OVERVIEW OF EMPLOYMENT REGULATION AND MINIMUM EMPLOYMENT STANDARDS

WHY HAVE MINIMUM STANDARDS FOR EMPLOYEES?

- Protective laws have taken two forms
    - Collective action by workers through the formation of trade unions – collective bargaining/trade bargaining
    - Statutory obligations on employers
- On one view, regulation is necessary to overcome inequality of bargaining power
- Countervailing ideology is that protective laws interfere with the 'natural' means of determining employment conditions

THE (COMPLEX) REGULATION OF EMPLOYMENT IN AUSTRALIA

- A variety of different sources of regulation of employment in Australia
    - Federal legislation (the FW Act)
    - State legislation (EO Act)
    - The common law (see, eg, the common law regulating the employment contract)
    - Equity (see, eg, the employment relationship as a fiduciary relationship)
- The rights and obligations of workers and employers are affected by:
    - Agreements, which may be written or unwritten, individual or collective, registered or unregistered
    - Industrial awards – 122 modern awards that regulated particular kinds of awards
    - Federal, state or territory statutes or regulations – FW Act, work and compensation legislation, long service leave legislation, anti-discrimination legislation, equal opportunity legislation
    - Executive governmental policies
    - Organisational policies and procedures
    - The rules and processes of common law
    - International labour standards

THE FW ACT AND ITS CONSTITUTIONAL BASIS

- The national industrial system of industrial regulation that exists under the FW Act is based upon the **Commonwealth's power to make laws with respect to 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (the corporation power within s 51(xx))**
    - **Strickland v Rocla Concrete Pipes Ltd – Facts -** Concerned the validity of s 35 of the TTPA which defined certain agreements (in restraint of trade) between parties to be examinable if one of the parties was a constitutional corporation. **Decision - <u>Commonwealth Parliament can enact laws that control and regulate the trading activities of trading corporations</u>** – court left open the question of what other activities of a corporation might be regulated or whether the relationship between a corporation and its employees was part of the entity's trading activities. However, the Court did not decide upon the outer

limits of the power – e.g. could all the activities of corporations be regulated? Two interpretations of the core of the power emerged from this case:

- **Narrow view –** suggests that the aspects or activities of a corporation which may be regulated by the Commonwealth must relate to those characteristics that bring a corporation within the reach of the head of power. The law must therefore have a sufficient connection to the trading activities of trading corporations and the financial activities of financial corporations
- **Broad view –** constructs the scope of the power as plenary. As long as a corporation satisfies the tests for identification as a "foreign, trading or financial corporation formed within the limits of the Commonwealth", all of its activities may be subjected to the Commonwealth's regulation and control
- **The majority in the Work Choices case favoured the BROAD view – therefore, a law which singles out constitutional corporations as the subject of the regulation will be a law with respect to s 51(xx)**

- **Work Choices NSW v Commonwealth – Facts -** Concerned the validity of changes to the *Workplace Relations Act 1996* (Cth) which had been introduced by the *Work Choices Act*. The Work Choices scheme's link to the corporations' power was provided largely through ss 5 and 6 of the Amended Act, which dictated that it applied to regulate relations between employers defined as constitutional corporations and their employees. The amended Act went beyond regulating the trading activities of a constitutional corporation and activities done for the purposes of trade - it provided for the regulation of the relationship between constitutional corporations and their employees. **Issue** – Does the corporations power extended to regulation of the relationship that exists between a corporate employer and its employees? **Decision –** The majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) went on to uphold the validity of the Work Choices legislation in its entirety.
  - The majority endorsed the description of the scope of the corporations power articulated by Gaudron J in Pacific Coal – the power extends to the regulation of the activities, functions, relationships and the business of a cooperation described on that subsection, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those whom it acts, its employees and shareholders and, also the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships of business. Underlined section represents a description of incidental power under s 51(xx), except to the extent that the imposition of rights and duties on those mentioned in the underlined section result in the correlative conferral of direct rights and duties on corporations. This seems to significantly extend the scope of direct and incidental power under s 51(xx)
  - The majority described the narrow view as the "distinctive character test" while the broad view was described as the "object of command" test. The majority went on to reject the "distinctive character" test
  - **The majority rejected the argument that s 51(xx) was limited to regulating the external relationships of a constitutional corporation, and not its internal relationships with, for example, employees, directors and shareholders**
  - Kirby and Callinan JJ dissented – Callinan J expressed a preference for the narrow view
- **Fencott v Muller – Facts** - Court examined s 82(1) of the TPA which permitted that any person who has suffered a loss because of a corporation's misleading or deceptive conduct to recover that loss from any natural person involved in that deception. It was submitted that the provision was not supported by the

