



Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009

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Law and Bills Digest Section

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Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009

Date introduced: 24 June 2009

House: House of Representatives

Portfolio: Treasury

Commencement: The formal provisions commence on Royal Assent; Parts 1 and 3 of Schedule 1 commence the day after the Act receives Royal Assent, and Part 2 of Schedule 1 commences immediately thereafter.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill amends the *Corporations Act 2001* (the Act) to give shareholders the right to veto termination payments (commonly known as ‘golden handshakes’) made to company directors and senior executives where the payments are greater than one year of the recipient’s ‘base salary’.

The veto will only apply to termination payments made in relation to retirement from an office or position held under an agreement (or a condition of an agreement) entered into, varied or extended on or after the commencement of Part 1 of Schedule 1 to the Bill (being the day after the proposed Act receives Royal Assent).

Background

In the last two years, several high-profile Australian companies, such as Telstra, Pacific Brands and Qantas, have posted either reduced profits or significant losses. In some cases, companies have reacted to the current economic downturn by restructuring their operations, including retrenching staff. However, often amid the rhetoric of poor financial performance, the same companies have continued to pay large salaries to their senior managers. More importantly, for the purposes of the Bill, they have also sometimes paid large termination payments, known as ‘golden handshakes’, to executives leaving the company, often at the conclusion of apparently lucrative employment contracts.

On 18 March 2009, the Treasurer, the then Assistant Treasurer and the then Minister for Superannuation and Corporate Law issued a joint media release announcing that the Productivity Commission would examine the regulation of director and executive

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remuneration in Australia.¹ It is not due to report until 19 December 2009, and is tasked with considering the following five issues:

- trends in director and executive remuneration, both in Australia and abroad
- the effectiveness of the existing regulatory framework
- the role of institutional and retail shareholders in setting and considering remuneration
- ways to better align the interests of boards and executives with those of shareholders and the community, and
- the effectiveness of the international response to remuneration issues arising from the global financial crisis, particularly excessive risk-taking and corporate greed.²

Also on 18 March 2009, the Treasurer announced reforms specifically aimed at termination payments. In a two-pronged attack, Wayne Swan announced that the Rudd Government is targeting the amount that an executive may receive as a termination payment, and is also expanding the ways in which termination payments will be subject to shareholder approval. Currently (under subsection 200F(3) of the Act) an executive can receive up to seven times his or her total annual remuneration before shareholder approval of the termination payment is required, but under the proposed law, shareholder approval will be required if a termination payment exceeds one year's average base salary for directors.³ Shareholder approval will also be required in relation to payments made not only to directors but to all executives named in the company's executive remuneration report. He also explained that the Government proposed to expand the definition of 'termination benefit' to catch all types of payments and rewards provided at termination. Wayne Swan further explained the policy rationale, saying:

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1. W Swan (Treasurer), C Bowen (then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs), and N Sherry (then Minister for Superannuation and Corporate Law), *Productivity Commission and Allan Fels to examine executive remuneration*, media release, 18 March 2009, viewed 22 July 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22media%2Fpressrel%2F982T6%22> The Productivity Commission 'is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians': see Productivity Commission, 'About Us', <http://www.pc.gov.au/about-us>, viewed 22 July 2009.
 2. Productivity Commission, 'Projects: Executive Remuneration (Current)', viewed 22 July 2009, <http://www.pc.gov.au/projects/inquiry/executive-remuneration>
 3. Under the Bill, the amount that can be received before shareholder approval is required is reduced to one year's 'base salary' (as opposed to total remuneration): see **item 31** of Schedule 1 (being proposed amendments to subsections 200F(3) and (4) of the Act). The term 'base salary' is to be inserted into the Act (section 9) by item 1 of Schedule 1 to the Bill. It will be defined in regulations made for the purposes of the section.

