



Employment and Industrial Law Specialist Accreditation Assessment Requirements 2010

These notes should be read in conjunction with the Guide to Application and Assessment. They will assist practitioners interested in becoming accredited in Employment and Industrial Law to understand and prepare for the assessment process.

Included are:

- A** The performance standard which is the benchmark for competent practice in this area and the performance criteria which form the basis for the assessment
- B** A list of the core skills and areas of knowledge
- C** The methods and dates of assessment which candidates are required to undertake

A. PERFORMANCE STANDARD

Standard of Accredited Specialist

The Standard of an Accredited Specialist in Employment and Industrial Law is that of a *'specially competent practitioner'* in the core skills and practical capabilities in the selected area of practice, as assessed against the spectrum of capability of all practitioners in that area of practice. This standard is to be distinguished from the idea that the Scheme requires the highest technical legal knowledge across all aspects of the selected area of practice.

B. CORE SKILLS AND KNOWLEDGE AREAS

Practitioners wishing to be accredited in Employment and Industrial Law should be able to:

- Display knowledge of the law and procedures which underpin the performance of tasks in this area of practice; and
- Demonstrate the following skills to the level of the performance standard

B. 1 CORE SKILLS

1. Gathers Information and Takes Instruction from Client by

1.1 Listening and Questioning the Client at Initial Interview and Examining Material Provided

The Employment & Industrial Law solicitor (“the solicitor”) displays an ability to communicate effectively with a variety of clients to elicit all relevant details, by listening actively and effectively and asking open and closed questions to encourage the client to confide underlying and apparent concerns. The solicitor is guided by a knowledge of the common law of employment, statute law and the tribunal and regulatory systems relating to workplace relations when developing a framework to assist the client. The solicitor displays a professional, objective attitude, tries to establish rapport with the client and uses language that is sensitive to the client’s situation, eg. non discriminatory language, plain English. The solicitor demonstrates a thoroughness of approach in assembling information, taking appropriate file notes, checking with client by clarifying and amplifying data, including the client’s records. The solicitor takes detailed file notes at all times.

1.2 Appraising the Situation

The solicitor analyses the information provided by the client and identifies the relevant issues of fact, law and principles, and the extent to which these are clear and settled. The solicitor identifies the immediately apparent options available to the client including appropriate legal and non legal courses of action. The solicitor communicates clearly the factors relevant to choosing between available options and courses of action and the consequences of each, including procedural requirements, timeframes and the costs. The solicitor checks to ensure the client’s understanding and reviews the resources available to the client to undertake the various options. The solicitor advises on and recommends interim actions in light of client responses/instructions.

1.3 Matters Requiring Urgent Response

The solicitor acts efficiently and effectively and identifies matters of urgency including time limitation periods and responds immediately. The solicitor identifies matters of urgency and then, with the knowledge of applicable statute of limitations, responds if necessary by immediate initiation of court or industrial tribunal proceedings. In so responding urgently the

solicitor will keep the client informed of the necessary steps including the risks if unsuccessful (eg an award of costs against your client in some matter if unsuccessful).

2. Obtains Further Information

2.1 Accessing Standard Sources of Information

The solicitor knows what information is readily obtainable from the client, the employer, union and government authorities and obtains relevant information by appropriate inquiry and correspondence e.g. wages records, awards, enterprise and other registered agreements, union rules, and employment data.

2.2 Conducting Legal Research

The solicitor knows the sources most likely to be of assistance and accesses them promptly and efficiently eg. textbooks, authorised case reports, reporting services and newsletters, services and statutes, award reporting services, parliamentary materials, official reports, tribunal and government web sites and other relevant databases. The solicitor researches and develops arguments where legal principles are likely to be an issue.

2.3 Interviewing Witnesses

When interviewing witnesses the solicitor demonstrates an understanding of relevant and necessary facts. The solicitor demonstrates an ability to communicate with a variety of people regularly checking, testing, clarifying and amplifying the information from interviewees. The solicitor maintains a professional objective attitude and assists each witness to produce a structured and coherent statement of the relevant information within the knowledge of each witness.

