



## LEGAL ALERT

# CHANGES TO THE REGULATION OF RETIREMENT PAYMENTS TO EXECUTIVE EMPLOYEES

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On 24 November 2009 the *Corporations Amendment (Improving Accountability on Termination Payments) Act 2009* (“**the amendments**”) commenced operation.

The amendments make significant changes to the provisions of the *Corporations Act 2001* (“**Act**”) relating to termination payments to executive employees. The effect of the amendments is that a significantly larger number of payments now require shareholder approval.

### Key Changes

Pursuant to the Act, payments made or benefits given by a company to a person holding a managerial or executive office in a company in connection with that person’s retirement require shareholder approval.

The key changes to the Act made by the amendments are as follows:

#### 1. Who holds a “managerial or executive office”

The Act now applies to payments made to a person who holds a “*managerial or executive office*”. A person holds a managerial or executive office if the person is a director or has been a director at any time during the last 3 years.

A person also generally holds a managerial or executive office in a listed company if the person is:

- a key member of the management personnel of the company; or
- one of the 5 executives who received the highest remuneration in the company for that year.

Previously, the Act limited the requirement for shareholder approval to payments made to directors and persons who were directors during the previous 12 months.

#### 2. When is a “benefit” given

The amendments make clear that a ‘benefit’ given to an executive which requires shareholder approval includes:

- any legal or equitable estate or interest in real or personal property;
- a pension;
- a voluntary out of court settlement relating to termination;
- payments made as a part of a restrictive covenant, restraint of trade or non-compete clause;
- in respect of share-based payments, the accelerated or automatic vesting of such payments upon termination; and
- payment in lieu of notice of termination.

However, the amendments also provide that the following are generally *not* benefits and therefore do not require shareholder approval:

- payment of a “deferred bonus”. A deferred bonus is an amount or property that is earned, accrued or allocated to an executive before retirement and which is not taken during the executive’s employment.

- genuine superannuation payments made by an employer or employee;
- genuine accrued benefits that are required by law to be paid;
- a genuine redundancy payment which is paid in accordance with company policy; and
- payment made in respect of leave of absence to which the executive is entitled under an industrial instrument.

### 3. Obtaining shareholder approval for payments

As a result of the amendments, when shareholder approval is obtained for retirement payments to executives, a vote on the resolution must not be cast (in any capacity) by or on behalf of the executive himself or by an associate of the executive.

### 4. Maximum payment not requiring shareholder approval

Shareholder approval is not ordinarily required if the total amount of the payments made to the executive upon termination do not exceed the prescribed maximum amount.

The prescribed maximum amount depends on how long the executive has held the office. However, if the executive has held the office for over 1 year, the amount is effectively the executive's average annual base salary.

Prior to the amendments, the prescribed maximum amount was up to 7 times the executive's annual salary depending on the executive's length of service.

### 5. Consequences for non-compliance

If a company provides a payment to an executive without obtaining shareholder approval, the executive must immediately repay the amount to the company.

Further, failure to seek shareholder approval as required is a criminal offence and carries with it a penalty for the company of \$99,000 if a body corporate or \$19,800 for an individual; or 6 months imprisonment or both.

### What should companies do as a result of the amendments?

If a board is contemplating making a payment to a director or executive employee in any way connected that person's retirement or termination, the provisions of the Act will need to be considered in determining whether shareholder approval is required.

It is also important to ensure that the structuring of these payments in executive service agreements complies with the Act.

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