2D.2 thresholds are provided by the ASX Listing Rules and the ACSI *Corporate Governance Guidelines*, both of which are explored in Part VII. Part VIII concludes with a series of questions we have in relation to the operation of Part 2D.2 of the *Corporations Act*. Our further analysis of these questions is the subject of a second article.[16]

II PRIOR LITERATURE ON TERMINATION PAYMENTS

To date, termination payments have received little empirical attention in Australia. The Stapledon study is one notable exception,[17] although we also note the contribution made by *The Australian Financial Review*'s reports on liquidated damages clauses.[18] Many articles on termination payments from United States-based scholars look specifically at golden parachutes and build upon the 1985 article by Richard A Lambert and David F Larcker on this phenomenon.[19] A golden parachute may be triggered as a result of M&A or takeover activity.[20] Thus, the focus of many studies is on whether the presence of a golden parachute influences managerial decisions and recommendations to shareholders on M&As or takeovers.[21] We explore US empirical literature on other types of termination payments and retirement benefits in Part II(A), while in Part II(B) we discuss the Stapledon study and *The Australian Financial Review*'s reports, and highlight how our work extends these studies.

16 Colin Fenwick and Kym Sheehan, 'Share-Based Remuneration and Termination Payments to Company Directors: What Are the Rules?' (2008) 26 *Company and Securities Law Journal* 71.

17 See below Part II(B).

18 Damon Kitney and Fiona Buffini, '$100m Payout Bonanza for CEOs', *The Australian Financial Review* (Sydney), 6 December 2004, 1; Damon Kitney, 'In Line for a Golden Parachute', *The Australian Financial Review* (Sydney), 6 December 2004, 15.

19 Richard A Lambert and David F Larcker, 'Golden Parachutes, Executive Decision-Making and Shareholder Wealth' (1985) 7 *Journal of Accounting and Economics* 179. The authors at 179 characterise golden parachutes as modifications to

> senior-level executive employment contracts to include special payments to executives when the company undergoes some type of 'change of control' (eg, purchase of a substantial block of outstanding stock, a change in the majority of the Board of Directors, or acquisition of the company by an unrelated third party).

20 See, eg, ibid 179–83.

21 See, eg, Craig E Lefanowicz, John R Robinson and Reed Smith, 'Golden Parachutes and Managerial Incentives in Corporate Acquisitions: Evidence from the 1980s and 1990s' (2000) 6 *Journal of Corporate Finance* 215; Judith C Machlin, Hyuk Choe and James A Miles, 'The Effects of Golden Parachutes on Takeover Activity' (1993) 36 *Journal of Law & Economics* 861; Albert Choi, 'Golden Parachute as a Compensation-Shifting Mechanism' (2004) 20 *Journal of Law, Economics, & Organization* 170.

A *US Empirical Studies on Retirement and Termination Payments*

Studies by David Yermack,[22] and by Lucian Arye Bebchuk and Jesse M Fried,[23] look at termination payments other than golden parachutes. Yermack's study examined the separation payments made to a sample of 179 *Fortune 500* chief executive officers ('CEOs') who left their firms during the period 1996–2002.[24] First, he found that only 24 per cent of the CEOs in his sample received some or all of their termination payment in the form of liquidated damages, which is a specific amount for a breach of contract agreed up-front at the time of entering into the contract.[25] Secondly, he observed that many companies deviated from their stated share plan policies in relation to how stock options or other share-based payments would be treated at termination.[26] Observed deviations included 'waiver of forfeiture rules, more generous vesting than usual, and longer exercise periods.'[27] As we report below in Table 1, our research suggests that Australian companies do provide more extensively for termination payments in the form of liquidated damages. However, there is also considerable flexibility in terms of how share-based payments are dealt with.[28] We note that the practices observed by Yermack are frequently provided for contractually or within share plan rules in Australia. This can be seen in the fact that, while all of the managing directors within our sample had employment contracts, only one third of the CEOs in Yermack's sample had written employment contracts at the time of the CEOs' exits.[29] We further note, as Yermack too observed,[30] that it is not uncommon for a CEO to be allowed to retain their right to yet unvested share-based payments after leaving the firm.[31]

Bebchuk and Fried's study examines retirement benefits from the managerial power perspective.[32] This perspective argues that senior executives will seek to avoid having shareholders become incensed over the size of payments made to executives by concealing or camouflaging this pay.[33] In the US, retirement benefits to senior executives are primarily delivered via defined benefit schemes known as supplemental executive retirement plans ('SERPs'). As Bebchuk and

22 David Yermack, 'Golden Handshakes: Separation Pay for Retired and Dismissed CEOs' (2006) 41 *Journal of Accounting and Economics* 237.

23 Lucian Arye Bebchuk and Jesse M Fried, 'Stealth Compensation via Retirement Benefits' (2004) 1 *Berkeley Business Law Journal* 291.

24 Yermack, above n 22, 238.

25 Ibid 246.

26 Ibid 249.

27 Ibid 249 fn 8.

28 See below Part V(C).

29 Yermack, above n 22, 245.

30 Ibid 249.

31 See below Table 1. The recent departure of Matthew Slatter as CEO of Tabcorp Holdings Ltd ('Tabcorp') illustrates the practice of share-based remuneration being retained beyond the date of termination and allowed to vest subsequently: see Tabcorp, 'Tabcorp's Matthew Slatter Leaves the Company' (Press Release, 14 March 2007).

32 Bebchuk and Fried, 'Stealth Compensation via Retirement Benefits', above n 23, 296–8. See also Lucian Arye Bebchuk, Jesse M Fried and David I Walker, 'Managerial Power and Rent Extraction in the Design of Executive Compensation' (2002) 69 *University of Chicago Law Review* 751, 764–83.

33 Bebchuk and Fried, 'Stealth Compensation via Retirement Benefits', above n 23, 298–300.

Fried note, companies are only required to report the total liability of the company's retirement or pension plans.[34] Accounting standards do not require separate reporting of SERP liability for each executive, and thus shareholders do not see the steady increase in the executive's SERP benefits as another year of service accrues.[35] Bebchuk and Fried do not quantify the potential benefits that such executives will obtain due to a lack of disclosure but suggest that such benefits are likely to be sizeable.[36]

A study by Bebchuk and Robert J Jackson Jr quantifies these payments by undertaking an actuarial analysis of the pension plan benefits of two samples of CEOs: (1) a sample of former S&P 500 CEOs who left that role during a 17 month period from the beginning of January 2003 to the end of May 2004; and (2) a sample taken from all CEOs in the ExecuComp database between the ages of 63 and 67 on 31 December 2003.[37] Their study reports that the average *annual* pension benefit to the retired CEOs in the first sample was US$1.1 million for life.[38] The current median actuarial value of this pension benefit was over US$14 million.[39] The average annual pension of the second group of CEOs was US$1.5 million, with a current median actuarial value of more than US$15 million.[40] They estimate that the median ratio of pension benefits to total executive compensation (including equity-based compensation) received per CEO was 35.3 per cent for the first group and 27.8 per cent for the second group.[41]

In our empirical study, we do not take into consideration accumulated superannuation entitlements. Thus, any amounts we show as a termination payment will not include superannuation. We observed an average superannuation expense of $202 600 in our sample of 28 managing directors, with one managing director's company contributing over $620 000 by way of superannuation. As Bebchuk and Jackson argue, any consideration of executive remuneration that does not take into account the amount of retirement benefits given by way of

[34] Ibid 308. For more details on the US requirements for disclosure by companies with two or more plans, see Financial Accounting Standards Board, 'Employers' Disclosures about Pensions and Other Postretirement Benefits' (Statement of Financial Accounting Standards No 132, 2003).

[35] Bebchuk and Fried, 'Stealth Compensation via Retirement Benefits', above n 23, 305–7. For the relevant US accounting standard, see Financial Accounting Standards Board, 'Employers' Accounting for Pensions' (Statement of Financial Accounting Standards No 87, 1985).

[36] Bebchuk and Fried, 'Stealth Compensation via Retirement Benefits', above n 23, 308.

[37] Lucian A Bebchuk and Robert J Jackson Jr, 'Executive Pensions' (2005) 30 *Journal of Corporation Law* 823, 836. The justification offered by the authors at 839 for the composition of the two samples is:

> Taken together, [the] samples provide a picture of the magnitude of the costs of executive pension plans to shareholders. The first sample, which consists only of retired CEOs, permits us to estimate the magnitudes of pensions that shareholders have already begun to pay. The second sample, which consists of CEOs who are approaching retirement, permits us to assess the approximate costs of pensions that shareholders can be expected to start paying before too long.

[38] Ibid 839–40.

[39] Ibid 843.

[40] Ibid 839, 841, 843.

[41] Ibid 847–8.

pensions or superannuation is underestimating the value of executive compensation.[42]

Finally, we note survey research compiled by Booz Allen Hamilton ('BAH') on the reasons behind CEO terminations in its annual study of CEO turnover in 2500 of the world's largest public companies.[43] In its most recent special report, BAH found that turnovers due to conflicts within the board increased from two per cent of turnovers in 1995 to 11 percent in 2004–06,[44] with nearly one in three turnovers being involuntary, including turnovers due to merger or private equity buyout.[45] This suggests that the type of termination we use as the trigger event in our empirical study — a termination initiated by the board for reasons other than misconduct or 'for cause' — is not some remote possibility.

B *The Stapledon Study*

Stapledon's 2005 study of termination payments to Australian executives was the first such analysis of its kind despite recent public concern over remuneration of company executives.[46] Aside from a comprehensive survey of the academic literature,[47] public policy analysis[48] and good practice guidelines relating to termination payments to company directors,[49] Stapledon's study presented empirical findings based on the termination payments made to 40 executives of listed companies over the period 1999–2004.[50] Stapledon noted that the average termination payment was $3.65 million, with a median payment of $3 million.[51] Moreover, nine of the 40 termination payments observed exceeded $6.5 million.[52] One feature of Stapledon's newspaper-based analysis is that the headline figure reported as a termination payment in the media does not discriminate between the actual termination payment and other accumulated payments legally due to the executive, such as accumulated long service leave and annual leave.[53] Stapledon suggested that one issue to be addressed as part of an informed debate on termination payments is the generosity of the statutory thresholds.[54] He further called for an empirical analysis of executive service agreements, with detailed analysis of the provisions of liquidated damages clauses to inform the debate as to whether such clauses are optimal.[55]

42 Ibid 826, 854.
43 See Chuck Lucier, Steven Wheeler and Rolf Habbel, 'The Era of the Inclusive Leader' (2007) 47 *strategy+business* 2, 13 <http://www.strategy-business.com/media/file/sb47_07205.pdf>.
44 Ibid 11.
45 Ibid 3.
46 Stapledon, 'Termination Benefits for Executives of Australian Companies', above n 8, 683.
47 Ibid 684–9.
48 Ibid 689–93.
49 Ibid 693–700.
50 Ibid 700–8.
51 Ibid 708–9.
52 Ibid 701.
53 Ibid 708.
54 Ibid 711–12.
55 Ibid 684, 710–11.