corporations' power because it did not impact directly upon a corporation's rights or duties. **Decision** – However, the court agreed that the imposition of duties on natural persons under s 82(1) was valid under s 51(xx). Mason, Murphy, Brennan and Deane JJ found that the regulation was "incidental to the regulation of corporate activities" while the other three judges, who adopted the narrow view of core power under s 51(xx), found the regulation incidental to the trading activities of trading corporations. All judges therefore found the law to be within power

- **Re Dingjan, ex parte Wagner 1995 – Facts -** The sufficiency of connection between a law and the subject matter of the corporations power was addressed. Involved a challenge to unfair contracts sections of the *Industrial Relations Act 1988*. Sections 127A and 127B gave the Commonwealth Industrial Relations Commission the power to review and vary contracts to which independent contractors were a party, if those contracts were unfair, harsh or contrary to the public interest. **Decision -** The majority found that the provisions in question were outside the scope of the corporations power as it did not have a sufficient connection to the head of power
    - **Brennan, Toohey and McHugh JJ** – the Commonwealth could not impose general regulations on contracts, just because they "related to" the business of a trading corporation.
    - A s 51(xx) law must at least operate so as to have some effect on a constitutional corporation.
    - s 51(xx) law must operate so as to have some definite significance for a constitutional corporation, in that it must normally cause some beneficial or detrimental effect on such a corporation
    - **Gaudron and Deane JJ** minority – appeared to agree with the majority that a s 51(xx) law must operate in such a way as to have "significance" for a constitutional corporation
    - They interpreted s 127C(1)(b) contracts as having such significance, on the basis that they bound persons who had business relationships with such corporations
    - The subsection could be read down so as to have such an effect
    - **<u>Enunciated a test for invalidity under s 51(xx) – a law would fall outside the placitum if it operated so as to have no effect, either beneficial or detrimental, on a constitutional corporation</u>**

- **Conciliation and arbitration power** (s 51(xxxv)) - deals with employment and workplace relations
    - It allows the Commonwealth to make laws with respect to conciliation and arbitration for the prevention or settlement of industrial disputes across State boundaries
    - It allowed parliament to depart from the traditional conciliation and arbitration model and adopt forms of collective bargaining or more direct statutory regulation of wages and conditions
    - This power is limited, as it does not allow the Commonwealth to prescribe laws regarding minimum employment conditions (e.g. setting a minimum wage)
    - All that s 51(xxxv) can do is establish a process for resolving industrial disputes, which must involve conciliation and/or arbitration – a process limited to dealing with disputes across State boundaries
    - There are other constitutional powers, which allow the Commonwealth to make laws with respect to minimum employment conditions
- **Trade and commerce power under s 51(i)** is used to support regulation an industrial relations in the waterfront, maritime and airline industries. Allows the Commonwealth to make laws about employment conditions for workers who are employed in businesses that have something to do with the interstate or overseas trade or commerce
- **Corporations power (s 51(xx))** - enables the Commonwealth to make laws regulating employment relations between 3 types of corporations (trading corporations, financial corporations and foreign corporations) and workers