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Golden handshakes, particularly where a company has not performed or where workers are being retrenched, are simply a means of rewarding failure and are absolutely unacceptable. So today we are sending a very clear message to corporate Australia: your actions are under scrutiny and the community does expect better because, as we go through this challenge of the global recession, we are going to require all the reserves of unity that we can muster as a nation. We need executives and workers working together, but to get that trust there has to be basic fairness and decency in the arrangements that apply to the workforce as well as to those who employ them.⁴

Shareholder voting

Under the Act, company shareholders have the right to vote on certain issues, but depending on the issue, the votes may not be binding on the company's board of directors. For example, section 250R of the Act deals with the business of an Annual General Meeting (AGM). Subsection 250R(2) provides that at a listed company's AGM, a resolution that the remuneration report be adopted must be put to the vote.⁵ However, subsection 250R(3) provides that the vote on the resolution is advisory only and does not bind the directors or the company.

In the past year shareholders have voted against 15 of the top 300 companies' remuneration reports, but as mentioned above, such votes are simply advisory only.⁶ While both the Federal Government and the Opposition have at times suggested the possibility of making such votes binding, John Colvin, CEO of the Australian Institute of Company Directors (AICD), has expressed some reservations about giving shareholders greater powers, saying: 'One of the things I think is happening is that executive pay becomes an issue for shareholders' disgruntlement and for everybody's unhappiness at the economic crisis'.⁷ Similarly, Peter Anderson, chief executive of the Australian Chamber of Commerce and Industry, while not dismissing the idea of binding shareholder votes,

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4. W Swan (Treasurer), 'Executive Remuneration', House of Representatives, *Debates*, 18 March 2009, pp. 3096–3097, viewed 22 July 2009, <http://www.aph.gov.au/hansard/reps/dailys/dr180309.pdf>
 5. The term 'remuneration report' is defined in section 9 of the Act to mean 'the section of the directors' report for a financial year for a listed public company that is included under subsection 300A(1)'. Section 300A contains the specific information that is to be provided by listed companies (ie companies listed on the Stock Exchange) in the annual directors' report.
 6. J Saulwick, 'Don't meddle with our pay, bosses tell MPs', *Sydney Morning Herald*, 2 March 2009, p. 1. Specifically shareholders at Qantas, Telstra and Austar voted against their companies' remuneration reports. See also F Leyden, 'Telstra heeds rings of ire', *Herald Sun*, 20 November 2008, p. 67; L Dodson, 'Shareholder group says no to pay role', *Australian Financial Review*, 25 November 2008, p. 4; and A Hepworth and D Kitney, op. cit.
 7. J Saulwick, op. cit.

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was reported as saying that ‘sweeping regulations could not account for the complexity of different businesses’.⁸

Presumably if the company or its board fails to give proper consideration to the vote of its shareholders, the shareholders could take legal action against the company under section 232 of the Act. Section 232 sets out the grounds for the making of a court order, including where the conduct of a company’s affairs or any act/omission (proposed or real) by or on behalf of the company is contrary to the interests of the members as a whole, or is ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity’.

Additionally, under section 249D of the Act, the directors of a company must call and arrange to hold a general meeting on the request of either (a) members who hold at least 5 per cent of the votes that may be cast at the general meeting or (b) at least 100 members who are entitled to vote at the general meeting. The request must be in writing and state any resolution to be proposed at the meeting. It must be signed by the members making the request and be given to the company. The directors must call the meeting within 21 days after the request is given to the company, and the meeting is to be held not later than 2 months after the request is given to the company.

Similarly, members who hold at least five per cent of voting rights may call and arrange to hold (at their own expense) a general meeting under section 249F of the Act.

Either of these procedures could be used by members to protest against any perceived mismanagement of the company by sacking or refusing to re-elect directors.⁹

Finally, if shareholders (as owners of the company, as opposed to management of the company) feel that the directors do not accord their wishes (expressed by voting) due and proper weight, then shareholders can sell their shares and otherwise withdraw support for the company.

‘Golden handshakes’

Currently, section 200B of the Act provides that a company, an associate of the company or a prescribed superannuation fund in relation to the company must not give a person a benefit in connection with that person’s, or someone else’s, retirement from a board or managerial office in a company, or a related body corporate, without member approval under section 200E of the Act.

