

EMPLOYMENT LAW — CHECKLIST

1.0	APPLICATION OF THE FWA	3
2.0	EMPLOYEE OR CONTRACTOR?	4
2.1	GENERAL CHECKLIST	4
2.1.1	Labour Hire Agreement – Agency And Worker	6
2.1.2	Sham Contracts	7
2.1.3	Independent Contractor Protections	7
3.0	FAIR WORK ACT APPLICATION	9
3.1	COMMON LAW EMPLOYEE	9
3.2	NATIONAL SYSTEM EMPLOYEE	9
3.3	CASUAL EMPLOYEE	10
4.0	FWA: MINIMUM STANDARDS	12
4.1	APPLICATION OF THE NES MINIMUM STANDARDS (PART 2-2)	13
4.1.1	Period Of Continuous Service	13
4.1.2	Maximum Weekly Hours — Div 3	13
4.1.3	Flexible Working Arrangements — Div 4	14
4.1.4	Unpaid Parental Leave — Div 5	16
4.1.5	Paid Annual Leave — Div 6	19
4.1.6	Personal/Carer's Leave — Div 7	20
4.1.7	Notice Of Termination — Div 11, Subdiv A	23
4.1.8	Redundancy Pay — Div 11, Subdiv B	24
4.1.9	Fair Work Information Statement — Div 12	25
4.2	MODERN AWARDS – PART 2-3	27
4.2.1	Content And Variation Of Awards	27
4.3	EQUAL REMUNERATION ORDERS	28
5.0	FWA: ENTERPRISE AGREEMENTS	29
5.1	THE BARGAINING PROCESS REQUIREMENTS	29
5.2	APPROVING AN ENTERPRISE AGREEMENT	30
5.2.1	Single Enterprise Agreement With Employee's Themselves	30
5.2.2	Multi Enterprise Agreements	32
5.2.3	Single Enterprise — Greenfields — New Enterprises	33
5.2.4	Multi Enterprise — Greenfields — New Enterprises	34
5.3	PROTECTED INDUSTRIAL ACTION	35
5.3.1	Grounds For FWC Terminating Protected Industrial Action	37
6.0	FWA: ENFORCEMENT	40
6.1	THREE AVENUES FOR RESOLVING A DISPUTE	40
6.1.1	Pursuing A Dispute Under An Enterprise Agreement	40
6.1.2	Pursuing A Dispute Under A Modern Award	40
6.1.3	Litigation For Contravention Of An Obligation Under The Fwa	40
6.1.4	Serious Contravention	42
7.0	WORK HEALTH AND SAFETY LAW	43
7.1.1	First Tier — General Duties On Employers	43
7.1.2	Second Tier — Regulations	44
7.1.3	Third Tier — Compliance Codes/Codes Of Practice	44
7.1.4	Consequences/Penalties	44
8.0	COMMON LAW CONTRACT OF EMPLOYMENT	46
8.1	IS THERE A VALID CONTRACT?	46

8.2	IF CONTRACT VALID, WHAT SORT OF BREACHES MAY BE RELEVANT?.....	46
8.2.1	Terms Implied By Fact	46
8.2.2	Terms Implied By Custom And Practice.....	46
8.2.3	Terms Implied By Law — Implied Obligations Of Employees	46
8.2.4	Terms Implied By Law — Implied Obligations Of Employers.....	48
8.3	MANAGERIAL POLICIES AND CODES OF CONDUCT	49
8.3.1	Does The Policy Have Contractual Force?	49
8.3.2	Evidence Indicating Policy Has Contractual Force	49
8.3.3	Has There Been A Breach?.....	50
8.3.4	If Not Contractually Binding, Do The Policies Have Any Other Impact?	51
9.0	ANTI-DISCRIMINATION	52
9.1.1	Direct Discrimination	53
9.1.2	Victimisation	57
10.0	ADVERSE ACTION.....	58
10.1	PROHIBITED GROUNDS	58
10.1.1	Workplace Rights (S 340).....	58
10.1.2	Industrial Activities (S 346)	59
10.1.3	Race/Sex/Disability/Carers/Sexual Preferences (S 351)	59
10.1.4	Causation	59
10.1.5	Exceptions.....	60
11.0	ANTI-BULLYING ORDERS	61
11.1.1	Application For An Anti Bullying Order.....	61
11.1.2	Was [X] Bullied?.....	62
11.1.3	Exceptions.....	62
11.1.4	Orders And Consequences	63
12.0	UNFAIR DISMISSAL	65
12.1.1	Exceptions.....	66