2.4 Inspecting

When conducting inspections the solicitor is guided by the purpose of the inspection and ensures that the inspection provides maximum information by obtaining answers to all relevant questions. The solicitor tries to ensure the attendance of the appropriate people such as site manager, experts, potential witnesses and investigators.

3. Develops Plan By

3.1 Identifying Options

The solicitor analyses the key features of the client's instructions in light of all the information so far obtained:

The solicitor considers and assesses the viability of *non legal options*.

The solicitor knows the service possibly appropriate to the client's situation; e.g. Government Department or agencies (State/Federal); industrial organisations; other professions or advisers; welfare organisations.

The solicitor considers and assesses the viability of *litigation* and the likely costs and timeframe for resolution.

The solicitor assesses the client's position by reference to the strengths and weaknesses of the parties' respective cases; the possible jurisdictions and different proceedings; the likely scope of the evidence; the opponent's range of options, the possible outcomes and adverse consequences, and the likely costs and timeframes for resolution.

The solicitor considers and assesses the viability of *non litigious action*.

The solicitor understands the commercial and industrial reality of the client's position, and evaluates the other parties' position. The solicitor compares the interests of the respective parties' for points of overlap/divergence and identifies the necessary processes and documentation for various alternatives. The solicitor also considers methods of alternative dispute resolution.

The solicitor considers and assesses the viability and appropriateness of other initiatives and strategies to achieve the client's aims, while avoiding litigation or disputation, such as advising on appropriate terms for an enterprise agreement, use of enterprise flexibility agreements and use of common law contracts alone or in combination with relevant modern awards.

3.2 *Assisting Client to Choose Course of Action*

The solicitor advises by communicating clearly the possible options to the client, ensuring the client's understanding of the rights, obligations and risks for each option and the reasons why some options may not be viable. The solicitor explains the processes required by each option. If making a recommendation the solicitor takes into account the client's objectives, priorities, resources and any special needs.

Whenever necessary the solicitor prepares letters of advice for the client, spelling out the client's options, the risks involved in different strategies and recommendations for the client to consider. The solicitor endeavors to provide letters of advice that are succinct and in plain English, or in language tailored to the circumstances of the reader. Where such advice is of necessity lengthy the solicitor will consider providing a separate "executive summary".

3.3 *Developing Plan*

In light of the client's instructions the solicitor develops an initial plan to secure the outcome sought including: actions required, the allocation of responsibility for the action, the allocation of resources from solicitor or client and identification of other support required, the timetable and a reconsideration of relevant law and procedures.

4. Conduct of litigation and contentious matters

4.1 *Managing the Plan*

Throughout the matter the solicitor constantly reviews the plan in light of changing circumstances resulting from eg. clarification or changes in the position of the other parties' procedural requirements, information gained, judicial or arbitral decisions, legislative changes. The solicitor informs the client of any changes and explains their impact on the plan and variation in prospects. The solicitor advises in relation to options which respond to the circumstances and obtains the client's instructions.

4.2 *Effecting Settlement*

When negotiating, the solicitor demonstrates an ability to put the client's case in the best light, assesses the opposition's needs, strengths, weaknesses and likely "bottom line". The solicitor knows the procedural requirements for implementing settlement. The solicitor keeps the client informed, and where appropriate, involves the tribunal in discussions and liaises with courts and tribunals on the progress of settlement negotiations and the format of the proposed settlement. The solicitor ensures that the client understands the short and long term consequences of settlement and recommends on whether the final offer ought to be accepted. The solicitor endeavours to obtain prompt finalisation of the matter by settling precise terms with other parties and settling documents which accurately reflect the negotiated agreement and fulfill any procedural requirement of the tribunal or courts.

4.3 *Preparing and Conducting Hearing*

The solicitor conducts proceedings and prepares court documents which properly present the case and comply with court rules and practices. The solicitor conducts any interlocutory procedure relevant to the jurisdiction and prepares witness statements and affidavits. Where necessary the solicitor advises on appeal.

4.4 *Where Necessary Briefing Counsel and Acting as Instructing Solicitor*

The solicitor considers when to brief counsel, having regard to such factors as the length of trial, the nature and complexity of the issues the particular knowledge and experience of the solicitor and the likelihood of success. The solicitor chooses the appropriate barrister for the matter. An instructing solicitor understands the relationship between barrister and client, plays an active role in the conduct and management of the case and acts as liaison between the barrister and the client.