- **Taxation power (s 51(ii))** in theory enables the Commonwealth to regulate **j**ust about anything simply by saying that if someone does/does not do something, then they will be taxed (e.g. passing a law that says that any business that does not pay their workers a minimum wage will be taxed extra)
    - Note that this power has not been utilised much, apart from with respect to making laws requiring employers to make minimum superannuation contributions on behalf of their employees (Superannuation Guarantee (Administration) Act 1992 (Cth))
- The **Commonwealth power** allows the Commonwealth to make laws with respect to the employment of its own workers (ie those in branches of the public service)
- **Territories power (s 122)** is an unconstrained power allowing the Commonwealth to make laws with respect to the Territories
- **State referral power (s 51(xxxvii))** allows States to refer powers to the Commonwealth
- **External affairs power (s 51(xxix)**
    - Parliament can use it to pass laws on any matter that is the subject of some form of international treaty/convention
    - Relied upon to support aspects of the legislation such as new enterprise bargaining arrangements and right to maintain an unfair dismissal claim
    - Empowers the Commonwealth to make laws with respect to minimum wages, equal remuneration for work of equal value, unfair termination of employment and parental leave – these provisions relied n the Internal Labour Organisation connections and internal instruments which Australia was a party to
    - **Victoria v Commonwealth (1996)** – High Court considered the scope and extent of the external affairspower in an industrial relations context
    - **Koowarta** – High Court upheld the validity of the Racial Discrimination Act 1975 (Cth) which gave effect to the Internal Convention on the Elimination of All Forms of Racial Discrimination
    - **Tasmanian Dams and Richardson v Forestry Commission** – High Court held that the external affairs power enables the Commonwealth to make laws which gave effect to any treaty or international convention to which Australia is a party despite that the law might otherwise go beyond the Commonwealth enumerated powers in the Constitution
    - The use of the external affairs power meant that the Australian Industrial Relations Commission was able to prescribe wages generally in certain circumstances thereby avoiding the constraints of parties and jurisdictional requirements imposed by s 51(xxxv)
    - This allowed the Federal government to legislate directly for certain minimum conditions of employment – most importantly, termination of employment (unfair dismissal regime allowing individual applicants to mount a claim for compensation or reinstatement)
- Federal laws **can validly apply to state governments and their workers** (e.g. state school teachers, state doctors and other public servants). Where the FW Act does apply to a National System Employee and a National System Employer, the general rules is that the FW Act **operates to the exclusion of State and territory laws**
- The states can still regulate
    - Long service leave
    - Work health and safety
    - Worker's compensations
    - Training
    - Child labour

- Discrimination

Is X a national system employee?

- **s 13** - A **national system employee** is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement.
- **S 14** – meaning of national system employee

(1) A **national system employer** is:

(a) a **constitutional corporation**, so far as it employs, or usually employs, an individual; or

(b) the **Commonwealth**, so far as it employs, or usually employs, an individual; or

(c) a **Commonwealth authority**, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a **body corporate incorporated in a Territory**, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or

(ii) is a body established for a local government purpose by or under a law of a State or Territory; or

(iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing (a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or (b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or
(b) supplies or distributes gas; or
(c) provides services for the supply, distribution or release of water; or
(d) operates a rail service or a port;
(e) unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

- **S 30D - Extended meaning of national system employer**

(1) A **national system employer** includes:

(a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and

(b) a holder of an office to whom subsection 30E(2) applies.

(2) This section does not limit the operation of section 14 (which defines a national system employer).

- **S 30E - Extended ordinary meanings of employee and employer**

(1) A reference in this Act to an employee with its ordinary meaning includes a reference to a law enforcement officer of a State that is a referring State because of this Division if the State's referral law so provides for the purposes of that law.

(2) A reference in this Act to an employer with its ordinary meaning includes a reference to a holder of an office of a State that is a referring State because of this Division if the State's referral law provides, for the purposes of that law, that the holder of the office is taken to be the employer of a law enforcement officer of the State.