Section 200E provides that the approval must be given by a resolution passed at a general meeting of the company and any domestic holding company of the company (whether

8. J Saulwick, op. cit.

9. For details of recent action by members, see, for example, K Emery, ‘Protests expected to grow over executive pay scales’, *West Australian*, 20 December 2008, p. 78, and A Hepworth and D Kitney, ‘Angry shareholders turn up the heat on directors’, *Australian Financial Review*, 1 December 2008, p. 1.

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listed or not). Details of the benefit must be set out in the notice of the meeting, including the amount of the payment (or the manner in which the amount is to be calculated) or the money value of the proposed prescribed benefit (or how that value is to be calculated).

If the payment is not to be made to the retiree but to a related party, then paragraph 211(3)(b) provides that member (shareholder) approval of a financial benefit given to a person because of retirement is not required where the financial benefit is 'reasonable'. Section 213 provides that member approval is not needed to give a financial benefit to a related party in a financial year if the total of the amounts or values is less than or equal to the amount prescribed by the regulations for the purposes of the section. Currently, that amount is \$5000.¹⁰

Remuneration reports

Section 300A sets out the specific information that is to be provided by listed companies (ie companies listed on the Stock Exchange) in their annual directors' reports. Paragraph 300A(1)(c) provides that an annual directors' report must contain 'the prescribed details' in relation to the remuneration of (emphasis added):

- (i) if consolidated financial statements are required--each member of the key management personnel for the consolidated entity; and
- (ii) if consolidated financial statements are not required--each member of the key management personnel for the company; and
- (iii) if consolidated financial statements are required--each of the 5 named relevant group executives who receive the highest remuneration for that year; and
- (iv) in any case--**each of the 5 named company executives who receive the highest remuneration for that year;** and

Sub-paragraph 300A(1)(e)(vii) states that for each person referred to in paragraph (c), the annual report must include ('in a separate and clearly identified section of the report') (emphasis added):

- (vii) if the person is employed by the company under a contract--the duration of the contract, the periods of notice required to terminate the contract **and the termination payments provided for under the contract;** and

While it is possible that details about a 'golden handshake' payment for a company executive may be set out in the person's employment contract, such details may not necessarily be included in the company's annual remuneration report. It would depend on whether payment is in fact a 'termination payment', or if (for example) it is the case that, the contract having run its normal course, the person simply receives an *ex gratia*-type payment that is not provided for in the contract.

10. Regulation 2E.1.01, Corporations Regulations 2001.

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The terms of the contract itself would presumably not be subject to shareholder scrutiny—although if the person is one of the ‘5 named company executives who receive the highest remuneration for that year’, at least the existence of the contract and some financial details would be flagged every year in the annual remuneration report.

Assuming that information about a ‘golden handshake’ payment is actually included in a remuneration report, then regardless of how much detail is made available to shareholders, it remains the fact (as stated above) that a shareholder vote on a remuneration report is not binding on the company or its directors. Any vote on a remuneration report is ‘advisory’ only, with any Board refusing to accept the vote (and its consequences) doing so, presumably, at its discretion and/or peril.

As mentioned above, and as discussed in detail in the ‘**Main provisions**’ section below, shareholder approval is only needed before certain termination payments can be made. While retirement benefits generally need shareholder approval under section 200B of the Act, that provision does not apply in a number of circumstances (see below), including where the payment is less than certain amounts that are currently defined by relation to the retiree’s length of service in the office and his or her total remuneration. The Bill revises the circumstances where shareholder approval is not required.

Committee consideration

On 25 June 2009, the Bill was referred to the Senate Economics Legislation Committee for inquiry and report by 7 August 2009. However, on 27 July 2009, the inquiry presented its interim report to the President of the Senate, saying that it needed more time to finalise its final report, which is expected to be ready by 7 September 2009.¹¹ Details of the inquiry are at http://www.aph.gov.au/Senate/committee/economics_ctte/termination_payments_09/info.htm, viewed 22 July 2009. The Committee received 15 submissions, the content of which is summarised in the next section of this Digest.¹²

Position of significant interest groups/press commentary

Some commentators have suggested that the Government should leave shareholders to set appropriate limits on termination payments, rather than intervening to set limits in the legislation. They say that there are ‘factors in play that companies need to take into

11. Senate Economics Legislation Committee, *Inquiry into the Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009: Interim Report*, 27 July 2009, viewed 3 August 2009, http://www.aph.gov.au/Senate/committee/economics_ctte/termination_payments_09/interim_report/report.pdf

12. The submissions are available at http://www.aph.gov.au/Senate/committee/economics_ctte/termination_payments_09/submissions.htm, viewed 22 July 2009.

