

COURSE OVERVIEW

Topic 1: Sources of Employment Regulation and Minimum Employment Standards

Topic 2: Forming an Employment Contract, Including Casual Employment

Topic 3: Terms of the Employment Contract, Including Fixed-Term Employment. Post-Employment Restraint of Trade

Topic 4: The Employee's Implied Duties

Topic 5: The Employer's Implied Duties

Topic 6: The Context and Nature of Working Arrangements, Particularly Employees and Independent Contractors

Topic 7: Unfair Dismissal

Topic 8: Termination and Remedies

Topic 9: Anti-Discrimination, Harassment and Bullying Protections

Topic 10: General Protections

EXAM TIPS

Topic 1: Sources of Employment Regulation and Minimum Employment Standards

1.3 Fair Work Act and its Constitutional Basis

FW Act, ss 13, 14, 30D and 30E

- The source of power for Federal labour laws is **s51(xxxv)** (labour power) which allows the federal government 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
 - The FWA is based on a combination of constitutional powers including **ss51(xx), 51(i), 51(xxix), 51(xxxvii), 52(ii) & 122**.
 - All employees in Victoria (excluding state public sector and law enforcement officers) are protected by the FWA.

S 51(20)	Corporations power: to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth Most covers employees under commonwealth organisations
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(xxxix)	External Affairs power: to make laws regarding external affairs
S 51(xxxvii)	Referrals power: to make laws regarding matters referred to the Parliament of the Commonwealth by the Parliaments of any state Only Western Australia did not refer their powers, therefore employees of non-corporate employers (e.g. law firms) cannot allege workplace bullying to Fair work commission
S 52(ii)	Commonwealth power: to make laws regarding 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 law for the government of any territory

1.4 NES – Minimum Standards

FW Act, Part 2-2

- National employment standards (NES) are legislated minimum terms and conditions of employment (**s61(2)**).
- NES and Modern Awards (MA) provide a fair minimum safety net to terms and conditions of employment (**s134(1)**).

[employer] must not contravene the NES (**s44(1)**) and cannot exclude them from a MA or Enterprise Agreement (EA) (**s55(1)**).

- A breach may result in civil penalties (**s44**).
- The minimum conditions prescribed by the NES cannot be excluded by an employment contract, even if an employee agrees (because cannot contract out of statute), however it can provide for conditions over those in the NES
- Employment contracts do not have to be written (they can be oral contracts as well)
- However, an employment contract can provide for conditions over and above those set out in the NES
 - E.g., if contract says 25 days leave - this would be effective because it is above NES and has not derogated from NES



Contained in Part 2-2 FWA and cannot be excluded by contract (s 44).



If contract term that excludes a NES term will not be enforceable (Givoni).



Breach of a NES term will trigger a civil penalty (s 44).



Note: the NES are not a term of the employment contract (unless explicitly included/incorporated in the contract). They have statutory force under the FWA. Therefore, remedies for a breach of a NES term are statutory, not contractual.

Applies to **FULL TIME WORKERS**

Maximum weekly hours	Requested for flexible working arrangements	Employee choice about casual conversion	Parental leave	Annual leave
Personal / carer's leave	Community service leave	Long service leave (MA/EA)	Public holidays	Termination and redundancy pay
	Fair Work Information Statement + Casual Employment Information Statement	Superannuation Contributions	Right to disconnect	

