EXECUTIVE EMPLOYMENT CONTRACTS - COMPLIANCE AND RISK ISSUES

GUIDANCE FOR BOARDS AND SENIOR EXECUTIVES IN AUSTRALIA

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PART 1: INTRODUCTION

The employment of key people in an organisation, particularly senior executives, is critical for any employer.

An “executive” employee can be any individual who performs managerial functions, ranging from junior managers with minor managerial duties to chief executive officers of major listed private companies or senior executives in the public sector.

The knowledge and skill possessed by an executive make them highly valuable to their employer. In turn, in order to perform their roles, executives are generally entrusted with commercially sensitive and confidential information, have access to considerable valuable intellectual property and can command generous remuneration packages.

That’s why it’s important for employers to be aware of the various employment issues that are unique to executives.

While our focus is on the employment of executives in the private sector, much of the content and issues raised apply equally to executives employed in the public sector; we have also dealt with some of the issues specific to that sector.

There are a number of sources of regulation that impact on the employment of executives in the private sector, which increases the complexity of issues that can arise in their employment. These sources not only include the employment contract and the Fair Work Act 2009 (Cth), but also aspects of the Corporations Act 2001 (Cth) and legislation specific to public sector employment.

Employers and Boards need to be familiar with these forms of regulation and should understand how they impact on all aspects of an executive’s employment, from negotiating contractual terms to termination of employment, and the importance of obtaining early strategic advice.
This Guidance provides an overview of the key employment issues that must be considered when dealing with executives, including:

► key contractual terms;
► termination issues;
► negotiating settlements; and
► litigation risks.

This Guidance is intended to provide general information, practical tips and checklists to help employers when managing the employment and termination of employment of executives. It is important to note, however, that the contents of this Guidance do not constitute legal advice and should not be relied upon as a substitute for detailed legal advice.

PART 2: ENGAGEMENT AND RECRUITMENT ISSUES

A number of key compliance issues arise during the recruitment and engagement process which should be considered before entering into an employment contract.

Discrimination

It is unlawful under both Federal and State discrimination law to offer (or not offer) employment or to offer employment on particular terms and conditions, because of a range of protected attributes, including but not limited to gender, age, race and parental or carers’ responsibilities.

Further, in most jurisdictions it is unlawful to request or require information from a candidate during a recruitment process that could be used as a basis for unlawful discrimination.

Recruitment questions and decision-making should be based upon and tied to the candidate’s capacity to perform the requirements of the role as an executive of the employer, rather than extraneous considerations.

Pre-employment medical testing, and/or relying on the outcome of any such testing in making decisions about a candidate’s suitability for employment, will also likely leave you significantly exposed to unlawful discrimination claims, unless the medical testing is related to the particular requirements of the employment.

Privacy

The Privacy Act 1988 (Cth) imposes obligations on most public and private sector employers to deal with personal information in accordance with the Australian Privacy Principles.\(^1\)

Additionally, privacy legislation in each State (both general and health information specific) apply to public sector organisations and regulate the collection, use and storage of personal information.

The Privacy Act contains a broad exception for “employee records”. However, this exception does not apply to candidates who are not then employed. Accordingly, the collection, use and storage of personal information during the recruitment process should be treated in accordance with applicable privacy laws.

\(^1\) The Australian Privacy Principles replaced the Information Privacy Principles and the National Privacy Principles on 12 March 2014. The former Principles now only apply to acts or practices that occurred before 12 March 2014.
with the relevant Australian Privacy Principles and/or any applicable privacy policy of the organisation.

Employers should be aware that notes taken during a job interview of an unsuccessful candidate can be lawfully accessed by the candidate, so you should take the appropriate care in making any notes to ensure that they could not form the basis of a potential unlawful discrimination claim.

Misleading and deceptive conduct

During the executive recruitment process it is common for discussions to occur about future matters, including the length of employment, the likelihood of a successful career at the organisation, and opportunities for progression/promotion and entitlements, including contingent entitlements such as bonuses and discretionary payments.

Significant care needs to be taken to ensure that statements and representations made during any discussions about future matters are truthful and there are reasonable grounds for making them.

It is generally accepted that representations in the course of negotiations, entering into or varying an employment contract can constitute representations made “in trade or commerce”, and under section 18 of the Australian Consumer Law (which forms part of the Competition and Consumer Act 2010 (Cth)) it is unlawful to engage in misleading and deceptive conduct in trade or commerce.

Making a representation that an employer knows to be untrue, or making a representation with reckless disregard for whether it is true or false, will constitute misleading and deceptive conduct.

Representations about future matters will be taken to be misleading unless the employer has reasonable grounds for making the representation and the employer shows acceptable evidence to the contrary.

The upshot is that an employer should not over-promise or guarantee outcomes, length of employment/career entitlements to bonuses and incentives as part of the recruitment process.

PART 3: KEY CONTRACTUAL TERMS FOR EXECUTIVES

The employment contract is one of the key sources of regulation applicable to an executive, so it’s important to have a well drafted executive employment contract that clearly identifies rights and obligations, both of the employer and the executive. This will create certainty for both parties and help to prevent or minimise any disputes, or breaches of any statutory provisions.

This Part outlines the key contractual terms which should be included in any executive employment contract, and the implied contractual duties that apply to employers and executives.

A word of warning...

There is often a tendency to rely on boilerplate provisions for standard terms such as the choice of applicable law, the jurisdiction in which the contract can be enforced, variation of the executive employment contract, and “entire agreement” provisions.

You should carefully consider the use of boilerplate provisions in drafting any executive employment contract, as they may not be appropriate in your specific circumstances, or those of the executive, and a different approach may be warranted.

You should seek advice in preparing executive employment contracts.

The purpose of an executive employment contract

The primary purposes of an executive employment contract are to:
► convey information about the terms and conditions of employment;
► provide clarity to both the employer and employee about their rights and obligations;
► exclude any unwanted terms which may otherwise be implied;
► facilitate executive performance (and in many cases create mechanisms to measure and encourage improved or higher performance); and
► protect the legal interests of both parties, particularly in the termination of employment and its consequences.
**Position and duties**

The executive's role and the nature of the duties that he or she will be required to perform in that role should be expressly outlined in the employment contract. This is important because it provides the basis for, and scope of, the employer’s rights to direct the executive to carry out the executive’s duties and obligations.

The terms specifying appointment to a particular position and the relevant duties should be drafted to provide employers with a broad discretion to vary them at any time during the life of the employment contract. This may be achieved, for example, by stipulating that the executive is to be appointed to such position as the Board allocates, and from time to time, to carry out such other duties and functions as the employer (either via the Board or a specific executive, such as the CEO) may allocate to the executive. To provide flexibility, the term should also specify that the duties outlined in the contract are not exhaustive and are subject to variation.

In order to provide maximum flexibility, you should also consider including a provision that enables you to change the executive’s title, reporting lines, role and responsibilities, while maintaining the executive’s remuneration.

**Location and mobility**

Where the executive will be located throughout the term of employment should be outlined in the employment contract.

Importantly, if there is a possibility that the executive will be transferred (either interstate or internationally) to other offices, this should be reflected by a term in the contract giving you the flexibility to direct the executive to perform their duties at locations other than the primary location specified in the contract.

