

**EXPLANATORY STATEMENT**  
**SELECT LEGISLATIVE INSTRUMENT 2009 NO.**

**Issued by authority of the Minister for Financial Services, Superannuation and Corporate  
Law**

*Corporations Act 2001*

*Corporations Amendment Regulations 2009 (No. )*

Subsection 1364(1) of the *Corporations Act 2001* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by regulations, or necessary or convenient to be prescribed by such regulations for carrying out or giving effect to the Act.

Division 2, Part 2D.2 of the Act sets out the regulatory framework regarding termination payments to company directors and executives.

Regulations in this area allows for flexibility to respond to an environment in which executive remuneration conditions and allowances rapidly change and evolve. The Regulations will offer guidance and certainty.

Section 9 of the Act sets definitions relevant to Division 2. It provides that 'base salary' has the meaning specified in the Regulations made for the purposes of this definition. The elements of remuneration that base salary will be composed of are detailed in the Regulation.

Section 200AB sets out the meaning of 'benefit' for the purposes of Division 2. Paragraph 200AB(1)(e) provides that any other payment specified in regulations for the purposes of this paragraph is to be included as a 'benefit'. There is currently some legal ambiguity as to whether certain types of payments are considered to be a termination benefit requiring shareholder approval. The Regulation provides a non-exhaustive list of specific examples of payments that would require shareholder approval.

Subsection 200AB(2) provides that a benefit does not include a thing specified in Regulations made for the purposes of this subsection. The Regulation provides a non-exhaustive list of specific examples of payments that would not require shareholder approval.

Section 200A in Division 2 sets out when a benefit is given in connection with retirement from office. Subsection 200A(1A) provides that 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.

Details of the Regulations are set out in the Attachment.

Under the *Corporations Agreement 2002*, the Commonwealth must consult with and obtain the approval of the Ministerial Council for Corporations before making amendments to certain provisions of the Corporations Regulations. *The Council was consulted and have approved the amendments and waived the period of public consultation, given the extensive consultation already undertaken. [Approval process currently underway]*

An earlier version of the Regulations was exposed for a four week public consultation along with the exposure Bill, ending on 2 June 2009. 31 stakeholders made submissions.

Following that, a revised draft of the Regulations, addressing the issues raised through the initial consultation, was released for further, targeted consultation for a period of 10 days, ending on 6 August 2009. 15 stakeholders provided comments. The draft legislation, together with a commentary on the draft was provided to each stakeholder by email. Targeted parties included industry representative groups, such as the Australian Institute of Company Directors (AICD), Chartered Secretaries Australia (CSA) and Australian Banker Association (ABA), as well as companies affected by the Regulations, such as Macquarie Group, Rio Tinto and Origin Energy.

Views were generally supportive of the intent of the Regulations and several technical aspects were addressed in the final Regulations.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

**Details of the Corporations Amendment Regulations 2009 (No.)**

**Regulation 1 – Name of Regulations**

This Regulation provides that the name of the Regulations is the *Corporations Amendment Regulations 2009 (No. )*.

**Regulation 2 – Commencement**

This Regulation provides that the Regulations commence on the day after they are registered.

**Regulation 3 – Amendment of *Corporations Regulations 2001***

This Regulation provides that Schedule 1 of the Regulations amends the *Corporations Regulations 2001* (the Principal Regulations).

**Schedule 1**

**Item [1] – Chapter 2D, before Part 2D.6**

Item [1] inserts new Regulations 2D.2.01, 2D.2.02 and 2D.2.03 in the Principal Regulations.

Regulation 2D.2.01 provides a definition of base salary in section 9 of the Act.

Given the fluidity of the definition of ‘base salary’ in application, this allows flexibility for the law to respond to an environment of rapid change and ongoing developments.

The regulation specifies that ‘base salary’ is the components of short-term employee benefits paid during the relevant period, specified in paragraphs (a), (c) and (d) of column 3 of item 6 in subregulation 2M.3.03(1).