(3) This section does not limit the operation of section 15 (which deals with references to employee and employer with their ordinary meanings)

THE NES

- **An employer must not contravene the NES (s 44(1)) – result in a civil penalty (s 44(2))**
- The FW Act provides for 10 minimum conditions of employment under the NES, which apply to all national system employees – outlined in **s 61**

(1) **Division 3 S 62 - Maximum weekly hours** – an employer must not request or require an employee to work more than the maximum standard working week of 38 hours for full-time employees **(s 62(1)(a)),** unless additional hours are 'reasonable'

- Other than full-time – the lesser of 38 hours and the employee's ordinary hours of work in a week **(s 62(1)(b))**
- Leave (paid or unpaid) is treated as hours worked during the week where authorised by employer, employment contract, a law - (**s 62(4))**
- Working beyond the maximum:
  - An employer may request 'reasonable' additional hours
  - The employee may refuse to work the additional hours if they are 'unreasonable' **(s 62(2))**
- Reasonable or unreasonable?

- The factors that 'must be taken into account' - **s 62(3)** – risk to personal safety from working additional hours, employee personal circumstances are going to be inhibited (e.g. family responsibilities), needs of the workplace, whether entitled to overtime or penalty rates or other remuneration that reflects an expectation of working additional hours, nature of your particular role, any notice given by employer to work additional hours, notice given by employee to refuse to work additional hours, usual patterns of work in industry, nature of employee's role and level of responsibility, in accordance with averaging terms in MA or EA (s 63), any other relevant matter

- For award/agreement-free employees – **26 weeks** is the maximum averaging period - **s 64**

(2) Division 3 s 65 - A right to request flexible working arrangements

- The employee can request a change in working arrangements if the employee:
  - is a parent or has parental responsibilities
  - is a carer of a child who is under school age or 18 or under 18 with a disability **(s 65(1(a)(b))**
  - has a disability
  - is 55 or older
  - is experiencing violence from a member of the employee's family or provides care and support to a family member experiencing the same - **ss 65(1), (1A), (1B) and (2)**
- Could include change to hours of work, patterns of work, location or work etc
- **Eligibility** for requesting a flexible working arrangement – 12 **months of continuous service completed 'immediately before' the request (s 65(2)(a))** or for **c**asuals:
  - Long-term casual employee of the employer immediately before making the request
  - Has a reasonable expectation of continuing employment on a regular and systematic basis **(s 65(2)(b))**
- **Procedure for requesting a flexible working arrangement**
  - The request must be in writing and set out details of change sought and reasons - **s 65(3)**
  - The employer must give the employee a written response within 21 days - **s 65(4)**
  - The employer may refuse the request only on reasonable business grounds. Examples of reasonable business grounds are set out in **s 65(5A)**
    (a) That the new working arrangements requested by the employee would be too costly for the employer
    (b) No capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
    (c) Impractical/no capacity to change
    (d) That it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
    (e) That the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
    (f) New arrangements may have a significant negative impact on customer service

(3) Division 5 - Parental leave and related entitlements – parental and adoption leave of 12 months (unpaid) with a right to request an additional 12 months

- **Eligibility s 67(1)** – employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3) (birth date etc)

- **Casuals s 67(2)** – the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and but for the birth, placement of adopted child etc the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis

(4) Division 6 s 87 - Annual leave – four weeks paid annual leave each year **(s 87(1)(a))**

- 5 weeks' annual leave for certain 'shiftworkers' (s **87(1)(b))**
- Accrues progressively according to the employee's ordinary hours of work and accumulates from year to year **(s 87(2))**
- Casuals not eligible **(s 86)**
- Can be taken as a period agreed between an employer and employee **(s 88(1))**
- An employer 'must not unreasonably refuse' **(s 88(2))**
- Excludes certain periods such as public holidays and other leave **(s 89)**
- Must be paid in lieu of termination **(s 90(2))**
- Cashing out permitted in accordance with **ss 92-94**

(5) Division 7 s 96 - Personal/carer's leave – for each year of service employee is entitled to 10 days paid personal/carer's leave which accrues according to the employee's ordinary hours of work **(s 96)**

