

TOPIC 1: SOURCES OF EMPLOYMENT REGULATION AND MINIMUM EMPLOYMENT STANDARDS

Abbreviations:

- **EA** Enterprise Agreement (Commonwealth)
- **EO Act** Equal Opportunity Act (Victoria)
- **FW Act** Fair Work Act 2009 (Cth)
- **FWC** Fair Work Commission (Cth)
- **FWO** Fair Work Ombudsman (Cth)
- **LHL Act** Labour Hire Licencing Act (Victoria)
- **LSL Act** Long Service Leave Act 2018 (Victoria) (previously Employee Relations Act, previously Industrial Relations Act)
- **MA** Modern Award (Cth)
- **NES** National Employment Standards prescribed by the FW Act 2009

Minimum standards for employees

Employment law is derived from the following sources:

- Common law
- Equity (employment relationship is a fiduciary relationship)
- Federal legislation (FWA)
 - **s.51(xxxv)** - Labour power: to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
 - **s.51(xx)** – Corporations power: to make laws with respect to (wrt) foreign corporations and trading or financial corporations formed within the limits of the Commonwealth
 - **s.51(i)** – Trade and commerce power: to make laws with respect to trade and commerce with other countries, and among the States
 - **s.51(xxix)** – External affairs power: to make laws about external affairs
 - **s.51(xxxvii)** – Referrals power: to make laws in matters referred to the Parliament of the Commonwealth by the Parliament(s) of any State(s)
 - **s.52(ii)** – Commonwealth power: to make laws wrt matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth
 - **s.122** – Territories power: to make laws for the government of any territory...
- State legislation (EO, LSL, LHL)

Fair Work Act

Coverage:

- Employee of corporations due to head of power (**s51(xx)** of the constitution)
- National system employer (**ss.14, 30D and 30N**, FW Act)
- National system employee (**ss.13, 30C and 30M**, FW Act – extends coverage to non-employees)
- Employer (**ss.15(2), 30E(2) and 30P(2)**, FW Act)
- Employee (**ss.15(1), 30E(1) and 30P(1)**, FW Act)

NES

Found within the FWA. NES are legislated minimum terms and conditions of employment.

- NES and (MA) are to provide a fair and relevant minimum safety net of T&C (**s.134(1)** FW Act)
- An employer must not contravene a provision of the NES (**s.44(1)** FW Act)
- A MA or Enterprise Agreement must not exclude the NES or any of its provision (**s.55(1)** FW Act)

10 MINIMUM TERMS (s61(2)):

1. *Maximum weekly hours*(s62):

- Full-time employee: 38 hours, unless additional hours reasonable (inc authorize leave)
- Another employee: Lesser of 38 hours or employee's ordinary hours of work in a week, unless additional hours are reasonable (employee can refuse if unreasonable)

Reasonable additional hours considerations?

- Health and safety risk
- Personal circumstances, including family responsibilities
- Workplace/enterprise needs
- Entitlement to additional remuneration for additional hours
- Notice given by the employer and employee
- Usual patterns of work in the industry
- Employee's role and level of responsibility
- Average hours arrangement
- Any other relevant matter (ss.62-64, FW Act)

Averaging hours

- A MA or EA may include terms providing for the averaging of the hours of work over a specified period (s.63, FW Act)
- An employer and a MA/EA free employee may agree in writing to the averaging of the hours of work over no more than 26 weeks (s.64, FW Act)

2. *Requests for flexible work arrangements*

3. *Parental leave and related entitlements*

- Up to 12 months' unpaid leave, with a right to request a further 12 months, for certain forms of maternity-related leave, including for long term casual employees who have a reasonable expectation of continuing employment (ss.67-85, FW Act)
- Cannot have 2 parents paid at the time – only primary parent
- Paid Parental leave Act: 18 weeks minimum leave that is paid

4. *Annual leave*

- Four weeks' paid leave per year, plus an additional week for certain shift workers, for non-casual employees (ss.86-94, FW Act) (No leave for casuals)

5. *Personal/carer's leave and compassionate leave*

- 10 days' paid personal/carer's leave per year for non-casual employees, two days' unpaid carer's leave and two days' compassionate leave (unpaid for casuals) (ss.95-112, FW Act)

6. *Community service leave*

7. *Long service leave*

8. *Public holidays*

9. *Notice of termination and redundancy pay*

10. *Fair Work Information Statement (Part 2-2 FWA)*

Modern Awards (MA)

A legal instrument made by the Fair Work Commission (FWC) setting minimum terms and conditions of employment for national system employees (*Part 2-3, FW Act*) – pursuant to a statute

- A person must not contravene a term of a MA (*s.45, FW Act*)

Exception: EA overrules MA (*s57 FWA*)

Coverage:

- MA which is in operation covers an employee, employer, union or outworker entity if it is expressed to cover them, or legislation or an order provides for or excludes their coverage (*s.48, FW Act*)
 - No obligations if MA does not cover the employee
- MA applies to an employee, employer, union or outworker entity if it (*s.47, FW Act*):
 - covers them
 - is in operation
 - no other provision of the FW Act provides that it does not apply
 - the employee is not a high-income employee (\$148, 700 i.e. senior managers)
 - If there is an EA between an employer and employee, that will override an MA

NES and MA

- A MA must not exclude the NES or any provision of the NES (*s.55(1), FW Act*)
 - A term of a MA has no effect to the extent it excludes the NES (*s.56, FW Act*)
- A MA may include terms:
 - that the NES or regulations permit, or
 - that are ancillary or incidental to the NES or that supplement the NES, provided they are not detrimental to an employee (*s.55(2)-(4), FW Act*)
- overtime (working more than specified hours) and penalty rate (working out of normal hours)

Enterprise agreements (EA)

An agreement made at the enterprise level and approved by the Fair Work Commission (FWC) which provides terms and conditions of employment for the national system employees (*Part 2-4, FW Act*). A person must not contravene a term of an EA (*s.50, FW Act*) → works like statute

Coverage:

- An EA which is in operation covers an employee or employer if it is expressed to cover them, and a union if it is a non-greenfields EA and the FWC approval decision notes they are covered, or a union or employer if it is a greenfields EA made with them (*s.53 (1), (2) and (5), FW Act*)
- An EA applies to an employee, employer or union if it covers them, is in operation, and no other provision of the FW Act provides that it does not apply (*s.52, FW Act*)
- A person has no obligations or entitlements under an EA, and does not contravene an EA, unless the EA applies to them (*s.51, FW Act*)
 - FW Act does not apply to a group of employees, hence why we have MA and EA
- (An EA cannot be made with one single employee (*s.172(6), FW Act*))

NES and EA

- An EA must not exclude the NES or any provision of the NES (*s.55(1), FW Act*)
- A term of an EA has no effect to the extent it excludes the NES (*s.56, FW Act*)
- An EA may include terms:
 - that the NES or regulations permit, or
 - that are ancillary or incidental to the NES or that supplement the NES, provided they are not detrimental to an employee (*s.55(2)-(4), FW Act*)

Operation:

- A negotiated EA must be approved before it can come into operation: first, by the majority of employees whose working conditions will be regulated by it (ie by ballot),
- Then it must be approved by the FWC (using the BOOT test)

An EA does not generally cover the CEO and most senior managers of an organisation.

APPROVAL FOR EA - Better Off Overall Test (BOOT) passed (*s.186(2)(d) FWA*)

Each employee must be better off overall than the award (*s193(1)*)

HART Coles supermarket v Bilo – Full bench held it is every hypothetical employee that will work for the company that must be better off.

Can approve/disapprove if contrary to public interest

Greenfields agreement – same as for non-greenfields, for prospective (because there is no current employee) employees (*s.193(5)*, FW Act). 6 months negotiation otherwise apply for approval.

Undertakings for approval:

- may approve agreement with written undertakings meeting the failure concerns, read together with the EA (*ss.190(1) and (2)*)
- An undertaking must, amongst other things, be enforceable as a term of the Agreement and cannot be uncertain, ambiguous, aspirational or perhaps conditional (*CEPU and AMWU v Main People*)

Variation/termination

- Continues to override MA until it is expired, after expiration, it continues until terminated or void
 - Min rates of pay catch up, but employer makes sure base rate is same as MA
- An enterprise agreement may be terminated:
 - by the employer(s) and employees covered by it jointly agreeing to do so and FWC approval (*ss.219-223*, FW Act)
 - after its nominal expiry date, by the FWC on application and if the FWC is satisfied termination is not contrary to the public interest and considers it is appropriate in all the circumstances

Multiple EA

Only one EA can apply to an employee at a particular time

- Earlier EA continues to apply to employee unless it expires or it is a multi-enterprise agreement and the later is single-enterprise agreement (*s.58, FW Act*)
- If Pbusinesses merge: Earlier EA that applies until it reaches the expiry date, then it is the other EA

Types of agreements

- Single-enterprise agreement – 1 national system employer (most of them)
- Multi-enterprise agreement – EA between two or more national system employers eg building sites
- Greenfields: – when a project starts. Basically for a site where no one has been employed yet

Annualised wages

- Benefits of an annualised salary for employees (disadvantages for employers):
 - A predictable pay packet every pay period
 - Incentive to finish work within the normal span of working hours
 - Superannuation benefits
 - Higher rates of pay when on leave
- Employers can currently offer annualised wage arrangements if they are covered by certain awards e.g.: Clerks – Private Sector Award, Banking, Finance and Insurance Award
- Annual salary not to disadvantage employees
 - (a) Salary can't be less than amount the employee would have received under this award
 - (b) Salary reviewed by the employer at least annually to ensure that the compensation is appropriate.
- Company is entitled to set off the payments made to you above that hourly rate against any claim for additional compensation or any entitlements, including wages, allowances, overtime, penalty rates and annual leave loading, that may otherwise be owing under the Award.