

EXPOSURE DRAFT

2008-2009

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT

Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009

No. , 2009

(Treasury)

**A Bill for an Act to amend the law relating to
corporations, and for related purposes**

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1 **A Bill for an Act to amend the law relating to**
2 **corporations, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

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

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

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T T T T

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.	
2. Schedule 1, Part 1	The day after this Act receives the Royal Assent.	
3. Schedule 1, Part 2	Immediately after the provision(s) covered by table item 2.	
4. Schedule 1, Part 3	At the same time as the provision(s) covered by table item 2.	

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

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

3 Schedule(s)

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9 repealed as set out in the applicable items in the Schedule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

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Main amendmentsT TPart 1T

1

Schedule 1—Amendments

2

3

Part 1—Main amendments

4

Corporations Act 2001

5

1 Section 9

6

Insert:

7

base salary has the meaning generally accepted within the
accounting profession.

8

9

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

10

Repeal the definition.

11

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

12

Omit all the words after “Part 2D.2”, substitute “(sections 200 to
200J)—has the meaning given by section 200AA.”.

13

14

4 Section 9

15

Insert:

16

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

17

18

5 Section 9 (definition of *payment*)

19

Omit “200A”, substitute “200”.

20

6 Section 9 (definition of *person*)

21

Omit “200A”, substitute “200”.

22

7 Before section 200A

23

Insert:

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TPart 1T Main amendmentsT

1 **200 Meaning of *managerial or executive office***

2 *If the company is a disclosing entity*

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

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

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

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

18 *Otherwise*

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

26 **200AA Meaning of *benefit***

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

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

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

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

8 **8 Subsection 200A(1)**

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

10 Note 1: The heading to section 200A is altered by omitting “office” and substituting “**an office**
11 **or position**”.

12 Note 2: The following heading to subsection 200A(1) is inserted “*General rules*”.

13 **9 At the end of subsection 200A(1)**

14 Add:

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

19 **10 After subsection 200A(1)**

20 Insert:

21 *Rules in regulations*

22 (1A) Without limiting subsection (1), a benefit is given in connection
23 with a person’s retirement from an office or position if the benefit
24 is given in circumstances specified in regulations made for the
25 purposes of this subsection.

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

28 **11 Subsection 200A(2)**

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

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

31 **12 Subsection 200B(1)**

32 Repeal the subsection, substitute:

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

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

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

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

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

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

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

19 (1AA) The entities are as follows:

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

24 **13 Subsection 200B(3)**

25 After "office" (wherever occurring), insert "or position".

26 **14 Paragraph 200C(1)(a)**

27 Omit "board or managerial office", substitute "managerial or executive
28 office".

29 **15 Subsection 200C(1) (note)**

30 Repeal the note.

31 **16 Paragraph 200D(1)(a)**

32 Omit "board or managerial office", substitute "managerial or executive
33 office".

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1 **17 Subsection 200D(1) (note)**

2 Repeal the note.

3 **18 Subsection 200E(1)**

4 Repeal the subsection, substitute:

5 *Conditions for member approval*

6 (1) For the purposes of section 200B, the following 4 conditions must
7 be satisfied for there to be member approval under this section for
8 the giving of the benefit to the person in connection with the
9 retiree's retirement from the office or position.

10 (1A) For the purposes of section 200C, the first and fourth of the
11 following 4 conditions must be satisfied for there to be member
12 approval under this section for the giving of the benefit.

13 *First condition*

14 (1B) The first condition is that the giving of the benefit be approved by
15 a resolution passed at a general meeting of:

16 (a) the company; and

17 (b) if the company is a subsidiary of a listed domestic
18 corporation—the listed corporation; and

19 (c) if the company has a holding company that:

20 (i) is a domestic corporation that is not listed; and

21 (ii) is not itself a subsidiary of a domestic corporation—the
22 holding company.

23 *Second condition*

24 (1C) The second condition is that a general meeting that considers such
25 a resolution must not have been called for the sole or dominant
26 purpose of passing the resolution.

27 *Third condition*

28 (1D) The third condition is that the retiree must have retired from the
29 office or position before notice is given of a general meeting that is
30 to consider such a resolution.

31 **19 Subsection 200E(2)**

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1 Omit “Details of the benefit must be set out in, or accompany, the
2 notice of the meeting at which the resolution is to be considered.”,
3 substitute “The fourth condition is that details of the benefit must be set
4 out in, or accompany, the notice of a general meeting that is to consider
5 such a resolution.”.

