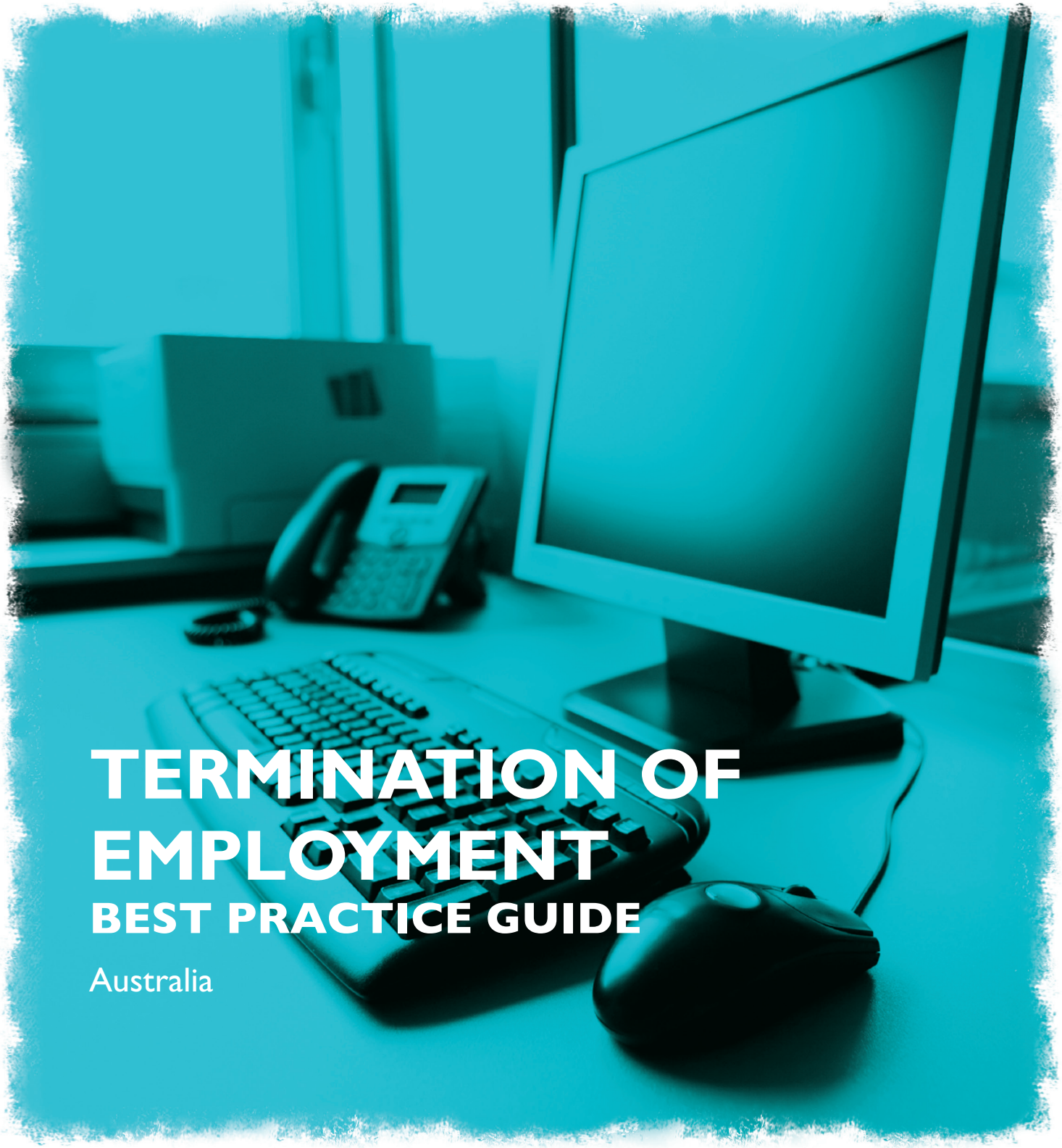

TERMINATION OF EMPLOYMENT

BEST PRACTICE GUIDE

Australia

DLA PIPER

The decision to dismiss an employee is an area of the employment relationship that requires an understanding of a wide range of legislative and other obligations of an employer. The decision is also a significant one in terms of the effect on the employee and the business. Not surprisingly, a significant amount of resources, time and effort needs to be devoted to the associated decisions and processes. Knowing the legal risks and obligations involved is essential.

