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Manager
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The Treasury
Langton Crescent
PARKES ACT 2600

By email: terminationbenefits@treasury.gov.au

Dear Minister Bowen

Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009: Corporations Amendment Regulations 2009 (No.)

Chartered Secretaries Australia (CSA) welcomes the opportunity to comment on the revised Regulations accompanying the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009. We had lodged a submission (to which we refer you) on the Exposure Draft of the legislation in which we noted that:

- CSA members agree with the introduction of a limit in relation to termination payments offered as 'golden handshakes', but that, while not attracting publicity, the majority of termination payments are not made in a context of poor company performance
- the definition of 'termination benefit' should exclude those ordinary course payments that apply to the length of service generally. 'Termination benefits' should only include any amounts that differ from what would be due to a person if they resign or retire in the ordinary course
- subject to a company's redundancy policy being of wide-ranging application across the company and disclosed, in the case of genuine redundancy, all those to whom the legislation applies should be entitled to the same benefits that are available to employees generally under the terms of that policy and the payment should not require approval as a 'termination benefit', although it should be taken into account in considering whether any additional termination payments over and above those under the policy require approval.

While our earlier submission indicated support for the government's policy objective, the revised legislation and Regulations do not address a number of issues that we raised as requiring attention. While these issues remain outstanding, CSA cannot continue to support the proposed legislation.

CSA members are concerned to see that the issues we raised in relation to the key recommendations above have not been addressed in the revised Bill or the revised Regulations. Of particular concern in our original submission was the effect that the new legislation would have on long-serving employees, who stood to be stripped of legitimate entitlements and individual property.

The revised Regulations do not recognise that there is a wide variety of circumstances leading to a termination payment, and the definition of 'termination benefit' continues to penalise individuals of longstanding employment with a single employer. CSA remains concerned that the legislation and Regulations unfairly discriminate against long-serving employees.

Termination benefits should exclude ordinary course entitlements

CSA does not believe that the Regulations address accumulated benefits that accrue according to length of service and that would apply broadly to employees within a company.

The benefits that we believe should be specifically excluded from the definition of termination benefit include those matters that apply to the length of service generally, such as:

- accrued annual leave
- accrued long service leave
- sick leave (to the extent that it can be cashed out)
- bona fide redundancy payments made in accordance with a policy applicable widely to employees of the company
- superannuation (including accumulation funds) or pension account balances already accrued.

These are accrued entitlements of the individual and should not be bundled together with payments that the government has labelled as 'rewards for failure'.

Currently the Regulations remain unclear as to whether such accrued entitlements are captured in the definition of termination benefit. Such entitlements appear to be recognised for a twelve month period for the purposes of calculating one year's fixed salary, but accumulated entitlements do not appear to be recognised as carve-outs from the definition of 'termination benefit'.

CSA recommends that the definition of 'termination benefit' should:

- exclude those matters that apply to the length of service generally
- only include any amounts that differ from what would be due to a person if they resign or retire in the ordinary course. This would capture payments in lieu of notice and most ex-gratia payments.

Superannuation

CSA notes that the revised Regulations specifically include in the definition of termination benefit:

> any superannuation contribution in excess of any charge imposed under the Superannuation Guarantee Charge Act 1992, by a person mentioned in paragraphs 200B (1) (a) to (c) of the Act, other than salary sacrifice contributions in excess of the contribution.

CSA is pleased to see that salary sacrificed into superannuation is excluded from the definition of termination benefit. This money is the property of the individual.

However, many companies pay (to employees generally) superannuation in excess of the statutory superannuation charge of nine per cent. Contributions may have been made by the company over many years in the case of long-serving employees and, in addition, accumulated funds may have been 'rolled over' from employment in other companies. This money is also the property of the individual. The payment of such accumulated superannuation should not be subject to shareholder approval.

Accumulated benefits in a superannuation fund, whether or not they have been made as a result of salary sacrifice, are also the property of an individual. When the revised Regulations are read in conjunction with the legislation, CSA believes that it remains unclear as to whether superannuation payouts to retiring/resigning employees (that is, payments by a superannuation fund of accrued superannuation entitlements) are captured as a 'termination benefit' requiring shareholder approval. CSA stresses that accumulated money in a superannuation fund should not be subject to shareholder approval.

