



Corporations Amendment (Improving Accountability on Termination Payments) Act 2009

No. 115, 2009

**An Act to amend the law relating to corporations,
and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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An Act to amend the law relating to corporations, and for related purposes

[Assented to 23 November 2009]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Corporations Amendment (Improving
Accountability on Termination Payments) Act 2009*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	23 November 2009
2. Schedule 1, Part 1	The day after this Act receives the Royal Assent.	24 November 2009
3. Schedule 1, Part 2	Immediately after the commencement of the provision(s) covered by table item 2.	
4. Schedule 1, Part 3	The day after this Act receives the Royal Assent.	24 November 2009

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Part 1—Main amendments

Corporations Act 2001

1 Section 9

Insert:

base salary has the meaning specified in regulations made for the purposes of this definition.

2 Section 9 (paragraph (b) of the definition of *benefit*)

Repeal the paragraph, substitute:

(b) when used in Division 2 of Part 2D.2 (sections 200 to 200J)—has the meaning given by section 200AB.

3 Section 9 (definition of *board or managerial office*)

Repeal the definition.

4 Section 9

Insert:

managerial or executive office has the meaning given by section 200AA.

5 Section 9 (definition of *payment*)

Omit “200A”, substitute “200”.

6 Section 9 (definition of *person*)

Omit “200A”, substitute “200”.

7 Before section 200A

Insert:

200 Interpreting this Division

For the purposes of this Division, in determining whether a benefit is given:

- (a) give a broad interpretation to benefits being given, even if criminal or civil penalties may be involved; and
- (b) the economic and commercial substance of conduct is to prevail over its legal form.

200AA Meaning of *managerial or executive office*

If the company is a disclosing entity

- (1) For a company to which section 300A applies for the previous financial year for the company, a person holds a ***managerial or executive office*** in the company during the current financial year if the person's details were included in the directors' report for that previous financial year for the company in accordance with paragraph 300A(1)(c).

Note: A person holding a managerial or executive office ceases to do so if the person's details are not included in the next directors' report. However, this is not relevant to whether the person has retired from an office or position in the company (see paragraph 200A(1)(f)).

- (2) The person is taken to hold the managerial or executive office for the whole of the current financial year unless and until the person retires from an office or position in the company before the end of that year.

Note: ***Retires*** has an extended meaning (see section 200A).

Otherwise

- (3) For a body corporate not covered by subsection (1), a ***managerial or executive office*** for the body corporate is:
 - (a) an office of director of the body corporate; or
 - (b) any other office or position in connection with the management of the body corporate's affairs that is held by a person who also holds an office of director of the body corporate or a related body corporate.

200AB Meaning of *benefit*

- (1) For the purposes of this Division, a *benefit* includes any of the following:
- (a) a payment or other valuable consideration;
 - (b) any kind of real or personal property;
 - (c) any legal or equitable estate or interest in real or personal property;
 - (d) any legal or equitable right;
 - (e) a thing specified in regulations made for the purposes of this paragraph.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (2) However, for the purposes of this Division, a *benefit* does not include a thing specified in regulations made for the purposes of this subsection.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

Note: The heading to section 200A is altered by omitting “**office**” and substituting “**an office or position**”.

8 Subsection 200A(1)

After “office” (wherever occurring), insert “or position”.

Note: The following heading to subsection 200A(1) is inserted “*General rules*”.

9 At the end of subsection 200A(1)

Add:

- ; and (f) when working out whether a person has retired from an office or position, disregard whether or not the person’s details are included in a directors’ report in accordance with paragraph 300A(1)(c).

10 After subsection 200A(1)

Insert:

Rules in regulations

- (1A) Without limiting subsection (1), a benefit is given in connection with a person’s retirement from an office or position if the benefit

is given in circumstances specified in regulations made for the purposes of this subsection.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

11 Subsection 200A(2)

After “office” (wherever occurring), insert “or position”.

Note: The following heading to subsection 200A(2) is inserted “*Related benefits*”.

12 Subsection 200B(1)

Repeal the subsection, substitute:

Benefits in connection with retirement if person has held a managerial or executive office

- (1) An entity mentioned in subsection (1AA) must not give a person a benefit in connection with a person’s (the *retiree’s*) retirement from an office, or position of employment, in a company or a related body corporate if:

- (a) the office or position is a managerial or executive office; or
- (b) the retiree has, at any time during the last 3 years before his or her retirement, held a managerial or executive office in the company or a related body corporate;

unless there is member approval under section 200E for the giving of the benefit.

Note 1: This subsection extends to benefits given by way of compensation for, or otherwise in connection with, a person’s loss of an office or position (see subsections 200A(1) and (3)).

Note 2: Sections 200F, 200G and 200H provide for exceptions to this subsection.

Note 3: The recipient of the benefit need not be the retiree.

(1AA) The entities are as follows:

- (a) the company;
- (b) an associate of the company (other than a body corporate that is related to the company and is itself a company);
- (c) a prescribed superannuation fund in relation to the company.