WHAT OBLIGATIONS ARISE?

Unfair dismissal laws, which are set out in the *Fair Work Act 2009* (Cth) (FW Act), apply to a large number of Australian employees and generally give those employees the broadest protection from having their employment terminated. Therefore a good starting point is to consider whether or not an employee is covered by unfair dismissal laws.

Who is covered by unfair dismissal laws?

Employees who are earning up to $123,300 excluding superannuation and incentive bonuses or payments (indexed for CPI each year) are covered by unfair dismissal laws. In addition, employees who are covered by awards or enterprise agreements made under the FW Act or its predecessor, irrespective of their earnings, will be covered by the unfair dismissal laws.

This is the case except for:

- Certain casual employees
- Employees who were dismissed during their first six months of employment (or 12 months in the case of stipulated small employers)
- Employees engaged on a specified term contract if the ending of the employment is due to the contract not being renewed at its expiry
- Certain employees engaged under traineeships.

KEY POINTS

If considering dismissing an employee, ask what obligations will impact upon the decision.

Comply with any unfair dismissal laws that apply and any workplace policies, industrial agreements or contractual provisions that may impact upon dismissal or discipline of employees.

Identify any payments the employee is entitled to on ending of the employment.

WHAT DO UNFAIR DISMISSAL LAWS REQUIRE?

Under unfair dismissal laws, an employer cannot dismiss an employee unless they have a valid reason connected with the employee's conduct, capacity or because of a genuine redundancy. In addition, if the dismissal is related to conduct or capacity, it may still be unfair if the employee is not notified of the reason for their dismissal, not given an adequate opportunity to respond to those reasons, not provided with a warning in certain circumstances, not allowed a support person to assist them in discussions about the hearing or if the dismissal was otherwise procedurally unfair.

A valid reason is one that is sound and defensible and related to the employment. Except for serious misconduct (eg theft), if dismissing an employee because of inadequate performance or misconduct, an employer may need to establish more than one incident of misconduct or poor performance to justify the dismissal. In addition, the existence of prior warnings about the employee's misconduct or poor performance will normally be necessary in the sense that the employee has been made aware that failure to improve their performance or conduct may jeopardise their ongoing employment.

In the case of the valid reason, employers need to establish the misconduct on the "balance of probabilities". A rigorous investigation of the circumstances is often a key element of satisfying that burden of proof. Employers need to ensure that they have sought and taken into account all relevant evidence and properly tested it and that, prior to any dismissal decision, they have given the employee an opportunity to respond to any allegations against them, including having given them sufficient detail of the matters that may form the basis for dismissal.

An employer should also take into account the employee's length of service, employment record and relevant personal circumstances before making the decision to dismiss.

REMEDIES UNDER UNFAIR DISMISSAL LAWS

A dismissal that is found to be unfair may lead to the employee being reinstated to the position that they were employed in prior to the dismissal or to another position on terms and conditions no less favourable than that position.

This may include an order that the employee be appointed to an associated entity of the employer that dismissed the employee. Where reinstatement is ordered, Fair Work Australia can also make an order that continuity of service of the employee is not broken by the dismissal and that they be compensated for any loss of pay suffered between the time of dismissal and reinstatement.

If Fair Work Australia considers that reinstatement is inappropriate, it may instead order payment of compensation to the employee up to a maximum of six months' pay (capped at a maximum of $61,650).

In determining the amount of compensation, Fair Work Australia must take all relevant circumstances into account, including the employee's length of service, the remuneration that the person would have received had they not been dismissed, efforts by the employer to mitigate any loss suffered, any remuneration earned by the employee since the dismissal, the effect of the order on the viability of the employer's enterprise and income reasonably likely to be earned by the person since the dismissal.

EMPLOYEE OBLIGATIONS

The common law imposes a number of obligations on employees, even when those obligations are not expressly stipulated in the employment contract or any industrial instruments. These obligations include the obligation of an employee to behave honestly, the requirement that the employee perform their work to the best of their ability, the obligation to act in the interests of the employer and the obligation to follow reasonable and lawful directions. Where those obligations are breached, an employer may, subject to applicable procedural issues, have the right to dismiss the employee, depending upon the nature and circumstances of the non-compliance. Dismissal of an employee is normally grounded on one of these types of implied duties.

