



6 May 2024

ASX Corporate Governance Council Secretariat
C/- Kelly Boschenok, Administration Co-ordinator
ASX Corporate Governance Council

By email: ASXCorporate.GovernanceCouncil@asx.com.au

Dear ASX Corporate Governance Council,

**PwC submission: ASX Corporate Governance Council Principles and Recommendations 5th Edition
Consultation Draft: Background paper and consultation questions**

PwC Australia welcomes the opportunity to comment on the ASX Corporate Governance Council's Consultation Draft for the fifth edition of its Corporate Governance Principles and Recommendations (**Consultation Draft**). We are committed to advocating for positive change to help strengthen corporate governance and increase transparency for investors.

Our Reward Advisory Services team have reviewed the Consultation Draft and associated materials and are responding specifically to remuneration-related proposals for your consideration. Specifically, with respect to the new Recommendation 8.3, our view is that in addition to clawback, there is an opportunity to focus on other remuneration adjustment mechanisms that better practice organisations are already employing. A broader set of remuneration adjustment tools will better support the effectiveness and efficiency of any remuneration adjustment process to achieve the desired effect of holding senior executives to account for matters such as corporate conduct, risk management and key stakeholder relationships.

I welcome the opportunity to discuss our views further. Please contact me if you wish to discuss any aspect.

Yours sincerely,

A handwritten signature in black ink that reads 'Emma Grogan'.

Emma Grogan
Partner, Reward Advisory Services

ASX Corporate Governance Council's consultation question

15. Recommendation 8.3: Do you support the following proposed clawback Recommendations?

- a) Recommendation 8.3(a): remuneration structures which can clawback or otherwise limit remuneration outcomes for senior executive performance-based remuneration?*
- b) Recommendation 8.3(b): disclosure of the use of those provisions (on a de-identified basis) during the reporting period?*

We support the suggestion to include a principle that provisions are included in remuneration frameworks to enable post-event adjustment to remuneration, either during or subsequent to employment. However, we recommend that the Recommendation 8.3(a) be adjusted to allow for more flexibility in how these adjustments are administered, so that listed entities have appropriate and sufficient tools for different circumstances, in a manner proportionate to their size, complexity and business operations. This may include, but not be limited to, clawback. The specific focus on clawback, without other remuneration adjustment mechanisms such as deferral, in-period adjustments or malus, is too narrow and may not alone be a deterrent to prevent inappropriate corporate conduct or poor risk management. While clawback is an important tool, there are several challenges with its implementation.

Where an entity considers a remuneration consequence, it typically seeks to do so via three key adjustment tools. This is consistent with the remuneration adjustment tools now required for Significant Financial Institutions under the APRA Prudential Standard CPS 511 Remuneration. Furthermore, in our experience, organisations seek to employ such adjustment tools typically in the sequence of an in-period adjustment, malus and lastly, clawback. That is, after determining that a remuneration adjustment is warranted, and that quantum of the adjustment that should be made, entities seek to recoup that quantum via:

- Adjustment to performance-based remuneration during the performance period (i.e. “in-period adjustments”);
- Adjustments to deferred performance-based remuneration prior to payment or vesting (i.e. “malus”), typically via deferred Short Term Incentives (STI), or deferred Long Term Incentives (LTI) that have not yet vested; and
- Lastly, the recovery of remuneration that has been paid or vested (i.e. money that is already been transferred into a person’s bank account) (i.e. “Clawback”).

Provisions that allow for clawback of awards after award payment and vesting have typically only been implemented at some of the largest ASX-listed entities, as well as the largest and most complex APRA-regulated financial institutions (known as “Significant Financial Institutions” or “SFIs”), and often only for the most senior of roles - due to a regulatory requirement to do so for key roles (as per the APRA Standard CPS 511). The APRA Standard requires a combination of risk adjustment tools, in a proportionate way where the simpler requirements apply to smaller, less complex organisations. The new APRA requirements are seen as the ‘gold standard’ and hence have been adopted by some of the largest organisations outside of the financial services sector.

In addition to the remuneration adjustment mechanisms, other remuneration design characteristics will be important in supporting Recommendation 8.3(a) such as sufficient remuneration deferrals, and a balance between both financial and non-financial measures to account for performance, conduct and risk considerations. Entities may also consider future eligibility in performance-based

remuneration plans, for example, because the mere presence of performance-based pay for some roles is considered inappropriate or ineffective, on the basis that it may induce risk taking behaviour.

These features, along with the additional remuneration adjustment mechanisms (of in-period adjustments and malus), are more practical and may have a more timely and direct impact, in many cases, than clawback alone. For example, the combination of long deferral periods and malus provisions together provide a “quasi-clawback”, without the practical and sometimes legal challenges associated. That is, it is more practical to give effect to a malus provision on deferred remuneration, than to commence legal proceedings to clawback remuneration that has already been paid or vested. In practice, some of the most public events have resulted in a combination of remuneration tools being applied to affect a significant remuneration consequence, without any publicly disclosed instances of clawback of awards after payment or vesting associated with such events (at least to our knowledge). To assist, we have included a list of recent public examples we are aware of when Australian listed entities have applied such adjustments following events (refer Appendix A).

