

# Executive and director termination payments: final regulations

September 10, 2009

On 3rd September, the Australian government released the draft regulations and explanatory material to accompany the proposed legislation relating to the reform of termination payments. We have described the proposed changes and detailed our concerns in previous articles that can be found [HERE](#), [HERE](#) and [HERE](#).

The draft regulations define 'base salary' essentially as fixed remuneration. The relevant period for the definition is the last 12 months of service if the person has held the office or position for more than 12 months. 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 pro-rated according to the length of service. Despite the criticisms contained in responses from various parties during the consultation period, the harshness of approach to those terminated with less than 12 months' service has not been addressed.

What constitutes a 'benefit in connection with a person's retirement from an office, or position of employment, in a company' is defined broadly and includes:

- Payments from any kind of pension, except payments paid from a superannuation fund or superannuation annuity;
- Amounts paid as a voluntary out of court settlement in connection with the termination of employment (but not including those relating to unfair dismissal, harassment or discrimination)
- Payments made as part of a restrictive covenant, restraint of trade or non-compete clause.

The regulations also prescribe the types of payments that are not

included as a 'benefit' and therefore are not subject to a shareholder vote. These include:

- Payments from a defined benefits superannuation scheme that was already in existence prior to the regulations commencing. Despite the suggestion contained in our submissions regarding the wording of this element, it remains unchanged and would not seem to preclude the transfer of new members into a defined benefit superannuation fund;
- Genuine accrued benefits that are payable under law (such as annual leave or long service leave);
- Payments required by law of a foreign country;
- Reasonable payments that are consistent with those payable to all employees in the company purely on the basis of length of service and relating to genuine redundancy;
- Genuine superannuation contributions that are paid by an employer or employee on or after the Regulation commences are not regarded as a benefit. The explanatory statement notes that it is reasonable to expect that contributions made from base salary as part of a salary sacrifice arrangement would be considered genuine, as would contributions made by employers relating to their obligations under the Superannuation Guarantee (Administration) Act 1992. The Regulations are not intended to capture earnings on genuine superannuation contributions.
- Payments from a prescribed superannuation fund due to death or incapacity; and
- A deferred bonus (defined to include an amount or property earned by, accrued by or allocated to a person, relating to performance up to the point of termination, but not paid, provided or released to the person at the time at which it is earned, accrued or allocated) including one attributable to:
  - 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.

While there are some circumstances in which a deferred bonus is not to be counted as a termination benefit, draft Regulation 2D.2.03(2) specifies that shareholder approval is required if the benefit is a deferred bonus in the form of a share based payment that is automatically vested or accelerated on retirement (other than on death or incapacity) and exceeds the new one-times base salary payment limit set under the proposed new section 200G of the Act.

Interestingly, the explanatory statement notes that the definition of deferred bonus “includes both cash and long term incentive bonuses”, seemingly implying that they are two different categories and that long-term incentives could not be cash based.