FAIR WORK ACT APPLICATION

THINK: Is [x] an employee under 2.0 above? FWA only applies to common law employees or NES employees

EXAM: Whether the FWA applies to [client] is contingent on whether they are a 'national system employee' (FWA s 13) or 'employee' within the meaning of the common law (See, s 15). The FWA uses these two 'standard' definitions interchangeably at the beginning of each Part to determine the scope of that Parts application.

[1] **Think:**

- [a] Which State is [x] employed in? If they're employed in WA they can only be an NES employee if they're caught by the s 13 + 14 approach as WA isn't a referral state.

IS [X] A COMMON LAW EMPLOYEE?

[1] See above.

IS [X] A NATIONAL SYSTEM EMPLOYEE?

TWO APPROACHES — Go through both!

(A) Section 13 + 14 Approach

State:

- [1] **[Client]** is an NES employee so far as **[he/she]** is employed by an NES employer (s 13). Therefore whether **[client]** is an NES employee under the s 13 + 14 approach is contingent on whether **[firm/employer]** is an NES employer (s 14)

NES employer test (s 14)

[1] Constitutional Corporation (s 14(1)(a)):

- [a] **State:** A Constitutional Corporation is a corporation includes all foreign corporations, and trading and financial corporations formed in the Cth within the meaning of s 51(xx) of the Constitution.

[b] **Apply:**

- [i] **State:** **[employer]** is a **[foreign/trading/financial]** corporation, therefore... **[apply below]**.

[ii] Foreign Corporation: Automatically covered (see s 51(xx)).

[iii] Trading Corporation: Apply — Activities test (*Adamson*)

- (a) **State:** The court will apply the activities test from *Adamson* in determining whether **[employer]** is a trading corp. This threshold requirement is difficult to apply. This test will look at whether [employer's] trading activities are a substantial or not insubstantial proportion of their activities (*Adamson*).

(b) **Apply**

[iv] Financial Corporation:

- (a) **State:** The same test applies for financial corps as trading corps (*State Superannuation Board*). The court will therefore apply the activities test from *Adamson* in determining whether **[employer]** is a financial corp. This threshold requirement is difficult to apply. This test will look at whether **[employer's]** trading activities are a substantial or not insubstantial proportion of their activities (*Adamson*).

(b) **Apply.**

[2] The Commonwealth itself (s 14(1)(b))

- [3] A Commonwealth Authority s 14(1)(c)
- [4] Person employed in connection with constitutional trade, who is employed as s 14(1)(d):
 - [a] A flight crew officer s 14(d)(i);
 - [b] Maritime employee; or s 14(d)(ii)
 - [c] Waterside worker s 14(d)(iii)

(B) Employed in a Referral State [Everywhere except WA who hasn't referred any power]

- [1] **State:** As [X] works in [Anywhere but WA] they may also be an NES employee to the extent of the States referral (s 30C, 30D, 30E).
- [2] **Apply:**
 - [a] Victoria:
 - [i]
 - [b] ACT:
 - [i] **State:** In ACT the national system includes all employees except a law enforcement officer or executive in the public sector. Therefore, [X] **is/is not** an NES employee.
 - [c] NSW, Qld and SA:
 - [i] **State:** In [NSW/Qld/SA] the national system includes all employees, except most state government and local government employees.
 - [d] NT:
 - [i] **State:** In NT the national system includes all employees except members of the police force.
 - [e] Tasmania:
 - [i] **State:** In Tasmania, the NES includes private enterprise and local government, but excludes state government.

IS [X] A CASUAL EMPLOYEE?