4.5 *Acting as Advocate*

When appearing in shorter matters the solicitor is well prepared, organised, clear and effective with the ability to think quickly on his or her feet. The solicitor tries to achieve the best result he/she can, regarding the client's instructions and the limits of the law and the remedies available. Where useful the solicitor prepares written material for tender. The solicitor prepares the client and witnesses to give evidence. The solicitor presents the case in a manner that takes account of the knowledge and experience of the court or tribunal concerned. The solicitor conducts the matter with due regard to ethical obligations.

4.6 *Finalising Matter*

The solicitor ensures all necessary documentation and correspondence are prepared and processed accordingly. The solicitor advises as to the outcome of the matter and how to meet any obligations arising therefrom, including payment of any outstanding accounts and expenses.

5. Conduct of non litigious or non contentious matters

In non litigious or non contentious matters the solicitor brings to bear the combination of skills that are necessary to carry out the instructions of the client to achieve the best possible result.

5.1 *Managing the Plan*

Throughout the matter the solicitor constantly reviews the plan in light of changing circumstances resulting from e.g. clarification or changes in the position of the other parties; procedural requirements, information gained, judicial or arbitral decisions, legislative changes. The solicitor informs the client of any changes and explains their impact on the plan and variation in prospects. The solicitor advises in relation to options which respond to the circumstances and obtains the client's instructions.

5.2 *Liaison/negotiation with government and non government agencies*

The solicitor knows the respective roles of and is able to deal effectively with the range of government agencies that are relevant to the matters in which the solicitor is instructed, including the staff of Fair Work Australia, the Fair Work Ombudsman, the WorkCover Authority of NSW, the Human Rights Commission and the Anti Discrimination Board. The solicitor is able to prepare concise and focused submissions to and enter into negotiations with these staff in circumstances other than contentious/litigious matters (eg obtaining approval of an enterprise agreement, seeking an exemption under the Anti Discrimination Act in order to positively discriminate in favour of a particular group, seeking approval for organization rule changes, or arguing that prosecution action ought not be initiated).

The solicitor appreciates the statutory framework and objectives within which these agencies work and all applicable guidelines and compliance documents and ensures that submissions or proposals are sensitive to those matters. The solicitor also applies these skills to liaison with non government agencies that may have a role in assisting or thwarting the client's aims, such as registered organizations of employers or trade unions, or professional bodies.

5.3 *Briefing counsel to advise*

The solicitor recognizes those circumstances where the advice of counsel is needed or beneficial, including briefing counsel in a cost effective and focused way. The solicitor selects the appropriate counsel for such an initiative and briefs counsel with sufficient material and observations as to elicit advice on the matters contemplated for such advice.

5.4 *Drafting documents*

The solicitor drafts all documents as needed with clarity and succinctness adapted to the matter in hand. The solicitor liaises with the client and other parties to fine tune and/or negotiate appropriate changes to such documents to achieve the wishes of the client without delay, without pedantry and with a capacity to compromise to the extent that that will further the client's overall interests.

5.5 *Finalising the matter*

The solicitor ensures that matters are fully and finally brought to conclusion, with no avoidable loose ends, in a timely and cost effective fashion. The solicitor reports to the client appropriately at the conclusion of the matters and bills without undue delay.

B. 1.1 CONFERENCES, MEDIATIONS AND SHORT HEARINGS

The Employment and Industrial Law solicitor is able to act as advocate in short matters and interlocutory hearings in the following tribunals:

- Pleas in mitigation for offences under the *Fair Work Act 2009* (Cth) before the Federal Magistrates Court
- Interlocutory hearings and directions hearings before the Federal Magistrates Court and the Federal Court (single Judge)
- Plea in mitigation for offences in "Stream Two" under *Occupational and Safety Act 2000* (NSW) before the Industrial Court of NSW
- Appearances in conciliation conferences and shorter hearing matters in unfair dismissal applications before Fair Work Australia (or the NSW Industrial Relations Commission where applicable)
- Application for approval of an enterprise agreement before Fair Work Australia (or the NSW Industrial Relations Commission where applicable)
- Mediation and short hearings (eg when other party is unrepresented) in courts and tribunals dealing with Discrimination Claims in employment related matters eg. Human Rights Commission, Fair Work Australia and Anti Discrimination Board of NSW
- Mediation in all courts and tribunals in employment related matters