There should also be a reference in the executive employment contract to any established policies that are relevant to the transfer of employees.

Specialist advice should be obtained for all immigration and relocation issues.

**Hours of work**

Under the Fair Work Act, an employee’s maximum ordinary weekly working hours must not exceed 38 hours plus “reasonable additional hours”.

An executive’s working hours in accordance with the relevant legislation should be specified in the employment contract, even though executives will often work longer hours. If they aren’t, this may impact on the calculation of the executive’s entitlements (including their leave entitlements).

The term should, for example, provide that the executive’s hours of work are such hours as are reasonably necessary for the executive to perform all of their duties and functions with the requisite level of attention and skill.

In addition, the contract should reflect that the remuneration under the contract has been calculated to adequately compensate the executive for any “reasonable additional hours” they may work.

**Remuneration and other benefits**

The employment contract should contain a term specifying the components of the executive’s remuneration package.

The components that make up the executive’s remuneration package will include salary and superannuation, and may also include benefits such as bonuses or incentives (including in the form of employee share options or schemes), the provision of a mobile phone or company vehicle and other incidental forms of remuneration (such as salary sacrifice).

To avoid any uncertainty or potential disputes about remuneration, the following matters should be included in the applicable terms:

► any key performance indicators or formulae used to determine the quantum of remuneration to be paid;
► the incidence of payment (ie. weekly, monthly or fortnightly);
► how payment is to be made;
► whether certain payments (ie. bonuses, incentives, commission) are discretionary or obligatory;
► when and how performance reviews, which link to salary increases, are conducted; and
► what the superannuable salary is or how superannuation is calculated.

When determining remuneration and other benefits, it is also important to be aware of the executive’s rights under the Fair Work Act, any applicable award or enterprise agreement, relevant internal policies and other relevant legislation (such as the Corporations Act, which is discussed in more detail below).
It is unlikely that there will be an applicable award or enterprise agreement in most cases, but there are some industries where industrial instruments cover executives (including banking, finance, higher education and in the public sector).

As it’s a financial benefit, an executive’s remuneration may also be subject to shareholder approval under the Corporations Act.

The Corporations Act may not require shareholder approval where the remuneration to be provided to the executive employed by a public company (or an entity that controls/is controlled by the public company or is controlled by an entity that controls the public company) is reasonable, given the circumstances of the employing company and the executive. It is recommended that external independent remuneration benchmarking and data can be sought when considering this requirement, and that the company appropriately documents these considerations.

An executive’s remuneration may also extend to entitlements to participate in employee share schemes and/or option schemes, particularly for listed entities. These incentives are subject to specific regulation under the Corporations Act (including disclosure obligations about employee share schemes and options). You should seek expert advice before implementing these forms of remuneration.

We note that conditional relief has recently been provided for employers (either a listed or unlisted company) so that they are no longer required to comply with the disclosure and licensing provisions of the Corporations Act for offers of shares or interests in a scheme if the employee scheme is an “eligible product” and is given to an “eligible participant”. The change was instigated to remove the burden on employers where financial products are made available and to promote an ongoing relationship between the employer and employee. Employers are therefore able to further incentivise good relations with an executive through, for example, an employee share scheme as a performance bonus or as part of the executive’s remuneration.

There are other considerations arising from the Corporations Act, which we look at in more detail below.

- Given the complexity of executive remuneration structures, you should consult an independent expert in remuneration and benefits about:
  - the level of remuneration to be paid to the executive under the employment contract, having regard to the position and market considerations; and
  - the structure of the package, including options such as employee share schemes and other benefits; and
  - quality financial and taxation advice.

**Policies**

An executive (like other employees) will be expected to comply with policies that the employer has in place from time to time.

There are differing views about incorporating policies into an executive’s employment contract and the legal implications of doing so, so you should think carefully before deciding whether or not to incorporate policies into an executive’s employment contract.

Whether or not a policy is incorporated into the executive’s employment contract, the case law suggests that the courts and tribunals will expect reciprocity from an employer – if an employee is required to comply with a policy, including the mandatory aspects of that content, this is something that may also be enforced against the employer.

While there have been many cases on this point, the potential for the employer’s breach of policy to be repudiation of the employment contract has recently been considered in Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCAFC 177. In that case the Full Federal Court found the failure to conduct an investigation in accordance with the employer’s discrimination policy was a breach of contract by the employer. A single judge of the Federal Court will now determine what damages should be awarded and whether the breach constituted a repudiation of the entire contract.

This should also be considered carefully, having particular regard to the content of the employer’s policies and the obligations that they may impose under the executive’s contract of employment.

**Termination provisions**

In many respects the termination provisions of an executive employment contract are the most critical provisions, particularly if the employment relationship has broken down and the parties are looking to enforce their legal rights, rather than continue the employment relationship.

An executive’s employment may be terminated by giving notice in accordance with an express notice provision in an employment contract,
which must not be less than the minimum requirements under the relevant legislation (the legislation will operate to override the contractual provision if it does not meet the minimum requirements).

If there is no express contractual provision, the common law implied term of “reasonable notice” will apply. Learn more about what constitutes “reasonable notice” in Part 4.

In order to minimise the risk of a “reasonable notice” claim, and to provide certainty for the employer and the executive on termination of the executive’s employment, you should include an express notice of termination provision in the executive’s employment contract. In drafting that provision, you should consider the appropriate length of notice period in light of, amongst other things, the nature and seniority of the position to be held by the executive.

Termination provisions of the employment contract should also provide a right for the employer to summarily terminate the executive’s employment without notice (or payment in lieu) on grounds of serious misconduct. This would commonly include wilful or significant breach of the terms of the employment contract, dishonesty, fraud and wilfully engaging in conduct that brings the company/employer into disrepute.

Where an executive’s employment is terminated by reason of redundancy of the executive’s position, the executive will be entitled to a severance payment in accordance with the relevant legislation in addition to notice, unless the employment contract provides for severance otherwise (which must not be less than the minimum requirements under the relevant legislation).

Traditionally, executives would get a notice period greater than the statutory minimum period, partly to ensure business continuity and protection, but also as compensation for the fact that the executive's position could be terminated, including for redundancy, without further payment.

Given the introduction of severance benefits by the Fair Work Act, where an executive’s notice exceeds the statutory minimum, you should consider incorporating an offset term in the employment contract to provide that any redundancy payment required to be paid by law may be offset against a payment in lieu of notice.

**Gardening leave**

A gardening leave term should be included when executive employment contracts are prepared at the commencement of the employment relationship, or when they are reviewed during the course of the relationship.

Learn more in Part 5.

**Protecting your business**

There are many aspects of the business which require protection from adverse consequences arising as a result of certain conduct by an executive.

Employers should therefore incorporate a range of terms into executive employment contracts which are designed to protect the various interests of the business during and after the executive’s period of employment.

**Conflicts of interest**

Given the nature and seniority of executives, particularly in managing a business, it is important to ensure that executives do not engage in conduct that may give rise to a conflict of interest.

A term specifying that the executive must not act in conflict with the employer’s best interest should be included in all executive employment contracts. It should also stipulate that an executive must disclose any conflict of interest and must not allow a conflict of interest to continue once it is discovered.

The contract should also require the executive to obtain the prior written consent of the employer before taking up a Board position (public or private).