13 Subsection 200B(1A)

Omit “person’s”, substitute “retiree’s”.

14 Subsection 200B(3)

Omit “a person’s retirement from an office” (wherever occurring), substitute “the retiree’s retirement from an office or position”.

15 Paragraph 200C(1)(a)

Omit “board or managerial office”, substitute “managerial or executive office”.

16 Subsection 200C(1) (note)

Repeal the note.

17 Paragraph 200D(1)(a)

Omit “board or managerial office”, substitute “managerial or executive office”.

18 Subsection 200D(1) (note)

Repeal the note.

19 Subsection 200E(1)

Repeal the subsection, substitute:

Conditions for member approval

- (1) For the purposes of section 200B, the conditions set out in subsections (1B), (2) and (2A) must be satisfied for there to be member approval under this section for the giving of the benefit to the person in connection with the retiree’s retirement from the office or position.
- (1A) For the purposes of section 200C, the conditions set out in subsections (1B) and (2) must be satisfied for there to be member approval under this section for the giving of the benefit.

First condition

- (1B) The first condition is that the giving of the benefit be approved by a resolution passed at a general meeting of:
 - (a) the company; and
 - (b) if the company is a subsidiary of a listed domestic corporation—the listed corporation; and
 - (c) if the company has a holding company that:

- (i) is a domestic corporation that is not listed; and
- (ii) is not itself a subsidiary of a domestic corporation;
the holding company.

20 Subsection 200E(2) (first sentence)

Repeal the sentence, substitute: “The second condition is that details of the benefit must be set out in, or accompany, the notice of the general meeting that is to consider the resolution.”.

Note: The following heading to subsection 200E(2) is inserted “*Second condition*”.

21 Subparagraph 200E(2)(b)(i)

Omit “prescribed”.

22 After subsection 200E(2)

Insert:

Third condition—for approvals relating to section 200B

- (2A) The third condition is that at the general meeting, a vote on the resolution must not be cast (in any capacity) by or on behalf of:
 - (a) the retiree; or
 - (b) an associate of the retiree.
- (2B) Subsection (2A) does not prevent the casting of a vote if:
 - (a) it is cast by a person as a proxy appointed by writing that specifies how the proxy is to vote on the resolution; and
 - (b) it is not cast on behalf of the retiree or an associate of the retiree.
- (2C) The regulations may prescribe cases where subsection (2A) does not apply.

23 Subsection 200E(3)

Omit “The approval extends to”, substitute “For the purposes of subsection (1B), the resolution may give approval by approving”.

Note: The following heading to subsection 200E(3) is inserted “*Meeting may approve a lesser benefit*”.

24 Subsection 200E(4)

Omit “The approval”, substitute “Member approval under this section”.

Note: The following heading to subsection 200E(4) is inserted “*Effect of approval on directors’ duties*”.

25 Paragraph 200F(1)(a)

After “office”, insert “or position”.

26 Subsection 200F(2)

After “an office”, insert “or position”.

27 Subparagraph 200F(2)(a)(ii)

After “office” (wherever occurring), insert “or position”.

28 Paragraph 200F(2)(b)

Omit “other payments (if any) already made or payable”, substitute “other benefits (if any) already given”.

29 Paragraph 200F(2)(b)

Omit “board or managerial offices”, substitute “offices or positions”.

30 Paragraph 200F(2)(b)

Omit all the words after “exceed”, substitute “the amount worked out under whichever of subsections (3) and (4) is applicable”.

31 Subsections 200F(3) and (4)

Repeal the subsections, substitute:

- (3) This subsection applies if the relevant period for the person is less than 1 year. The amount worked out under this subsection is:

$$\frac{\text{Estimated annual base salary} \times \text{Number of days in relevant period}}{365}$$

where:

estimated annual base salary is a reasonable estimate of the base salary that the person would have received from the company and related bodies corporate during the relevant period if the relevant period had been 1 year.

Note: The *relevant period* for the person is defined in subsection (5).

- (4) This subsection applies in every other case. The amount worked out under this subsection is:
- (a) if the relevant period is 1 year—the base salary that the person received from the company and related bodies corporate during the relevant period; or
 - (b) if the relevant period is more than 1 year but less than 2 years—the average annual base salary that the person received from the company and related bodies corporate during the relevant period, worked out as if:
 - (i) the relevant period were 2 years; and
 - (ii) the person’s annual base salary for the second year were a reasonable estimate of what the person would have received as base salary after the first year of the relevant period had the relevant period been 2 years; or
 - (c) if the relevant period is 2 years—the average annual base salary that the person received from the company and related bodies corporate during the relevant period; or
 - (d) if the relevant period is more than 2 years but less than 3 years—the average annual base salary that the person received from the company and related bodies corporate during the relevant period, worked out as if:
 - (i) the relevant period were 3 years; and
 - (ii) the person’s annual base salary for the third year were a reasonable estimate of what the person would have received as base salary after the second year of the relevant period had the relevant period been 3 years; or
 - (e) if the relevant period is 3 years or more—the average annual base salary that the person received from the company and related bodies corporate during the last 3 years of the relevant period.

