

Draft termination payments legislation has been released

On 5 May 2009, the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009 and accompanying regulations were released in exposure draft form. These provisions are effective on the day that this Bill receives the Royal Assent and do not apply retrospectively. The Federal government is seeking written submissions on the exposure draft by 2 June 2009.

Key differences between the new and the current legislation:

| | New law | Current law |
|---|---|---|
| Coverage | <ul style="list-style-type: none"> Directors, key management personnel and the five most highly remunerated group and company executives (all officers named in the remuneration report). Only applies to retirement and resignations from offices and positions held under agreements entered into, or extended after, the commencement of the Bill and will not apply to termination benefits made under existing contracts. | <ul style="list-style-type: none"> Directors only. |
| Termination payments threshold (above which shareholder approval is required) | <ul style="list-style-type: none"> One year's base salary (averaged over the past three years where applicable). Threshold is pro-rated where the recipient has not served a full year. Base salary is defined as having the meaning generally accepted within the accounting profession – unfortunately there does not appear to be a generally accepted definition and this definition may require amendment to provide greater certainty. | <ul style="list-style-type: none"> Up to seven times a recipient's total annual remuneration. |
| Definition of termination benefit | <ul style="list-style-type: none"> The definition of a termination benefit has been clarified and expanded. It includes: <ul style="list-style-type: none"> any kind of pension; the payment of superannuation in excess of the statutory amount; payments in lieu of notice; the accelerated or automatic vesting of options; and an amount paid as a voluntary out of court settlement. It does not include: <ul style="list-style-type: none"> deferred bonuses (bonuses earned but not yet paid); payments from a defined benefits superannuation scheme that was in existence before the regulations commenced; and accrued annual and long service leave. The Bill contains a regulation making power to create regulations which prescribe things to either be or not be a benefit. | <ul style="list-style-type: none"> There is currently some legal ambiguity as to whether certain types of payment meet the definition of a termination benefit and as a result require shareholder approval. |

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Key differences between the new and the current legislation cont'd:

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|---|---|---|
| Timing of shareholder vote | <ul style="list-style-type: none">• Must be held after the director or executive has departed the company.• The Bill prohibits entities from calling a general meeting for the sole or dominant purpose of holding the vote on the termination benefit.• Details of the benefit must be set out in, or accompany, the applicable notice of general meeting. | <ul style="list-style-type: none">• Can be held at any point in time before the benefit is paid. |
| Treatment of unauthorised termination benefits | <ul style="list-style-type: none">• Must be repaid by the individuals immediately.• Provisions introduced to facilitate the recovery of unauthorised benefits. | <ul style="list-style-type: none">• There is no express requirement on an individual to repay an unauthorised termination benefit. |
| Penalty provisions for breaches of sections 200B, 200C and 200D | <ul style="list-style-type: none">• The penalty provisions have been strengthened to \$19,800 for a natural person and \$99,000 for a body corporate, whilst retaining the option of six months imprisonment. | <ul style="list-style-type: none">• \$2,750 for an individual and \$16,500 for a body corporate, together with the option of six months imprisonment. |

How PwC can help

To have a deeper discussion about what these changes mean for your business, please contact:

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