**Secondary employment**

An exclusive service term aims to prevent the executive, without prior written approval, from undertaking secondary employment where such employment would have an adverse impact on the employer’s business.

To protect your interests, include a term in the employment contract which requires the executive to provide exclusive service to you, and to devote their entire time and attention to performance of their role, unless the executive has the prior written consent from you.
The term should prevent the executive from being engaged (either during or outside of work time), in any capacity, by another business if this engagement would either:

► compete/conflict with your business; or
► interfere with the executive’s ability to properly perform their duties.

**Protection of confidential information and intellectual property**

As executives are generally privy to confidential information and have access to substantial intellectual property during their employment, you should include a term in executive employment contracts to protect the business from misuse of these intangible assets.

The term should be drafted in such a way that it asserts ownership of the confidential information and the intellectual property. It should also impose an obligation on the executive not to disclose, use or produce the confidential information or intellectual property for any purpose outside the ambit of their employment, without the prior express consent of the executive’s employer.

Learn more in Part 4.

**Restraint of trade**

You should consider including a restraint of trade clause; an effective restraint of trade clause will prohibit the executive from soliciting their employer’s clients, customers, suppliers and employees for a period and within a specified geographical area after the executive’s employment has come to an end.

Critically, if you do decide to include it, the clause must be carefully drafted to ensure that it is reasonable. This is very important as post-employment restraints will otherwise be unenforceable and are notoriously difficult to enforce against former employees.

Learn more in Part 4.

**Requirements under the Corporations Act and ASX Listing Rules**

When negotiating and preparing executive employment contracts, it is critical that public companies are aware of the restrictions imposed by the Corporations Act and the ASX Listing Rules on the payment of certain termination benefits to directors and some executives.

The Corporations Act restricts the giving of benefits that are greater than one year’s base salary in connection with an employee’s retirement from a board or managerial office, unless there is shareholder approval.

The concept of “retirement” is broadly defined and includes a loss of office and resignation.

Likewise, the benefits captured by these provisions are also very broad, including payments and other valuable consideration, property and advantages that are receivable on termination of employment. Other deemed benefits include amounts paid in connection with an out-of-court settlement in a termination of employment and payments made under restraint of trade clauses.

**Who do these restrictions apply to?**

These restrictions apply to any employee who holds a “managerial or executive office” within a company or related body corporate of that company. For example, the restrictions will cover:

► anyone who has been a director of a company at any time over the previous three years; and
► for listed companies, key members of management and/or the five highest paid executives over a 12-month period.

**Termination payments under the executive employment contract**

The provisions of the Corporations Act have wide application and extend to, among other things, the giving of a benefit that must be provided under an employment contract.

This can present difficulties for employers where an executive’s employment contract provides for the conferral of a termination benefit. For example, while a contractual agreement to provide a termination benefit without shareholder approval is not unlawful in itself, payment and receipt of such a benefit pursuant to the contract may contravene the Corporations Act.

However, if an executive is contractually entitled to a termination benefit and the employer does not pay it so as to avoid breaching the Corporations Act, the employer may then be at risk of being in breach of the executive’s
employment contract. This emphasises the critical importance for employers of complying with these obligations.

**Restrictions imposed on public companies by the ASX Listing Rules**

Public companies must also comply with the ASX Listing Rules. Under these Rules, a listed company is obliged to ensure that no officer will be entitled to a termination benefit if a change occurs in the shareholding or control of the company.

The practical effect is that although employers of listed companies may provide for termination benefits in employment contracts in various circumstances, payment of termination benefits when a change in the shareholding or control of the company has occurred is strictly prohibited.

**What should employers do?**

In light of the complexity of these requirements listed, employers should be extremely careful when preparing executive employment contracts, modifying existing contracts or providing termination benefits and, in addition, should seek advice about the potential application of these requirements in any situation involving an executive.

The likelihood of disputes or unlawful termination payments can be significantly reduced through careful drafting of executive employment contracts. For example, a term could be incorporated which provides that the employer’s performance of the contract is subject to its compliance with the Corporations Act and ASX Listing Rules. It is therefore important to deal with these requirements up front when negotiating and preparing executive employment contracts.

Learn more in Part 4.

**Implied duties**

In addition to the express duties that are outlined in the terms of the executive employment contract, you must be aware of the implied duties that apply to all employees (including executives) and employers.

Implied duties derive from “implied terms”, which are terms that are not written into a contract but may be implied into the contract either as a question of fact or as a matter of law.

**Employees’ implied duties**

As a matter of law, all executives have an implied duty to:

- A. obey all lawful and reasonable directions;
- B. exercise reasonable care and skill; and
- C. observe good faith and fidelity towards the employer.

**A. Duty to obey all lawful and reasonable direction**

An employer has the power to give directions to an executive and to expect the executive to follow those directions. However, an employer’s directions must be “lawful and reasonable”. Certainly, an executive is not required to obey an employer’s direction if that would require him or her to engage in unlawful conduct, or if the direction is unreasonable.

Whether an employer’s direction is “reasonable” will depend upon the scope of the services that the executive has been engaged to complete. This may be a matter of express agreement, or may be inferred from the executive’s engagement in a specific capacity. In addition, this obligation may be affected by the particular terms of the executive contract.

**B. Duty to exercise reasonable care and skill**

The common law has implied a duty that an executive be “able to and will exercise reasonable care and skill in carrying out his or her duties”. As such, executives are expected to perform according to the standard of skill and competence that can be reasonably expected of someone with their experience and training.

**C. Duty to observe good faith and fidelity towards the employer**

It has been long acknowledged that executives owe duties of good faith and fidelity to their employers. These duties are manifested in a number of terms ordinarily implied into employment contracts. Aspects of these duties include:

**A duty not to compete:** During his or her employment an executive has a duty not to solicit an employer’s customers for the purpose of competing with his or her employer. Whether an executive is in breach of this duty will depend upon the circumstances of the case, including whether the nature of the work is similar to the work being done for the employer, and is undertaken with or without the employer’s knowledge.
Executives are encouraged to obtain express and informed consent from their employers before seeking to undertake any outside business ventures.

**Unauthorised use of the employer’s property:** Executives must preserve an employer’s property interests and must not exploit an employer’s property (including intellectual property such as customer lists) for personal gain without express and informed consent from the employer. Where an executive leaves his or her employment and remembers certain customer details, he or she would generally be permitted to use that information, provided that information is not confidential information of the employer and the executive is not limited by a relevant post-employment restraint.

An employer’s property includes intellectual property rights created by the executive in the course of their employment. This means that patentable inventions, copyright works, trademarks and designs created in the course of work will generally all belong to the employer. Where intellectual property rights are found to belong to an employer, an executive will not be permitted to exploit that intellectual property in future employment.

**Misuse of confidential information:** An executive is under a duty to protect an employer’s secrets, both during and beyond the employment relationship. However, this duty only applies to genuinely confidential information and does not include all knowledge, skill, experience or information that an executive gains in the course of employment. Where information is of a genuinely confidential nature, an executive may be prevented from divulging that information after termination of the employment contract.

**Is there a mutual obligation of trust and confidence?** Until recently, there was a degree of uncertainty about whether Australian law recognised and implied into employment contracts a duty of mutual trust and confidence. The High Court decision of Commonwealth Bank of Australia v Barker [2014] HCA 32 recently ruled that such a duty should not be implied in contracts of employment. Similar obligations may however still arise through express terms in an employment contract and/or employer policies and procedures that are incorporated into an employment contract.