Our work, while building directly on Stapledon's, also has some key points of difference in its focus and methodology. Our study indeed sheds light on current practice, as he suggested, in its empirical analysis of both executive service agreements in Part V and Tables 1–3, and in the analysis of the Part 2D.2 thresholds in Part VI and Table 4. While we also draw our data from company annual reports, as is done in Stapledon's study, our data is taken from 2005 annual reports, the first year of company reporting under the new remuneration disclosure requirements in the *Corporations Act*.[56] This material provides unprecedented information not only about remuneration payments, but also about contractual termination provisions. These disclosure requirements provide the necessary data to illustrate what the new limits in the Part 2D.2 thresholds might actually allow in practice. As will be explained in Part V, our methodology is based on using real remuneration and contractual provisions to explore the hypothetical situation of a forced termination, whereas Stapledon's study relies upon actual terminations reported. We note in particular that Stapledon's study did not explicitly consider the fate of share-based payments but relied on the termination payment disclosed as such in the annual report.[57] Based on our empirical results in Table 4 and our analysis of the provisions of executive service contracts in Table 1, it is possible that many executives received additional benefits over and above what has been disclosed as a termination payment.

Our work extends the review of contractual termination benefits highlighted by *The Australian Financial Review*[58] by undertaking a more detailed analysis of the contractual provisions featured in that article. In Part V and Table 2, we analyse how the contractual terms fit into the *Corporations Act* ss 200F–200G exemptions and thresholds. In Part V and Table 1, we extend the analysis by illustrating how share-based payments will be treated upon termination.

III Regulation of Termination Payments

In this Part, we examine the nature of termination payments and the current *Corporations Act* requirements, as well as present a brief history of the Part 2D.2 thresholds.

A *The Nature of Termination Payments*

Of its nature, a termination payment signifies the end of the employment relationship between a company and its executive. As noted above, regulation of executive remuneration is largely disclosure-based rather than being prescriptive or proscriptive.[59] Shareholders may choose to use mechanisms such as the

56 The reporting amendments introduced by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) ('*CLERP 9 Act*') sch 5 cls 6–8 'apply to remuneration reports for financial years that start on or after 1 July 2004': see *Corporations Act* s 1468(3).

57 See Stapledon, 'Termination Benefits for Executives of Australian Companies', above n 8, 700 fn 85.

58 See Kitney and Buffini, above n 18; Kitney, above n 18.

59 See above nn 1–4 and accompanying text.

advisory vote on the company's remuneration report,[60] the re-election of the company's directors or voting in relation to the issue of securities to signal their approval or disapproval of current practice.[61] There is no system of shareholder redress against an executive once they have 'left the building' after a termination payment has been made, although the labour markets for executive and non-executive directors will take note of the reasons for the executive's forced departure if and when the executive seeks a subsequent position.[62]

Shareholders have a more fundamental problem with termination payments: the contract entered into with the executive is negotiated and signed on the company's behalf by the board of directors; it is not made subject to shareholder approval or ratification.[63] When contractual provisions are settled at the time of the executive's initial hiring, the executive has a number of bargaining chips that they can use to influence the final contractual provisions, most notably the fact that the company wants to hire this executive. Termination provisions negotiated in this climate may seek to insure the executive against financial loss, rather than to protect the company in the future from paying out too much to the executive it no longer wishes to employ. From the perspective of the managerial power thesis, the board is effectively 'captured' by the executive and is unable to be relied upon to negotiate an arms-length bargain that would best serve shareholder interests.[64] In the case of contracts subsequently renegotiated by an incumbent executive, a likely climate is one in which the executive, armed with information from a remuneration consultant on market practice together with the advice of their lawyer, seeks a contract that reflects their value in the labour market. Given the value of the executive to the company, the board may feel pressured to meet the market for this particular executive.[65] Corporate governance guidelines offer pithy advice for boards. Amongst other things, they suggest that a company:

60 A resolution that a listed company's remuneration report be adopted must be put to the vote at the company's AGM: *Corporations Act* s 250R(2). The vote on the resolution, however, is only advisory: *Corporations Act* s 250R(3). Similar provisions exist in the UK: *Companies Act 1985* (UK) c 6, s 241A.

61 Kym Sheehan, 'Is the Outrage Constraint an Effective Constraint on Executive Remuneration? Evidence from the UK and Preliminary Results from Australia' (Working Paper, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2007) 24–9, 41–3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=974965>.

62 Jeffrey Sonnenfeld and Andrew Ward, *Firing Back: How Great Leaders Rebound after Career Disasters* (2007) 123–34.

63 A recent US Bill — passed by the US House of Representatives on 20 April 2007 and to be voted on in the US Senate at the time of writing — seeks to allow shareholders an advisory vote on golden parachute provisions in CEO contracts: see *Shareholder Vote on Executive Compensation Act*, S 1181, 110th Cong § 2 (2007). Alternative approaches mooted by the then Department of Trade and Industry in the UK — disbanded and replaced by the Department for Business, Enterprise and Regulatory Reform on 28 June 2007 — during its consultation into executive termination payments were to strengthen best practice guidelines that would give shareholders some input into the contractual process or to legislate to achieve the same outcome by limiting the length of contracts or, subject only to member waiver, declaring certain contractual provisions void: see Department of Trade and Industry, UK, *'Rewards for Failure': Directors' Remuneration — Contracts, Performance and Severance* (2003) 10, 15–16. Ultimately, the best practice route, rather than a legislative one, was adopted: Trade and Industry Committee, *Rewards for Failure*, House of Commons Paper No 914, Session 2002–03 (2003) 14.

64 Lucian Bebchuk and Jesse Fried, *Pay without Performance: The Unfulfilled Promise of Executive Compensation* (2004) 87–94.

65 See generally ibid 70–2.

- ensures that the contract permits it to terminate the executive's employment in a variety of situations including, but not limited to, misconduct;
- agrees on termination payments in advance — for example, by liquidated damages clauses;
- distinguishes between terminations for misconduct — that is, 'for cause' — and other terminations when determining payments;
- deals specifically with share-based payments, both vested but unexercised, and unvested; and
- above all, avoids making excessive payments where the reason for the termination is that the executive has failed to perform.[66]

Regulation of termination payments has to balance the competing interests of an executive forced from managerial office — namely, their interest in securing a fair financial outcome, especially where the termination is not due to misconduct — with those of the company's shareholders, who do not want the company's funds dissipated through unnecessary payments to executives. While both statutory and equitable principles relating to fiduciary duties seek to manage such conflicts of interest,[67] something else is needed in these circumstances. Thus, provisions in Part 2D.2 of the *Corporations Act* allow payments to be made up to a certain threshold without shareholder approval, but require prior approval for payments in excess of the threshold.

B Corporations Act *Requirements*

Section 200D of the *Corporations Act* makes it an offence for a person who has held board or managerial office in a company to receive a benefit if that benefit contravenes either s 200B or s 200C of the Act. Furthermore, s 200B of the Act makes it an offence for a company, its associates or a prescribed superannuation fund to give a benefit in connection with a person's retirement from office unless shareholder approval is first obtained under s 200E.[68] Shareholder approval is not required for exempt benefits under s 200F of the Act or genuine payments of a pension or lump sum under s 200G. In both cases, exempt benefits are defined with reference not only to the type of payment,[69] but also to a threshold contained in the respective sections.[70]

[66] See, eg, ASX Corporate Governance Council, above n 3, 51–7; ACSI, *Corporate Governance Guidelines*, above n 3, 13–15.

[67] R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (13th ed, 2007) 437, 508–10.

[68] Section 200C of the *Corporations Act* requires shareholder approval for benefits given on the transfer of the whole or part of the undertaking or company property. The exemptions in ss 200F–200G of the Act do not apply to s 200C. Our focus is upon payments likely to be captured by s 200B of the Act.

[69] See *Corporations Act* ss 200F(1), 200G(1)(a)–(b).

[70] See *Corporations Act* ss 200F(2), 200G(1)(c), (2).

The following payments do not require shareholder approval:

- benefits given under an agreement signed earlier than 1 January 1991, provided that the giving of the benefit would have been lawful had it been given at the time the agreement was entered into;[71]
- payment made for a 'leave of absence' under an 'industrial instrument';[72]
- benefits given under a court order;[73] and
- benefits given by companies to superannuation funds or by one superannuation fund to another superannuation fund where the benefit is subsequently given to the employee.[74]

In relation to the last exemption, Professor Ian Ramsay suggests that superannuation payments need to be considered separately. On his analysis, the payment from the company to the superannuation fund falls within s 200F of the *Corporations Act* and the prescribed circumstances in s 200B(3) of the Act, while the subsequent payment by the superannuation fund to the executive properly falls under s 200G.[75]

Section 200F(2) of the *Corporations Act* is the key provision for contractual benefits, whereas s 200G(1) of the Act allows benefits given in relation to past services — such as superannuation or an accumulated lump sum — to be exempt from the operation of s 200B, provided the amount falls within the thresholds specified in ss 200G(2)–(3). It is important to note that s 200G of the Act excludes contributions made by the person towards superannuation or lump sums,[76] and it covers gratuitous payments.[77] Moreover, s 200G clearly provides for consideration of the extent to which the person has been a full-time employee of the company in determining the size of the threshold,[78] thus allowing a higher threshold for a longer serving employee, up to the maximum multiplier of seven.[79] In contrast, s 200F of the Act only takes into consideration the period that the person held a board or managerial office.[80] Furthermore, when calculating the threshold amount under s 200F of the Act, payments made under s 200G are accounted for,[81] whereas the corresponding threshold calculation under

71 *Corporations Act* s 200F(1)(a)(i).
72 *Corporations Act* s 200F(1)(a)(iv). An 'industrial instrument' is defined by s 9 of the Act as 'a contract of employment' or 'a law, award, determination or agreement relating to terms or conditions of employment'. Moreover, s 9 defines 'leave of absence' as 'long service leave, extended leave, recreation leave, annual leave, sick leave or any other form of leave of absence from employment'.
73 *Corporations Act* s 200F(1)(aa).
74 *Corporations Act* ss 200B(3), 200F(1)(b).
75 LexisNexis Australia, *Ford's Principles of Corporations Law* (at 61) [9.580].
76 *Corporations Act* s 200G(4). However, Einstein J in *Whitlam v Insurance Australia Group Ltd* (2005) 52 ACSR 470, 534 highlights that salary sacrifice contributions do not count as personal contributions but as contributions by the company.
77 *Randall v Aristocrat Leisure Ltd* [2004] NSWSC 411 (Unreported, Einstein J, 8 June 2004) [538].
78 *Corporations Act* ss 200G(2)(a), (5).
79 *Corporations Act* s 200G(3).
80 *Corporations Act* s 200F(5).
81 *Corporations Act* s 200F(2)(b).

s 200G disregards payments made under s 200F for the purposes of determining that threshold.[82]

Section 200F of the *Corporations Act* is the primary focus of this article.[83] Under s 200F, a benefit given either as a genuine payment by way of damages for breach of contract or given under an agreement as part of the consideration for taking up the office is exempt if the sum of that benefit, together with all other payments paid or payable in connection with retirement from office, does not exceed a threshold calculated by reference to years in office and average annual remuneration. The relevant formula is given in s 200F(3) of the Act:

$$\frac{\text{Total remuneration} \times \text{Relevant period}}{3}$$

The 'relevant period' is the time that the person held office in the company,[84] or seven years, whichever is the lesser,[85] while 'total remuneration' means the person's total remuneration received from the company and from related bodies corporate in the last three years of the relevant period.[86] Remuneration is defined in s 9 of the Act by reference to the applicable accounting standards for disclosure of remuneration in a company's remuneration report.[87] Appendix 1 to AASB Accounting Standard No 1046 — the applicable standard for the period of this study[88] — has a list of what is to be included as remuneration. While share-based payments are to be reported at their fair value in accordance with AASB 2,[89] any gains on exercise of share-based payments — for example, where unvested share-based payments are permitted to vest upon termination and are exercised by the executive — are *not* considered to be remuneration and are not required to be reported by the company.[90] Remuneration includes superannuation payments

82 Section 200G(1) of the *Corporations Act* explicitly provides that in applying s 200G(1)(c) 'any pension or lump sums that section 200F applies to' are to be disregarded.

