

**EXECUTIVE CONTRACT GUIDANCE
FOR
BOARDS AND MANAGEMENT**

ABN: 94 113 349 189

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BOARDS & EXECUTIVE RECRUITMENT

Boards need to be aware of the key issues that can arise when recruiting and terminating executives.

Discrimination and Privacy

Firstly, it is unlawful to discriminate. This means that questions and decisions should be based on the candidate's capacity to perform the essential requirements of the position. Notes of the recruitment process can be used by the executive in the event of litigation, thus care should be taken when taking such notes.

Misleading Conduct

Apart from the issues around privacy, misleading and deceptive conduct is another matter that must be taken into account. Promises and statements made about the future or particular statements or representations can lead to future litigation pursuant to section 18 of the Competition and Consumer Act 2010. All such statements must have a basis in fact as they might otherwise be construed as misleading and deceptive.

Contract of Employment

A properly drafted contract is essential. It should provide clarity and identify the duties and responsibilities of the parties as well as the key terms of employment. The contract should also have a measure of flexibility with the right to change job titles, reporting lines, roles and responsibilities and so on.

Hours should be those that are required to perform the functions required, and remuneration should be calculated to adequately compensate for the reasonable additional hours worked.

The remuneration clause should be clear and spell out what is included. Unclear provisions will lead to disputes as to what is in and what is not.

Quality and financial taxation advice should be obtained as well as to the appropriate level of remuneration.

Policies of the employer can be referred to in contracts, but should not be incorporated in the contract and an express statement that such policies do not form part of the contract should be included.

Termination provisions are always a central part of any contract. It is the area in which the two parties will assert their rights under the contract. If the clause is unclear, litigation may result.

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An express notice provision will provide clarity provided it is appropriate under the contract given the nature of the position.

Similarly a provision must provide for termination without notice in the event of serious misconduct.

There are also matters that can be included such as:

- Leave
- Gardening leave
- Exclusive service
- Conflicts of interest
- Restraint of trade
- Confidential Information
- Intellectual property
- Secondary employment

Restrictions under the Corporations Act

Boards should be aware that there are restrictions imposed by the Corporations Act and the ASX Listing Rules on the payment of certain termination benefits. These apply when an executive “retires” from a board or managerial office. “Retirement” includes loss of office and resignation.

This raises the distinct potential for conflict between the Act and the contract of the executive. This means that the Act and the contract should be consistent with the “retirement” entitlements outlined in the Act with additional entitlements to be subject to shareholders approval.

Employee’s implied duties

As a matter of law, there are a number of implied duties to:

- Obey all lawful and reasonable directions; and
- Exercise reasonable care and skill and
- Observe good faith and fidelity towards the employer.

There was also an implied duty relating to mutual trust and confidence asserted in previous court decisions. This implied duty has now been negated by the High Court who basically found that there was no such duty and that it could not be and implied term.

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Employer's express duties

The employer has a general duty to ensure the health and safety of their executive.

This means the following:

- The provision of competent staff; and
- Provision of safe systems of work and the provision of materials to carry out the task; and
- Adequate and quality supervision.

SPECIFIC REGULATORY ENVIRONMENT OF THE PUBLIC SECTOR

Boards should be aware that there are specific requirements applying to the Public Sector. Although most of the above equally applies to executive contracts in the Public and Private Sectors, in the first instance the Public Sector uses so called GSERP Contracts. They also specify ranges of remuneration for various GSERP Executives, which Boards must comply with and require the Executive to follow Government Policies and Ministerial Directions.

Further there are a number of acts that are immediately relevant including:

- Public Administration Act 2004 (Vic);
- Financial Management Act 2006 (Vic);
- Freedom of Information Act 1982 (Vic);
- Whistleblowers Act Protection Act 2001 (Vic);
- Ombudsman Act 1973 (Vic).

Boards or employers must obtain specialist advice regarding their obligations.

