

## MEDIA RELEASE

### Terminating employment of senior executives poses legal minefield for companies

*Being aware of potential termination claims from exited senior executives and putting in place mitigation procedures are essential to avoiding litigation*

Sydney, 1 September 2008 – A number of recent examples in corporate Australia indicate that senior executives who believe they have been shown the door unfairly are no longer leaving without putting up a legal challenge. According to Harmers Workplace Lawyers, Australian courts are increasingly awarding compensation in favour of senior executives who claim their positions have been unfairly or unreasonably terminated, particularly on the grounds of the ‘implied terms’ of their contracts.

Bronwyn Maynard, Senior Associate at Harmers Workplace Lawyers, says companies now need to be much more careful about how they terminate the employment of senior executives.

“Increasingly we are seeing senior executives who feel their positions have been unfairly terminated challenging these actions. This is especially the case when an executive believes his or her reputation has been tarnished by implication of non-performance or wrong-doing.

“A number of recent decisions of Australian courts have recognised ‘implied terms’ in employment contracts, including the implied term of mutual trust and confidence, and found that the company’s actions have been in breach of those terms,” she said. “While companies need to have a level of trust and confidence in the executives they employ to run their companies, this relationship is reciprocal.”

Ms Maynard said this increased reliance on, and recognition of, implied terms in termination claims means that companies need to be more aware of fair and reasonable processes when considering terminating the employment of senior C-suite executives.

She said companies needed to be aware of the areas in which senior executives, if aggrieved, have recourse. These include:

- **Breach of contract** – The executive may argue that their dismissal was contrary to the terms of their contract. To avoid such a claim, employers need to take care that they do not act contrary to the contract or applicable policies both in the lead up to the termination (e.g. performance management, misconduct investigations) and at the time of the dismissal of the executive. Employers need to be aware that the contract comprises not only its express terms but also a range of ‘implied’ terms, such as the mutual duty to preserve

the relationship of trust and confidence. This may also include workplace policies, which can be regarded as having contractual force.

- **Discrimination / unlawful termination claim** – This may arise when an employee, including a senior executive, has been dismissed for a reason protected by legislation such as race, sex, age or disability. To avoid such a claim, employers need to take care that the basis for the dismissal is not prohibited by legislation.
- **Trade practices claim** – Trade practices legislation prohibits employers from misleading or deceiving employees in relation to their working conditions when offering employment and during contract negotiations. For this reason, employers need to take particular care when making representations regarding job security or expected length of employment, or an employee's entitlements.

Ms Maynard said an important first step in preventing potential dismissal-related litigation is to get the contract of employment right, including the provisions for termination. These provisions would generally address not only the notice of termination, but also other aspects of the notice period such as payment in lieu of notice, 'garden leave' and assistance during the notice period.

"The contract should also clearly define the circumstances of summary termination for serious misconduct, resignation as a director (so that the executive is obliged to immediately resign as a director if their employment is terminated), and termination payments and entitlements. Furthermore, it is also important to continually review and update employment contracts, especially when promoting an employee, or if conditions of employment and/or workplace policies change.

Ms Maynard said that companies wishing to terminate the employment of senior executives should take extra care that a reasonable termination procedure is in place and can be followed before any action is taken.

She said one further step employers can take to avoid legal action is to ask departing executives to sign a deed of release upon termination. In exchange for the release, the employer will need to provide a benefit that employees would not otherwise have received, such as an additional payment or a longer notice period.

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**Note to editors:**

***About Harmers Workplace Lawyers***

*Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia's leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business's 'employment specialist firm of the year' for the past three years running.*

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