83 The treatment of share-based payments is discussed more fully in our second article: see Fenwick and Sheehan, above n 16, 79–82. Specifically, we consider whether such payments may fall under s 200G(1)(b) of the *Corporations Act* as a payment 'for past services'.

84 Habersberger J in *Orrong Strategies Pty Ltd v Village Roadshow Ltd* (2007) 207 FLR 245, 399–400 suggests that the term 'board' or 'managerial office' should be given an interpretation such that it accords with the circumstances in which a person will be considered to be involved in the management of a corporation for the purposes of s 206A of the *Corporations Act*. This relies primarily on comments from R P Austin, H A J Ford and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 100–1.

85 *Corporations Act* ss 200F(3)–(5). See also *Corporations Act* s 200(G)(3).

86 *Corporations Act* s 200F(3). See also *Corporations Act* s 200G(3).

87 AASB 124 (2005), above n 4, [Aus25.4] requires disclosure of compensation '[f]or each key management person'. That category of persons is defined to include directors: at [9]. Disclosure of compensation of 'key management personnel' is required 'in total' and for a number of categories including short-term employee benefits, post-employment benefits, other long-term benefits, termination benefits and share-based payments: at [16]. The Standard further clarifies that while the word 'compensation' rather than '*remuneration*' is used in the Standard, 'both words refer to the same concept and all references in the *Corporations Act* to the remuneration of directors and executives is taken as referring to compensation as defined and explained in this Standard': at [Aus9.1.1] (emphasis in original).

88 See AASB 1046, above n 4 and accompanying text.

89 AASB 2, above n 4, [10]–[15].

90 AASB 1046, above n 4, [5.2.14].

made by the company,[91] so the total remuneration figure reported will include all cash payments, non-cash benefits, share-based remuneration granted and superannuation payments made by the company in that financial year. As noted recently, the policy of the *Corporations Act* and the accounting standards is to give remuneration in s 9 of the Act 'an ample definition … The policy is to catch anything that is, in reality, a reward to a director.'[92]

C *A Brief History of the Part 2D.2 Thresholds*

The actual thresholds in Part 2D.2 of the *Corporations Act* are generous. The original Victorian threshold of an amount equivalent to total remuneration (emoluments) received for the previous three years[93] was amended in 1981 with the passage of uniform Commonwealth corporations legislation. Thus, the current threshold level is seven times the average annual 'emoluments'[94] — the term then used to describe what is now termed 'remuneration' — over the preceding three year period.[95] The higher threshold was justified in the explanatory memorandum to the Companies Bill 1981 (Cth) as being a change to the averaging formula to take into account inflation.[96] It is important to remember that the 1970s and early 1980s were times of double-digit inflation in Australia. The highest levels of inflation — as measured by the Consumer Price Index — were recorded in the September 1974 to June 1975 quarters (as measured by the percentage change from the corresponding fiscal quarter of the previous financial year, which was 16.4 per cent, 16.3 per cent, 17.6 per cent and 16.9 per cent respectively). However, the inflation rate did not drop back to single digits until December 1977 and went back to double figures for the period December 1979 to September 1980 (percentage change from the corresponding fiscal quarter of the previous financial year was 10.1 per cent, 10.7 per cent, 10.8 per cent and 10.1 per cent respectively).[97] Granted the exposure draft of the Bill was released for consultation in mid-April 1980, the comments about inflation have to be viewed against this background.

The need to adjust the threshold could also reflect the nature of executive remuneration payments at the time. Superannuation provision to private sector employees in the 1970s was '*status-related*'.[98] That is, for the most part superannuation coverage was 'greater among executive, professional and non-manual employees than among other groups.'[99] A 1972 survey by the then Common-

[91] Ibid [5.2(b)].

[92] *Silver v Dome Resources NL* (2007) 62 ACSR 539, 563 (Hamilton J). For the contrary view that ss 200F–200G of the *Corporations Act* do not cover every type of termination payment, see Stapledon, 'Termination Benefits for Executives of Australian Companies', above n 8, 712.

[93] *Companies Act 1958* (Vic) s 108(5)(d).

[94] *Companies Act 1981* (Cth) s 233(7).

[95] See *Companies Act 1981* (Cth) s 233(7)(e).

[96] Explanatory Memorandum, Companies Bill 1981 (Cth) [569(e)].

[97] Australian Bureau of Statistics, *Consumer Price Index*, Time Series Workbook, ABS Catalogue No 6401.0 (2006), Series ID A2325847F.

[98] Commonwealth, *Occupational Superannuation in Australia — Final Report of the National Superannuation Committee of Inquiry, Part Two*, Parl Paper No 70 (1977) 8 (emphasis in original).

[99] Ibid.

wealth Department of Labour noted that of a total of 703 schemes surveyed, 73 were funded purely by employer contributions.[100] Moreover, for the other schemes the survey hinted that employer contributions for executive employees were considerably higher than the employee's own contributions.[101] A typical superannuation benefit paid to a retiring senior executive of a medium to large firm around that time would have been a lump sum of seven times the final average salary (over a three year averaging period), provided a minimum service requirement of 20–30 years.[102] Lower amounts were payable to senior executives with less extensive service periods.[103] This lump sum payment was provided on a non-contributory basis — in other words, no contributions were funded by the senior executive.[104] The formula for determining the final payment for superannuation purposes appears to have been driven by limits on the ability of superannuation funds to claim a tax exemption on income pursuant to s 23F of the *Income Tax Assessment Act 1936* (Cth).[105]

The fact that there was a distinct similarity between the taxation legislation thresholds and the formulae adopted under the then equivalent of Part 2D.2 of the *Corporations Act* is perhaps unsurprising. To a certain extent, trends in executive remuneration have been driven by taxation initiatives, as both companies and executives seek to optimise their respective taxation situation. For example, data for the period 1971–81 show that the percentage of executive base salary as a percentage of total remuneration decreased from 87.1 per cent in 1971 to 79.2 per cent in 1981.[106] Fringe benefits at that time comprised a large part of the total remuneration of chief executives. Data from Cullen Egan Dell show that at December 1983, fringe benefits represented 32 per cent of total remuneration.[107] The top personal income tax marginal rate at the time was around 50–60 per cent.[108] Introduction of the capital gains tax in 1985[109] and fringe benefits tax in 1986,[110] together with any subsequent changes to taxation treatment of

100 Ibid 17.
101 Ibid 8, 17.
102 Bruce D Crook, 'Superannuation Benefit Design in the 1980s' in Leo Cussen Institute for Continuing Legal Education (ed), *Current Problems in Law — Superannuation Directors' Benefits and Responsibilities* (1980) vol 4, 1, 9.
103 Ibid.
104 Ibid.
105 M J Walsh, 'Superannuation' in Leo Cussen Institute for Continuing Legal Education (ed), *Current Problems in Law — Superannuation Directors' Benefits and Responsibilities* (1980) vol 4, 16, 29–30. Section 23F of the *Income Tax Assessment Act 1936* (Cth) was repealed in 1987 by the *Taxation Laws Amendment Act [No 4] 1987* (Cth) s 8.
106 Advisory Committee on Prices and Incomes, Department of Employment and Industrial Relations, Australian Government, *Changes in Executive Incomes and Benefits* (1985) 10. By way of comparison, base salary formed a much smaller part of managing director remuneration in 2005, representing 35.11 per cent of total remuneration. The other significant component of annual remuneration was the cash short-term incentive, representing around 32 per cent of total remuneration: see Institutional Shareholder Services and ACSI, *CEO Pay in the Top 100 Companies: 2005* (2006) 19.
107 Advisory Committee on Prices and Incomes, above n 106, 9–13.
108 Sam Reinhardt and Lee Steel, 'A Brief History of Australia's Tax System' (Paper presented at the 22nd Asia-Pacific Economic Cooperation Finance Ministers' Technical Working Group Meeting, Khanh Hoa, Vietnam, 15 June 2006) 15.
109 *Income Tax Assessment Amendment (Capital Gains) Act 1986* (Cth).
110 *Fringe Benefits Tax Act 1986* (Cth); *Fringe Benefits Tax Assessment Act 1986* (Cth).

superannuation payments, are likely to have an impact on executive remuneration practices.

IV METHODOLOGY

Relying on actual remuneration data as disclosed in the annual reports of a sample of listed companies, this study seeks to identify:

1 The total value of the payments that would have to be made if the managing director's employment had been terminated on 1 March 2006.[111]
2 The total value of the payment that would be made if the managing director was entitled to a payment equal to seven times their average annual remuneration, or some lesser total based on their actual years in office — that is, the values of the Part 2D.2 thresholds for the managing director.
3 Whether the total value of the payment in (1) exceeds either of the thresholds in (2).
4 Whether the total value of the payment in (1) would exceed either the ASX or ACSI thresholds.

Readers should be aware that it is not possible to calculate the *actual* payment that would be received in the case of an individual managing director within our sample. This is due to: (1) the lack of full disclosure of executive service agreements in Australia; and (2) the lack of disclosure of accumulated superannuation benefits. In addition, boards typically exercise broad discretions in relation to accelerated vesting of share-based payments in termination situations. As such, it is not possible to know in advance how the board of any one company will exercise its discretion. It is because of this inability to be more precise about the actual payment that we have chosen not to identify by name either the companies or executives in our study. Rather, each executive was assigned a letter and in all the results noted below in Tables 1–5 these letters are used.

As we have indicated, our sample of executives was drawn from the S&P/ASX 50 as at 1 July 2005.[112] We focus on the position of managing director/CEO on the basis that it is usually the highest paid executive director's position within a company.

We excluded over 20 companies and their managing directors from our sample. First, we excluded any managing director who had taken up their position during or after the 2004–05 financial year as the remuneration reported in that company's 2005 annual report would not represent remuneration for a full 12 months in the managing director's role. Nine managing directors were excluded on this basis. Secondly, we excluded companies that had not released remuneration data for 2005 by 15 March 2006. Six managing directors were excluded on this basis. Thirdly, we excluded companies that are not domiciled in Australia — such companies are not subject to the same reporting requirements as they are not incorporated in Australia. Fourthly, we excluded companies where the

[111] As we explain below, the chosen date of 1 March 2006 is only one of a number of simplifying assumptions that were used: see further below Part IV.
[112] See above Part I.

managing director was a major shareholder so as to focus upon the more typical situation of a listed company. The third and fourth considerations led to the exclusion of four companies. Two managed investment schemes were also excluded on the basis that they are not companies subject to the detailed remuneration disclosure requirements of the *Corporations Act*.[113] One further managing director was excluded on the basis that the company had undergone a major restructure and the remuneration reported in the company's 2005 annual report did not reflect the current responsibilities of that managing director. Therefore, of the 50 companies potentially in the sample, the final sample was comprised of 28 managing directors.