**Employers’ implied duties**

Employers have an implied duty of reasonable care requiring them to take care as to the safety of their executives’ work environment. There are three common aspects of this duty:

► the provision of competent staff;

► the provision of adequate material and a safe system of work; and

► proper and effective supervision.

While the High Court has confirmed that there is no separate and distinct implied mutual obligation of trust and confidence in Australian employment contracts (as identified above), an employer’s obligation to act fairly and reasonably towards its executives could arise through policies and procedures that are expressly incorporated into the employment contract and provide process protections, or through other recognised implied duties, such as the duty to provide a safe system of work.

**Other terms required by law**

While the above are key critical terms to consider and include in any executive employment contract, it is also important to include a number of other standard terms in an employment contract.

These include terms of entitlements that are provided to executives under the National Employment Standards of the Fair Work Act and other legislation, such as annual leave, long service leave, personal leave, sick leave, paid parental leave, public holidays and superannuation.

It is also important to be aware of the various implied contractual duties that apply and we often recommend also either expressly including those duties or in some cases, expressly excluding them.

**Public sector employment**

Public sector employers may have additional regulatory requirements that must be complied with for executive appointments and the terms and conditions of employment of those executives.

The Commonwealth and each State and Territory have specific legislation for public sector employment:

► Public Service Act 1999 (Cth);

► Public Sector Employment and Management Act 2002 (NSW);

► Public Administration Act 2004 (Vic);

► Public Service Act 2008 (Qld);

► Public Sector Act 2009 (SA);

► Public Sector Management Act 1994 (WA);
State Service Act 2000 (Tas);
Public Sector Management Act 1994 (ACT); and
Public Sector Employment and Management Act 1993 (NT).

In addition to the obligations of executive appointments and terms and conditions of employment, this legislation (and any subordinate legislation and/or guidelines) also commonly places additional obligations on employers for disciplinary matters and termination of employment. These include, but are not limited to, mandating specific procedural steps for disciplining or terminating the employment of a public sector employee.

There will also be the question of which is the appropriate employing authority, and whether those making decisions about the employment of an executive have the appropriate delegations and authorisations to do so.

Finally, the above list of legislation is not exhaustive. “Public sector” is a concept that can be used in a broader context and may also be taken to include, by way of example, local government, statutory authorities, and Government Owned Corporations that are established under separate legislation and have their own specific regulatory requirements for the appointment of senior employees, including executives.

Executive employment obligations must therefore be considered in light of the specific legislation that may apply to them.

We strongly recommend that employers obtain specialist advice about these obligations.

PART 4: TERMINATION ISSUES

Managing the termination of employment of executives is a difficult task which often gives rise to a number of complex issues for employers to consider. In this part we’ll provide general guidance on the following issues which commonly complicate the process of terminating an executive’s employment:

- termination with notice;
- restraint of trade clauses;
- protection of confidential information;
- resignation, retirement, removal of directors and the Corporations Act; and
- public statements.

As will become obvious, however, the termination of an executive’s employment can be a complex task, involving navigating a myriad of legal and procedural issues. Legal advice before and during this process is imperative.

General tips

From the outset, there are a number of general tips that employers should take into account when terminating the employment of an executive.

Employer to ensure contractual obligations are met

Former employees can lodge a common law claim against their employer on the basis that the employer has breached a term of the employee’s contract.

Although a common law claim is generally rare, because of its high cost to the employee, it is more often commenced by highly paid employees such as executives. Employers should, when dismissing an executive, minimise the risk of an executive making such a claim, by ensuring compliance with all express and implied terms of the contract.

Ensure the Fair Work Act has been complied with

Employers should not assume that the Fair Work Act unfair dismissal laws do not apply to executives. Employees who earn more than $133,000 per year (exclusive of mandatory superannuation) and who are not covered by an award or enterprise agreement are excluded from bringing a claim for unfair dismissal under the Fair Work Act.

2 As at FY 14/15. This amount is indexed and increases on 1 July each year.
While these exclusions will generally capture most executives, if an executive either earns below the threshold amount or is covered by an award or enterprise agreement, they will in fact have access to unfair dismissal remedies under the Fair Work Act.

Has a fair process been followed?

It will be important to ensure that executives are afforded procedural fairness throughout the process of, and leading up to, the termination of their employment. It is critical that the employer has processes and procedures in place to ensure that the dismissal process is properly and fairly managed. This is important because:

► where an executive is not excluded from bringing a claim for unfair dismissal under the Fair Work Act, failure to provide procedural fairness during the termination of employment process may result in a finding that the dismissal was harsh, unjust or unreasonable; and
► failure to provide procedural fairness may have an adverse impact on the morale of other staff and, if made public, may reflect poorly on the business generally.

Have all Corporations Act provisions been complied with?

Employers should be aware of the Corporations Act provisions that restrict the giving of benefits in connection with an employee’s retirement from a board or managerial office without shareholder approval. An employer who provides a termination benefit to an executive that exceeds the legislative limit, without shareholder approval, is at risk of contravening these provisions of the Corporations Act.

As noted in Part 3, careful drafting of the executive employment contract from the outset can significantly minimise the likelihood of contravening these provisions.

Make sure public relations implications are covered including Corporations Act requirements

It is important that you obtain advice on the public relations implications and any public statements that must be made as a consequence of terminating the employment of an executive. The Corporations Act requires public disclosure of information that company members would reasonably require in order to make an informed assessment of the operations, financial position and business strategies of the company. This includes, for example, information about remuneration and termination payments for directors and certain senior executives.

It’s also important that the executive’s departure is communicated internally to people within the business who previously reported to, or relied on, the executive – and that this is done in a timely and appropriate manner.

Has the executive exercised a “workplace right” under the Fair Work Act?

Be aware of, and ensure that you do not breach, the adverse action provisions in the Fair Work Act, particularly for workplace rights. These provisions prohibit an employer from taking adverse action against an executive because that executive has (or has exercised) a “workplace right” – and the remuneration threshold exclusion does not apply to adverse action claims.

Under the Fair Work Act, an executive’s ability to make a complaint or inquiry about their employment constitutes a “workplace right”. Therefore if an employer takes any adverse action, including commencing an investigation, against an executive because that executive made a complaint or inquiry about their employment, then the employer should seek advice immediately to avoid falling foul of the adverse action provisions in the Fair Work Act.

What representations were made to the executive when employed and therefore will allegations of “misleading and deceptive conduct” be a risk?

Employers must consider their obligations under the Competition and Consumer Act. This prohibits employers from making misleading claims about the availability, nature, terms or conditions of, or any other matter relating to, an executive’s employment.

For example, in some cases, on termination an executive may make a claim that the termination breaches a representation made prior to employment, and therefore is a breach of the Competition and Consumer Act.

Have we considered the “unfair contracts” jurisdiction if the executive is employed in NSW or Queensland?

In New South Wales and Queensland, employers should also be aware that State System employees can lodge an unfair contracts claim on the basis that their employment contracts are “unfair”. The Industrial Relations Act 1996 (NSW) confers upon the Industrial Court of New South Wales the power to vary, or declare void, contracts, arrangements or collateral arrangements under which work is performed in an industry in New South Wales. The power of the court to make orders is dependent on a finding that
the contract or arrangement is unfair, harsh or unconscionable, or contrary to public interest.

