

Commercial Law Update

Crackdown on “golden handshakes”

In response to community concerns over corporate excess in relation to executive “golden handshakes”, the Rudd Government will be introducing the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009 into Parliament during the 2009 winter sittings.

The Bill seeks to reform corporate practice in relation to termination benefits by amending sections of the *Corporations Act 2001* that regulate termination payments to company directors.

The regulatory net is to be cast more widely and backed by more punitive monetary penalties in the event of breach.

The key features of the Exposure Draft of the Bill are as follows.

Expanded requirements for shareholder approval

The threshold at which shareholder approval is required to approve a termination payment has been significantly lowered to enable shareholders to disallow excessive termination benefits.

Previously, shareholder approval was only required if the proposed termination payment was more than seven times a company executive’s annual remuneration package. Shareholder approval must now be obtained if the proposed termination payment exceeds one year’s average base salary.

Expanded categories of company officers

The current legal framework only regulates the payment of termination benefits to company directors. Under the new Bill, the categories of company officers have been expanded to include senior executives and “key management personnel” and “the five most highly remunerated officers” (if different from the key management personnel). This is defined as including any person holding a “managerial or executive office”.



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Crackdown on “golden handshakes” Continued

Expanded definition of termination benefits

In an effort to close any loopholes and to catch new forms of payment that seek to avoid the law, the new Bill clarifies and expands the definition of what constitutes a “termination benefit”.

Broadly, a benefit includes a payment or other valuable consideration, any kind of real or personal property, any legal or equitable estate or interest in real or personal property, or any legal or equitable right.

The Bill contains a regulation making power to create regulations which prescribe things to either be a benefit or not a benefit and to prescribe certain types of benefits that are taken to be given in connection with a person's departure from office.

The draft regulations include a non-exhaustive list of specific examples of payments that will or will not require shareholder approval. Some examples are as follows:

Included

- Payments of superannuation in excess of the statutory amount
- Any kind of pension
- An amount paid as a voluntary out of court settlement
- Accelerated or automatic vesting of options and payments in lieu of notice

Not included

- Statutory superannuation payments
- Deferred bonuses
- Payments from a defined benefits superannuation scheme that was in existence before the regulations commenced

Post-termination shareholder vote to reward performance

Any shareholder vote on the approval of termination benefits is now required to take place at an annual general meeting following the executive's departure, not prior to it.

The timing of this requirement is designed to ensure that the vote occurs at a point when the shareholders are in a position to fairly assess whether the termination payment is justified on a performance basis.

Further, the calling of an extraordinary general meeting for the sole purpose of undertaking an approval vote is prohibited.

Repayment of unauthorised benefits

The new Bill introduces an express obligation that any unauthorised termination benefits received without shareholder approval must be immediately repaid.

Increased penalties

Maximum penalty limits for individuals have increased from \$2,750 to a much heftier

\$19,800, whilst corporations could face fines of up to \$99,000 – a considerable increase from the \$16,500 fine specified under the old scheme.

The option of six months' imprisonment has been retained.

Going forward

The new arrangements will not apply retrospectively to existing contracts which have already been settled.

Whilst a number of areas will require a measure of further clarification, it is expected that this will not dilute the intent of the new law to empower shareholders to disallow excessive termination benefits, improve the accountability of company management in setting remuneration and promote responsible remuneration practices.

** This Update was prepared with the assistance of Sophie McGuinness, Lawyer.*

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