B. 2 CORE KNOWLEDGE AREAS

Candidates are to be familiar with the following core knowledge areas. Candidates are to clearly understand that while a candidate's practice may only expose him or her regularly to certain of these knowledge areas, and that the assessors also understand that fact, a successful candidate must be conversant with all of the below key knowledge areas to the extent that the Committee will be confident that the candidate can be held out to the public as a specially competent practitioner in this field.

PLEASE NOTE: The Employment and Industrial Law *Assessment Requirements* were published in December 2009. Candidates taking part in the 2010 accreditation program should be aware of all recent and impending amendments to the law in this area. All assessments will be based on the law and procedures applicable as at the date of the assessment.

The Common Law of Employment

- (i) Identifying the employment relationship and being able to distinguish it from other working relationships (eg. independent contractor, labour hire and outsourcing, partnership etc)
- (ii) Understanding the necessities for the formation of the employment relationship
- (iii) Understanding the principles of construction of employment contract (and when human resources policies, and industrial instruments will be incorporated into employment contracts)
- (iv) Familiarity with the common implied terms in contracts of employment (eg. duty of fidelity and good faith, entitlement to wages for being available for work, employers' duty not to destroy mutual trust and confidence, reasonable notice of termination)
- (v) All aspects of termination of employment (including termination on notice, summary dismissal for misconduct, constructive dismissal, repudiation of contract)
- (vi) Basis of claims for damages for breach of the employment contract
- (vii) Privacy issues in the workplace (eg. employers' right to monitor e-mail, use and abuse of e-mail and workplace video surveillance)
- (viii) Employment responsibilities outside the workplace

Industrial Relations Systems (Federal and New South Wales)

- (i) Appreciate the basic constitutional principles in relation to Federal Jurisdiction
- (ii) Understanding of the core functions of Fair Work Australia and the Fair Work Ombudsman
- (iii) Understanding of the core functions of the New South Wales Industrial Relations Commission
- (iv) Reasonable familiarity with procedures including appeal procedures in both the Federal and State systems
- (v) Understanding of the law relating to protected and unprotected industrial action, and consequences thereof (including secondary boycott provisions)

National Employment Standards

Familiarity with employer obligations and employee rights under the National Employment Standards.

Awards

- (i) Understanding how modern awards are made, reviewed and varied
- (ii) Principles for the interpretation of awards
- (iii) Enforcement mechanisms in relation to awards
- (iv) Familiarity with well known award entitlements such as annual leave loading, overtime prescriptions and casual loadings)
- (v) The inter-relationship between awards enterprise agreements and/or common law contracts of employment

Collective Agreement Making

- (i) Law relating to and processes for the making of enterprise agreements in the Federal Jurisdiction
- (ii) Law relating to compliance with the good faith bargaining obligations in the *Fair Work Act*, and procedures for seeking bargaining orders and workplace determinations from Fair Work Australia
- (iii) Law relating to and processes for the making of enterprise agreements in the New South Wales system (for public sector employers)
- (iv) Law relating to and processes for the making and termination of individual flexibility agreements
- (v) The nature and effect of unregistered site or local agreements

Transitional industrial instruments

Familiarity with the range of transitional industrial instruments operating in the transition from the *Workplace Relations Act* to the Fair Work system.