EXAM: The FWA does not define 'casual worker.' The most common definition of a casual is simply someone who is specifically 'engaged and paid' as a casual (Stewarts Guide, 4.2). However, the case law relating to whether employee's can be correctly characterised as 'casual' is very ambiguous (See, eg. *Williams*; *Skene* and cf. *Telem*)

- [1] **Is there a modern award or enterprise agreement in play?**
 - [a] Does it define 'casual employment'?
 - [i] Yes – apply the definition in the award
 - [ii] No – State rule below.
 - [b] **STATE RULE:** Modern awards generally define 'casual' employee's in line with the common definition that someone who is 'engaged and paid' as a casual is thus a casual.
- [2] **Does the agreement between [X] and [employer] contemplate the future?**
 - [a] **STATE RULE:** One similarity in the case law concerning casual employment is that where the agreement between the employee and employer in some way contemplates future matters (*Williams*) and/or fails to make a 'firm advance commitment as to the duration of the employee's employment or the days/hours they will work' (*Skene* approving *Hamzy*) this will help to suggest a casual relationship.
- [3] **Analogize** — *Williams v McMahon*
 - [a] **Facts:**
 - [i] FIFO miner.
 - [ii] **Regular shift:** 7 consecutive day shifts, then 7 consecutive night shifts (of 12 hours each), then 1 week off.

[iii] **Contract:** Written contract stated he was a casual; \$40 per hour flat rate. Contract terminable on 1 hours' notice.

[iv] **W's claim:** seeking annual leave under Workplace Relations Act (equivalent to NES under FW Act).

[b] **FCA Held:**

[i] FCA held that Williams was NOT a casual because:

(a) Casual work means engagement on an 'intermittent' and 'irregular' basis [40]

(b) The 'future was provided for' between Williams and McMahon Mining

(c) Regularity of Employment: The roster system meant that there was a 'regularity' of employment which was inconsistent with a casual employment relationship.

[c] **Application:**

[i] Is there some regularity in [X's] employment?

[ii] Is the 'future provided for' → therefore suggesting some form on ongoing employment that is inconsistent with a casual employment relationship

[4] **Analogize — *Telem v CFMEU***

[a] **Facts:**

[i] Construction workers.

[ii] Worked full time equivalent hours; regular start and finish times; attended work each day.

[iii] CFMEU Claim: seeking redundancy pay under NES & Enterprise Agreement.

[b] **Held by FWCFB:**

[i] "Casual" means that the worker was engaged as a casual under an Enterprise Agreement, and where there is not an EA, then a modern award.

[c] **Application:**

[i] Look at whether there is an EA or MA on the facts which stipulates the worker is a casual employee.

[5] **Analogize — *Workpac v Skene***

[a] **Facts:**

[i] FIFO truck driver.

[ii] S a truck driver at a coal mine.

[iii] S claim: seeking paid annual leave under NES.

[b] **FCAFC – Held:**

[i] Skene was entitled to paid annual leave under NES because he was not a "casual" due to his "regular predictable working arrangements".

CONCLUSION: The above analysis suggests that [X] will/will not be considered a casual employee. However, I would advise [X] that this is an ambiguous area of law and the court holds a broad discretion in its interpretation of the factors indicating a casual or non-casual employment relationship.

FWA: MINIMUM STANDARDS

[1] **THRESHOLD: Is [X] an NES employee or NES employer?**

- [a] The minimum standards in Part 2—2 of the FWA only apply to NES employees and employers (s 60 FWA)
- [b] **Yes?** Carry on.
- [c] **No?** Minimum standards in the NES don't apply but

EXAM STATEMENT: Section 60 of the FWA applies the NES minimum standards in Part 2-2 of the FWA to NES employees and NES employers only. As [X] is an [NES employee/NES employer] the minimum standards apply. As an employer, [employer] must not contravene the NES standards (s 44 FWA).

- a) **CONSIDER: Is there an AWARD or ENTERPRISE AGREEMENT in play on the facts?**
- b) Yes? Statement below and consider rules.

EXAM STATEMENT: A modern award or enterprise agreement cannot exclude the National Employment Standards or any provision of the NES (s 55(1)).

- [i] s 55(2): A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
 - (a) (a) By a provision of Part 2-2 which deals with NES
 - (b) (b) By regulations made for the purposes of s 127.
- [ii] s 55(4): A modern award or enterprise agreement may also include the following kinds of terms:
 - (a) (a) Terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES
 - (b) (b) Terms that supplement the NES.