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

7 **20 Subparagraph 200E(2)(b)(i)**

8 Omit “prescribed”.

9 **21 Subsection 200E(3)**

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

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

14 **22 Subsection 200E(4)**

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

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

18 **23 Paragraph 200F(1)(a)**

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

20 **24 Subsection 200F(2)**

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

22 **25 Paragraph 200F(2)(a)**

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

24 **26 Paragraph 200F(2)(b)**

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

27 **27 Paragraph 200F(2)(b)**

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

29 **28 Paragraph 200F(2)(b)**

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

3 29 Subsections 200F(3) and (4)

4 Repeal the subsections, substitute:

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

$$7 \frac{\text{Estimated annual base salary} \times \text{Number of days in relevant period}}{365}$$

8 where:

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

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

14 (4) This subsection applies in every other case. The amount worked
15 out under this subsection is:

- 16 (a) if the relevant period is 1 year—the base salary that the
17 person received from the company and related bodies
18 corporate during the relevant period; or
19 (b) if the relevant period is more than 1 year but less than 2
20 years—the average annual base salary that the person
21 received from the company and related bodies corporate
22 during the relevant period, worked out as if:
23 (i) the relevant period were 2 years; and
24 (ii) the person’s annual base salary for the second year were
25 a reasonable estimate of what the person would have
26 received after the first year of the relevant period had
27 the relevant period been 2 years; or
28 (c) if the relevant period is 2 years—the average annual base
29 salary that the person received from the company and related
30 bodies corporate during the relevant period; or
31 (d) if the relevant period is more than 2 years but less than 3
32 years—the average annual base salary that the person

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1 received from the company and related bodies corporate
2 during the relevant period, worked out as if:
3 (i) the relevant period were 3 years; and
4 (ii) the person’s annual base salary for the third year were a
5 reasonable estimate of what the person would have
6 received after the second year of the relevant period had
7 the relevant period been 3 years; or
8 (e) if the relevant period is 3 years or more—the average annual
9 base salary that the person received from the company and
10 related bodies corporate during the last 3 years of the relevant
11 period.

12 **30 Subsection 200F(5)**

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

14 **31 Paragraph 200G(1)(a)**

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

17 **32 Paragraph 200G(1)(c)**

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

20 **33 Paragraph 200G(1)(c)**

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

22 **34 Paragraph 200G(1)(c)**

23 Omit all the words after “exceed”, substitute “the amount worked out
24 under whichever of subsections (2) and (3) is applicable”.

25 **35 Subsections 200G(2) and (3)**

26 Repeal the subsections, substitute:

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

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

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AmendmentsT TSchedule 1T
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1 where:

2 *estimated annual base salary* is a reasonable estimate of the base
3 salary that the person would have received from the company and
4 related bodies corporate during the relevant period if the relevant
5 period had been 12 months.

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

7 (3) This subsection applies in every other case. The amount worked
8 out under this subsection is:

- 9 (a) if the relevant period is 1 year—the base salary that the
10 person received from the company and related bodies
11 corporate during the relevant period; or
- 12 (b) if the relevant period is more than 1 year but less than 2
13 years—the average annual base salary that the person
14 received from the company and related bodies corporate
15 during the relevant period, worked out as if:
- 16 (i) the relevant period were 2 years; and
17 (ii) the person's annual base salary for the second year were
18 a reasonable estimate of what the person would have
19 received after the first year of the relevant period had
20 the relevant period been 2 years; or
- 21 (c) if the relevant period is 2 years—the average annual base
22 salary that the person received from the company and related
23 bodies corporate during the relevant period; or
- 24 (d) if the relevant period is more than 2 years but less than 3
25 years—the average annual base salary that the person
26 received from the company and related bodies corporate
27 during the relevant period, worked out as if:
- 28 (i) the relevant period were 3 years; and
29 (ii) the person's annual base salary for the third year were a
30 reasonable estimate of what the person would have
31 received after the second year of the relevant period had
32 the relevant period been 3 years; or
- 33 (e) if the relevant period is 3 years or more—the average annual
34 base salary that the person received from the company and
35 related bodies corporate during the last 3 years of the relevant
36 period.

37 **36 Subsection 200G(5)**

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1 Repeal the subsection.

2 **37 Subsection 200G(6)**

3 Insert:

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

6 (a) throughout a period; or

7 (b) throughout a number of periods;

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

10 **38 Subsection 200J(1)**

11 Repeal the subsection, substitute:

12 (1) If an entity (the *giver*) contravenes section 200B by giving a
13 benefit to a person (the *recipient*), then the amount of the benefit,
14 or the money value of the benefit if it is not a payment:

15 (a) is taken to be received by the recipient on trust for the giver;
16 and

17 (b) must be immediately repaid by the recipient to the giver.

18 (1A) An amount repayable under subsection (1) to the giver:

19 (a) is a debt due to the giver; and

20 (b) may be recovered by the giver in a court of competent
21 jurisdiction.

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

24 **39 Schedule 3 (table items 35, 36 and 37)**

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

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Other amendmentsT TPart 2T

1

2 **Part 2—Other amendments**

3 *Corporations Act 2001*

4 **40 Paragraph 200F(1)(a)**

5 Repeal the paragraph, substitute:

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

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TSchedule 1T AmendmentsT

TPart 3T ApplicationT

1

2

Part 3—Application

3

41 Application

4

(1) The amendments made by Part 1 apply in relation to resignations of offices, or positions of employment, held under agreements entered into, or extended, on or after the commencement of that Part.

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(2) If the amendments made by Part 1 apply in relation to a person's resignation 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:

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(a) in the company or related bodies corporate; and

13

(b) before, on or after the commencement of that Part.

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(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.