- **S 97 -** May be taken if employee is:
  - Unfit for work with a personal illness or injury
  - Required to care/support a member of their immediate family or household who has a personal illness or injury or an unexpected emergency - **s 97**
- **S 98** – If the period during which an employee takes paid personal/carer's leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid personal/carer's leave on that public holiday
- Payment at base rate of pay for ordinary hours of work: **s 99**
- Casuals ineligible for paid personal/carer's leave**: s 95**
- **S 102** – entitled to 2 days of <u>unpaid</u> carer's leave for each permissible occasion when a member of immediate family or household requires care/support due to illness, injury or emergency
  - Continuous period of 2 days
  - Separate periods as agreed by employer and employee: **s 103(2)**
  - Unable to take if employee could take paid personal/carer's leave: **s 103(3)**
- **S 104** - 2 days <u>paid</u> compassionate leave for each permissible occasion
  - When a member of the employee's immediate family or household:
    - Contracts or develops a personal illness that poses a serious threat to his or her life; or
    - Sustains a personal injury that poses a serious threat to his or her life; or
    - Dies
- Continuous period of 2 days, 2 separate periods of 1 day each **or separate periods as agreed with the employer - s 105(2)**

(6) Division 8 s 108 - Community service leave – Entitlement to be absent from employment for the purpose of engaging in eligible community service activity. Entitled to be absent if period consists of (i) when employee engages in activity; (b) reasonable travelling time associated with activity; (c) reasonable rest time immediately following activity

- **S 108(1)(b) –** if jury service, employee's absence is reasonable in all circumstances

- **S 109 -** jury service or activities dealing with certain emergencies or natural disaster – unpaid except for jury service
    - Jury service: **s 109(1)(a)**
    - Voluntary emergency management activity (as defined): s **109(1)(b)**
    - Any activity prescribed by the regulations: **s 109(1)(c)**
- Payment to employees (other than causals) on jury service for the first 10 days at the base rate (minus jury service pay) **(s 111)**
- Notice and evidence requirements set out in **s 110**

(7) Division 9 s 113 - Long service leave - a limited entitlement for those who were subject to pre-FW Act industrial instrument provisions

(8) Division 10 s 114 - Public holidays and entitlement to be paid for ordinary hours on those days

- An employee is entitled to be absent on a public holiday - **s 114(1)**
- Employer may request an employee to work if request is reasonable - **s 114(2)**
- Employee may refuse the request if the request is not reasonable or the refusal is reasonable **- s 114(3)**
- Factors to be taken into account to determine reasonableness are set out in **s 114(4)**
    - Nature of employer's workplace and nature of work performed by employer
    - Personal circumstances including family responsibilities
    - Whether employee could reasonably expect that employer might request work on public holiday
    - Whether employee entitled to receive overtime, penalty rates or remuneration that reflects expectation of work on public holiday
    - Type of employment of employee (full time, part-time, casual, shift-work)
    - Amount of notice in advance of public holiday given
    - Amount of notice in advance of public holiday given by employee when refusing request
    - Any other relevant matter
- Entitled to payment on a public holiday - **s 116**

(9) Division 11 s 117 - Notice of termination and redundancy pay

- Requirement for notice of termination by employer in writing - **s 117(1)**
- Minimum notice period
    - Not more than 1 year – 1 week
    - More than 1 year but not more than 3 years – 2 weeks
    - More than 3 years but not more than 5 years – 3 weeks
    - More than 5 years – 4 weeks
    - Increase by 1 week if the employee is over 45 years old and has completed at least 2 years of service: **s 117(3)**
- Or payment in lieu: **s 117 (2)**
- MAs and EAs may provide notice: **s 118**
- Entitlement to redundancy pay where employment is terminated:
    - At the employer's initiative because the employer no longer requires the job done (except where ordinary and customary turnover of labour): s **119(1)(a)**
    - Because of insolvency or bankruptcy of employer: **s 119(1)(b)**
- Up to 16 weeks redundancy pay based on length of service: **s 119(2)**