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account such as the need to attract top talent from overseas as well as competing for that talent in the local market'.¹³

Other commentators have suggested that the Government should await the report from the Productivity Commission before introducing legislation on matters which are the subject of the Commission's inquiry.¹⁴ Michael Robinson, Director of Guerdon Associates, an independent executive remuneration and performance management consulting firm, suggested that 'there is a risk that changes in tax and law before the Productivity Commission reports in December will undermine the potential benefits of its review'.¹⁵ Specifically on the issue of whether the threshold for shareholder approval of termination payments should be lowered, Robinson indicated (in the context of recruiting executives from overseas) that companies are 'likely to increase fixed pay to compensate for the fact that termination pay will be lower than the levels considered acceptable in the [prospective executive's] home country, and the risk is higher'.¹⁶ Such comments presuppose the likelihood that shareholders would consider proposed termination payments that would otherwise require their approval to be unreasonable and not in the interests of the company.

In submissions made to the Senate Economics Legislation Committee on the current Bill, several entities suggested the one year base salary threshold (over which shareholder approval of a proposed termination payment is required) is too low and out of step with the position in comparable jurisdictions (such as the UK, Canada and the USA).¹⁷

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13. Editorial, 'Shareholders key to checking executive pay', *West Australian*, 2 June 2009, p. 20.
14. See, for example, Australian Chamber of Commerce and Industry, Submission to the Inquiry into Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, 13 July 2009, viewed 28 July 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=7ad58953-9290-4a74-a4c0-a3b0c77de2d5> and BHP Billiton, Submission to the Inquiry into Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, 17 July 2009, viewed 28 July 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=8168ce42-76a0-4603-a306-ccb7d75dd858>
15. M Robinson, 'Hold the remuneration horses until PC reports', *Australian Financial Review*, 26 June 2009, p. 67.
16. M Robinson, op. cit.
17. See, for example, BHP Billiton, Submission to the Inquiry into Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, op cit.; Hay Group, 'Hay Group Submission to the Senate Economics References Committee', 17 July 2009, viewed 28 July 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=06d93d26-221e-4507-bc56-b949ffb6e1ea> ; and Australian Council of Super Investors, Submission to the Inquiry into Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, 16 July 2009, viewed 28 July 2009,

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Guerdon Associates suggested it should be set at ‘three time base salary plus bonus (using an average based on the previous three years’ experience)’,¹⁸ whereas the Australian Compliance Institute suggested a two year base.¹⁹

The submission from Origin Energy identified three possible unintended consequences of the reform: imposing additional costs to compete; downward pressure on established redundancy protection for all employees; and increasing fixed costs.²⁰

Financial implications

According to the Explanatory Memorandum, the Bill has ‘no significant impact’ on Commonwealth resources.²¹

Main provisions

Part 1—Main amendments

Items 1–6 of Part 1 of Schedule 1 amend the dictionary in section 9 of the Act, mainly to define terms by reference to new provisions contained in the Bill. For example, **item 1** inserts the new term ‘*base salary*’ and defines it as having the meaning ‘specified in regulations made for the purposes of this definition’. Notably, in the exposure draft of the Bill released for public comment on 5 May 2009, the term was defined as having ‘the meaning generally accepted within the accounting profession’.²² The definition found in

<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=b21f9967-8b81-447e-8786-11c6ea246967>

18. Guerdon Associates, Submission to the Inquiry into Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, 13 July 2009, viewed 28 July 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=3175bc7c-ba58-4c83-8c97-48a3f81b75b5>
19. Australian Compliance Institute, Submission to the Inquiry into Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, 14 July 2009, viewed 28 July 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=3e9800b2-6bb2-42b5-9e3f-14e5f4c31af0>
20. Origin Energy, Submission to the Inquiry into Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009’, 14 July 2009, viewed 28 July 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=7df9e776-7971-45d5-82a2-0d12cf82e985>
21. Explanatory Memorandum, Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, p. 3.
22. Exposure Draft: Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, item 1, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1531>, viewed 28 July 2009.

