



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

**CORPORATIONS AMENDMENT
(IMPROVING ACCOUNTABILITY ON
TERMINATION PAYMENTS) BILL 2009**

Second Reading

SPEECH

Wednesday, 9 September 2009

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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Questioner
Speaker Robert, Stuart, MP

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Mr ROBERT (Fadden) (12.34 pm)—It is always good to follow the big-government interventionist, the member for Blair. Big government should be the centre of the economy and big government must intervene in what shareholders are doing. Shareholders do not know best, according to the good member for Blair—government knows what is best. The fact that shareholders own the company and are responsible for the company's direction is irrelevant. Only big government has the solutions. Only big government has the answers. Big government must be the centre of the economy—so Labor would have us believe. But here we are, with another bill before us where big government is here to save the day. Well, let me give you the drum, Member for Blair: big government does not save the day, because the problem with big government—indeed, the problem with socialism—is that, at some stage, you run out of other people's money.

The government intends to amend the Corporations Act through the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, the principle of change being to lower the threshold for shareholder approval for termination payments paid to company directors and certain other persons, from the current seven years total remuneration to one year's base salary. As we know, termination payments are governed by division 2 of part 2D.2 of the Corporations Act.

Interestingly, though, on 18 March this year, the government announced a Productivity Commission inquiry into executive remuneration more generally. The commission is due to release its draft report sometime this month and a final report by 19 December. In May this year, APRA, the Australian Prudential Regulation Authority, also released a discussion paper on remuneration for authorised deposit-taking institutions. Subject to consultation, it is expected that the final prudential standards will be released again this month and be effective from the start of next year. There are a range of reviews and commissions going on in this area. But, rather than wait for the outcomes of those—that is, have evidence based policy, as Mr Rudd continues to talk about—here we are, legislating. I note, though, that in June 2004 the Parliamentary Joint Committee on Corporations and Financial Services noted thresholds and appeared to raise some issues with them. I also note from reading

that report that the Labor members put up a dissenting report calling for termination payments not to exceed one year's salary. At least they are consistent.

In summary, the bill lowers the amount that a termination payment may be before shareholder approval is required. The threshold will go from seven years total remuneration to one year's base salary. I note that 'base salary' will be defined within the regulations. I note also that the bill intends to extend the act to cover termination payments for all key management personnel, that is, not just the CEO and directors but a whole raft of other senior people. I wonder how many key management personnel there are in Rio Tinto? Are there 100? Are there 1,000? In the case of reporting entities, this consists of all key individuals that are disclosed in the company's remuneration report. It will be interesting to see what response companies' remuneration reports will have to this legislation. The bill also prevents directors and executives from voting in relation to their own benefits and, of course, requires that any payments made without approval be repaid.

The big question facing all legislators is: what problem are we trying to fix? What is it that necessitates a move to amend the Corporations Act and increase regulation? This Labor government came to power promising that for every one regulation it would add it would take one away. During the last two years that I have been here, I have seen literally hundreds of new regulations, yet I have not seen one disappear. I look forward to that day, though I fear that day may never come. So let us focus on what the problem that is that the bill is trying fix. The principal justification for the bill, as far as I can see, is community concern. The minister said in the second reading speech:

There is significant community concern about the levels of termination benefits paid to company management. Such payments are given to outgoing company directors and executives at a time when they are no longer able to influence the company's future performance. The government's reforms will empower shareholders to more easily reject such payments where they are not in the best interests of the company ...

I note that the minister gave no factual evidence of significant community concern. He just rolled it out. On 18 March 2009, the Treasurer referred to community concern about 'obscene' and 'outrageous'

termination payments and the need to ensure that executive pay is in step with good corporate governance, provides correct incentives and meets decent community standards. Again, there was no evidence of obscenity, and the idea of linking current arrangements and saying they are not good corporate governance is simply outrageous.