- **120 –** employer can argue no capacity to pay

(10) The right of new employees to receive the Fair Work Informational Statement upon being employed (S 125)

- Casual employees are excluded from a number of these minimum conditions in exchange for a loading of 20-25% of the normal hourly rate for work
- **The minimum conditions prescribed by the NES cannot be excluded by an employment contract, even if an employee agrees.** However, an employment contract can provide for conditions over and above those set out in the NES
- The FW Act also provides for the setting of minimum wages, but not as part of the NES

MODERN AWARDS - FW Act Part 2-3

- **NOTE:**
  - Civil remedy provision if a person contravenes a term of a MA (breached where employer imposes conditions that provides terms and conditions that are less than those specified in the MA) - **s 45**
  - Does not apply to a high-income employee ($142k) – **s 47(2)**
  - Do not apply if an EA applies **(s 57)**
  - Generally, MAs prevail over a State or Territory law, but there are exceptions
  - 122 MAs and it is possible for a business to be covered by more than 1 MA, depending on the type of work undertaken by employees
- **Coverage**
  - An instrument covers a person if they are included within its scope - **s 48**
  - An instrument applies to a person when it actually has the effect of conferring rights or imposing obligations on them - **s 47**
  - Dual coverage issues are addressed by mixed functions clauses and a clause that prioritises award classification that is most appropriate to the work performed by the employee
- **Matters/terms that cannot be included – ss 150-155**
  - Objectionable terms – **s 150**
  - Terms about payments and deductions for benefit of employer etc – s **151**
  - Terms about right of entry **– s 152**
  - Terms that are discriminatory – **s 153**
    - Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin
    - Not discriminatory where:
      - the discrimination is the inherent requirements of the particular position held by the employee
      - in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed
      - provides for minimum wages for: (a) all junior employees, or a class of junior employees; or (b) all employees with a disability, or a class of employees with a disability; or (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply
  - Terms that contain State-based differences - **s 154**

    - Terms dealing with long service leave – **s 155**
    - Terms of no effect to the extent that they purport to exclude the NES: **ss 55-56**
- **Matters/terms that may be included – ss 139-142**
    - Minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply
    - type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities
    - arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours
    - overtime rates
    - penalty rates (for working unsocial, irregular or unpredictable hours, on weekends or public holidays, shift workers)
    - annualised wage arrangements
    - allowances
    - leave, leave loadings and arrangements for taking leave
    - superannuation
    - procedures for consultation, representation and dispute settlement
    - **s 140** – terms relating to the conditions under which an employer may employ employees who are outworkers and terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers.
    - **S 141** – industry-specific redundancy schemes
    - **S 142** – incidental and machinery terms
- **Matters/terms that must be included – ss 143-149D**
    - **S 143 –** coverage terms - set out which employees/employers are covered by the MA
    - **S 144 - Individual flexibility arrangements**
        - S 144 requires every MA to have a flexibility term
        - Typically regarding time at which work is performed, overtime or penalty rates, allowances or leave loadings
        - Must result in the employee being 'better off overall': **s 144(4)(c)**
        - Taken to operate as a term of the award: **s 144(2)**
        - Not required to be lodged with the FWC
    - **S 147** – ordinary hours of work
    - **S 148** – base and full rates of pay for pieceworkers
    - **S 149** – automatic variation of allowances

ENTERPRISE AGREEMENTS

- An **EA** is a written agreement about terms and conditions of employment. It is negotiated between the employer and bargaining representatives of its employees as a group (eg a union, or nominated employee representatives)

- EAs are collective agreements between one or more national system employers and whichever of their employees are specified in the agreement