Similarly, section 276 of the Industrial Relations Act 1999 (Qld) confers upon the Queensland Industrial Relations Commission the power, upon application by an employee, to amend or declare void a contract it considers an unfair contract (i.e. a contract that is harsh, unconscionable, unfair, against the public interest or that provides less terms than the relevant industrial instrument or the Act).

While both jurisdictions exclude employees from seeking a remedy if they earn above the statutory cap, do not assume that executives are necessarily always excluded from bringing a claim.

**Termination with notice**

An executive employment contract may be terminated by giving appropriate notice. Notice is the act of informing the other party to the contract of the intention to terminate that contract upon the expiry of the relevant notice period.

**Notice periods**

The amount of notice that must be given will usually be determined by the express terms of the employment contract. Although it is unlikely, it is also important to consider whether an industrial instrument, such as an award or enterprise agreement, might also apply to the executive’s employment. An industrial instrument may identify a period of notice that must be given to an executive in order to terminate that executive’s employment.

Where an employment contract contains an express notice provision, you must ensure it’s effective and can be relied upon. If a court holds that a notice provision cannot be relied upon, then the principles relating to reasonable notice will apply.

Learn more in Part 6.

**Changes to an executive’s position and notice**

In Quinn v Jack Chia (Australia) Ltd [1992] 1 VR 567, it was held that where there is a fundamental change to an employee’s position that was not contemplated by the original employment contract, the original contract will cease to apply. Instead a new contract, the terms of which are implied by law, will apply.

Where a contract is implied by law in this way, the reasonable notice principles discussed in Part 5 would apply.

**Restraint of trade clauses**

Executive employment contracts routinely contain “restraint of trade” clauses, which employers often use to protect their business interests. These clauses might operate:

► during employment, such as by preventing an executive from working for another employer or misusing confidential information; and/or

► after the employment has been terminated, such as by preventing an executive from soliciting the employer’s customers or from commencing employment with a competitor.

Restraint of trade clauses present a number of challenges, particularly when terminating an executive’s employment.

**Enforceability**

Where the validity of a restraint of trade clause is considered by a court, the default position will be to refuse to enforce that restraint of trade clause, even if the clause has been freely accepted by the executive. In order for a court to enforce a restraint of trade clause, the employer must establish that, at the time the clause was agreed, the clause was reasonable for a number of factors.

To establish the reasonableness of a restraint of trade clause, an employer must show that the clause is reasonable to protect the employer’s legitimate interests, and the scope of the restraint must not be wider than would be necessary to protect those interests.

**A. Legitimate interest**

Examples of the kinds of interests that might be allowed to be protected by a restraint of trade clause could include:

► where an executive has access to confidential information, a restraint of trade clause may be sought by the employer to prevent the executive from using that information to the employer’s detriment;

► where an executive has a particular connection with customers as a result of his or her employment, a restraint of trade clause may be sought by an employer to prevent the executive from using those connections to draw customers away from the employer’s business; and
an employer may seek a restraint of trade clause to prevent an executive from trying to solicit the employer’s other employees to work for another employer.

B. Scope

Where an employer has established that it has a legitimate interest to protect, the employer must then establish that the restraint of trade clause that is sought to be enforced is reasonable in its content and scope. The factors that will be relevant in making this determination are:
► the duration of the restraint;
► the geographical area in which the restraint is to apply; and
► the nature of the activities that it seeks to restrain.

Restraint of Trade Act 1976 (NSW)

In New South Wales, the Restraint of Trade Act 1976 (NSW) allows a court to partially retain a restraint of trade clause that would otherwise be unenforceable. A court can do this by a process known as “reading down”. That is, a court has the power to read down an unenforceable clause and enforce it only to the extent that it is reasonable.

Termination of employment

On termination of an executive’s employment, it would be worthwhile for an employer to:
► remind the executive about any applicable restraint of trade clauses; and
► ascertain the enforceability of any applicable term in light of the matters referred to above and the available evidence.

Confidential information

After termination of employment, an executive must not disclose confidential information that he or she has obtained during the course of his or her employment. This obligation commonly arises from the employment contract, by way of an express or an implied term. That said, courts are generally reluctant to impose restrictions on executives to prevent them from using information that they have gained during the course of their employment. Accordingly, a court will only enforce a restriction on the use of confidential information by an executive where that information is sufficiently confidential.

When will information be considered confidential?

The following factors are considered when determining whether information is sufficiently confidential so as to attract protection:
► the value of the information to the employer;
► the amount spent by the employer in researching and developing the information;
► whether the information is known outside the employer’s business;
► the extent to which the information is known inside the business; and
► the measures taken the employer in guarding the secrecy of the information.

Confidential information is to be contrasted with information that has been gained in the executive’s general know-how, that is, skills and information about the business and its processes that have been built up as part of the executive’s working life. A court would generally be reluctant to protect that information.

Protecting confidential information

An employer can use a number of methods to protect confidential information, such as:
► entering into an agreement with the executive to restrain his or her activities after the termination of the employment (subject to the restraint of trade principles discussed above);
► obtaining an injunction from the court to prevent a former executive from using or disclosing the confidential information;
► obtaining an order from the court for the return and destruction of the confidential information, or an item, such as a piece of machinery, relating to the confidential information; and
► if the confidential information has already been used or disclosed, obtaining an order from the court for damages as compensation for any loss that has been suffered.

Upon termination

Upon termination of employment, an employer should consider whether an executive has access to any of the employer’s confidential information. If an executive does have access to confidential information, it may be
worthwhile for the employer to consider the express terms of the executive’s employment contract to determine its options in protecting it.

**Resignation, retirement, removal of directors and the Corporations Act**

There are additional laws that apply to the resignation, removal and retirement of directors that must also be considered when terminating the employment of an executive, where the executive is also a director of the employer organisation.

These laws are set out in the Corporations Act. Provisions in the Corporations Act that facilitate the removal of directors do not remove any rights to damages or compensation which the director may have as a result of their employment contract.

Provisions regarding resignation, retirement and removal of directors on termination may also be found in the employer’s constitution and/or the director’s employment contract.

This is a complex area of law, and you should seek legal advice before you remove any director from office, or terminate the employment of a member of the board or a holder of a managerial office.

**Public statements**

An important aspect of managing the risks that may be associated with the termination of an executive’s employment for any organisation is developing an appropriate communications strategy.

How, when and what you communicate about the termination, both internally and externally, will ultimately depend on the circumstances of the termination, and the nature of your organisation.

In some cases, you may be compelled to disclose the termination. For example, the Corporations Act imposes continuous disclosure obligations on listed entities to disclose price-sensitive information that is not generally available to the market. This information may include termination of the employment of an executive.

Alternatively, you may be seeking to minimise any reputational damage arising from the termination. As such, a “less is more” approach may be best.

There are however, a number of potential risks in making public statements on termination of an executive’s employment, including but not limited to potential defamation claims.

If your organisation does wish to make public statements on termination of an executive’s employment, you should consider:

► Is there scope for negotiating agreed statements with the executive? If so, how do you best protect the organisation to ensure agreed statements are complied with? Do you enter a Deed? If so, what consideration are you prepared to offer the executive for entering the Deed?