TIPS ON TERMINATION

1. You should be aware of all contractual obligations and ensure these are met. This will normally avoid litigation, unless the standards in the contract are not appropriate or below what is considered 'reasonable' under the circumstances. For example, someone with ten years' service may litigate if the contract only specifies 4 – 6 weeks' notice on termination, despite such notice exceeding the minimum requirements under the NES.
2. You must ensure that you comply with the Fair Work Act. This means both the manner in which you terminate – have you provided a 'fair and reasonable process?' – And meet the minimum NES standards both by way of notice and redundancy if relevant. You can assume that an executive has access to the Commission if there is an award or EBA that covers the executive, or in the event the employee earns less than the high income threshold (as defined by the Fair Work Regulations)(inclusive of statutory

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minimum superannuation.) This amount is indexed each year. If the executive is award or EBA free and earns above the high income threshold, they are excluded from bringing a claim pursuant to the Fair Work Act.

3. The process of termination is important. It is important for two main reasons. In the first place an unreasonable or unfair process may lead to litigation and secondly, an unfair process may lead to a claim for worker's compensation. If the employer has relevant policies in place that cover termination of employment, these must be followed. Failure to follow such policies can lead to claims for stress and mental suffering.

Further, if the executive has access to the Fair Work Commission, an unreasonable or unfair process could lead to a claim of unfair dismissal. Worst case scenario would be that a claim could also lead to re-instatement.

Failure to apply procedural fairness, natural justice, or what is colloquially termed "a fair go all around" may result in litigation, workcover claims and impact on the morale of other staff. It will also reflect on the business itself.

4. For non-public sector executives, Boards or management should ensure that the relevant provisions of the Corporations Act are complied with since payouts are limited under the Act.

INSURANCE

Boards and management are reminded that if they are in the Victorian Public Sector, VMIA Insurance taken out by government covers organisations in the event of termination of employment. Organisations that are in receipt of state government funding are also usually covered by similar insurance.

Boards and management should check whether they are covered and the terms and requirements of that cover. For example, the rule of thumb is that prior to terminating employees organisations should consult their lawyers before proceeding down this path. There is also an 'excess' payable when a claim is made.

Private Sector employers may be covered by their own insurance policies. This should be checked in the event you have to make a claim.

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CONTRACT CHECKLIST

CONTRACT CLAUSES	COMMENT
<p>Are there terms in the contract that provide flexibility in areas such as Job/Position Title/ Location of Work/Duties etc. at the discretion of the employer?</p>	
<p>Is there a probationary period outlined (if deemed appropriate). Is the term of the contract specified (fixed term) or is it simply subject to notice?</p>	
<p>Are the hours specified or sufficiently broad to take account of the duties? Are they broadly consistent with the Fair Work Act requirements of 38 hours plus additional reasonable hours?</p>	
<p>Are the remuneration details sufficiently detailed, do they include all the benefits? Salary, Superannuation, Bonus or Incentive Payments, Annual or incremental increases, Superannuation – is it capped to the statutory amount? Does it include other conditions such as telephone, computer, internet, entertainment expenses, personal education, travel, use of motor vehicle etc.</p>	
<p>Is there any reference to the key Performance Indicators and the manner in which performance assessments are conducted and when?</p>	
<p>Have all the other conditions such as various leave entitlements been included? Do they meet the NES standards to ensure minimum standards are met?</p>	

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<p>Is there a detailed termination clause? Does it spell out the required notice period for either side? Is the notice period consistent or better than the NES standards?</p> <p>Does the termination clause provide for dismissal without notice and the circumstances under which that will be used? Can the executive be sent on gardening leave?</p>	
<p>Does the contract specify who owns the Intellectual property whilst employed; does it provide for a requirement not to compete following separation? Is the employee required to work solely for the employer or can the executive have other business interests? Is there a Privacy and Confidentiality clause that applies whilst the contract is on foot and does it persist post-employment?</p>	
<p>Does the contract ensure that any termination payout is consistent with relevant legislation (ASIC; Fair Work Act) as well as government requirements (if any)? Is the termination payment reasonable in terms of the type of contract, length of employment and positions of the executive?</p>	
<p>If the executive is also a board director does the contract provide that on separation that the board position is vacated?</p>	

The Board or Employer must ensure that prior to exchanging and executing contracts, a comprehensive reference check is conducted including any other relevant Police and Working with Children checks (if relevant). Employers should also conduct a probity check to satisfy themselves that any qualifications that the applicant claims to hold are legitimate. Employers are reminded that a check using ‘Linked-in’ or the Internet is a great start but is not sufficient in its self.

For further information, please contact Ignatius Oostermeyer or Gareth Wee on 03 9972 4950

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