

MEDIA RELEASE

New 'golden parachute' legislation - Time for managers to do some Christmas homework

14 December 2009 – With Christmas fast approaching and many managers changing roles or remuneration, businesses would be wise to carefully consider the impact of the new Federal legislation to curb managerial termination payments which will be more far-reaching than executives and managers anticipate, according to Harmers Workplace Lawyers.

The new so-called “*golden parachute*” legislation stipulates that termination payments for key managerial personnel for both publicly-listed and private companies (with very limited exceptions) require shareholder approval should the total payments exceed up to one year’s base salary, which is defined narrowly. For example, even payments after termination to executives to prevent them competing with their previous employers will likely be included in the “one year cap”.

Jamie Robinson, Partner at Harmers Workplace Lawyers, said, “Those affected by the reform won’t just be the high profile CEOs of the world. Rather, many managerial and senior executive employees may find that their employers are prohibited from paying them the termination payments that appear in their contracts.”

He said that whilst the new legislation will not work retrospectively, if an existing contract is extended, renewed or varied, there is potential for existing agreed termination arrangements to require new shareholder approval.

“Directors and key management personnel on pre-existing contracts will need to get advice about whether the termination clause in the contract remains enforceable after any revision, due to a promotion or job role change or renewed contract,” said Mr Robinson.

“The legislation also creates difficulties for people proposing to accept positions where significant termination payments may accrue over time. Potential appointees should not assume that what is written in their contract is enforceable. Unlike under previous provisions, appointees can no longer rely on a contracts entered into prior to taking the office. Indeed, unless the termination payment is made as a result of a court order (not just out of court settlement) shareholder approval above the “one year cap” is essential to enforceability,” he said.

Mr Robinson also predicted that many companies may seek to obtain general shareholder approval to provide termination payments above the new threshold rather than seek their approval on a case by case basis. The legislation seems to allow these “blank cheque” type approvals, creating the possibility that the new legislation may not always reign in management termination payments in every case.

“If these agreements are properly structured and tied to the performance of executives, they would seem to be an appropriate and cost effective approach for companies to avoid regular shareholder’s meetings. Alternatively there may be a

push, potentially contrary to shareholder interests, for an increase in “base salary” and a decrease in performance related pay,” he said.

Mr Robinson said companies and key management personnel will need to quickly and carefully assess their position under this new legislation, which became effective on 24 November 2009, as they go through changes in their organisations. Such assessments must include:

- whether they or their managerial personnel have termination payments potentially over the cap which do not have shareholder approval;
- what types of ‘benefits’ will be captured by the new laws;
- whether changes to contracts (remuneration adjustments for example) over the Christmas period mean that termination payments are not fully enforceable;
- whether companies have post employment restraint provisions that are reliant on payments that may breach the legislation and therefore make the restraints unenforceable. This would cause damage to the very shareholders the legislation is intended to protect;
- the termination of employment operation of various types of share options schemes; and
- the approach of their organisation to shareholder approval for termination payments.

“Whilst companies and employees will eventually adapt to this new legislation, the transitional period has the potential to leave some key management personnel, potentially the longest serving and most deserving, out of pocket”, despite what their contracts say,” Mr Robinson concluded.

Ends

Note to editors:

About Harmers Workplace Lawyers

Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia’s leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business’s ‘employment specialist firm of the year’ for the past three years running.

Issued by Sefiani Communications Group on behalf of Harmers Workplace Lawyers

For further information, please contact:

Lauren White / Dylan Malloch

Tel. (02) 8920 0700

Email: white@sefiani.com.au / dmalloch@sefiani.com.au