► What do you need to say in those statements? What do you not want to say? What compromises are you prepared to make in negotiating agreed statements?

► Who is going to make any statements on behalf of the organisation?

► When do you need to make those statements? Are there any legislative / operational / reputational reasons that may impact on the timing of communications about the termination?

► How do you intend to make those statements? What is the most appropriate form of remuneration in the circumstances? Approved form? Press release? Email to employees? Employee reference?

Given the risks attaching to making public statements on termination of an executive’s employment, you should seek advice in the formulation of, and best practice in making, these statements.
PART 5: NEGOTIATING SETTLEMENTS

The termination of an executive’s employment can, at times, be contentious and the process may become protracted, so once the decision to terminate has been made, you should implement a well-planned strategy to minimise the impact on the business. If that strategy involves a desire or willingness to negotiate a settlement with the outgoing executive, a comprehensive negotiation plan should be in place.

Critical questions for your negotiation strategy

When planning the negotiation strategy, you should ask yourself:

► What are our goals? For example, is the executive required to exit quickly or will it better for your business for the executive to serve out the notice period?
► Who is authorised to carry out the negotiations?
► What are the negotiation parameters or limits on the authority to settle?
► Is the executive covered by the termination benefits provisions of the Corporations Act and, if so, will that limit your ability to negotiate a settlement?

Settlement terms, termination letter, and deed of settlement and release

Once the negotiation strategy and parameters have been set, the employer should get legal advice on the proposed negotiation and broad settlement terms, including the termination letter and the preparation of a deed of settlement and release.

At this stage, issues that employers should turn their minds to:

► whether the reasons for the termination of the executive’s employment will be relevant (for example, redundancy, poor performance or misconduct);
► any applicable policies which must be complied with;
► the executive’s contractual and legislative entitlements which must be provided on termination of employment;
► any entitlement to any bonus payments or shares/options which are linked to a particular date or time. If so, this is likely to be an issue for the executive in the negotiation process;
► what steps the employer should be taking to protect the business (for example, protecting confidential information and relationships with key stakeholders);
► any requirement to make an announcement to the ASX following the termination of employment;
► what the employer’s rights are for the executive’s post-employment obligations, such as restraints, confidential information and intellectual property; and
► appropriate scripts for the purposes of conducting a without prejudice negotiation with the executive.

Prepared scripts

Before the negotiations commence with the executive, it is important to prepare a script for them. Armed with this, the employer’s representatives can check that the relevant issues are canvassed and irrelevant matters are not discussed as they work through the negotiations. If the executive raises an issue which has not been considered, the employer’s representative should take it on notice and seek legal advice.

Without prejudice discussions

Before you initiate negotiations with the executive, make sure all discussions are held on a “without prejudice” basis. This means that any statements made or information provided are to be used in the negotiations only, so they cannot be used against the other party in any litigation. As a result, parties can discuss more freely the matters concerning the termination of the executive’s employment.

Settlement documents

If you can reach agreement on the terms of the executive’s termination of employment, a properly drafted deed of settlement and release is crucial to capture those terms. This will help protect you from litigation.

The executive must be given a reasonable opportunity to consider the terms of the deed of settlement and release and to obtain legal advice on the terms.
Gardening leave

Sometimes, an employer may wish to enforce an executive’s notice period, but will not require the executive to attend the office or provide any services unless directed to do so. This is referred to as “gardening leave”. During a period of gardening leave, the executive will be paid his or her ordinary remuneration and be required to comply with any reasonable request of the employer.

There are two situations in which an executive may be directed onto gardening leave:

► first, where a written contract specifically confers a contractual right for the employer to direct the executive to take gardening leave; and
► second, in some circumstances in the absence of an express contractual right where an executive will not suffer loss or damage as a result.

Gardening leave can protect the employer’s business, as it extends the period of the executive’s employment, and during that time the executive will continue to be subject to the direction of the employer and must act in the employer’s best interests. Other benefits include:

► the ability to protect confidential information;
► the ability to manage relationships with stakeholders and to ensure an orderly handover of the executive’s duties and responsibilities; and
► if the employment contract contains an enforceable restraint of trade clause, it will not commence operation until the end of the gardening leave period.

Are there any restrictions on what the employer can negotiate?

An employer cannot contract out of an executive’s legislative entitlements. As such, if an executive has a statutory right to receive payment for any accrued and untaken annual and long service leave, this must be provided on termination of employment and should be reflected in the deed of settlement and release.

Further, as set out in Part 3, the Corporations Act restricts certain benefits being provided to directors and some executives without shareholder approval being obtained. Statutory entitlements to workers compensation and superannuation will also generally be excluded from the scope of a release.

Termination benefits – Complying with the Corporations Act

When negotiating the provision of a benefit triggered by termination of employment with executives, employers must ensure that they comply with the legislative requirements imposed by the Corporations Act for termination benefits.

The Corporations Act restricts the payments that may be made to directors and certain executives upon termination from their office or position of employment without shareholder approval. The provisions impose a two-part test for when a termination benefit can be paid to an executive without first obtaining shareholder approval:

► first, the benefit must be for one of the reasons set out in Part 2D.2, Division 2 of the Corporations Act (for example, the benefit was paid for past services rendered to the company); and
► second, the benefit must be less than the prescribed monetary cap, which is currently set at 12 months’ base salary.

Breaches of these provisions of the Corporations Act are strict liability offences. An offence may result in a civil penalty of $30,600 for individuals and $153,000 for corporations (or six months’ imprisonment).³

The Corporations Act also provides that where a breach of these provisions occurs, the benefit is held on trust and must be immediately repaid.

The prohibitions in the Corporations Act can significantly restrict an employer’s ability to negotiate a settlement with an executive. Given the complexities of this legislation and the legal ramifications if a breach occurs, you should seek legal advice before any payments are made to an executive pursuant to a settlement arrangement.

Ex gratia payments

As part of the process of negotiating a settlement with an executive, an employer will often pay the executive an ex gratia payment in exchange for the executive releasing the employer from any potential claims they may have in relation to the termination of their employment. This is paid in addition to the executive’s contractual entitlements such as annual leave, pro rata long service leave and payment in lieu of notice, usually through a deed of settlement and release.

While the ex gratia payment may be required to be substantial in order

³ Civil penalties are indexed annually.
to secure the executive’s agreement to a settlement arrangement, the employer should weigh the cost of that payment against the potential costs of litigation involving a claim by the executive if such a release is not obtained. In addition to legal costs, the time and personnel required to deal with defending such a claim, as well as the potential damage to the employer’s reputation and the morale of other employees, are factors that should be considered.

Legal advice

In light of the complexity of this area, employers should obtain legal advice before making a decision to terminate an executive’s employment. This advice can be sought at any stage of the process, from the executive commencing employment up to the execution of a signed deed of settlement. Seeking and acting on this advice may not eliminate all risks associated with the termination of an executive’s employment. However, it will go a long way towards minimising these risks and reducing the disruption and potential costs to the employer.

PART 6: LITIGATION RISKS

Terminating an executive will always involve some element of litigation risk. Employers should be aware of the various statutory and common law claims that may be available to a disgruntled executive.