In our experience working with entities who have implemented a combination of remuneration adjustment mechanisms as described above, they have been able to put in practice a practical and flexible approach for the entity to hold senior executives to account, with consequences that are easiest to enforce and thus more impactful, sending a strong signal regarding risk management and conduct, in terms of what is acceptable and what is not.

Whereas clawback provisions take the form of a contractual entitlement to have a payment or other benefit returned in certain circumstances. If the employee did not comply with the obligation the employer would be required to commence legal proceedings claiming damages for breach of contract against the employee in order to effect the clawback. Practical challenges associated with effecting clawback provisions may include:

- Possible legal challenge, including in proving individual culpability and the resulting quantum of the clawback
- Difficulty in recovering amounts from individuals (e.g. if the individual is impecunious)
- Cost of legal action being higher than the amount of money due for recovery
- There may be no amounts to recover if no performance-based remuneration has been awarded, paid or vested (e.g. if the individual has recently joined the organisation)
- Even if successful, material delay in application of clawback relative to the trigger event or conduct.

The proposed draft Recommendation 8.3(a) to include clawback provisions places a different and potentially more onerous requirement on listed entities of all sizes and complexity, as compared to, for example the APRA Prudential Standard that focuses a requirement for clawback provisions on larger entities. The draft Recommendation also does not necessitate other risk adjustment tools or provide requirements that consider the relative size, complexity, or business operations of the listed entities.

Finally, we also support the proposed draft Recommendation 8.3(b) to provide annual disclosures on the use of these provisions during the reporting period. The commentary outlining the proposed details of such disclosures broadly aligns with better practice disclosures provided by large, listed entities in their Remuneration Reports. For the avoidance of doubt, the commentary supporting Recommendation 8.3(b) could be updated to clarify that the expectation applies to current and former senior executives (who may or may not have been KMP in current or prior years), for a period of at least [two] years from the date of payment or vesting of the performance-based

remuneration. We suggest that the timeline aligns with the APRA Standard for simplicity and consistency (i.e. two years) and noting that the inclusion of a time limit may be helpful in the case of legal proceedings to effect clawback.

Summary of PwC perspectives

- We support the suggestion to include a recommendation that provisions are included in performance-based remuneration requiring it to be reduced in certain circumstances, noting that the focus should not specify only clawback. This is because, in our view, clawback alone may not achieve the desired effect of holding executives to account for matters such as corporate conduct, risk management and key stakeholder relationships.
- There are practical challenges to effect clawback provisions (e.g., if the individual is impecunious), possible legal challenge and the cost of legal action being higher than the amount of money due for recovery, among others).
- Experience from the financial services sector tells us that there are other remuneration adjustment provisions and remuneration design characteristics that are more effective.

Recommendations

- Modify the Recommendation 8.3(a) to require a reduction of performance-based remuneration in circumstances of serious misconduct, risk management failings, or similar, and either remove the prescriptive requirement for clawback, or expand it to require a senior manager's performance-based remuneration be subject to remuneration adjustment tools, such as in-period adjustment, malus and/or clawback.
- Consider including a combination of appropriate remuneration adjustment tools, or highlighting these in the commentary, that may include but are not limited to in-period adjustment, malus and, where appropriate, clawback. We suggest that listed organisations consider the appropriate set of remuneration adjustment tools relative to their size, complexity, business operations and risk environment.
- Consider adding commentary clarifying that these provisions aren't required where there is no performance-based remuneration.
- Modify the Recommendation 8.3(b) or underpinning commentary to clarify the period of time which these provisions may apply to current and previous senior executives. We suggest aligning this with the requirement under the APRA Standard CPS 511 i.e. for a period of at least two years from the date of payment or vesting of the performance-based remuneration.

Appendix A – Examples of organisations that have made remuneration adjustments

All information summarised in the table below is based on publicly available information, including Annual Reports. Links and page references are provided for ease of reference.

Company	Year	Link to annual report (page)	Type of remuneration adjustment applied (Yes / No)		
			In-period adjustment	Malus	Clawback
Qantas	2023	LINK (p.31)	Yes	No	No
Medibank	2023	LINK (p.54, 57, 61)	Yes	Yes	Yes
Rio Tinto	2020	LINK (p. 141, 142)	Yes	Yes	No
NAB	2019	LINK (p. 43, 47, 51, 54)	Yes	Yes	No
Westpac	2019	LINK (p. 6, 44, 45, 52)	Yes	Yes	No
AMP	2018	LINK (p. 37, 40, 46, 47)	Yes	Yes	No
ANZ	2018	LINK (p. 40, 49, 52, 58)	Yes	Yes	No
CBA	2018	LINK (p. 96, 98, 99, 100, 104, 106)	Yes	Yes	No
NAB	2018	LINK (p. 39, 42, 48, 49, 50, 52)	Yes	Yes	No
Westpac	2018	LINK (p. 48, 58)	Yes	No	No