As stated, the main data source for the study is the remuneration reports contained in the 2005 annual reports. Details of remuneration, service contract provisions and share plan rules disclosed in these reports are the primary source of information used.[114] Key provisions of each executive service agreement were examined to determine what provision was made for any future termination of the managing director in three circumstances: (1) a termination without cause; (2) a termination due to a change in control; and (3) a termination initiated by the executive due to a material change in duties.[115] As these agreements may defer to the rules of any share-based remuneration plan on termination of employment prior to vesting, these rules were also reviewed. We relied principally on disclosure in the 2005 annual reports, supplemented, where necessary, by disclosure in a notice of meeting at which shareholder approval was obtained for the issue of securities to the relevant managing director.[116]

A number of simplifying assumptions were made to determine which provisions of the executive service contract would apply to the termination and what value could be attributed to each of the benefits given by that contract. In making these assumptions, we have sought to optimise the amount the managing director would receive as part of their termination payment. The assumptions for each managing director are that:

- the managing director's termination was initiated by the company;
- the date of cessation of employment was 1 March 2006;
- the managing director was treated as a 'good leaver';
- the managing director was paid in lieu of notice as required under the contract;

113 The disclosure requirements under s 300A(1) of the *Corporations Act* apply 'to any disclosing entity that is a company': *Corporations Act* s 300A(2). Managed investment schemes are not companies: *Corporations Act* s 9. For an overview of the provisions relating specifically to managed investment schemes, see *Corporations Act* ch 5C.

114 For further information, see below Part V.

115 A termination without cause would include a mutual agreement to separate or situations of poor performance. A termination due to a change of control can occur as early as the receipt of an unconditional offer to acquire more than 50 per cent of the company's share capital. Both of these terminations would be triggered by the company. In contrast, a termination due to a material change in duties allows the managing director to terminate the employment relationship and will require the company to pay higher amounts than would be typical in the case of a managing director terminating to take up another corporate role. For more information on the terms of the service agreements examined in this study, see below Tables 1–2.

116 Required under ASX Listing Rule 10.14.

- the total remuneration reported in the 2005 annual report was equivalent to the average annual remuneration of the managing director for the previous three years;
- the managing director's holdings of securities were as stated in the annual report and valued as at 1 March 2006 using the closing share price;
- if any share-based payments vested upon termination, they were exercised on 1 March 2006 at the closing share price of the company's ordinary shares (or, where relevant, stapled securities) on 1 March 2006, provided it was 'in the money';
- aggregate amounts of superannuation were excluded as this information is not able to be identified from the information sources we used — this means that any termination payment received by a managing director does not include any details of the aggregate superannuation *and is thus understated*;
- any taxation consequences were ignored; and
- no benefits awarded fell outside the thresholds due to the combined operation of ss 200F(1) and 1468(2) of the *Corporations Act* — these provisions relate, respectively, to agreements made prior to 1 January 1991 and to those that did not come into effect before 1 July 2004, the date on which the amendments to the *Corporations Act* contained in the *CLERP 9 Act* commenced.[117]

V Termination Payments: Prevailing Practice

In this Part, we consider the termination provisions contained in executive service contracts for our sample of managing directors. This information, together with the total remuneration as disclosed in the 2005 annual report, is used to determine how much would be paid to terminate the managing director's employment in circumstances other than 'for cause'. We then construct a 'best-case scenario' and 'worst-case scenario' of the termination payment depending on whether all share-based payments lapse or vest on termination. This provides us with the outer boundaries within which any actual termination payment must fall.

A *Contractual Provisions*

An analysis of the termination provisions in the executive service contracts for the 28 managing directors is contained in Table 1. It is important to note that we

[117] This is a major assumption and, together with the acknowledged understatement of termination payments due to lack of disclosure of accumulated superannuation, establishes that no termination payment can be definitively determined by an outsider based on disclosed information. For most of the managing directors in the sample, a proportion of any benefits at termination would most likely be covered by agreements made prior to 1 July 2004. However, it would turn on the exact wording of the agreement, in particular any variation to the agreement as to whether s 1468(2) of the *Corporations Act* would quarantine benefits under pre-existing agreements in terms of payment in lieu of notice, restraint of trade or other payments from the ambit of s 200F(2)(a) of the Act.

are relying on disclosure in the remuneration report of the key terms, rather than conducting our own review of the full service contracts.[118]

We found limited use of fixed-term contracts that provide for the balance of the contractual term to be paid out on termination. Only four of the 28 contracts reviewed were fixed-term contracts. The remaining contracts all provided for liquidated damages on termination in the form of a sum, ranging from one month to 40 months, with none of the contracts disclosing that the executive was expected to take steps to mitigate their loss or that the payments would be phased payments. Stapledon has questioned whether liquidated damages clauses are the best way to manage terminations due to the fact that the executive can be paid what Yermack describes as 'a minimum lifetime wage level'[119] via a termination payment, only to be re-employed within a short time frame.[120] We also found that restraints of trade were not prevalent. Only two contracts in our sample disclosed that a proportion of remuneration payable on termination was in exchange for a restraint of trade.

A further feature of note in relation to Table 1 is the treatment of share-based payments. In all but nine of the contracts reviewed, share-based payments outstanding at the time of termination were allowed to vest either immediately or according to the original vesting schedule found in the agreement.[121] In relation to vesting, we are able to draw the following general conclusions. Where share rights vest immediately, they do so in one of three ways: (1) as a result of deemed satisfaction of any performance conditions — that is, waiver of the original performance conditions; (2) as a result of the variation of the original performance conditions to pro-rated performance conditions; or (3) as a result of the variation of the original grant by pro-rating the quantum of awards — that is, reducing the number of awards but retaining the original performance conditions and vesting schedule. In some instances, more than one method could be used to allow for immediate vesting. These rights are in addition to any rights provided by way of consideration for the company's breach of contract when it terminated the managing director's employment without notice. If so, this may be relevant in determining whether the payment falls within s 200F or s 200G of the *Corporations Act* or whether the payment is indeed caught by these provisions at all.

B *Categorising Payments: ss 200F–200G*

As noted above, the complexity of contractual arrangements for termination payments makes it more difficult to apply the statutory provisions as, for

118 For a view that current disclosure of executive service contracts is inadequate, see Stapledon, 'Termination Benefits for Executives of Australian Companies', above n 8, 713–14.

119 Yermack, above n 22, 255.

120 Stapledon, 'Termination Benefits for Executives of Australian Companies', above n 8, 710–11.

121 The nine contracts were the ones pertaining to managing directors J, K, Q, R, U, V, X, Z and BB. There was no disclosure of how share-based payments would be treated for managing director B. The share plan rules (as disclosed in the annual report or a notice of meeting) were unclear on how share-based payments would be treated on termination for managing directors J, K, R, U, V and X. However, from what was disclosed, we suggest that it is unlikely that unvested payments would simply be forfeited.

example, in the case of share-based payments noted above.[122] Another difficulty arises in attempting to characterise particular elements of a termination payment package for the purposes of ss 200F–200G of the *Corporations Act*. As already noted, the tests and formulae under these sections are not the same.[123] Drawing on the decided cases for guidance,[124] we divide each total termination payment into smaller constituent payments and allocate each to the most appropriate subsection of ss 200F–200G.[125] For this exercise, we treat the various types of payments as follows:

- Amounts showing as 'genuine payment[s] by way of damages for breach of contract' under s 200F(2)(a)(i) of the Act are collected in column 2 of Table 2. They reflect payments made in lieu of notice periods in the executive service contracts. These ranged from one month to 24 months' notice as disclosed below in Table 1.
- Payments for restraints of trade are reflected in s 200F(2)(a)(ii) of the Act and we classify them accordingly in column 3 of Table 2. While only two contracts contained restraints of trade, we speculate that many other companies might seek to impose restraints of trade via a deed of release and settlement at the time of termination, with a restraint likely to be accepted by the departing executive in consideration for an additional payment over and above those provided for in their executive service contract.
- Other contractually agreed amounts to be paid in the event of termination are also reflected in the amounts showing for the purposes of s 200F(2)(a)(ii) in column 3 of Table 2. Column 3 of Table 2 thus represents an aggregate of two payments.
- Payments under s 200G(1) of the Act are collected in column 4 of Table 2. They reflect only a disclosed accumulated post-employment benefit. No accumulated superannuation amounts are shown in s 200G due to a lack of disclosure of accumulated superannuation.
- For convenience, we sum all of the above amounts and present them in column 5 of Table 2 as a total.
- Amounts shown as gains from the exercise of share options are collected in column 6 of Table 2. These amounts were calculated using the closing share price on 1 March 2006 as the relevant exercise price. Where share options were exercised, the grant price was taken from the annual reports for each tranche.

Table 2 also shows the importance of the *CLERP 9 Act* reforms on contractual termination provisions. Prior to the introduction of the reforms, all amounts shown in columns 2–3 would have been fully exempt from the requirement of

[122] See above Part V(A).
[123] See above Part III(B).
[124] See, eg, *Silver v Dome Resources NL* (2007) 62 ACSR 539; *Fox v GIO Australia Ltd* (2002) 56 NSWLR 512; *Randall v Aristocrat Leisure Ltd* [2004] NSWSC 411 (Unreported, Einstein J, 8 June 2004); *Whitlam v Insurance Australia Group Ltd* (2005) 214 ALR 703. For further discussion of this case law, see Fenwick and Sheehan, above n 16.
[125] See below Table 2.

shareholder approval under s 200B(1) of the *Corporations Act*, irrespective of the amount of the benefit. Such payments are now only exempt if the amount of the payment, together with all other payments made in connection with retirement from office, fall below the threshold calculated in accordance with ss 200F(3)–(4) of the Act.