Minimum Conditions

- The NES sets 10 minimum conditions (s61(2)):
 - (a) Max weekly hours
 - (b) Requests for flexible work arrangements
 - (ba) casual employment
 - (c) Parental leave and related entitlements
 - 1) Main entitlement is 12 month unpaid leave
 - 2) The return to work guarantee after 12 months – s 84
 - 3) Consultation with employee on paid parental leave – s 83 (most litigated)
 - 4) Paid parental leave is NOT part of the FW Act (*Paid Parental Leave Act applies*)
 - (d) Annual leave
 - 1) ss 86-94
 - 2) 4 weeks for full time workers
 - 3) Can cash out leave
 - 4) Additional week for shift workers e.g., nurses, firefighters
 - 5) Employers can force employees to take annual leave e.g., during shut downs
 - (e) Personal/carer's leave, compassionate leave and paid family and domestic violence leave
 - 1) ss 95-107
 - 2) **Notification and evidentiary requirements** contained in s 107
 - 3) Made up of:
 - 1) 10 days paid personal leave (carer/sick)
 - 2) 2 days unpaid carer's leave for each permissible occasion
 - 3) 2 days paid compassionate leave for each permissible occasion
 - 4) 10 days paid domestic and family violence leave
 - (f) Community service leave
 - 1) Leave to do with volunteer firefighters e.g., in country areas
 - 2) Jury duties
 - (g) Long service leave
 - 1) Governed by state legislation
 - (h) Public holidays ss 114-116
 - (ha) superannuation contributions ss 116A-116E
 - (i) Notice of termination and redundancy pay
 - (j) Fair Work Information Statement

PLUS – the right to disconnect which appears in the general protections s 333M

Breaching a term of the NES is a civil penalty offence and cannot be excluded from an employment contract (s 44), even if the parties agree (**Givoni**). These are not implied terms of the employment contract (can be express if parties agree).

Maximum Weekly Hours s 62

- An employer cannot request an employee to work:
 - If a full-time employee, more than 38 hours (**s 62(1)(a)**);
 - If not a full-time employee, the lesser of 38 hours or the employee's ordinary hours of work in a week (**s 62(1)(b)**)
- Unless the hours are reasonable. If they are unreasonable, an employee can refuse to work the hours (**s 62(1)**)
- In determining whether the hours are reasonable per **s 62(3)**:

(a) Any risk to employee health or safety	(b) Employee's personal circumstances, such as family responsibilities
(c) Needs of the workplace in which the employee is employed	(d) Whether the employee is entitled to receive overtime payments
(e) The notice given to the employee to work the additional hours	(f) Any response from the employee in relation to this notice
(g) The usual patterns of work in the industry	(h) The nature of the employee's role and their responsibility
(i) Whether the additional hours are in accordance with averaging	(j) Any other relevant matter

Flexible Working Arrangement s 65

- A permanent employee who has completed at least 12 months of continuous service with their employer (**s 65(2)(a)**); **OR**
- A casual employee who has been employed as a casual for at least 12 months (**s 65(2)(b)(i)**) and has a reasonable expectation of continuing employment by the employer on a regular and systematic basis (**s 65(2)(b)(ii)**)
 - will be entitled to request a flexible working arrangement pursuant to **s 65(1)** if a factor in **s 65(1A)** applies:

(a) the employee is a carer	(b) the employee has a disability
(c) the employee is 55 years old or older	(d) the employee is experiencing violence from a member of the employee's family
(e) the employee provides care and support to a member of the employee's immediate family, or a member of the employee's household, who requires it because the member is experiencing violence from their family	

Parental Leave ss 67-85

- Employees have 12 months of unpaid parental leave, with a right to request another 12 months (which the employer can refuse on reasonable business grounds) (**ss70 & 76**). This **includes long term casual employees** who have a reasonable expectation of continuing employment on a regular and systematic basis.
- Employees are able to take parental leave if they have worked for their employer for at least 12 months (**s67**) and if the leave is associated with (**s70**):
 - The birth of a child
 - The adoption of a child
 - The employee has or will have the responsibility to care for a child
- Employees on parental leave have a right to return to their job or a job of equivalent pay and status once they return from leave.
 - Note: Paid parental leave is under another Act

Annual Leave s 86

- Annual leave applies to all employees **other than casual employees** (**s86**).
- Employees are entitled to 4 weeks (20 days) of paid annual leave and certain shift workers are entitled to 5 weeks (25 days) of paid annual leave (**s87**).
 - Casual employees do not get paid annual leave (**s86**)
 - Annual leave accrues yearly
- When to take annual leave (RED FLAG:** if employer is specifying when annual leave can be taken/ refusing to let employee take annual leave): An employee may take annual leave once it has accrued when it is reasonable to do so and the employer cannot unreasonably refuse (**s88**).
- An annual close down would be reasonable grounds to refuse (to require employee to take leave in annual close down)