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the current version of the Bill is thus more specific than the definition in the exposure draft, but it would be more user-friendly to define the term in the Act itself.²³ According to the Minister's second reading speech, the regulations will be made following 'further targeted consultation'.²⁴

Item 7 inserts **proposed sections 200, 200AA and 200AB** into the Act. **Proposed section 200** states that in determining whether a 'benefit' is given (for the purposes of Division 2 of Part 2D.2 of the Act), a wide interpretation of that term is to be used (even if criminal or civil penalties may be involved), and 'economic and commercial substance' is to prevail over the form of the conduct involved.²⁵

Proposed section 200AA sets out when a person holds a '*managerial or executive office*'. Primarily, for a company to which section 300A applies for the *previous* financial year, a person holds such an office in a company during the current financial year if his or her details were included in the directors' report for the *previous* financial year.²⁶ The person is taken to hold the 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.²⁷ If section 300A does not apply to the company (because it is not a listed company), a '*managerial or executive office*' for the body corporate is defined as an office of director or any other office or management position that is held by a person who also holds an office of director of the body corporate or a related body corporate.

Proposed section 200AB defines the term '*benefit*' for the purposes of Division 2 of Part 2D.2 of the Act. It includes:

- a payment or other valuable consideration
- any kind of real or personal property

23. Presumably the term will be defined in the regulations so that it can be amended more easily than a definition in an Act.

24. C Bowen (Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services), 'Second reading speech: Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009', House of Representatives, *Debates*, 24 June 2009, pp. 20–21, viewed 23 July 2009, <http://www.aph.gov.au/hansard/reps/dailys/dr240609.pdf>

25. Division 2 deals specifically with termination payments, and is found in Part 2D.2, which deals with restrictions on indemnities, insurance and termination payments.

26. As mentioned earlier, section 300A sets out the specific information to be provided by listed companies in their annual directors' report. The text of this section is available on the Austlii website at http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s300a.html, viewed 23 July 2009.

27. Under paragraph 200A(1)(e), '*retirement from an office*' includes loss of the office, resignation of the office, and the death of the person at a time when they hold the office.

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- any legal or equitable estate or interest in real or personal property
- any legal or equitable right, and
- anything specified in regulations made for the purposes of this definition.

However, under **proposed subsection 200AB(2)**, the term ‘benefit’ does not include anything specified in regulations made for the purposes of this subsection. Thus, regulations made for the purposes of **proposed section 200AB** may define both what is, and what is not, a ‘benefit’.

Items 8–11 amend existing section 200A, mainly as a consequence of amendments contained elsewhere in the Bill. Section 200A sets out when a benefit is given in connection with retirement from an office.

Items 12–14 amend existing section 200B, which provides that retirement benefits generally need membership (or shareholder) approval. Under the amendments, shareholder approval will no longer be required under section 200E before a person receives a benefit in connection with that person’s (or another person’s) retirement from a company’s board. If the amendments are passed, then shareholder approval will only be required if a person is to receive a benefit in connection with the person’s (or another person’s) retirement from a ‘managerial or executive office’ in the company (or if the retiree held such a position during the last three years).²⁸

Items 14–18 make minor, consequential amendments to existing sections 200B and 200C.

Items 19–25 amend section 200E in relation to member approval of termination payments. **Item 19** repeals existing subsection 200E(1) and inserts **proposed subsections 200E(1), (1A) and (1B)**, setting out the conditions that must be satisfied for the purposes of sections 200B and 200C.²⁹ These conditions are as follows:

28. As mentioned earlier, section 200E deals with member approval of termination payments. Note that section 200E is the subject of amendments contained in **items 19–24** of Schedule 1 to the Bill.