Workplace policies about behaviour may also form a basis to dismiss an employee when there is a breach of the policies by the employee.

Conversely, an employer has obligations to its employees, including a duty to pay the employee an agreed or stipulated amount of remuneration and a duty to take care for the employee's safety. More recently, Australian courts have considered whether an employer is actually under an obligation to provide work to an employee rather than simply pay them the agreed or stipulated amount of remuneration. This is relevant when considering suspending an employee on full pay or if putting an employee on garden leave (that is, paying the employee but directing them not to perform any work).

Employers should also consider any obligations owed, either by the employer or the employee, in any written contract of employment.

DISCRIMINATION AND GENERAL PROTECTIONS

When dismissing an employee, employers also need to ensure that a reason for the dismissal (even if not the only reason) did not include certain protected attributes of that employee, set out under state and federal discrimination laws or under the general protections available under the FW Act, including:

- Race, ethnicity, colour, natural extraction or social origin or religion
- Age
- Physical features or characteristics
- Disability or impairment
- Temporary absence due to illness or injury
- Sex or sexual preference
- Pregnancy, carer or family responsibilities, or parental or carer status
- Marital status
- Having a role as a union delegate or oh&s representative
- Political opinion
- Union membership or being involved in industrial activities
- Making a complaint about occupational health and safety matters or conditions of employment.

A temporary absence is where the absence is not more than three consecutive months or three months in a 12 month period and where the employee is not on paid sick leave for the duration of the absence.

An employer may have a defence to dismissing an employee for some of the above reasons if it was an integral requirement of the job or the employee could not perform the inherent requirements of the position due to the attribute (usually this will only apply to a dismissal due to a disability or impairment).

Some categories of employees have additional protections, such as employees who have been injured at work, as they have additional protections under workers' compensation legislation.

It is also unlawful to terminate an employee's employment because they have exercised, or wish to exercise, what is known as a workplace right. An employer is prevented from dismissing employees because the employee:

- Is able to or has participated in workplace processes or proceedings
- Has the benefit of, or a responsibility under a workplace instrument or law
- Is able to make, or has made, a complaint or inquiry to a body or person seeking compliance with a workplace law or instrument.

For more information about general protections and workplace rights, see our *Best Practice Guide to General Protections*.

If a court or tribunal finds that a reason for an employee's dismissal is related to one of the above reasons, the dismissal is unlawful. Reinstatement is a possibility, as well as compensation of up to six months' pay (capped at $61,650, which is half of the high-income threshold amount) and a penalty of up to $33,000 imposed on the employer. Where a discrimination claim is made in a state or federal discrimination tribunal, compensation is not usually capped and while a penalty cannot be ordered, compensation can be ordered for pain and suffering or general damages as well as economic loss.

With discrimination or unlawful termination claims, an employee usually has to establish that they have been dismissed and that they have the protected attribute they allege was a reason to dismiss them. However, in practice, the burden of proof then falls on the employer to show that the dismissal was not motivated by any of the claimed discriminatory reasons. The best way for an employer to do this is to demonstrate the valid reason that it was motivated by. Failing to do so may lead the court or tribunal to infer that the discriminatory attribute alleged by the employee was a reason for the dismissal. So even if a valid reason and procedural fairness is not technically required, they will often be very important to demonstrate in order to defend a discrimination or breach of workplace rights claim.

SUSPENSION OF EMPLOYEE

Often when an employer is faced with information that suggests an employee may be guilty of serious misconduct, it is preferable that the employee in question is suspended while an investigation takes place. Taking this course is often advisable as if the employee has engaged in the alleged misconduct, it is prudent to remove the employee from the workplace.

An employer does not have a general right to suspend employees unless they are permitted to do so under a workplace agreement or where the employee is not covered by an industrial instrument or by an express written clause in the employment contract.

Typically, an employer will be able to suspend the employee pending an investigation into serious misconduct, provided that the employee is paid their normal remuneration during the suspension period. Suspension on full pay will normally be permitted, provided it is not for an unreasonable length of time.

Any investigation carried out by an employer, whether or not the employee is suspended, should always be undertaken without any unnecessary delay.