Registered Organisations

- (i) Understanding of the system for registration, internal governance and court supervision of registered organisations (both employer and employee) under the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Industrial Relations Act 1996* (NSW)
- (ii) Basic understanding of the legal status of trade unions, registered organisations, transitionally registered associations, recognized associations and unregistered associations
- (iii) Understanding of the Federal and State systems for the judicial supervision of the internal affairs of registered organisations
- (iv) Freedom of association rights, particularly legislative and case law developments particularly in the federal jurisdiction
- (v) Union rights of entry including under the *Fair Work Act 2009* (Cth) and the *Occupational Health and Safety Act 2000* (NSW)
- (vi) The interpretation and application of union eligibility rules including in the context of demarcation disputes and acting as bargaining agents

Statutory Unfair Dismissal Regimes

- (i) Familiarity with the system for the challenging of unfair dismissals under the *Fair Work Act 2009* (Cth)
- (ii) Familiarity with the system for challenging unfair dismissals under the *Industrial Relations Act 1996* (NSW)
- (iii) Ability to advise on the availability or suitability of these remedies as against other remedies that may be available to apply in the context of dismissal

Fair Work Act Chapter 3 Rights and Responsibilities

Familiarity with the General Protections in Part 3-1 of the *Fair Work Act*, including employees' rights against 'adverse action'

Understanding of Special Aspects of the State Commission's Jurisdiction (and their limited application)

- (i) Deemed employees
- (ii) Harsh and unfair contracts (Section 106)
- (iii) Contract determinations in the transport industry

Transmission of Business and Outsourcing Issues

- (i) Federal law protection of rights under the transfer of business provisions in Part 2-8 of the *Fair Work Act 1996* (Cth)
- (ii) Protection of entitlements of state system employees under NSW law: eg. Sections 101 to 104 of the *Industrial Relations Act 1996* (NSW) and *Long Service Leave Act 1955* (NSW)

Independent Contractor issues

- (i) Familiarity with the *Independent Contractors Act 2006* (Cth), and its provisions for review of contracts on 'unfairness' grounds
- (ii) Familiarity with the 'sham' contracting provisions in the *Fair Work Act 2009* (Cth)

Restraint of Trade and Confidential Information

- (i) Common law concept of "confidential information"
- (ii) Principles concerning unreasonable restraint of trade and application of *Restraints of Trade Act 1976* (NSW)
- (iii) Remedies for the enforcement of restraint of trade covenants and the protection of confidential information

Construction Industry regulation

- (i) Familiarity with the *Fair Work (Building Industry) Act 2009*

Workers Compensation

- (i) Basic general understanding of concepts and entitlements, and interaction with *Fair Work Act 2009* (Cth) and *Industrial Relations Act 1996* (NSW) (especially unfair dismissal provisions)
- (ii) Understanding of the reinstatement rights of injured workers under the *Workers Compensation Act 1987* (NSW)

Occupational Health and Safety Law

- (i) Familiarity with the relevant principles under the *Occupational Health and Safety Act 2000* (NSW) and the *Occupational Health and Safety Act 1991* (Cth)
- (ii) Ability to advise regarding the powers of inspectors
- (iii) Ability to advise in relation to Occupational Health and Safety prosecutions
- (iv) General familiarity with proposed National model occupational health and safety legislation (to commence 1 January 2012)

Discrimination Law

- (i) Familiarity with the principles and remedies under the *Anti-Discrimination Act 1977* (NSW)
- (ii) Familiarity with principles under various federal various statutes providing rights and remedies in relation to discrimination matters

Taxation Matters/Superannuation

- (i) Basic knowledge of PAYG
- (ii) Understanding of the normal taxation rules in relation to termination payments (eg bona fide redundancy, employer termination payments etc).
- (iii) Basic understanding of Superannuation Guarantee Charge legislation

Corporations Law Matters

- (i) Basic understanding of the priority of employee entitlements in a liquidation
- (ii) Some knowledge of the system for enforcement of employee priority rights in a liquidation
- (iii) Restrictions on retirement and severance payments to directors and officers under the *Corporations Act 2001* (Cth)
- (iv) Familiarity with the General Employment Entitlements Redundancy Scheme ("GEERS") system
- (v) Basic knowledge of developments in the law relating to duties of administrators in employment matters
- (vi) Knowledge of effect of administration/liquidation on rights and remedies

Trade Practices

- (i) Availability of action under *Trade Practices Act 1974* (Cth) in employment law disputes

Miscellaneous relevant matters

- (i) Familiarity with long service leave principles, including entitlements under the *Long Service Leave Act 1955* (NSW)
- (ii) Familiarity with the law relating to workplace surveillance, particularly the *Workplace Surveillance Act 2005* (NSW)
- (iii) General knowledge of whistleblower laws
- (iv) General understanding of *Privacy Act 1988* (Cth) as it applies to employee records