Let us look at this issue of whether termination payments are indeed excessive. This bill is premised on there being excessive termination payments across the board and community outrage about how excessive they are. There are clearly some standout cases. Mr Owen Hegarty of Ausminerals received a bonus of \$8.35 million in 2008. John Anderson of Consolidated Media received \$15 million in 2008. Kim Edwards of Transurban Group received \$16 million in his final year, including a termination payment of \$5.2 million. There are certainly large numbers. There are always cases of large numbers. But let us look at the entirety. Let us look at the whole, because it is less than clear to me that these excessive examples are indeed representative of general practice within business. In 2004, an article in the *Australian Financial Review* stated:

An analysis ...of the latest annual reports released by 50 of Australia's largest companies reveals that nearly a third of chief executives are entitled to termination payments worth more than the equivalent of 12 months salary, as well as performance-linked bonuses and entitlements to shares and options ...

'At least a third'—let us call that 30 per cent. That means that 70 per cent are not. The minister is putting forward the idea that this is out of control, it is rampant and it is excessive, but the facts seem to indicate that, based on the analysis of the *Australian Financial Review*, around 70 per cent are less than the equivalent of 12 months salary. I would suggest to the government that that is not excessive and community concern is blowing out, when for the vast bulk of companies it is less than 12 months salary.

The great fear with any legislation is the unintended consequences—the adverse reactions, the implications and the responses to bills. The Senate Economics Legislation Committee received a range of submissions warning that there were likely consequences, that reducing termination payments to one year base salary would have the impact of inflating base salaries for executives. Reading from the Senate committee report, the Australian Institute of Company Directors described the possibility as such:

... attempts to restrict termination payments are likely to result in a "squeezing the balloon" effect, by which we mean artificial restrictions on one component of executive remuneration will cause upward movement in another component.

The Law Council of Australia expressed similar views:

For many executives in large corporations, base salary represents less than half the value of their remuneration package ... this proposal will actually limit termination payments to less than 6 months total remuneration, which is likely to be viewed as inadequate compensation for the risks to tenure of executives in these organisations ... the likely consequence of the proposal will therefore be to increase base pay levels, both in absolute terms and as a proportion of an executive's total remuneration.

The Law Council is warning about the use of 'golden hellos' when executives commence a new position. How can the government possibly present a bill that would see that adverse consequence—especially when there are a range of reports and commissions going in, with drafts being released this month alone, to look at remuneration?

The Senate committee report also indicates that other submitters warning of possible increases in base salary include such small and inconsequential firms as Ernst & Young, the Business Council of Australia, ACCI, ABA, Guerdon Associates, the Insurance Australia Group and IFSA—all warning the same thing. Even the AMWU warned that treating termination payments in isolation could lead to manipulation in other areas. My concerns echo theirs and I am also concerned that this legislative overreach and the government's continued intervention in the market will introduce a range of distortions which will not be in the interests of shareholders. Shareholders are responsible for the company's outcomes. Shareholders are able to make informed decisions about what they accept and what they do not otherwise do. Shareholders are able to turf directors out and force changes. They do not need the government.

I would suggest that this legislation is little more than a knee-jerk response, an appeasement—yes, Mr Deputy Speaker, in our time—to public opposition to ex-gratia payments made to executives. I can only see that the government is acting after the event, as many corporations are already reviewing their policies on how they deal with these types of issues. This legislation is pre-empting what the Productivity Commission is doing and it is rushed. I am not alone in this parliament in saying that corporate Australia have the capacity to deal with these issues themselves. I have confidence in Australia's corporate frameworks. I have confidence in Australia's boards to be able to deal with these issues. I do not have confidence that big government and Labor's intervention will be able to assist, especially where, if the *AFR* is correct, 70 per cent of corporations in that top 50 already have termination payments below the levels of 70 per cent. There is further evidence that many companies are moving towards a self-regulatory practice on this

issue, especially considering the recent downturn in the economy.

These provisions are, of course, widespread. They move from public to unlisted companies and they lower the thresholds, which will capture middle managers serving as directors. The definition of termination payments is broadened, and there is concern that it will catch genuine retirement of long-serving directors. I do not think the unintended consequence of the impact this may have on sourcing, especially of international directors, has been properly considered by the government. I support the amendment moved by the relevant shadow minister in seeking to make this bill more appropriate for the market in which it operates, and I look forward to the government's response to what is a sensible and significant amendment.