IMPLEMENTING THE DISMISSAL

Once a decision has been made to dismiss the employee, termination of the employment and the meeting leading up to it should be documented in writing. Unfair dismissal laws require that the employee be notified of the reasons for the dismissal. In any event, it is good practice to expressly state in writing the reasons for the dismissal, as well as the effective date of termination.

It is generally not good practice to be evasive or too general about the reasons for the dismissal (even if unfair dismissal laws do not apply) as it may raise questions about the reasons for dismissal, allowing courts or tribunals to draw an inference that discriminatory reasons outlined above may have been part of it.

Where a dismissal is due to serious and wilful misconduct, an employee is not entitled to notice of termination or to a payment in lieu of notice in most circumstances. However, where a dismissal is not related to serious and wilful misconduct, an employer needs to ensure that the employee receives the appropriate notice period or pay in lieu of notice. The employee will also need to be provided with any accrued entitlements that are payable on the ending of the employment, such as annual leave and long service leave.

Employers also need to consider any obligations or processes set out in workplace agreements or workplace policies that may impact upon the dismissal of an employee. For example, it is common for workplace agreements to stipulate disciplinary processes that are to be followed prior to dismissing an employee. Failure to comply with these may expose the employer to an unfair dismissal claim or breach of the workplace agreement. Employers should also note that injunctions may be ordered for breaches of enterprise agreements made under the FW Act.

NOTICE

The employee will be entitled to at least the minimum period of notice or payment in lieu of notice stipulated in the FW Act. The notice period depends upon the employee's length of service. Employers should also check any applicable workplace instrument in the event that the notice period is higher than the minimum in the FW Act, in which case the notice provisions in that workplace agreement should be complied with.

Employers also need to check whether an employee may be entitled to a higher period of notice in accordance with their contract of employment. Where the employee has a written employment contract that expressly stipulates the period of notice to apply on termination, and it is higher than any legislative or workplace agreement minimums, then that express notice provision in the contract must be provided.

In some cases, employees may be entitled to reasonable notice (which again may be far higher than any minimums in legislation or workplace agreements). This might be the case when, for example, there is no written contract of employment, the written contract of employment does not provide for notice of termination or where, since the written contract was agreed to, there have been substantial changes to the employee's position, which may render the express notice in the initial contract irrelevant.

Employers need to be careful about these issues as reasonable notice in some cases, particularly for senior employees, may be significantly more than standard minimums.

Employers who pay an amount in lieu of notice should be careful. Unless the contract of employment expressly allows it, it is a breach of the contract.

Any payment in lieu of notice should also properly consider whether it is calculated on base salary or may need to include other benefits in the employment contract.

REDUNDANCY

Where an employee's employment comes to an end because their position is redundant, the employee may be entitled to redundancy or severance pay in addition to any notice of termination or payment in lieu of notice. This entitlement may arise under the National Employment Standards in the FW Act, under an applicable award (including a modern award), workplace agreement, workplace policy or from the employee's contract. In the case of the employment contract, there may be an express provision entitling the employee to severance or redundancy pay or such a benefit may be implied or otherwise incorporated into the contract - for example, due to the existence of an applicable redundancy policy applying at the workplace.

An employer needs to provide the employee with the higher of any applicable redundancy pay entitlement in a written contract, workplace policy, under the FW Act or industrial instrument.

Employers should also keep in mind that in some cases, an employee is not entitled to redundancy or severance pay in the event that their position is made redundant - for example, if the employer has offered them or arranged suitable alternative employment. Employers need to carefully review the document that provides the redundancy pay entitlement to assess that issue.

Employers must also comply with any process or obligations set out in workplace agreements relating to consultation and exploring alternative positions in the case of genuine redundancies. Failure to do so may expose employers to a breach of those workplace agreements or to an unfair dismissal claim.

LEAVE ENTITLEMENTS, SUPERANNUATION AND TAXATION

An employee is also entitled to accrued statutory entitlements such as annual leave and long service leave (if the employee reaches the relevant length of service threshold). Employers should carefully consider the rate of pay that employees ought to receive for leave accruals on termination, particularly when there are non-cash components of remuneration. Also, superannuation payable on final entitlements, including leave and payments in lieu of notice, is likely to be different, as will the tax payable (which will also depend on whether the dismissal relates to redundancy or not).