B.2.1 CORE LEGISLATION

Age Discrimination Act 2004 (Cth)
Anti-discrimination Act 1977 (NSW)
Australian Human Rights Commission Act 1986 (Cth)

Corporations Act 2001 (Cth)

Disability Discrimination Act 1992 (Cth)

Employee Liability Act 1991 (NSW)

Fair Work Act 2009 (Cth)
Fair Work Regulations 2009 (Cth)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Fair Work (Registered Organisations) Act 2009 (Cth)
Fair Work (Building Industry) Act 2009 (Cth)

Industrial Relations Act 1996 (NSW)

Long Service Leave Act 1955 (NSW)

Occupational Health and Safety Act 2000 (NSW)
Occupational Health and Safety Regulation 2001 (NSW)
Occupational Health and Safety Act 1991 (Cth)

Protected Disclosures Act 1994 (NSW)
Privacy Act 1988 (Cth)

Racial Discrimination Act 1975 (Cth)
Restraints of Trade Act 1976 (NSW)
Sex Discrimination Act 1984 (Cth)

Trade Practices Act 1974 (Cth)

Workers Compensation Act 1987 (NSW)
Workplace Injury Management and Workers Compensation Act 1998 (NSW)
Workplace Surveillance Act 2005 (NSW)

C. METHODS OF ASSESSMENT

TAKE HOME WRITTEN EXAMINATION

Candidates will be required to complete a take-home written test. The test will be subject to strict time and word limits. It will assess the candidate's ability to explain and apply legal principles across the areas specified in the Knowledge Requirements. The written test will be problem based, with the candidate being required to provide a written advice under pressure, and in a manner demonstrating relevant core skills and a familiarity with a number of the core knowledge areas.

Assessment criteria:

In your response you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

You will be assessed on the following:

- Ability to marshal and analyse information
- Demonstrate capacity to apply the law (legislative and case) to the facts discovered
- Demonstrate ability to write clearly, succinctly and wherever possible using plain English
- Ability to identify client's options (legal and non legal) and assesses appropriateness of each
- Capacity to provide clear direction to the client with specific and practical recommendations

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SIMULATED CLIENT INTERVIEW

Candidates will be required to conduct a simulated first interview with a person acting the role of a client. The exercise will take up to 60 minutes and will be videotaped and the videotape assessed. The exercise is intended to assess a wide range of performance standards, including those relating to listening and questioning the client at the initial interview, appraising the situation, taking instructions and responding to all aspects of the situation, identifying options and assisting the client to choose a course of action.

Topic: To be confirmed.

Date: Sunday, 1 August 2010
Venue: College of Law, 2 Chandos Street, St Leonards

Applicants will be notified at the time in mid July.

Assessment criteria:

In your response you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

You will be assessed on the following:

- Ability to actively listen, and elicit all available relevant information
- Capacity to establish rapport with the client
- Ability to identify client objectives and offer options
- Demonstrate ability to explain legal concepts to client in a way that particular client will understand

PEER INTERVIEW

Candidates will be interviewed by a panel of two practitioners (for approx 45 minutes). The interview will take the form of discussion of issues focusing on situations to assess a variety of performance standards which may include identifying options, communicating legal knowledge, developing and managing a plan, briefing counsel and finalising a matter. The assessors will also discuss with the candidate, to the extent they believe appropriate, the matters addressed or required to be addressed by the candidate in the written advice that constitutes the first form of assessment (written test).

Date: Sunday, 1 August 2010
Venue: College of Law, 2 Chandos Street, St Leonards

Applicants will be notified of the time in mid July.

Assessment criteria:

In your response you will be assessed on the following performance criteria. You will be required to perform each criterion to the level of the performance standard.

You will be assessed on the following:

- Demonstrate clear oral expression
- Ability to think quickly and incisively under pressure
- Ability to engage productively in dialogue with professional colleagues
- Ability to show that knowledge acquired of the area can be brought to immediate use in a coherent and meaningful way

EMPLOYMENT AND INDUSTRIAL LAW ADVISORY COMMITTEE 2010

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