The area of understatement in relation to superannuation is reflected in *Corporations Act* s 200G(1) payments. As stated before, it is not possible to determine the amounts, if any, that could be included within s 200G(4) of the Act because Australian companies are not required to disclose accumulated superannuation entitlements for individual executives.[126] The retirement of David Murray from the Commonwealth Bank of Australia illustrates this well. Mr Murray's pay on leaving the Commonwealth Bank totalled $17.5 million, which included $11.8 million in superannuation benefits.[127] He occupied the managing director position at the Commonwealth Bank for 13 years, with a total of almost 40 years with the same employer,[128] a situation that most of today's managing directors are highly unlikely to match. Mr Murray is also entitled to further payments in the form of long-term incentive shares granted annually under plans during 2002–04 that might vest over the period 2006–09.[129] This benefit is valued by the Commonwealth Bank in its 2005 annual report at $5.2 million based on an assumption that 50 per cent of the shares awarded will be received.[130]

Finally, we note in passing that three executives in our sample show 'Nil' in the share payments column (column 6 of Table 2). These managing directors had no outstanding share-based payments waiting to vest. This is an unusual situation, and we interpret this as an indication that the particular managing directors were nearing retirement.[131]

C *Share-Based Payments*

Tables 1–2 indicate that a typical managing director of a large listed corporation will hold, immediately prior to termination, a significant amount of potential wealth in the form of share-based payments. To understand the features of these

126 This contrasts with requirements for listed companies in the UK: sch 7A para 12(2) of the *Companies Act 1985* (UK) c 6 requires public companies to disclose in the directors' remuneration report changes in the year to accrued benefits in a defined benefit scheme plus the accrued benefits as at the end of that year, together with transfer values for both of these items. Money-purchase schemes are required to disclose details of the contribution to the scheme paid or payable by the company for that year. The listing rules issued by the Financial Services Authority ('FSA') in its capacity as the UK Listing Authority also require this disclosure. For disclosure requirements for money-purchase schemes, see FSA Listing Rules 9.8.6R(7), 9.8.8R(11). For disclosure requirements for defined benefit schemes, see FSA Listing Rule 9.8.8R(12).

127 Commonwealth Bank, *Annual Report 2005* (2005) 54.

128 Ibid.

129 Ibid.

130 Ibid. These shares were granted under the 'Equity Reward Plan': at 50–1. The three year performance period for the grants is subject to six monthly retests up until the fifth anniversary of the grant: at 139–40. The 'Total Shareholder Return' performance criteria are for 50 per cent to vest if the Commonwealth Bank's performance is equal to the 50th percentile as against a comparator group of banking and finance companies: at 139. For performance in the top quartile, 100 per cent of the share rewards will vest: at 139.

131 In one instance, the managing director in question exercised 3 million options during the 2004–05 financial year, a fact that tends to lend support to our interpretation.

share-based payments, we obtained details of all awards of share-based remuneration as disclosed in the company's remuneration report, supplemented by disclosure in the notes to the financial statements reported in the 2005 annual report. We also obtained details of the actual shareholdings of each managing director immediately prior to 1 March 2006 from Appendix 3Y notices to the ASX. The notices were retrieved from Aspect Huntley's DatAnalysis database.[132]

Table 3 reports on the share-based payments granted, but not exercised, as at the date of the annual report, together with details of the size of any existing shareholding (in terms of numbers of shares and the value of these shares at the closing share price on 1 March 2006). There is considerable variation in the levels of share ownership within the sample, ranging from a holding of only 1000 shares (managing director N) to a holding of more than 4 000 000 shares (managing director V).

Three different types of share-based payments are identified in Table 3: traditional share options;[133] zero exercise price options ('ZEPOs');[134] and other share-based payments.[135] A traditional share option has an explicit performance component, namely, the appreciation in the company's share price between the date of grant and the date of exercise. If the share price has failed to increase within this time, the share option will not be exercised. A ZEPO, however, is always of value to the managing director because the director need only pay a nominal price to exercise any number of vested ZEPOs.[136] Other share-based payments are of three types: deferred shares;[137] a conditional entitlement to shares;[138] and cash-settled performance shares.[139] As Table 3 demonstrates, a managing director may have a mixture of the various types of share-based payments — for example, executives C and Z have all three types, but many managing directors hold only two different types. Other managing directors

132 See Aspect Huntley, DatAnalysis <http://www.aspecthuntley.com.au/licensee/dat/>.

133 See below Table 3, column 2.

134 See below Table 3, column 3.

135 See below Table 3, column 4.

136 G P Stapledon, 'The Pay for Performance Dilemma' (2004) 13 *Griffith Law Review* 57, 59–60.

137 A deferred share is a share 'issued' but held in escrow and not released until the expiration of a specified performance period: see generally ASX Listing Rules ch 9; ASX, 'Restricted Securities and Voluntary Escrow' (Guidance Note No 11, 2002). Dividends accruing on the shares are usually paid at the time of the shares' release. For an example from Qantas Airways Ltd ('Qantas') on the details of the 'Qantas Deferred Share Plan' subsequently approved at Qantas's 2006 AGM, see Qantas, *Qantas Notice of Meeting 2006* (2006) 4–12. Under the terms of that plan, shares are either issued or purchased on market at the time of the grant and held on behalf of each participant by the 'Qantas Deferred Share Plan Trustee' until the expiration of a holding lock: at 5. The plan allows for early call of shares, but also specifies the relevant earliest dates for such a call: at 5.

138 A conditional entitlement to shares is an entitlement to receive up to a specified number of shares at the expiration of a performance period. The number of shares ultimately received will depend on the level of performance attained over the performance period and is governed by the share plan rules under which the shares are issued. The executive pays no consideration when the shares are issued.

139 A cash-settled performance share scheme involves a nominal grant of a specified number of shares with vesting subject to performance conditions. Any final payment made to the executive will be paid in cash rather than 'settled' by a physical issue of securities.

again (such as managing directors B, D, G, M, N, O, R, X, Y and BB) are rewarded using only one type of share-based payment.

To calculate the value of any termination benefit from share-based payments,[140] we used the details in Table 3,[141] along with share prices of the sample companies at the date of grant and on 1 March 2006, to arrive at a figure for such payments. Shares already held by an executive do not form any part of the termination benefits or payments.[142]

D *Quantifying the Termination Payments Made*

Due to the wide variation in the provisions of executive service contracts as disclosed below in Tables 1–3, we derived dollar amounts for the termination payments by analysing the data in the context of two different scenarios: (1) a 'worst-case scenario'; and (2) a 'best-case scenario'. To do so, we made some additional simplifying assumptions:

- Scenario A — here we assumed that all unvested share-based remuneration lapsed on the date of termination. In this scenario, the executive would receive only the payments provided for in their service agreement, such as cash payments, compensation in return for not competing against the company in subsequent employment and payment in lieu of notice. From the managing director's perspective, this is a worst-case scenario as they are forgoing significant financial benefits.
- Scenario B — here we assumed the contrary: that all unvested share-based remuneration vested and was exercised if 'in the money', that is, if the value of the share exceeded the cost of exercising the option. This concern, of course, is relevant only for traditional options as ZEPOs by their very nature always have value. We found that the assumption underlying this scenario was true in the case of all but one of 33 option payments in our sample. This is the best-case scenario for the managing director because they can retain all of the potential remuneration locked up in share-based payments.

In the first four columns of Table 4, we show the 2005 total remuneration expense for each managing director (column 2), together with the termination payments that would have been payable under the two alternative scenarios. Depending on how the remuneration committee or the entire board of directors exercised its discretion, the actual termination payment made would fall somewhere between these two scenarios. Details of the contractual provisions in Table 1 would indicate that in many instances it is unlikely that the worst-case scenario (Scenario A) would prevail.

By comparing the results that would have been achieved in Scenario A[143] with the actual remuneration received in 2005,[144] it is clear that some companies are

[140] See below Table 3, column 6.
[141] See below Table 3, columns 2–4.
[142] For details on the number of shares already held by each executive in our sample, see below Table 3, column 5.
[143] See below Table 4, column 3.
[144] See below Table 4, column 2.

exercising restraint in terms of the contractual entitlements to payments upon termination. This is apparent from the relatively large number of cases where the figure in column 3 of Table 4 is not greater than the figure in column 2. The mean of the termination payments that could be made under Scenario A is \$5 146 314 — median value of \$3 573 175 — with payments ranging from \$1 460 856 to \$22 250 969.

Table 4 highlights the importance of share-based remuneration for most Australian managing directors. Columns 3–4 show the clear differences between the results in Scenario A and Scenario B: in almost every case the managing director would have realised a significantly higher gain upon termination under Scenario B, in which it is assumed that all share-based payments vested and were exercised. It must be emphasised, however, that the calculation in Scenario B relates to the exercise of *all* share-based payments held at the time of the hypothetical termination, not merely those payments granted in 2005. It does not, however, include the value of the managing directors' existing shareholdings, as reported in the final column of Table 3.

The mean of the termination payments that could be made under Scenario B is \$14 600 705 — median value of \$10 835 409 — with payments ranging from \$1 977 684 to \$48 100 468.

VI THRESHOLDS AND EXEMPT PAYMENTS

In order to assess the scope of the limits imposed by the formula in s 200F(3) of the *Corporations Act*, we constructed two models to calculate and represent the maximum possible termination payments that would be permitted under the Act.

A *The Maximum Threshold: Model 1*

In Model 1, we assumed that the managing directors' 2005 remuneration figures represented their average annual remuneration in the previous three years, and that each had at least seven years of service.[145] For these purposes, we used the headline remuneration figure reported in the 2005 annual report as total remuneration. The results are set out below in column 5 of Table 4. This shows the maximum possible termination payments as we have assumed the highest number of years of service[146] that might be used in applying the formulae in ss 200F–200G. It also shows that the genuine payments or exempt benefits that would be payable within the statutory formula are sizeable indeed.

Based on the data in column 5 of Table 4, the average threshold below which no shareholder approval is required for a termination payment is \$25 451 854, and the median is \$21 471 923. Both of these figures are notably higher than most of the actual termination payments observed by Stapledon in his study over the period 1999–2004.[147]

[145] This allows the highest multiplier of seven to be used in the numerator as the relevant period.
[146] That number, under both ss 200F(3) and 200G(3) of the *Corporations Act*, is seven.
[147] That study showed that the total 'final year' remuneration of Australian executives ranged from \$1.3 million to \$34.7 million, and that the actual termination payment disclosed by the company

B *Varied Thresholds: Model 2*

In Model 2 we applied the formula using the *actual* years of service of each managing director to define the relevant period. This calculation enables an assessment of what each managing director in the sample would in fact have been able to receive as a maximum termination payment whilst still falling within the Part 2D.2 thresholds. As the sample selection excluded managing directors with less than one year's service as at 30 June 2005, the relevant periods (within the meaning of s 200F(3)) ranged from three to seven years. Unsurprisingly, these calculations show that in most cases the threshold limit increases as the number of years in the relevant period increases. The results are presented below in column 8 of Table 4.

C *Comparison of Best-Case Scenario and Worst-Case Scenario with Model Thresholds*

In each model we compared the termination payments calculated under the two scenarios with the relevant thresholds. Under Scenario A (the worst-case scenario), all share-based payments are assumed to have lapsed, while under Scenario B (the best-case scenario), it is assumed that all share-based payments vested and were exercised on 1 March 2006. We then compared these figures with the thresholds calculated for each model. The results are shown below in columns 6–7 of Table 4 for Model 1 (the maximum threshold allowed) and columns 9–10 for Model 2 (the managing director's actual years of service). The negative figures in bold in columns 6–7 and 9–10 indicate those payments that exceed the threshold limit in the particular model for that executive. These payments would be illegal without prior shareholder approval.[148]

All possible termination payments under Scenario A (worst-case scenario) fell within each model's thresholds. However, one payment under Scenario B (best-case scenario) fell outside the Model 1 threshold: managing director C. Using the Model 2 thresholds based on actual periods in office, four termination payments under Scenario B would have triggered the thresholds in the Act *if* the value to the executive of the shares included in the calculation of the termination payment was in all cases caught by relevant provisions. These are the payments due to managing directors C, F, P and Y. All had been with their companies for fewer than seven years at the time of termination and thus had a multiplier of less than seven in the applicable formula. Two of these managing directors had high levels of options relative to other managing directors in the study. The payments listed in columns 6–7 and 9–10 of Table 4 exclude superannuation payments. It is therefore possible that a number of other payments calculated under Scenario B[149] would exceed the permitted Model 2 threshold, in particular payments to managing directors D, E, L, S and W.

ranged from \$800 000 to just under \$10 million: see Stapledon, 'Termination Benefits for Executives of Australian Companies', above n 8, 701–7.