Australian Consumer Law

When dismissing an employee, employers also need to consider any potential for an employee to raise claims about breaches of the Australian Consumer Law (ACL) or misleading and deceptive conduct or misrepresentation. Typically these issues arise when an employee claims that they were promised certain benefits, which may not have been set out in any written agreements. For example, an employee may claim that they were promised certain bonuses, or that they were promised long-term or secure employment and that non-payment of these bonuses or dismissing them is in breach of those promises and constitutes misleading and deceptive conduct, misrepresentation or breach of the ACL by the employer.

Employers need to be careful to investigate whether any such promises may have been made, including at the time the employee was being recruited by the employer to commence employment.

RESTRAINTS OF TRADE AND CONFIDENTIAL INFORMATION

Certain obligations on employees during their employment survive the ending of the employment, eg non-disclosure or use of confidential information and restraint of trade clauses (provided, in the case of restraint clauses, that they are express terms of a written employment contract). After dismissing an employee, employers should consider how to best minimise the risks of employees breaching those obligations. Employers may need to consider taking specific steps to protect confidential information that the dismissed employee had access to or may have retained. Similarly, where an employee is the subject of a restraint, employers should give consideration to the best way to ensure that the employee maintains that obligation.

Employers should also be aware that if they dismiss an employee contrary to the express provisions of the contract of employment, including failing to give the required notice of termination or other termination benefits, a court may regard this as a repudiation of the employment contract by the employer. If that occurs, a court may also conclude that other clauses in the employment contract such as restraint of trade clauses are no longer enforceable by the employer as the employer's breach of the contract shows an intention that the employer no longer wishes to be bound by the terms of the contract. This highlights the need to ensure that the dismissal of any employee is carefully implemented.

HOW CAN DLA PIPER ASSIST?

We have many expert lawyers who can help you update your policies and procedures, conduct training to assist compliance and advise you when dealing with complaints.

We have extensive expertise dealing with union rights of entry and can also help your organisation respond to claims made in Fair Work Australia, Federal Court or Federal Magistrates Court.

CHECKLIST FOR MANAGING DISMISSALS

- ❑ Can you establish that you have a sound, defensible reason related to the employee's conduct or capacity or due to redundancy to dismiss the employee, unrelated to any discriminatory attribute?
- ❑ Do you need to suspend the employee if the possible reason may amount to serious misconduct?
- ❑ Have you conducted a thorough investigation (where appropriate and necessary) into the grounds for the dismissal, by considering and adequately weighing up all relevant evidence?
- ❑ Have you given the employee an opportunity to respond to the grounds for the possible dismissal, including giving the employee sufficient detail of the grounds?
- ❑ If the grounds for dismissal are not serious misconduct, have there been previous recorded instances of the same or similar behaviour or performance by the employee and has the employee received warnings for these?
- ❑ Were you required to enable the employee to have a support person at the meeting to consider dismissal and did you do so?
- ❑ Have you identified and followed all policies and procedures relating to dismissal that apply to your workplace?
- ❑ Have you considered any matters relevant to the decision, including the employee's length of service, employment record and relevant personal circumstances, before making any decision to dismiss?
- ❑ Have you notified the employee of the reason for dismissal and that the employment has been terminated, identifying the effective date, in writing?
- ❑ Have you paid the employee all appropriate entitlements on termination, including entitlements in industrial instruments, policies and any written contract of employment?
- ❑ Do you need to take steps to protect the organisation's confidential information or property and enforce any restraint of trade?
- ❑ Have you properly considered the period of notice the employee is entitled to and any pre- or post-employment representations that may have been made to the employee?
- ❑ Have you considered if it is a special type of case, eg an absent worker due to illness or injury, short or long term?

For more information, please contact:

Andrew Ball, Partner
T +61 2 9286 8449
andrew.ball@dlapiper.com

Rick Catanzariti, Partner
T +61 3 9274 5810
rick.catanzariti@dlapiper.com

Allan Drake-Brockman, Partner
T +61 8 6467 6205
allan.drake-brockman@dlapiper.com

Murray Procter, Partner
T +61 7 3246 4062
murray.procter@dlapiper.com

Pattie Walsh, Partner
T +61 2 9286 8197
pattie.walsh@dlapiper.com

www.dlapiper.com