To minimise the risk of a claim being made, the terms and conditions of the executive’s employment, including any applicable policies and procedures, should be thoroughly reviewed by a lawyer to ensure that, to the extent possible, the termination process is consistent with those terms and conditions and that legal exposure is minimised.

General protections claims under the Fair Work Act

For executives, the general protections provisions in the Fair Work Act provide an increasingly popular avenue for redress, particularly if they do not otherwise meet the eligibility criteria for unfair dismissal. These provisions prohibit an employer from taking adverse action against an executive because that executive has a protected attribute or engaged in a protected activity.

This claim has three elements:

► the employer must have taken adverse action against the executive;
► the executive must have a protected attribute or have engaged in a protected activity; and
► the adverse action must have been taken against the executive because the executive had a protected attribute or engaged in a protected activity.

There must be a connection between the employer’s decision to take adverse action and the executive’s protected attribute or activity for a claim to be successful. On this point, it is important to be aware that these provisions are subject to a reverse onus of proof, meaning that the employer must disprove the claim and demonstrate that it did not take adverse action because of the executive’s protected attribute or activities.

What types of conduct constitute adverse action?

Adverse action is broadly defined under the Fair Work Act and is not limited to simply terminating an executive’s employment. Instead, conduct that is deemed to constitute adverse action includes doing, threatening or organising any of the following:
► dismissing an executive;
► injuring the executive in his or her employment;
► altering the position of the executive to the executive’s prejudice; and
► discriminating between the executive and other executives/employees of the employer.

Adverse action may therefore include steps taken or things done by an employer during an investigation or disciplinary procedure against an executive.

What attributes or activities are protected?

The Fair Work Act outlines that the protected attributes or activities, for which an employer is prohibited from taking adverse action against an executive, include the executive’s workplace rights, industrial activities and other protected grounds (including race, sex, age and disability).

A. Workplace rights

An employer must not take adverse action against an executive because of a workplace right that the executive has, or because the executive has, or proposes to, exercise their workplace right. An executive will have a workplace right if he or she is:
► entitled to the benefit of, or have a role or responsibility under, a workplace law or instrument;
► able to initiate, or participate in, a process or proceeding under a workplace law or instrument; or
► able to make a complaint or inquiry about his or her employment.

The definition of workplace rights is very broad and therefore it is important that employers are able to identify what constitutes a workplace right so as to ensure they do not take action against an executive on this basis.

B. Industrial activities

An employer must not take adverse action against an executive because of the executive’s membership or non-membership of an industrial association, or because of the executive’s involvement in certain industrial activities. Although unlikely in the context of an executive employee, the obvious example of a breach of this protection is to dismiss an executive because he or she is a union member.

C. Discrimination grounds

The Fair Work Act also says that an employer must not take adverse action against an executive because of his or her race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

What is the process and possible remedies?

An executive who alleges that they have been dismissed in breach of the general protections provisions may make an application to Fair Work Australia or a court at first instance following the dismissal.

Remedies for breach of the general protections provisions include, but are not limited to, reinstatement and compensation. Compensation for breach of the general protections provisions is uncapped and may include compensation for hurt and humiliation suffered by the executive as a result of their dismissal.

The general protections provisions under the Fair Work Act also allow executives to obtain an injunction from a court to prevent their employer from dismissing them unlawfully.

The general protections provisions are civil remedy provisions to which pecuniary penalties may attach in the event of a breach.

Unfair dismissal

If:
► a modern award or enterprise agreement apply to the employment of the executive; or
► the executive earns less than the high income threshold (which is indexed annually and is currently $133,000 pa);

then the executive will be able to access the unfair dismissal jurisdiction under the Fair Work Act.

Employers must therefore ensure not only that they have a valid reason for terminating the executive, but that they provide the executive with procedural fairness throughout the termination process. This is critical in order to prevent incurring liability for unfairly dismissing the executive on the basis that the dismissal was harsh, unjust or unreasonable.
Remedies available in successful unfair dismissal claims include reinstatement or compensation in lieu of reinstatement (up to 26 weeks’ remuneration), capped at half the higher income threshold. In most cases, executives will be precluded from making an unfair dismissal claim as they usually earn above the high income threshold and are not covered by an enterprise agreement or modern award. Nevertheless, you should confirm that the executive is eligible to make an unfair dismissal claim before you start the process of terminating his or her employment.

**Litigation under State laws and unlawful termination under the Fair Work Act**

Some State industrial laws have preserved special rights that are able to be litigated in State industrial tribunals and courts. For example, in Western Australia an executive of a partnership (that is, a true partnership that is not incorporated) may have a right to pursue a claim in the Western Australian Industrial Relations Court. In the vast majority of cases executives will not be covered by state industrial laws.

It is also possible for an unlawful termination claim to be made under the Fair Work Act, but this claim is reserved only for executives that are not employed by companies (eg. a partnership). Unlawful termination largely replicates the general protection provisions outlined above, except that such a claim is reserved for termination only (and not other types of adverse action).

**Equal opportunity claims**

Executives are afforded the same protections from discriminatory conduct under the Fair Work Act or Commonwealth and State anti-discrimination laws as less senior employees.

In summary, under the Fair Work Act and Commonwealth and State anti-discrimination laws it is unlawful to terminate an executive’s employment on the basis that the executive has an “attribute” that is protected by those laws. The list of protected “attributes” varies between the different State and Commonwealth anti-discrimination jurisdictions, but commonly include attributes such as age, race, sex and marital status. Equal opportunity claims are first dealt with by specialist equal opportunity tribunals, rather than by Fair Work Australia, and are referred to a State or Federal Court if the specialist tribunal is not able to successfully conciliate the matter.

Both “direct” and “indirect” discrimination are prohibited. “**Direct**” discrimination occurs where, for example, an executive is terminated directly because of his or her race. “**Indirect**” discrimination can occur when the employer imposes a requirement or condition which, although apparently neutral, has the effect of discriminating against an executive with a particular attribute.

It is important to note that some exceptions to the protections in anti-discrimination laws do exist. If you are concerned about the potential for breach of anti-discrimination laws in a particular case, seek specific advice on these issues and how the law applies in the circumstances.

**Double-dipping**

Executives are generally prohibited from double-dipping, ie. they cannot lodge multiple claims about their termination. This means:

► both a general protections claim and an unfair dismissal claim cannot be heard in respect of the termination of their employment;
► both a general protections claim and an unlawful termination claim cannot be heard in respect of the termination of their employment; and
► in most cases, an equal opportunity claim cannot be heard if the executive has lodged another claim in a Federal or State industrial tribunal.

The double-dipping rules ensure employers are not engaged in multiple litigations over the same issues.

**Common law claims**

Separate to the statutory claims available to executives on termination of their employment outlined above, executives can also make a common law claim against their employer on the basis that the employer has breached a term of the executive’s employment contract. Common law claims, if successful, have the potential to expose employers to payment of substantial damages to the executive involved.

**Breaches of express contractual terms**

The terms of any employment contract may, depending on the circumstances, derive from any number of sources. As such, claims for breach of an express term of an employment contract may include claims in respect of:

► breaches of the terms of any written employment contract (for example, failure to provide notice as provided in the employment contract);
commitments made orally by the employer but which are otherwise said to form part of an employment contract; and/or

“external” terms and conditions of employment said to have been incorporated into the employment contract by reference.