29. As mentioned earlier, section 200B states that retirement benefits generally need membership approval, and section 200C states that benefits given on the transfer of an undertaking or property need membership approval. Two further conditions were included in the exposure draft of the Bill but were omitted in the current version of the Bill. These conditions were that a general meeting that considers such a resolution must not have been called for the sole or dominant purpose of passing the resolution, and that the retiree must have retired from the office or position before notice is given of a general meeting that is to consider such a resolution. See Exposure Draft: Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, item 18 (proposed subsections 200E(1C) and (1D)). Such additional conditions were the subject of adverse comment in submissions made on the exposure draft. See, for example, Australian Institute of Company Directors (AICD), *AICD says draft termination payments legislation is unworkable*, media release, 2 June 2009.

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- that the giving of the benefit needs to be approved by a resolution passed at a general meeting of the company,³⁰ and
- that the details of the proposed benefit must be set out in, or accompany, the notice of the meeting at which the resolution will be considered.³¹

For the purposes of section 200B (shareholder approval of retirement benefits generally), an additional condition must also be satisfied:

- that at the general meeting, a vote must not be cast (in any capacity) by or on behalf of the retiree or an associate of the retiree.³²

Proposed subsection 200E(2C) (item 22) states that the regulations may prescribe cases where proposed subsection 200E(2A) does not apply.

Items 25–32 amend section 200F of the Act, which deals with benefits to which section 200B does not apply. Largely the amendments are consequential upon other amendments contained in Schedule 1, however, **item 31** repeals existing subsections 200F(3) and (4) and inserts new provisions in their place. Section 200B does not apply if the value of a proposed benefit, when added to the value of any other payments made in connection with the person's retirement from a relevant office or position, is lower than the amount worked out using the formulae in **subsections 200F(3) and (4)**, whichever formula is applicable. **Proposed subsection 200F(3)** sets out the formula that must be used if the person held the position or office for less than a year (continuously or throughout a number of periods), and **proposed subsection 200F(4)** sets out the formula that must be used if the person held the position or office for more than one year.

The main difference between existing subsection 200F(3) and **proposed subsection 200F(3)** is that the formula in the existing provision is based on the retiree's total remuneration, whereas the formula in the proposed subsection is based on the person's '*estimated base annual salary*'. That term is defined in the subsection to mean '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 period had been one year'.

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30. In the case of a company that is a subsidiary of a listed domestic corporation, the resolution must be passed at a general meeting of the listed holding corporation, while in the case of an unlisted domestic corporation that is not a subsidiary of a domestic corporation, then the resolution must be passed at a general meeting of the holding company.
 31. If the proposed benefit is a payment, the details must include the amount of the payment, or (if such information cannot be ascertained at the time of disclosure); the manner in which it will be calculated and any matter than will, or is likely to affect the calculation of the amount; and otherwise the money value of the proposed benefit (or if such information is not available, then the manner in which it will be calculated etc).
 32. See **proposed subsection 200E(2A)**, which is to be inserted by **item 22** of Schedule 1 to the Bill.

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As mentioned immediately above, **proposed subsection 200F(4)** sets out the amount that applies if the person held the position or office for one year or more. The amount varies slightly, depending on the length of time the person held the office, however, it is essentially the person's average annual base salary. If the person held the office or position for three years or more, then the relevant amount is the person's average annual salary for the last three years of the period.

The practical effect of **proposed subsections 200F(3) and (4)** is that membership approval is not needed for a retirement benefit if the value or the benefit, when added to the value of all other benefits already made or payable in connection with the person's retirement does not exceed the person's annual base salary (or the relevant proportion thereof if the person held the office or position for less than one year). Where a person had held the office or position for more than three years, the revised formula in **proposed subsection 200F(4)** significantly reduces the threshold at which member approval of a termination payment is required.

Items 33–39 amend section 300G of the Act, which provides that shareholder approval is not required for a payment made in connection with a person's retirement from an office or position where the payment is for past services rendered to the company or related body corporate by the person, provided the value of the payment does not exceed the amount worked out under **proposed subsection 200G(2) or (3)**, whichever is applicable. **Proposed subsection 200G(2)** applies if the person held the office or position for less than one year, and **proposed subsection 200G(3)** applies in all other cases. The content of these provisions is the same as that in **proposed subsections 200F(3) and (4)**. That is, where a person received a termination payment for past services, member approval is not required where the person held the position for less than one year and the amount received is less than the relevant proportion of the person's estimated annual base salary. Where the person held the position for more than one year, the amount is worked out using the person's annual base salary (or an average annual base salary where the person worked for more than one year, limited to the last three years where the person held the position or office for three years or more).