148 *Corporations Act* ss 200B(1), 1311(1), sch 3 item 35.

149 See below Table 4, column 10.

As we have emphasised, our calculations have been made on the basis of certain assumptions. In what we have called Scenario B, the key assumption is that all share-based payments owing to an executive vested upon termination. Analysis of the contractual termination provisions considered in this study[150] shows that such an assumption is not far removed from observed practice among the S&P/ASX 50.

VII ALTERNATIVE THRESHOLDS: ASX AND ACSI

In this Part, we consider how the worst-case and best-case termination payments to our sample of managing directors compare with the thresholds specified in the ASX Listing Rules and the ACSI *Corporate Governance Guidelines*.

A *ASX Listing Rules*

Two rules in chapter 10 of the ASX Listing Rules deal directly with termination benefits. For the purposes of the ASX Listing Rules, termination benefits are defined as 'payments, property and advantages that are receivable on termination of employment, engagement or office, except those from any superannuation or provident fund and those required by law to be made'.[151] The reference to 'advantages' suggests a broader concept than 'benefit' under the *Corporations Act*. However, this is balanced by the narrower circumstances in which the termination payment restrictions of the ASX Listing Rules apply, namely:

- where termination benefits are paid to an officer on a change of control;[152] and
- where termination benefits are paid to an officer or officers, if the value of those benefits and the termination benefits that are or may become payable to all officers together exceed five per cent of the equity interests of the entity as set out in the latest accounts given under the Listing Rules.[153]

We take the five per cent threshold from ASX Listing Rule 10.19 and use each sample company's statement of financial position or balance sheet as disclosed in its 2005 annual report, together with the relevant notes to the accounts, to calculate a threshold,[154] shown as the 'ASX Limit' in column 5 of Table 5. Taking the worst-case (Scenario A) and best-case (Scenario B) termination payments described above in Part V(D) and displayed for each managing director in columns 3–4 of Table 5, columns 6–7 of Table 5 show that all of the managing directors' termination payments fall comfortably within the ASX

150 See below Table 1.
151 ASX Listing Rule 19.12.
152 ASX Listing Rule 10.18.
153 ASX Listing Rule 10.19.
154 Based on the definition of 'equity interests' in ASX Listing Rule 19.12, we obtained figures for paid-up capital, reserves and accumulated profits or losses from the statement of financial position or balance sheet for the consolidated entity. We then reviewed the notes to the accounts to ensure that the figures for contributed equity did not include redeemable preference share capital or any share capital attributable to outside equity interests.

Limit, even where the Scenario B termination payment is utilised. This demonstrates that the limit in ASX Listing Rule 10.19 is unlikely to be breached in the case of a one-off termination, although it has been used as a reason for seeking shareholder approval under s 200E of the *Corporations Act*.[155]

B *ACSI* Corporate Governance Guidelines

Among the major corporate governance guidelines in Australia, the revised ACSI *Corporate Governance Guidelines* take the strongest stand against excessive payments, especially where the termination arises through poor performance against previously agreed benchmarks.[156] The strict application of guideline 14.1 would require companies to seek prior shareholder approval for any termination payment valued at more than 12 months' fixed remuneration.

ACSI recommends clear disclosure and supports the use of liquidated damages clauses that provide for payment of not more than 12 months' base salary, with no amount payable when the executive is dismissed 'for cause'.[157] The guidelines further provide that unvested performance and incentive-related elements of remuneration should be forfeited when an executive is dismissed for performance not amounting to cause.[158] However, ACSI suggests that a company establish a clearly defined but not excessive time frame within which vested options and other incentive instruments can be exercised.[159] ACSI supports UK-style phased payments that cease on an executive finding new employment.[160] It also supports legislative reform for shareholder approval of packages, viewing ss 200F–200G of the *Corporations Act* as too generous. ACSI also advocates US-style disclosure of executive service agreements.[161]

[155] Macquarie Bank Ltd ('Macquarie Bank') and Toll Holdings Ltd ('Toll') each sought approval of termination benefits by reference to both ASX Listing Rule 10.19 and s 200E of the *Corporations Act* at their respective 2005 AGMs. For details on the resolutions sought by Macquarie Bank, see Macquarie Bank, *Notice of Annual General Meeting 28 July 2005* (2005) 2–3. For similar information regarding Toll, see Toll, *Powering Ahead — Notice of Annual General Meeting* (2005) 6–7. Toll also sought approval at an extraordinary general meeting held on 28 May 2007: see Toll, *Toll Holdings Restructure: General Meeting and Court-Ordered Meetings* (2007) items 5–8. See also Toll, *Restructure Scheme Book* (2007) 307–13.

[156] ACSI, *Corporate Governance Guidelines* (2005), above n 3, 14–15 (guideline 14.1). This Guideline directs attention to terminations in circumstances where poor performance is the cause of the termination: at 14. The ACSI *Corporate Governance Guidelines* are silent on a termination initiated by a company for circumstances not amounting to cause nor amounting to poor performance.

[157] Ibid 14 (guideline 14.1).

[158] Ibid.

[159] Ibid.

[160] Ibid 15 (guideline 14.1). This requirement can be found in the Association of British Insurers and National Association of Pension Funds, *Best Practice on Executive Contracts and Severance — A Joint Statement by the Association of British Insurers and the National Association of Pension Funds* (2003) [3.2].

[161] ACSI, *Corporate Governance Guidelines* (2005), above n 3, 15 (guideline 14.1). The important enactments are the *Securities Exchange Act of 1934*, 15 USC § 78m (2006) and *Standard Instructions for Filing Forms under* Securities Act of 1933, Securities Exchange Act of 1934 *and* Energy Policy and Conservation Act of 1975 — *Regulation S-K*, 17 CFR § 229.601(b)(10)(iii)(A) (2007). They require a company to file a copy of the contract with the US Securities and Exchange Commission when a senior executive is hired and when there are material changes to the contract, with the filings typically occurring as exhibits to the company's Form 8-K report: see Securities and Exchange Commission, United States Government,

The ACSI *Corporate Governance Guidelines* might be contrasted with the more general guidelines of the Investment and Financial Services Association ('IFSA'), which is the industry association that represents investment management firms. IFSA recommends that boards pay particular attention to

> increasing the transparency of termination or retirement payments to directors and senior management. It is important that termination or retirement payments should be fully disclosed to shareholders and that they are reasonable in the circumstances of the departure.[162]

To calculate a termination payment that satisfies the ACSI *Corporate Governance Guidelines*, we added the amounts reported as base salary, non-cash benefits and superannuation in the 2005 annual reports to arrive at a figure of 12 months' fixed remuneration for each of our managing directors. This amount is shown below in column 8 of Table 5. The ACSI threshold is clearly lower than the thresholds provided under Part 2D.2 of the *Corporations Act*,[163] with the worst-case and best-case termination payment scenarios under the ACSI threshold in stark contrast with similar payments under the legislative thresholds.[164] As shown below in column 9 of Table 5, only one Scenario A payment fell within the ACSI threshold (managing director H) and one other payment equalled the threshold (managing director Z). These two payments would likely fall outside the threshold in column 8 if accumulated superannuation was taken into account. That aside, it bears emphasising that the possibility of payments falling within the ACSI threshold is limited to Scenario A, in which we assumed that unvested share-based payments lapsed at termination. In Scenario B, all payments fell outside the ACSI threshold, in some cases by a very significant margin. Thus, if companies followed the ACSI *Corporate Governance Guidelines*, *all* the payments shown in columns 3–4 of Tables 4–5 would have required prior shareholder approval. In other words, no ASX-listed companies within our sample could be said to comply with the ACSI *Corporate Governance Guidelines*. Analysis of the contractual termination provisions illustrated in Table 1 suggests that the likely scenario is a payment that falls somewhere between Scenario A and Scenario B. Shareholders should not presume it would be at the lower, Scenario A end of the spectrum.

VIII CONCLUSION

By using real remuneration data and contractual provisions to model the termination payments that could be made by a company to its former managing director, this study demonstrates that companies are prepared to give generous

Form 8-K — Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (2006) <http://www.sec.gov/about/forms/form8-k.pdf>. The Committee that considered the draft Bill leading to the *CLERP 9 Act* reforms also recommended that there be disclosure at the time of making an executive service agreement, although this is not reflected in the legislative requirements: see Parliamentary Joint Committee on Corporations and Financial Services, above n 9, 68.

162 IFSA, 'Blue Book', above n 3, 28. See also at 27–30.

163 See below Table 4, columns 5, 8; Table 5, column 8.

164 See below Table 4, columns 6–7, 9–10; Table 5, columns 9–10.

termination benefits to senior executives. It shows that a poorly performing senior executive can receive a sizeable termination payment because the terms of their executive service agreement provide for it. Our analysis in Part V reveals the widespread use of liquidated damages clauses. Stapledon has questioned whether such clauses are optimal.[165] On the basis that many of the clauses analysed provided for a cash bonus and a multiple of annual base salary to be paid, they appear misaligned with the circumstances of a company-initiated termination.

Furthermore, a board exercising discretion is also likely to permit some part of the executive's unvested share-based payments to vest, usually without reference to the underlying performance conditions. This too contributes to a sizeable payment on termination. While the best-case scenario (Scenario B) outlined in Part V(D) and in Table 4 may seldom eventuate, it is feasible that a termination payment will fall closer to this high point than the low point worst-case scenario (Scenario A). If a senior executive has a large amount of unvested share-based payments that were due to vest soon after the employment termination date, they are unlikely to simply walk away from these payments. A board of directors will be sensitive to this issue, preferring to reach a settlement than to face litigation.

Perhaps of even greater concern is that the thresholds in Part 2D.2 of the *Corporations Act* themselves permit a sizeable benefit to be given on termination or retirement. As our study shows, most payments would fall comfortably within the Part 2D.2 thresholds and also within the ASX threshold. While Stapledon's study gives an indication of the size of termination payments that have been made to departing CEOs in recent years, the legislation and the ASX Listing Rules would actually permit far more substantial payments to be made without prior shareholder approval. Every payment in our study, from the lowest worst-case scenario payment upwards, fell outside the ACSI threshold.[166] We do not interpret this to mean that the ACSI *Corporate Governance Guidelines* have set the correct threshold. Rather, it simply indicates that at least one significant group of shareholders has a very different view on where the dividing line is between acceptable and unacceptable levels of payments to that of Parliament and security exchange regulators.