Significant damages may flow where it is found that there has been a breach of an express terms of an employment contract, relative to the nature of the employment, the seniority of the executive and/or the nature and seriousness of the breach of the employment contract.

Executives also often commence litigation if an employer seeks to enforce the restraint of trade clause of the contract, especially when they believe the restraint is unreasonable, as discussed in Part 4.

Breaches of implied contractual terms

In addition to claims of breaches of the express terms of an employment contract, there is also scope for executives to make claims of implied contractual terms.

For example, it is common for an executive to file a claim alleging that he or she should have been paid “reasonable notice” on termination of their employment and commence a breach of contract claim on this basis. A court will imply a reasonable notice term when the executive’s contract is silent or the executive’s duties have significantly changed such that he or she is subject to a new implied contract.

What constitutes “reasonable notice” depends on the facts and circumstances of each case, but a court will consider:

- the executive’s length of service;
- the executive’s age;
- seniority of the executive;
- the importance of the position;
- quantum of the executive’s salary;
- nature of employment;
- any standards in the relevant industry or profession;
- custom and practice of the employer; and
- expected time that it would take the executive to obtain alternative employment.

“Reasonable notice” in some cases has been found to be up to 24 months, although it is more common for periods of 6 to 12 months to be found as appropriate. However, each case will turn upon its own facts and various factors, including those listed above.

**Competition and Consumer Act 2010 (formerly Trade Practices Act 1974)**

The Competition and Consumer Act prohibits an employer making misleading claims to a person who is seeking employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

In some cases, on termination an executive may make a claim that termination breaches a representation made prior to employment and therefore constitutes a breach of the Competition and Consumer Act. For example, a claim might be successful if an executive can prove that:

- a representation was made to the executive before he or she commenced employment that he or she would never be made redundant;
- a redundancy has in fact occurred; and
- the executive relied on the representation when choosing to accept the position.

Claims about unfair treatment (known as “unconscionable conduct”) of an executive during employment or in relation to termination may also be made under the Competition and Consumer Act in some cases.

These claims are often made at the same time as claims for breaches of express or implied contractual terms. To minimise the risk of these claims, you should take care making commitments to job applicants and ensuring employment contracts are carefully drafted.
PART 7: TRAINING

Clayton Utz has developed a series of comprehensive training courses for managers on minimising the risks associated with termination of employment. These courses include training in the key area of managing performance and conduct and provide managers with tailored one-on-one coaching.

Please go to www.claytonutz.com/training for more information and to find the training course that’s right for you.

PART 8: KEY CONTACTS

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**ANNEXURE A – EXECUTIVE EMPLOYMENT CONTRACT TERMS CHECKLIST**

This checklist will help you identify the key contractual terms that are relevant to executives, but it’s a general guideline only, and is not intended to replace legal advice in a particular situation.

**Does your executive employment contract include:**

- A term outlining the executive’s position and general and specific duties which is flexible enough to allow the employer to vary at its absolute discretion?

- A term outlining the location where the executive is to perform their role? Does the term enable the employer to transfer the executive to other offices (either interstate or internationally)?

- A term outlining the executive’s hours of work that meets the requirements of the Fair Work Act?

- A term outlining the components of the executive’s remuneration, entitlements and other benefits? Does the term specify:
  - any key performance indicators or formulae used to determine the quantum of remuneration?
  - when remuneration is to be paid?
  - how the payment is to be made?
  - whether certain payments (ie. bonuses, incentives) are obligatory or payable at the employer’s discretion?
  - what is/is not superable?

- A detailed termination term which expressly outlines the period of notice that must be given to an executive upon termination of their employment?

- A term that addresses whether or not any redundancy severance payment required to be paid by law may be offset against a payment in lieu of notice above the legal minimums?

- A term specifying that the executive must not act in conflict with the employer’s best interests?

- A term requiring the executive to provide exclusive service to the employer if secondary employment would have adverse consequences on the interests of the employer?

- A term outlining the executive’s obligations with respect to confidential information and intellectual property of the employer?

- A reasonable restraint of trade clause which restricts the business activities of the executive following the termination of their employment?

- Relevant terms providing for the other benefits that employees are generally entitled to under the Fair Work Act and other legislation, such as:
  - Annual leave
  - Long service leave
  - Personal leave
  - Sick leave
  - Paid parental leave
  - Public holidays
  - Superannuation

- A term which provides that any clause which confers a termination benefit on the executive is subject to compliance with relevant legislation?

- If the executive is also a director – a term dealing with resignation from the Board if the executive’s employment is terminated?
ANNEXURE B – TERMINATION OF EMPLOYMENT STEPS

Clayton Utz has developed this checklist to help you identify the key steps in the termination process, but it's a general guideline only and is not intended to replace legal advice in a particular situation.

<table>
<thead>
<tr>
<th>Termination of employment</th>
<th>☐</th>
</tr>
</thead>
<tbody>
<tr>
<td>Have you checked the executive’s employment contract to identify potential termination entitlements? For example, is there a written notice period?</td>
<td>☐</td>
</tr>
<tr>
<td>Does the executive have access to unfair dismissal protections under the Fair Work Act or other legislative protections?</td>
<td>☐</td>
</tr>
<tr>
<td>Are the reasons for termination not discriminatory?</td>
<td>☐</td>
</tr>
<tr>
<td>What are the executive’s statutory entitlements?</td>
<td>☐</td>
</tr>
<tr>
<td>Will the termination of employment impact on any bonus payment, grant of shares or vesting of options? If so, how will these be dealt with?</td>
<td>☐</td>
</tr>
<tr>
<td>Are there any applicable policies which must be considered and potentially followed? For example, is the termination for reasons of redundancy or poor performance?</td>
<td>☐</td>
</tr>
<tr>
<td>Have you considered who will have responsibility for the managing the process for the employer and are proper delegations in place?</td>
<td>☐</td>
</tr>
<tr>
<td>Does your representative have the necessary authority or delegated authority to manage the process, including negotiating any settlement? For example, is Board approval required?</td>
<td>☐</td>
</tr>
<tr>
<td>Does any negotiated settlement require shareholder approval?</td>
<td>☐</td>
</tr>
<tr>
<td>What steps should be taken to protect the employer’s business? For example, do you need to take any steps to protect client relationships and confidential information?</td>
<td>☐</td>
</tr>
<tr>
<td>Are there any post-employment obligations that the executive is required to comply with, such as a restraint of trade clause?</td>
<td>☐</td>
</tr>
<tr>
<td>Must the termination of employment be disclosed to the ASX?</td>
<td>☐</td>
</tr>
</tbody>
</table>

- How will the termination of employment be communicated to the employees and external stakeholders?
- Do any additional steps need to be taken to facilitate an effective handover?
- Has any intended negotiation with the executive been properly planned and is there a suitable deed of settlement and release being prepared?
- Is the executive also a director? Has the status of his or her Board position been considered if the executive’s employment ceases?
These guidelines reflect the law as at February 2015. They are intended to provide general information on managing performance, conduct and productivity of Victorian Public Service Employees. The contents do not constitute legal advice and should not be relied upon as a substitute for detailed advice or as a basis for making decisions. Persons listed may not be admitted in all States and Territories. © Clayton Utz 2015