

THEMES WHICH MAY APPEAR ON THE EXAM

1. Workplace conduct agreements v employees' expression of religious and political beliefs (Topics 9, 1)
2. FWO entitlement enforcement and consequence / wage theft / time sheets (Topics 1, 3, 4)
3. Termination remedies and payments in a volume claim jurisdiction (Topics 7, 9)
4. Class action risks — misclassification and discrimination (Topics 1, 2, 3, 7, 9, 10)
5. Diverging legislative approaches — state/federal; b/w States (Topics 1, 3, 6)
6. Reduction of collective bargaining and increase of private sector wages set by collective agreement-making (Topics 1, 4)
7. Challenges to labour hire
8. Re-regulation — challenge to ER's ability to annualised salary (Topics 1, 3, 4)
9. Enforceability of post-employment restraints of trade (Topic 5)

Topic 1: Sources of Employment Law

- **Common law**
- **Equity**
- **Legislation**
 - **Fair Work Act** prescribes: the NES; MA; EAs; unfair dismissal provisions; general protections provisions (adverse action); workplace bullying.
 - Note also State legislation (eg, **Equal Opportunities Act**).
 - Most legislation created via **labour power** (**s 51(xxxv) Constitution**) but focus now shifted to **corporations power** (**s 51(xx)**) which regulates trading corporations.
- **The employment contract ('EK')**

Who does the FWA cover?

- **Constitutional corporations**, as well as:
 - **National system employers** (**ss 14D; 30D; 30N**)
 - Constitutional corporations (**s 14(a)**)
 - Cth (**s 14(b)**)
 - Cth authorities (**s 14(c)**)
 - Flight crews, maritime employees, waterside workers (**s 14(d)**)
 - Employer in a territory (**s 14(e)–(f)**)
 - **National system employees** (**ss 13, 30C and 30M**)
 - **Employers** (**ss 14(2), 30E(2), 30P(2)**); and
 - **Employees** (**ss 15(1), 30E(1), 30P(1)**).
- **NOTE** powers on workplace bullying were not referred to Cth. Thus to the extent FWA refers to bullying, it only protects EEs of **corporations** (thus doesn't cover partnerships).
- Should have effect for all EEs in Vic but some limitations apply to state public sector employees; doesn't cover private sector EEs in ACT/NT.

National Employment Standards ('NES')

NES involves legislated minimum terms and conditions for employment: **s 134(1)**.

Prohibitions

- *ER must not contravene a NES provision:* **s 44(1)**.
- *An EA cannot exclude NES or any provision of the NES:* **s 55(1)**.
 - *To the extent it excludes NES or does not NES minimums, it is **unenforceable**.*

NES principles (Pt 2-2)

[A] MAXIMUM WEEKLY HOURS

- ER cannot make EE work more than following number of hours/week **unless reasonable** (**s 62(1)**):
 - **For full-time EEs:** 38 hours
 - **Otherwise:** the lesser of 38 hours or EE's ordinary hours of work in a week.

Were the additional hours reasonable?

Per **s 62(3)**, look at the following considerations:

- **(a) Health and safety risk**
- **(b) Personal circumstances**, including family responsibilities
- **(c) Workplace/enterprise needs**
- **(d) Entitlement to additional remuneration** for additional hours
- **(e) Notice** given by the employer and employee
- **(f) Usual patterns** of work in the **industry**
- **(g) Employee's role and level of responsibility**
- **(i) Average hours** arrangement— is it in accordance with averaging terms un **s 63** in a MA/EA applying to employee or averaging arrangements agreed to by employer/employee under **s 64**.
- **(j) Any other relevant matter**

Averaging hours

- ER may average hours over a period of no more than 26 weeks.
- Therefore, if for example the MA or EA requires you to work 38 hours per week, you may validly be working more than 38 hours on some weeks provided you work less hours in other weeks so that it averages out to 38 hours per week, over 26 weeks.

Refusing to work additional hours

- EE may refuse working additional hours if they are *unreasonable*: **s 62(2)**.

[B] PARENTAL LEAVE

Application

- Applies to **on-going EE** with at least **12 months service** (before baby) OR **long-term EEs** OR **on-going casuals (s 67)**
 - **Long-term casual**: defined as **(a)** casual EE who is **(b)** employed by ER on regular/systematic basis of a sequence of periods of employment for at least 12 months (**s 12**).

Leave

- Must be taken in a single continuous period (one parent after the other and not simultaneously): **s 72(2)**.
- EE can request up to 12mo unpaid leave: **s 70**.
- EE has right to request a **further** 12mo for certain forms of maternity/paternity/adoption-related leave (this also applies to long-term casual EEs who have a reasonable expectation of continuing employment by ER on regular/systematic basis): **s 76**.

Other benefits

- When pregnant, entitlement to transfer to safe job. If not available, EE can take paid leave for period they'd usually work: **s 81**.
- EE gets 'return to work guarantee' — reinstated to where they were pre-leave or nearest suited position: **s 84**.

Note other legislation: ***Paid Parental Leave Act 2010 (Cth)***

- EEs who are carers of newborn/children get **18 weeks PAID leave** at minimum wage.
- Only applies to primary carer (not both parents).

[C] ANNUAL LEAVE ('AL')

Leave

- Non-casual EE gets **4 weeks paid leave** a year; shift workers may get an extra week: **s 72(2)**.
- To be negotiated between parties: **s 88**.
- Rates based on ordinary hours (ie, no overtime): **s 90(1)**.

If leave is not taken / cashing out

- ER must pay out untaken AL if employment ends: **s 90(2)**.
- MA or EA may provide for cashing out AL and terms requiring EE to take paid AL (if reasonable): **s 93**.