

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury

Corporations Amendment (Improving accountability on Termination Payments) Bill 2009

25 August 2009

Topic: Approval of Termination Payments

Senator Xenophon asked:

What part of this legislation would prevent a company engaging an executive on a contract where the initial contract of employment includes a large retirement benefit? For example, shareholders could agree to engage an executive on a basic salary of \$1 million per annum for three years with a retirement payment of \$10 million at the end of the three years if certain conditions have been met. In this case, at the end of the three years, would the shareholders have to again agree to the 'termination' payment? Or would their initial agreement (at the beginning of the three years) be sufficient?

In the example above, would shareholder be required to agree to the retirement benefit being paid if the conditions on which the payment was based were not met? I.e. if the shareholders had agreed to pay a final payment of \$10 million at the end of the three year contract on the conditions that certain profit and growth targets were reached, but the company failed to meet those targets, would the Bill allow shareholders to demand that they again re-endorse the final payment?

Answer:

This legislation is designed to ensure that any termination (or retirement) benefit over the threshold must be approved by shareholders. It is not intended to prevent a company from engaging an executive on a contract where the initial contract of employment includes a large retirement benefit.

Section 200B of the Corporations Act (the Act) provides that an entity must not give a person a benefit in connection with a person's retirement if that person has held a managerial or executive office unless there is member approval for the giving of the benefit. The Bill provides that benefits above one years' base salary is subject to shareholder approval. The Act does not specify when shareholder approval is required to be sought, only that shareholder approval must be obtained for the benefit to be payable. Therefore, shareholders could agree to engage an executive on a basic salary of \$1 million per annum for three years with a retirement payment of \$10 million at the end of the three years if certain conditions have been met.

Section 200E of the Act sets out the requirements that must be met to obtain shareholder approval for giving a person a benefit in connection with retirement from office or position. The provisions specify that the giving of the benefit must be approved by a resolution passed at a general meeting. Furthermore, the Act currently specifies in section 200E(2) that, details of the benefit must be set out in or accompany the notice of the meeting at which the resolution is to be considered. The details of the benefit must include the amount of the benefit or if the amount cannot be ascertained at the time of disclosure – the manner in which that amount is to be calculated and any matter, event or circumstance that will, or is likely to, affect the

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury

Corporations Amendment (Improving accountability on Termination Payments) Bill 2009

25 August 2009

calculation of that amount. As such, if the requirements of section 200E have been met and shareholder approval has been obtained, at the end of the three years, shareholders would not have to again agree to the 'termination' payment. Their initial agreement (at the beginning of the three years) would be sufficient.

As noted above, section 200E(2) of the Act provides that the money value of the proposed benefit or if that money value cannot be ascertained at the time of the disclosure – the manner in which that value is to be calculated and any matter, event or circumstance that will, or is likely to, affect the calculation of that value, must be disclosed to shareholders. Therefore, if shareholders had agreed to pay a final payment of \$10 million at the end of the three year contract on the conditions that certain profit and growth targets were reached, but the company failed to meet those targets, it is unlikely that the requirement for shareholder approval would be met. As a result, subsequent shareholder approval would be required.