Measuring the size of the termination payments against the thresholds for payments in Part 2D.2 of the *Corporations Act* also raises interesting questions about whether the thresholds in the Act — thresholds based on average annual remuneration as defined by the accounting standards — have kept pace with remuneration practices. While share-based payments form a large portion of the total remuneration awarded to senior executives, the receipt of such payments as a result of termination may yet be excluded from the *Corporations Act* Part 2D.2 provisions simply because the causative link between termination and payment may not exist.[167] The initial expensing of the fair value of the share-based

165 See above n 120 and accompanying text.

166 While the payment under Scenario A to managing director H falls inside the threshold, the simplifying assumption in relation to accumulated superannuation — see above Part IV — means that it is highly probable that this payment would also fall outside the ACSI threshold. The payment to managing director Z would likely exceed the threshold for the same reason.

167 See above nn 11–14 and accompanying text.

payment at the date of grant will be considered as remuneration for the purposes of determining the annual remuneration paid, but the final gain — that is, what the executive actually receives either in shares or as cash in lieu — may fall outside the definition of 'a benefit given in connection with a person's retirement from an office'.[168]

This study, while shedding some light on these practices, raises more questions than it answers. Space does not permit these issues to be explored here. In a second article,[169] we examine the classification of the various payments typically made at termination by reference to the limited case law on Part 2D.2 of the *Corporations Act*. We also consider whether share-based payments are actually caught by the legislation by illustrating four alternative methods of vesting contemplated in share plans and service agreements.[170] How such payments should be valued for the purposes of calculating the value of the termination payment is also highlighted: accounting standards that determine how share-based remuneration is to be valued at its fair value at grant date may not sit comfortably alongside the notion of *giving a benefit* in connection with retirement that Part 2D.2 seeks to regulate. Finally, we examine s 200E of the Act. Based on two case examples, we note the observed practice of bundling shareholder approvals for different purposes into the one resolution.[171] In doing so, we suggest that companies might benefit from additional guidance on how to disclose these payments so that shareholders can make informed decisions under s 200E of the Act. While recent legislative initiatives in the area of executive remuneration are premised on detailed disclosure, additional disclosure alone that does not necessarily result in the provision of *information* should be avoided. Shareholders require clear and relevant disclosure to make informed decisions about whether to approve termination payments that may occur some years after the resolution seeking their approval. Ultimately, legislators and regulators, together with companies and their shareholders, will be well positioned to make decisions in this area if all remember why regulation of termination payments is required.

168 *Corporations Act* s 200F(1). See also *Corporations Act* ss 200A(1)(b), 200B(1).

169 Fenwick and Sheehan, above n 16.

170 These situations are: (1) the exercise of vested options by a departing executive; (2) the board or remuneration committee exercising its discretion, in accordance with an executive service agreement or share plan rules, to waive or deem satisfied applicable performance conditions; (3) a cash payment is made in lieu of an issue of securities; and (4) the executive retains their rights to unvested share-based payments, such payments vesting according to their original schedule.

171 Companies typically seek approval for the purposes of s 200B of the *Corporations Act* at the same time as seeking approval for an issue of securities to a director — usually an executive director — pursuant to ASX Listing Rule 10.14, as well as approval for a related party transaction pursuant to s 208 of the *Corporations Act* on the basis that the transaction does not fall within the reasonable remuneration exemption found in s 211 of the Act: see Fenwick and Sheehan, above n 16, 86–8.

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Table 1: Contractual Termination Provisions

Managing Director	Length of Notice Period in Months	Number of Months Used to Determine Termination Payment	Total Months	Fixed Remuneration[172]	Annual Bonus[173]	Accelerated Vesting of Share Payments?[174]	Deemed Satisfaction of Performance Conditions for Share Payments?[175]	Retain Unvested Share Payments and Exercise According to Original Schedule?[176]
A	Fixed-term contract			✓		✓		
B	6	18	24	✓[177]				
C	12	N/A	12	✓	✓	✓	✓	✓
D	1	24	25	✓	✓	✓		
E	6	12	33[178]	✓	✓	✓		
F	12		12	✓	✓	✓	✓	
G	12	24	36	✓	✓	✓		
H	12[179]		12	✓	✓	✓		
J[180]	6	12	18	✓				
K[181]			18	✓				
L	1	11	12	✓			✓	

172 Base salary plus superannuation.

173 All bonuses pro-rated to actual period in office during financial year.

174 Can provide for full or pro-rated number of entitlements as at date of termination and exercise within a short-time frame. Alternatively, the performance condition can be adjusted to reflect a shorter performance period but the number of entitlements is unchanged.

175 Performance conditions are essentially waived and the whole grant is available for exercise or award.

176 Executive retains unvested share-based payments and can exercise only when performance conditions are subsequently satisfied. The number of entitlements may be pro-rated to reflect the actual period of service.

177 No specific discussion of share-based payments in contract.

178 An additional 15 months' base salary, pension and short-term incentive bonus for a non-complete clause is provided for in the contract and included in this total.

179 Current contract due to expire in 2006. The date from 1 January to expiry was used to calculate the termination payments. However, the normal contractual provision was for 12 months' base remuneration, superannuation and short-term incentives.

180 The fate of share-based payments on termination is covered by share plan rules. The plan rules, as disclosed in the annual report and/or notice of meeting, would seem to give the board the discretion to deal with payments in our hypothetical situation. We infer this when the plan rules provide that (1) generally the entitlement to the payment lapses when an executive leaves the company; and (2) the board has the express ability to exercise discretion in relation to terminations due to redundancy or retirement for ill health.

181 Ibid.

Managing Director	Length of Notice Period in Months	Number of Months Used to Determine Termination Payment	Total Months	Fixed Remuneration[172]	Annual Bonus[173]	Accelerated Vesting of Share Payments?[174]	Deemed Satisfaction of Performance Conditions for Share Payments?[175]	Retain Unvested Share Payments and Exercise According to Original Schedule?[176]
M	12		18[182]	✓	✓	✓		
N	12		12	✓	✓	✓		
O	1		1	✓		✓		
P	6	12	18	✓				✓
Q	24		24	✓				
R[183]	12		12	✓	✓			
S	24		24	✓	✓	✓		
T	12		40	✓				✓
U[184]	12		12	✓	✓			
V[185]	24		24	✓	✓			
W	12			✓	✓			✓
X[186]	6	18	24	✓	✓			
Y	Fixed-term contract			Lump sum			✓	✓
Z[187]	12		12	✓				
BB	3	12	15	✓				
CC	Fixed-term contract			✓	✓	✓	✓	✓
DD	Fixed-term contract			Fixed amount	✓	✓		

182 Includes six months of fixed annual remuneration for a restraint of trade clause.
183 See above n 180.
184 Ibid.
185 Ibid.
186 Ibid.
187 Ibid.

Table 2: Termination Payments Separated into *Corporations Act* ss 200F–200G Payments

Managing Director	Section 200F(2)(a)(i) — 'genuine payment by way of damages for breach of contract' ($)	Section 200F(2)(a)(ii) — given under an agreement as consideration for holding the office ($)	Section 200G(1) — payment in connection with retirement from office and is payment for past services ($)	Total ($)	Gains from Share Exercise ($)
A	4 079 569			4 079 569	32 015 250
B	736 775	1 841 937		2 578 712	1 204 311
C	3 549 993			3 549 993	44 550 475
D	135 602	8 136 130		8 271 732	6 172 500
E	1 214 901	9 312 241		10 529 142	2 958 570
F		5 400 500		5 400 500	20 122 926
G		7 543 232		7 543 232	1 902 739
H	2 224 341			2 224 341	9 832 200
J	683 437	1 366 873		2 050 310	6 637 900
K	1 977 684			1 977 684	Nil
L	111 294	1 349 562		1 460 856	4 446 920
M	1 344 000	806 400	2 724 000	4 874 400	4 464 600
N	2 753 000	7 757 219		10 510 219	9 447 231
O	54 944		22 196 025	22 250 969	13 144 176
P	1 348 634	2 247 723		3 596 357	16 556 737
Q	2 730 000			2 730 000	6 884 277
R	1 888 050			1 888 050	6 335 000
S	2 367 235	17 538		2 384 933	3 133 161
T		7 640 038		7 640 038	11 700 639

Managing Director	**Section 200F(2)(a)(i) — 'genuine payment by way of damages for breach of contract' ($)**	**Section 200F(2)(a)(ii) — given under an agreement as consideration for holding the office ($)**	**Section 200G(1) — payment in connection with retirement from office and is payment for past services ($)**	**Total ($)**	**Gains from Share Exercise ($)**
U	3 301 000	4 396 500		10 998 500	5 734 490
V	4 730 379			4 470 739	Nil
W	3 000 000			3 000 000	13 974 420
X	3 079 134	452 907		3 532 041	1 068 800
Y		3 465 000		3 465 000	11 790 000
Z	1 490 732			1 490 732	1 850 041
BB	314 375	1 257 499		1 571 874	925 625
CC		4 026 878		4 026 878	27 878 960
DD	3 000 000		3 000 000	6 000 000	Nil

Table 3: Share-Based Payments and Shareholdings

Managing Director	Share-Based Payments Granted (but Not Exercised as at Date of Annual Report)			Existing Sharehold-ings (Shares Owned Outright) per Annual Report	Existing Sharehold-ings as per Annual Report (Valued at Date of Termination) ($)
	Share Options	ZEPOs	Other		
A	3 500 000	175 000		1 820 056	46 138 420
B		102 055		597 621	11 366 751
C	401 338	1 543 850	72 694[188]	746 007	17 926 548
D		945 000		1 825 881	11 868 227
E	1 750 000	120 000		2 807 926	24 176 243
F	2 220 270	1 481 877		225 577	2 244 491
G		269 982		236 722	1 668 890
H	3 000 000	170 000		1 029 458	9 944 564
J		70 000		343 511	17 852 267
K				2 201 852	8 212 908
L			831 200[189]	236 577	1 265 687
M		1 260 000		1 150 059	6 037 810
N		913 875		1000	13 350
O	498 400			404 436	24 933 479
P	1 175 000	278 750		27 373	983 512
Q	500 000	33 537		11 097	233 037
R	1 750 000			239 613	1 634 161
S			574 892[190]	654 942	3 569 434

188 Deferred shares.
189 Deferred shares.
190 Conditional entitlement to shares.

Managing Director	Share-Based Payments Granted (but Not Exercised as at Date of Annual Report)			Existing Shareholdings (Shares Owned Outright) per Annual Report	Existing Shareholdings as per Annual Report (Valued at Date of Termination) ($)
	Share Options	**ZEPOs**	**Other**		
T		2 341 470	550 000[191]	394 974	1 595 695
U	334 165	138 038		1 079 602	22 304 577
V				4 042 243	45 839 036
W	1 250 000	57 600		275 000	8 030 000
X			160 000[192]	2 350 000	15 698 000
Y			600 000[193]	74 491	1 463 748
Z	660 042	29 943	40 400[194]	10 401 440	15 502 556
BB			800 000[195]	61 000	427 000
CC	2 526 000	436 000		2 227 580	51 679 856
DD				293 165	5 379 578

191 Deferred shares.
192 Deferred shares.
193 Deferred shares.
194 Deferred shares.
195 Cash-settled performance shares.

Table 4: Comparison of Worst-Case Scenario (Scenario A) and Best-Case Scenario (Scenario B) Termination Payments against Model 1 and Model 2 Threshold Limits Based on Part 2D.2 of the *Corporations Act*