32 Subsection 200F(5)

Omit “an office”, substitute “a managerial or executive office”.

33 Paragraph 200G(1)(a)

Omit “a board or managerial office (the *relevant office*)”, substitute “an office or position”.

34 Paragraph 200G(1)(c)

Omit “other payments (if any) already made or payable”, substitute “other benefits (if any) already given”.

35 Paragraph 200G(1)(c)

Omit “board or managerial offices”, substitute “offices or positions”.

36 Paragraph 200G(1)(c)

Omit “the payment limit set by subsection (2)”, substitute “the amount worked out under whichever of subsections (2) and (3) is applicable”.

37 Subsections 200G(2) and (3)

Repeal the subsections, substitute:

- (2) This subsection applies if the relevant period for the person is less than 1 year. The amount worked out under this subsection is:

$$\frac{\text{Estimated annual base salary} \times \text{Number of days in relevant period}}{365}$$

where:

estimated annual base salary is a reasonable estimate of the base salary that the person would have received from the company and related bodies corporate during the relevant period if the relevant period had been 1 year.

Note: The *relevant period* for the person is defined in subsection (6).

- (3) This subsection applies in every other case. The amount worked out under this subsection is:
- (a) if the relevant period is 1 year—the base salary that the person received from the company and related bodies corporate during the relevant period; or
 - (b) if the relevant period is more than 1 year but less than 2 years—the average annual base salary that the person received from the company and related bodies corporate during the relevant period, worked out as if:
 - (i) the relevant period were 2 years; and
 - (ii) the person’s annual base salary for the second year were a reasonable estimate of what the person would have received as base salary after the first year of the relevant period had the relevant period been 2 years; or

- (c) if the relevant period is 2 years—the average annual base salary that the person received from the company and related bodies corporate during the relevant period; or
- (d) if the relevant period is more than 2 years but less than 3 years—the average annual base salary that the person received from the company and related bodies corporate during the relevant period, worked out as if:
 - (i) the relevant period were 3 years; and
 - (ii) the person's annual base salary for the third year were a reasonable estimate of what the person would have received as base salary after the second year of the relevant period had the relevant period been 3 years; or
- (e) if the relevant period is 3 years or more—the average annual base salary that the person received from the company and related bodies corporate during the last 3 years of the relevant period.

38 Subsection 200G(5)

Repeal the subsection.

39 Subsection 200G(6)

Insert:

relevant period: if a person has held a managerial or executive office in the company or a related body corporate:

- (a) throughout a period; or
- (b) throughout a number of periods;

the *relevant period* for that person is that period or the period consisting of those periods.

40 Subsection 200J(1)

Repeal the subsection, substitute:

- (1) If an entity (the *giver*) contravenes section 200B by giving a benefit to a person (the *recipient*), then the amount of the benefit, or the money value of the benefit if it is not a payment:
 - (a) is taken to be received by the recipient on trust for the giver; and
 - (b) must be immediately repaid by the recipient to the giver.

- (1A) An amount repayable under subsection (1) to the giver:
- (a) is a debt due to the giver; and
 - (b) may be recovered by the giver in a court of competent jurisdiction.

Note: The heading to section 200J is altered by omitting “**in trust for company**” and substituting “**on trust and repaid**”.

41 Schedule 3 (table items 35, 36 and 37)

Omit “25 penalty units”, substitute “180 penalty units”.

Part 2—Other amendments

Corporations Act 2001

42 Paragraph 200F(1)(a)

Repeal the paragraph, substitute:

- (a) a benefit that is a payment made in respect of leave of absence to which the person is entitled under an industrial instrument; or

Part 3—Application

43 Application

- (1) The amendments made by Part 1 apply in relation to a retirement from an office, or position of employment, held under:
 - (a) an agreement entered into; or
 - (b) an agreement renewed or extended; or
 - (c) an agreement, for which a variation of a condition of the agreement happens;on or after the commencement of that Part.
- (2) If the amendments made by Part 1 apply in relation to a person's retirement from an office or position in a company, the person's relevant period for the purposes of section 200F or 200G of the *Corporations Act 2001* applies to managerial or executive offices held by the person:
 - (a) in the company or related bodies corporate; and
 - (b) before, on or after the commencement of that Part.
- (3) Despite the amendment made by Part 2 (the ***Part 2 amendment***), paragraph 200F(1)(a) of the *Corporations Act 2001* (as amended by Part 1 of this Schedule) continues to apply, in relation to agreements entered into before 1 January 1991, as if the Part 2 amendment had not been made.

[*Minister's second reading speech made in—
House of Representatives on 24 June 2009
Senate on 10 September 2009*]

(135/09)

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115, 2009

No.
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