- **Coverage**
  - Must cover at least 2 employees **(s 172(6))**
  - Does not generally cover the CEO and most senior managers of an organisation
  - May cover employees at a particular workplace (e.g. Monash University), or all employees of a particular employer across Australia (e.g. all Woolworths supermarkets across Australia).
- There are certain **mandatory terms** for any EA made under the FW Act:
  - Duration and expiry - **s 186(5)**
  - Dispute settlement - **s 186(6)** and FW Regs, Sch 6.1
  - Flexibility - **ss 202-203** and FW Regs, Sch 2.2
  - Consultation - **s 205** and FW Regs, Sch 2.3
- Base rate of pay under an EA can never fall below the minimum set by a MA or national minimum wage order - **s 206**
- Must not contain any **'unlawful terms' - s 186(4)**
- Can only deal with **'permitted matters' - s 172(1)**
  - A non-permitted term will be unenforceable - **s 253(1)(a)**
  - But there is no requirement for the FWC to look for/do anything about a non-permitted matter when approving an EA
- **Duration of EAs**
  - EA can potentially operate indefinitely, even past its nominal expiry date
  - One way to end an EA is for parties to negotiate a new one, noting that a new EA cannot apply while an old one is still in operation, until it has passed its nominal expiry date - **s 58(2)**
  - Parties can terminate EA by mutual consent - **ss 219-224**
  - Parties can wait until an EA has reached its expiry date and apply to the FWC to terminate it - **ss 225-226**
- **'Better off' overall -** The FWC must be satisfied that the employees whose conditions are to be regulated by the EA will be 'better off overall' than under the terms and conditions of whichever MA(s) cover the type of work being done
  - As the 'no disadvantage' test evolved, it took on a global character, so that EAs could omit particular award entitlements, provided that there were other compensating benefits that would leave workers 'better off'
    - An EA might allow an employer not to pay a particular penalty rate at a certain time, provided that there was something else in the agreement to compensate for that disadvantage
- **Making an EA under the FW Act**
  - A greenfields agreement can be made simply by each employer and union signing it **(s 182(3))** and must then be submitted to the FWC for approval **(s 185)**
  - For all other EAs, a series of preliminary steps are required
    (1) A prescribed notice must be provided to all employees who will be covered by the EA informing them of their right to be represented by a bargaining representative (**notice of representational rights**) **(ss 173-174)**
      - That representative may or may not be a union

- **S 176** explains who counts as a bargaining representative for any type of EA (other than a greenfields agreement)

(2) Each bargaining representative for a proposed EA must meet the good faith bargaining requirements under **s 228(1)**

(3) Once agreement has been reached, the EA must be submitted to employees for approval, whether by ballot, or some other method

- This cannot happen until at least 21 days after the notice of representational rights has been given **(s 181)**
- To be eligible to vote, an employee must be covered by the proposed EA, be employed at the time of the vote, and be likely to have a job after the EA takes effect

(4) The employer must take all reasonable steps to ensure that each eligible employee has a written copy of the agreement, or ready access to a copy, for at least 7 days before voting begins

(5) The employer must also make reasonable efforts to ensure that the terms and effect of the agreement are explained to employees **(s 180)**

(6) For a single-EA to be made, it must be approved by a majority of those casting a valid vote. In a multi-enterprise agreement, there must be a separate vote at each enterprise

- **Approval of an EA by the FWC**
  - EA must be approved before it can come into operation – (1) by the majority of employees whose working conditions will be regulated by it (2) by the FWC
  - An EA cannot come into operation until at least 7 days after it has been approved by the FWC **(s 54(1))**
  - There are many requirements that must be met in order for the FWC to approve an EA
  - For instance, the FWC must be satisfied that the:
    - EA has been 'genuinely agreed to' by the employees concerned - **s 188**
    - Group of employees covered by the EA was 'fairly chosen' – s **186(3)**
    - EA does not contain 'unlawful terms' **- s 186(4)**
    - EA does not contain terms that are inconsistent with the NES
    - EA passes the 'better off overall test' **- s 193**

RESTAURANT AWARD 2010

- **16.2** - The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES,an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.
- **16.3** - Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off is to be taken at times that are convenient to the employee after consultation with the employer.