1	2	3	4	5	6	7	8	9	10
Managing Director	**2005 Total Remunera-tion Expense Shown ($)**	**Scenario A[197] ($)**	**Scenario B[196] ($)**	**Model 1 Limit ($)**	**Model 1 — Scenario A ($)**	**Model 1 — Scenario B ($)**	**Model 2 Limit ($)**	**Model 2 — Scenario A ($)**	**Model 2 — Scenario B ($)**
A	7 209 922	4 079 569	36 085 819	50 469 454	46 389 885	14 383 635	50 469 454	46 389 885	14 383 635
B	2 665 002	2 578 712	3 783 023	18 655 014	16 076 302	14 871 991	15 990 012	13 411 300	12 206 989
C	6 445 189	3 549 993	48 100 468	45 116 323	41 566 330	**-2 984 145**	19 335 567	15 785 574	**-28 764 901**
D	4 562 432	8 271 732	14 444 232	31 937 024	23 665 292	17 492 792	18 249 728	9 977 996	3 805 496
E	3 627 488	10 529 142	13 487 712	25 392 416	14 863 274	11 904 704	18 137 440	7 608 298	4 649 728
F	7 072 000	5 400 500	25 523 426	49 504 000	44 103 500	23 980 574	21 216 000	15 815 500	**-4 307 426**
G	4 571 679	7 543 232	9 445 971	32 001 753	24 458 521	22 555 782	22 858 395	15 315 163	13 412 424
H	4 427 435	2 224 341	12 056 541	30 992 045	28 767 704	18 935 504	22 137 175	19 912 834	10 080 634
J	2 913 553	2 050 310	8 688 210	20 394 871	18 344 561	11 706 661	20 394 871	18 344 561	11 706 661
K	4 098 053	1 977 684	1 977 684	28 686 371	26 708 687	26 708 687	12 294 159	10 316 475	10 316 475
L	3 311 963	1 460 856	5 907 776	23 183 741	21 722 885	17 275 965	9 935 889	8 475 033	4 028 113
M	3 264 000	4 874 400	9 339 000	22 848 000	17 973 600	13 509 000	16 320 000	11 445 600	6 981 000

196 All share-based payments vested and were exercised at the closing share price on 1 March 2006.
197 All share-based payments lapsed.

1	2	3	4	5	6	7	8	9	10
Managing Director	**2005 Total Remunera-tion Expense Shown ($)**	**Scenario A[199] ($)**	**Scenario B[198] ($)**	**Model 1 Limit ($)**	**Model 1 — Scenario A ($)**	**Model 1 — Scenario B ($)**	**Model 2 Limit ($)**	**Model 2 — Scenario A ($)**	**Model 2 — Scenario B ($)**
N	6 532 000	10 510 219	19 957 450	45 724 000	35 213 781	25 766 550	26 128 000	15 617 781	6 170 550
O	18 553 566	22 250 969	35 395 145	129 874 962	107 623 993	94 479 817	129 874 962	107 623 993	94 479 817
P	5 932 665	3 596 357	20 153 094	41 528 655	37 932 298	21 375 561	17 797 995	14 201 638	**-2 355 099**
Q	4 254 000	2 730 000	9 614 277	29 778 000	27 048 000	20 163 723	25 524 000	22 794 000	15 909 723
R	2 439 258	1 888 050	8 223 050	17 074 806	15 186 756	8 851 756	14 635 548	12 747 498	6 412 498
S	2 775 660	2 384 933	5 518 094	19 429 620	17 044 687	13 911 526	8 326 980	5 942 047	2 808 886
T	6 482 673	7 640 038	19 340 677	45 378 711	37 738 673	26 038 034	32 413 365	24 773 327	13 072 688
U	3 998 000	10 998 500	16 732 990	27 986 000	16 987 500	11 253 010	27 986 000	16 987 500	11 253 010
V	3 234 293	4 470 739	4 470 739	22 640 051	18 169 312	18 169 312	19 405 758	14 935 019	14 935 019
W	4 491 000	3 000 000	16 974 420	31 437 000	28 437 000	14 462 580	17 964 000	14 964 000	989 580
X	2 231 435	3 532 041	4 600 841	15 620 045	12 088 004	11 019 204	15 620 045	12 088 004	11 019 204
Y	3 530 093	3 465 000	15 255 000	24 710 651	21 245 651	9 455 651	14 120 372	10 655 372	**-1 134 628**

198 All share-based payments vested and were exercised at the closing share price on 1 March 2006.
199 All share-based payments lapsed.

1	2	3	4	5	6	7	8	9	10
Managing Director	**2005 Total Remunera-tion Expense Shown ($)**	**Scenario A[201] ($)**	**Scenario B[200] ($)**	**Model 1 Limit ($)**	**Model 1 — Scenario A ($)**	**Model 1 — Scenario B ($)**	**Model 2 Limit ($)**	**Model 2: Scenario A ($)**	**Model 2: Scenario B ($)**
Z	3 177 621	1 490 732	3 340 773	22 243 347	20 752 615	18 902 574	12 710 484	11 219 752	9 369 711
BB	4 987 118	1 571 874	2 497 499	34 909 826	33 337 952	32 412 327	34 909 826	33 337 952	32 412 327
CC	7 451 730	4 026 878	31 905 838	52 162 110	48 135 232	20 256 272	52 162 110	48 135 232	20 256 272
DD	8 441 661	6 000 000	6 000 000	59 091 627	53 091 627	53 091 627	59 091 627	53 091 627	53 091 627

200 All share-based payments vested and were exercised at the closing share price on 1 March 2006.
201 All share-based payments lapsed.

Table 5: Comparison of Worst-Case Scenario (Scenario A) and Best-Case Scenario (Scenario B) Termination Payments against ASX and ACSI Threshold Limits

1	2	3	4	5	6	7	8	9	10
Managing Director	**2005 Total Remunera-tion Expense Shown ($)**	**Scenario A[203] ($)**	**Scenario B[202] ($)**	**ASX Limit ($'000)**	**ASX Limit — Scenario A ($'000)**	**ASX Limit — Scenario B ($'000)**	**ACSI Limit ($)**	**ACSI — Scenario A ($)**	**ACSI — Scenario B ($)**
A	7 209 922	4 079 569	36 085 819	880 150	876 070	844 064	2 331 182	**-1 748 387**	**-33 754 637**
B	2 665 002	2 578 712	3 783 023	163 380	160 801	159 596	1 227 958	**-1 350 754**	**-2 555 065**
C	6 445 189	3 549 993	48 100 468	1 065 850	1 062 300	1 017 749	1 793 270	**-1 756 723**	**-46 307 198**
D	4 562 432	8 271 732	14 444 232	172 865	164 593	158 420	1 627 226	**-6 644 506**	**-12 817 006**
E	3 627 488	10 529 142	13 487 712	123 510	112 980	110 022	2 024 835	**-8 504 307**	**-11 462 877**
F	7 072 000	5 400 500	25 523 426	161 685	156 284	136 161	3 086 000	**-2 314 500**	**-22 437 426**
G	4 571 679	7 543 232	9 445 971	71 835	64 281	62 389	2 046 616	**-5 496 616**	**-7 399 355**
H	4 427 435	2 224 341	12 056 541	186 500	184 275	174 443	2 269 736	45 395	**-9 786 805**
J	2 913 553	2 050 310	8 688 210	75 775	73 725	67 087	1 366 873	**-683 437**	**-7 321 337**
K	4 098 053	1 977 684	1 977 684	62 075	60 097	60 097	1 825 611	**-152 073**	**-152 073**
L	3 311 963	1 460 856	5 907 776	213 295	211 834	207 387	1 335 523	**-125 333**	**-4 572 253**
M	3 264 000	4 874 400	9 339 000	195 050	190 175	185 711	1 344 000	**-3 530 400**	**-7 995 000**

202 All share-based payments vested and were exercised at the closing share price on 1 March 2006.
203 All share-based payments lapsed.

1	2	3	4	5	6	7	8	9	10
Managing Director	**2005 Total Remunera-tion Expense Shown ($)**	**Scenario A[205] ($)**	**Scenario B[204] ($)**	**ASX Limit ($'000)**	**ASX Limit — Scenario A ($'000)**	**ASX Limit — Scenario B ($'000)**	**ACSI Limit ($)**	**ACSI — Scenario A ($)**	**ACSI — Scenario B ($)**
N	6 532 000	10 510 219	19 957 450	138 625	128 114	118 667	2 753 000	**-7 757 219**	**-17 204 450**
O	18 553 566	22 250 969	35 395 145	158 900	136 649	123 504	659 323	**-21 591 646**	**-34 735 822**
P	5 932 665	3 596 357	20 153 094	1 206 100	1 202 503	1 185 946	2 247 723	**-1 348 634**	**-17 905 371**
Q	4 254 000	2 730 000	9 614 277	56 115	53 385	46 500	1 365 000	**-1 365 000**	**-8 249 277**
R	2 439 258	1 888 050	8 223 050	96 618	94 730	88 395	1 313 658	**-574 392**	**-6 909 392**
S	2 775 660	2 384 933	5 518 094	121 735	119 350	116 216	1 092 570	**-1 292 363**	**-4 425 524**
T	6 482 673	7 640 038	19 340 677	321 135	313 494	301 794	2 303 238	**-5 336 800**	**-17 037 439**
U	3 998 000	10 998 500	16 732 990	279 500	261 501	262 767	1 485 000	**-9 513 500**	**-15 247 990**
V	3 234 293	4 470 739	4 470 739	118 975	114 504	114 504	1 576 793	**-2 893 946**	**-2 893 946**
W	4 491 000	3 000 000	16 974 420	217 200	214 200	200 225	1 500 000	**-1 500 000**	**-15 474 420**
X	2 231 435	3 532 041	4 600 841	275 784	272 252	271 183	1 254 020	**-2 278 021**	**-3 346 821**
Y	3 530 093	3 465 000	15 255 000	212 800	209 335	197 545	1 252 756	**-2 212 244**	**-14 002 244**

204 All share-based payments vested and were exercised at the closing share price on 1 March 2006.
205 All share-based payments lapsed.

1	2	3	4	5	6	7	8	9	10
Managing Director	**2005 Total Remuneration Expense Shown ($)**	**Scenario A[207] ($)**	**Scenario B[206] ($)**	**ASX Limit ($'000)**	**ASX Limit — Scenario A ($'000)**	**ASX Limit — Scenario B ($'000)**	**ACSI Limit ($)**	**ACSI — Scenario A ($)**	**ACSI — Scenario B ($)**
Z	3 177 621	1 490 732	3 340 773	163 660	162 169	160 319	1 490 732	0	**-1 850 041**
BB	4 987 118	1 571 874	2 497 499	166 418	164 846	163 920	1 257 499	**-314 375**	**-1 240 000**
CC	7 451 730	4 026 878	31 905 838	694 600	690 573	662 694	2 326 878	**-1 700 000**	**-29 578 960**
DD	8 441 661	6 000 000	6 000 000	108 190	102 190	101 190	2 396 639	**-3 603 361**	**-3 603 361**

206 All share-based payments vested and were exercised at the closing share price on 1 March 2006.
207 All share-based payments lapsed.