- c) No? Move on

APPLICATION OF THE NES MINIMUM STANDARDS (PART 2-2)

I) PERIOD OF CONTINUOUS SERVICE

EXAM: A number of [X's] entitlements under Pt 2-2 are contingent on their length of continuous service. Continuous service is defined as the period in which [X] has been employed by [employer] but excludes some periods: s 22(1). This period will be determined here to help inform an analysis of their potential entitlements below.

[Apply below]

CONCLUDE: [X's] period of continuous service for Part 2-2 generally is [insert period of employment less any excluded periods] and for Divs 4 & 5 and Subdiv A of Div 11 is [insert period of employment less any excluded periods]

[1] **GENERAL SERVICE: Part 2—2.**

[a] **Excluded periods which do not count towards service:**

- [i] Any period of unauthorised absence: s 22(2)(a)
- [ii] Any period of unpaid leave: s 22(2)(b)

- (a) Note: This doesn't include a period of stand-down under an EA or under the employee's contract: s 22(2)(b)(ii)

- d) **SERVICE under Div 4 (Flexible Working Arrangement); Div 5 (parental leave) and Subdiv A of Div 11 (termination)**

- e) Excluded periods under Div 4, Div 5 and Subdiv A of Div 11:
[iii] Any period of unauthorised absence: s 22(4)(a)(i)

I) MAXIMUM WEEKLY HOURS — DIV 3

PART 2—2 DIV 3 (ss 62-64)

[1] FULL-TIME WORKER:

EXAM STATEMENT: As [X] is a full-time employee, he/she is only required to work for 38 hours weekly, plus additional reasonable hours (s 62(1)(a)).

2) PART-TIME WORKER:

EXAM STATEMENT: As [X] is not a full-time employee, he/she is only required to work the lesser of 38 hours weekly (s 62(1)(b)(i)); or his/her ordinary weekly hours (s 62(1)(b)(ii)) plus reasonable additional hours. [X's] maximum hours will be [ordinary hours/38 hours] + reasonable additional hours.

- a) **APPLY** — Can [X] refuse to work unreasonable additional hours? **(For both Full-Time and Part-Time Employees).**
- b) **STATE:** [X] has been asked to work additional hours. He/she can refuse provided these additional hours are considered unreasonable (s 62(2)). In determining whether these hours are unreasonable, the court must consider factors listed in s 62(3).
- c) **TEST – Section 62(3) Factors**
- [i] Risk to employee health and safety from working additional hours: s 62(3)(a).
 - [ii] Employee's personal circumstances, including family responsibilities: s 62(3)(b).
 - [iii] Needs of the workplace and the enterprise where employee is employed: s 62(3)(c).
 - [iv] Whether the employee is entitled to overtime or penalty rates: s 62(3)(d).
 - [v] Whether the employee is well remunerated (suggests an underlying expectation of working extra hours): s 62(3)(d).
 - [vi] Notice given by the employer of a need to work additional hours: s 62(3)(e).
 - [vii] Notice given by the employee of his or her intention to refuse extra hours: s 62(3)(f).
 - [viii] Usual work patterns in that specific industry: s 62(3)(g)
 - [ix] Nature of the employee's role and their level of responsibility: s 62(3)(h).
 - [x] Any other relevant matter: s 62(3)(j).

d) Are hours being averaged over an extended period?

[i] **Option One — Award or EA:**

- (a) **State:** An MA or EA may include terms which averages hours over a specific period (s 63(1)).
- (b) **Rule:** These averaged hours can exceed the normal thresholds for both full-time and part-time employees provided they are reasonable for the purposes of ss 62(1) (s 63(2)).
- (c) **Apply**

[ii] **Option Two — [X] Agreed in Writing:**

- (a) **State:** [X] has agreed in writing that [his/her] weekly hours will be averaged over [period].
- (b) **Rule [if relevant]:** Weekly hours must be averaged over a period less than 26 weeks (s 64(1)).
- (c) **State Rule:** These averaged hours can exceed the normal thresholds for both full-time and part-time employees provided they are reasonable for the purposes of ss 62(1). (s 64(2))
- (d) **Apply**

[b] **Conclude**