Furthermore, the Regulations specify that a termination benefit includes 'any kind of pension'. CSA supports the draft legislation's exclusion from the definition of termination benefit of any defined benefit plan that was in place prior to the proposed legislation being enacted. However, defined benefit plans frequently pay a pension, as do schemes overseas in the United Kingdom and the United States, where the Australian superannuation legislation does not apply. There are key management personnel who are employed by Australian companies but who work overseas and whose conditions relate to the jurisdiction in which they work. The Regulations as they are currently drafted will force such employees to take a lump sum rather than a pension.

CSA recommends that:

1. when calculating one year's fixed salary, company superannuation contributions above the statutory minimum, fixed salary sacrificed into superannuation (including an accumulation fund), shares, a pension paid from a defined benefit plan or a pension fund in another jurisdiction should be included within the definition of 'base salary' for the purposes of calculating the maximum permissible termination payment, and
2. superannuation account balances should be expressly excluded from the calculation of a termination benefit, subject to any necessary anti-avoidance provisions to protect against abuse (that is, to protect against hiding a large termination payment in superannuation).

The difficulties of requiring shareholder approval of bona fide redundancy payments

Positions in companies are made redundant for a variety of reasons. Redundancy occurs at all levels and is often subject to a company's redundancy policy. A senior executive position could be made redundant because an industry is consolidating through mergers and acquisitions, because a company is restructuring, or because of difficult economic circumstances faced by an individual company. Genuine redundancy is not about poor performance. It relates to the restructuring of the company in response to an adverse change in the circumstances of that entity.

CSA believes that in circumstances of genuine redundancy it is widely considered to be appropriate to make a termination payment. Redundancy payments to short-serving employees are typically not excessively large. However, a long-serving employee, possibly promoted during that tenure for good performance, may be entitled to a significant payment.

Where company policies apply to employees generally, it would be inappropriate to discriminate against long-serving senior executives who are made redundant. For example, a person with 25 years' service may have a six-month notice period plus a payment based on a broad company policy reflecting long service with the company (say, two weeks per year totalling 50 weeks). Redundancy payments in such instances are not for poor performance, and should not be contingent on approval by shareholders.

Conclusion

At present, the revised Regulations do not adequately deal with accrued entitlements (such as annual and long service leave) or benefits (such as accumulated benefits in a superannuation or pension fund). Rather, they subject long-serving employees to a lottery process, whereby

shareholder approval may or may not be granted for the payment of accrued entitlements and benefits.

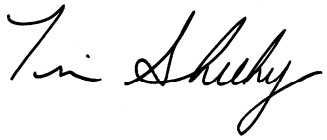
It is not unknown for an employee to progress through a company over many years. At present, such long-serving employees are discriminated against by the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009 and accompanying Regulations. Their entitlements can be stripped from them should shareholders not wish to recognise their efforts. Ironically, this could induce long-serving employees to refuse promotion on the basis of not wanting to put at risk their entitlements of many years. Even more ironically, the legislation rewards short-term employees, whose entitlements and benefits are not at risk, as they will not have accumulated over years.

CSA cannot support a public policy that rewards short-term executive behaviour and penalises long-serving employees.

CSA notes that the timeframe for consultation on both the original Exposure Draft and the revised Regulations was very brief. The current eight-day consultation process breaches the Office of Best Practice Regulation guidelines. CSA believes that such short consultation periods greatly increase the risk of both drafting that has unintended consequences and inadequate consideration of issues raised in the process of consultation. The absence of a Regulatory Impact Statement adds to this problem. CSA believes that a proper consultation process would most likely ensure drafting that would temper stakeholder concerns and legislation that can be implemented to effect the policy objective without penalising employees whose termination payments are not causing shareholder disquiet.

We would welcome the opportunity to meet with you to discuss any of our views in greater detail. Please call me if you would like to set up a meeting. I can also arrange a meeting with our members.

Yours sincerely



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