Included in base salary is any superannuation contribution that is paid during the relevant period. Also included in base salary are any share based payments that are paid during the relevant period and specified in column 3 of item 11 in subregulation 2M.3.03(1). Additionally, any liability or prospective liability to tax in respect of a fringe benefit taxable amount under the Fringe Benefits Tax Assessment Act 1986 and the Fringe Benefits Tax 1986 relating to the provision of any benefit within the definition of base salary is captured in the Regulation.

The components of short-term employee benefits, superannuation contributions and share based payments included in base salary are not dependent on the satisfaction of a performance condition. The definition of base salary is essentially made up of fixed remuneration. In the case of superannuation contributions and share based payments, this means that they would have been captured in paragraphs (a), (c) and (d) of column 3 of item 6 in subregulation 2M.3.03(1) if they had been paid as a short-term employee benefit.

For this definition of base salary, the relevant period is the last 12 months of service if the person has held the office or position for more than 12 months. Alternatively, if the person has held the office or position for 12 months, the relevant period will be that 12 months of service. If the person has held the office or position for less than 12 months, the relevant period is a pro-rated according to the length of service.

The components of base salary set out in the Regulation are required to be calculated in accordance with the accounting standards.

Subregulation 2D.2.02(1) prescribes the types of payments that are included as a benefit and therefore, subject to shareholder vote. This includes payments made from any kind of pension, except pensions paid from a superannuation fund or superannuation annuity, regardless of whether it is paid from an Australian or foreign fund. Also included are any amounts paid as a voluntary out of court settlement in connection with the termination of employment. This is where legal proceedings have commenced for breach of contract in relation to the termination of employment, however, does not include other types of actions including those relating to unfair dismissal, harassment or discrimination. Additionally, any payments made as part of a restrictive covenant, restraint of trade or non-compete clause are considered a benefit which requires shareholder approval when the payment exceeds the threshold in section 200G of the Act, either on its own or when added to other benefits payable.

Subregulation 2D.2.02 (2) prescribes the types of payments that are not included as a benefit and therefore, not subject to shareholder vote. A deferred bonus as defined in the Regulation for these purposes, including the release of a deferred bonus from a restriction due to death or incapacity, the investment of the deferred bonus or another change to the value of the deferred bonus is not included as a benefit. The definition of a deferred bonus includes any amount or property earned by, accrued by or allocated to a person, relating to performance up to the point of termination, but is not paid, provided or released to the person at the time at which it is earned, accrued or allocated. This includes both cash and long term incentive bonuses.

Also not included as a benefit are payments from a defined benefits superannuation scheme that is already in existence prior to the Regulations commencing; genuine accrued benefits that are payable under law; payments required by law of a foreign country; and payments from a prescribed superannuation fund due to death or incapacity.

Genuine superannuation contributions that are paid by an employer or employee on or after the Regulation commences are not regarded as a benefit. Ultimately, the courts will determine whether certain types of superannuation contributions are genuine. However, it is reasonable to expect that contributions made from base salary as part of a salary sacrifice arrangement would be considered genuine. In addition, contributions made by employers relating to their obligations under the Superannuation Guarantee (Administration) Act 1992 would also be considered genuine. The Regulations are not intended to capture earnings on genuine superannuation contributions.

Additionally, reasonable payments that are consistent with those made payable to all employees in the company purely on the basis of length of service and relating to genuine redundancy, are not regarded as a benefit. Generally, a payment of a maximum of two weeks per year of service could be regarded as a reasonable amount.

Regulation 2D.2.03 prescribes circumstances where a benefit is given in connection with retirement from an office or position and therefore, subject to a shareholder vote. This includes circumstances where share based payments are accelerated or automatically vested at or due to retirement. Circumstances where payments are made in lieu of giving a notice of termination are also included in the Regulation.

Also prescribed in the Regulation is the treatment of a deferred bonus that is subject to automatic or accelerated vesting of share based payments. In this situation, a deferred bonus will be subject to shareholder approval, except where the deferred bonus is released from a restriction because of death or incapacity.