Item 40 repeals existing subsection 200J(1) and replaces it with **proposed subsections 200J(1) and (1A)**. Section 200J currently provides that if giving a benefit to a person contravenes section 200B, then the amount of the payment, or the money value of the prescribed benefit is taken to be received by the person in trust for the company. If the amendments are passed, then the amount of the benefit, or the money value of the benefit, is taken to be received by the recipient on trust for the giver and must be immediately repaid. Under **proposed subsection 200J(1A)**, any amount repayable under **proposed subsection 200J(1)** is a debt due to the giver and may be recovered in a court of competent jurisdiction.

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Item 41 amends items 25, 26 and 27 in the table in Schedule 3 to the Act.³³ The amendment increases the penalty for breaches of subsections 200B(1) and 200C(1) and section 200D from 25 penalty units to 180 penalty units. As a ‘penalty unit’ is \$110,³⁴ the amendment increases the maximum possible fine from \$2750 to \$19 800. Such fine can be imposed on its own or in combination with a (maximum) term of six months’ imprisonment. As the Explanatory Memorandum for the Bill explains, the increase ‘is intended to reflect the seriousness of giving a termination benefit where it has not been approved by shareholders in accordance with the Act, and to provide a sufficient deterrent to such benefits’.³⁵ Obviously the deterrent effect will depend upon the quantum of the termination payment and the resources of the company or body corporate involved.

The Explanatory Memorandum also refers to an increase in the penalty units applicable to a body corporate for breach of sections 200B, 200C and 200D from 150 penalty units to 900 penalty units. While such an increase is not mentioned in the Bill, subsection 4B(3) of the *Crimes Act 1914* states that where a body corporate is convicted of an offence against a law of the Commonwealth, ‘the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence’. While five times the proposed penalty is 900 penalty units, five times the current penalty is only 125 and not the 150 penalty units mentioned in the Explanatory Memorandum as applying to body corporates.³⁶

All of the amendments in **Part 1** commence the day after the proposed Act receives Royal Assent.

Part 2—Other amendments and Part 3—Application

Item 42 amends paragraph 200F(1)(a), with effect immediately after the commencement of Part 1. Paragraph 200F(1)(a) currently provides an exception to the requirement that a proposed termination payment must receive shareholder approval, and applies where the benefit is given under an agreement entered into before 1 January 1991 or is a payment made in respect of leave of absence to which the person is entitled under an industrial instrument. Under the proposed amendment, paragraph 200F(1)(a) will refer only to a benefit payable in respect of leave of absence to which the person is entitled under an industrial instrument.

33. Schedule 3 sets out the penalties that apply to various provisions of the Act.

34. The term ‘penalty unit’ is defined in section 4AA of the *Crimes Act 1914* (Cth) as \$110.

35. Explanatory Memorandum, p. 15.

36. Explanatory Memorandum, op. cit.

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Given the short space of time between the commencement of Part 1 and the commencement of Part 2, it is not clear why this amendment was not made in Part 1, particularly when under **sub-item 43(3)**, paragraph 200F(1)(a) will continue to apply, in relation to agreements entered into before 1 January 1991, as if the amendment in **item 42** had not been made. The Explanatory Memorandum offers no assistance on this point.

Sub-item 43(1) provides that the amendments made by Part 1 apply in relation to a retirement from an office or position held under an agreement (or a condition of an agreement) entered into, varied or extended on or after the commencement of Part 1 (being the day after the proposed Act receives Royal Assent). Similarly, **sub-item 43(2)** provides that if the amendments in Part 1 apply to the a person's retirement from the holding of an office or position of employment, the relevant period for the purposes of section 200F or 200G applies to offices or positions held before the commencement of Part 1.

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