

Table of Contents

Abbreviations	1
Foreword	1
Chapter One – Managing Poor Performance and Misconduct	1
Introduction.....	1
Differentiating between underperformance and misconduct.....	1
Managing poor performance	3
Performance management	3
Purpose of performance management.....	3
Clear performance expectations.....	4
Regular feedback on performance	4
Role of performance appraisals.....	5
Managing underperformance	5
Performance management flowchart	6
Further Information about performance management	7
Misconduct and employer policies	7
Further assistance with policies.....	8
Investigating allegations of misconduct.....	8
Workplace investigation flowchart	9
Formal vs informal investigations	10
When is a formal investigation appropriate?	10
Procedural fairness.....	11
The investigation process.....	11
Allegation not substantiated or unable to be substantiated.....	14
Allegation substantiated	15
Disciplinary action.....	15
Implement the outcome	16
Review the investigation process	16
Monitor the situation	16
Guidelines for developing a disciplinary policy	16
Introduction	16
Objectives of a disciplinary policy.....	17
Procedural and substantive fairness	17
Wide understanding essential	18
Procedural steps should be clear	18
Authority should be identified	18
Records should be kept.....	19
Acknowledgment of accuracy of records.....	19
Relevance of previous warnings.....	19
Promptness is essential.....	20
Consistency is also essential.....	20
The importance of establishing the facts	21

Care needed in issuing warnings	21
Allow time to correct behaviour	22
Opportunities to explain and defend	22
Witnesses	22
Termination requires careful consideration	23
Disciplinary procedure	23
Informal stage	24
Formal stage – warnings and termination of employment.....	24
Notice of termination.....	26
Summary dismissal.....	26
Guidelines for conducting a disciplinary interview.....	27
Annexure Aa – Sample Documentation.....	31
Sample written warning	31
Sample final written warning.....	32
Sample record of interview	33
Sample certificate of employment	34
 Chapter Two – Unfair Dismissal	 1
Overview	1
Brief history of unfair dismissal legislation in Australia.....	2
Constitutional basis for federal unfair dismissal legislation	4
Who can bring an unfair dismissal claim?.....	5
Who can bring a claim?.....	6
The requirement to be an employee of the employer.....	6
Previous approach: the multifactorial test	7
Current test: consideration of the terms of the contract	9
Termination by the employer	13
Expiration of a fixed term contract.....	13
Resignation	13
Demotion	17
Frustration.....	19
Abandonment	21
Reason for termination	23
Bar on multiple claims	23
Types of termination claims.....	24
Who can bring an unfair dismissal application?	24
Employees of constitutional corporations	25
Who is excluded from making an unfair dismissal application?	31
Minimum employment periods.....	32
Minimum employment period and transfer of business	33
Redundancy	34
What is a genuine redundancy?	34
Selection criteria	35
Obligation to consult under modern awards and enterprise agreements.....	35

Redeployment.....	36
Amount of redundancy pay.....	37
Dismissal consistent with Small Business Fair Dismissal Code	37
Employed under a contract for a specified period of time (fixed term contract)	39
Successive fixed term contracts	41
Fixed term contracts containing notice provisions.....	41
Fixed term contracts containing probationary periods	42
Suspension of fixed term contracts	43
Employed under a contract for a specified task (fixed task contracts)	45
Need to identify a specific task.....	47
Termination of specified task employee before the task is complete.....	48
Casual employee engaged beyond the minimum employment period	48
Eligibility to pursue an unfair dismissal claim	48
Meaning of casual employment	49
Regular and systematic basis.....	50
How is the minimum employment period calculated for a casual employee?.....	53
Expectation of ongoing employment	53
Termination of casual employee at the employer's initiative.....	55
Employed under a contract for the duration of a specified season	57
Employed under a formal training arrangement	58
Earning above the 'high income threshold' and not employed under an award or enterprise agreement.....	59
The test for unfair dismissal	60
Valid reason.....	61
Misconduct	62
Serious misconduct	64
Misconduct proven after dismissal	66
Investigating serious misconduct	67
Poor performance.....	68
Remedies	69
Costs	70
Process for dealing with unfair dismissal claims	70
Commencement of proceedings.....	70
Out of time applications	70
Jurisdictional challenge	71
Conciliation conferences	71
Hearings	71
Representation	71
Notice of discontinuance	72
Appeal.....	72
Annexure A – Small Business Fair Dismissal Code.....	73

Chapter Three – General Protections & Unlawful Termination of Employment.....	1
Overview	1
Failure to give notice of termination.....	2
Notice of termination must be given in writing	2
Minimum notice of termination.....	2
Payment in lieu of minimum notice	3
Summary dismissal due to serious misconduct.....	3
Notice of termination must be clear and precise	5
Annual leave and notice	6
Transfer of employment and notice of termination	7
Failure to give redundancy pay	7
Entitlement to redundancy pay	7
Amount of redundancy pay.....	8
Transfer of business and redundancy pay	9
Failure to notify Centrelink of proposed terminations in certain cases	9
Dismissal in contravention of the Act's general protections, including dismissal for certain discriminatory reasons	10
Protection of workplace rights and freedom of association	10
Adverse action	10
Workplace rights	11
Protection from workplace discrimination	14
Default unlawful termination protections.....	15
Process for handling general protections or unlawful termination applications.....	16
Onus of proof in general protections and unlawful termination cases.....	20
Termination during a temporary absence from work due to illness or injury	20
Termination due to absence from work during maternity leave or other parental leave	23
Employer defences	23
Bar on multiple claims	24
Remedies for general protections or unlawful termination claims	25
Chapter Four – Wrongful Dismissal and Breach of Contract	1
Overview	1
Essentials of the contract of employment	2
Impact of legislation, awards and implied terms upon the employment contract	4
Implied contractual duties	4
Damages for breach of contract	5
Actions for wrongful dismissal	5
Reasonable notice of termination	6
Interaction between notice of termination provided by contract and the NES	9
Payment in lieu of notice	9
Summary dismissal	9
Constructive dismissal.....	11
Contractual procedures required prior to dismissal.....	12

Other actions for breach of contract.....	14
Implied term of good faith	15
Mitigation of loss.....	16
Chapter Five – Competition and Consumer Law as an Alternative	1
Overview	1
Prohibition against misleading or deceptive conduct.....	2
Case law relating to misleading or deceptive conduct.....	2
Chapter Six – Consultation with Trade Unions.....	1
Overview	1
Requirement to notify and consult.....	1
Meaning of ‘consultation’ and ‘notification’	2
Potential consequences of failure to consult or notify.....	3
Chapter Seven – Discrimination and Other Issues	1
Overview	1
Anti-discrimination legislation and dismissal	1
Federal anti-discrimination laws	2
State anti-discrimination laws	3
Choice between state and federal law	4
Case law dealing with pregnancy and return to work from parental leave	4
Other pregnancy-related discrimination claims	9
General workplace protections and anti-victimisation laws.....	10
Federal unfair contracts legislation and independent contractors.....	13
Chapter Eight – Managing Resignations.....	1
Overview	1
Forced resignation or constructive dismissal	2
Heat of the moment resignation	2
Notice of termination obligations.....	5
Employer notice obligations.....	5
Employee notice obligations.....	5
Payment in lieu of notice by employer.....	8
When an employee gives too much notice.....	8
Where an employee does not provide the required notice	10
Withdrawal of notice	11
Employee obligations during notice period.....	12
Annual leave and notice of resignation	13
Garden leave	13
Exit interviews.....	14