

Specialist Accreditation Scheme



2022

Employment and Industrial Law

Assessment Requirements



THE LAW SOCIETY
OF NEW SOUTH WALES



These notes should be read in conjunction with the **2022 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:

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



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Timetable

The shaded area below shows the core assessment period including the dates associated with each assessment.

Candidates need to focus on this core assessment timeframe, planning their workload well in advance, accordingly.

Based on feedback reports from previous years, candidates are encouraged to dedicate and manage their time during this period to optimise their performance across all assessment tasks.

Candidates are reminded that participating in the Specialist Accreditation program requires a considerable level of commitment if candidates are to achieve their desired outcome.

Activity	Date
Question & Answer sessions for potential candidates	Mid-February 2022
Applications for Specialist Accreditation close	Early Bird: Monday, 28 February 2022 Standard: Thursday, 31 March 2022
Candidature confirmed	Friday, 29 April 2022
Written Examination	Saturday, 16 July 2022
Peer Interview	Sunday, 17 July 2022
Simulated Interview	Sunday, 17 July 2022
Results released to candidates	Mid October 2022
Reassessment and/or Appeal applications close	14 days from notification of results
Reassessment results released	December 2022
Appeal results released	December 2022



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 accredited specialist scheme requires the highest technical legal knowledge across all aspects of the selected area of practice.

Candidates should also refer to the first paragraph under the heading **Core Knowledge Areas**.

B. Core skills

Candidates wishing to be accredited in Employment and Industrial Law should be able to demonstrate the following skills to the level of the performance standard.

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 and 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 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, e.g. non-discriminatory language, plain English.

The solicitor demonstrates a thoroughness of approach in assembling information, taking appropriate file notes and checking with the 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 costs.

The solicitor checks to ensure the client understands 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 filing time periods and limitations, responds if necessary, by immediate initiation of court or tribunal proceedings. In responding urgently, the solicitor will keep the client informed of the necessary steps including the risks if unsuccessful (e.g. an award of costs against the client in some matters if unsuccessful).

2. Obtains further information by:

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, workplace 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 e.g. textbooks, journals, authorised case reports, reporting services and newsletters, statutes and services, 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 and considers relevant matters including legal and non-legal options and the likely costs, consequences and timeframe for resolution.

The solicitor assesses the client's position by reference to:

- a) the strengths and weaknesses of the parties' respective cases;
- b) the possible jurisdictions and different proceedings;
- c) the likely scope of the evidence;
- d) the opponent's range of options;
- e) the possible outcomes and adverse consequences; and
- f) the likely costs and timeframes for resolution.

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 a workplace agreement and use of common law contracts alone or in combination with relevant modern awards.

3.2. Assisting the client to choose a 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 written 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 endeavours to provide written advices 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 an initial plan

In light of the client's instructions the solicitor develops an initial plan to secure the outcome sought including:

- a) actions required;
- b) the allocation of responsibility for the action;
- c) the allocation of resources from solicitor or client and identification of other support required;
- d) the timetable; and
- e) 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 agreed plan in light of changing circumstances resulting from, for example, clarification or changes in the position of the other parties' procedural requirements, information gained (including any changes in instructions from the client), judicial or arbitral decisions and legislative/regulatory 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 further 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 court or 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 fulfil any procedural requirement of the tribunal or courts. If relevant, the solicitor demonstrates an understanding that specialist tax advice might be required in relation to financial settlements.

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 prospects.

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 the proceedings, 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 and obtains instructions from the client.

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 as an advocate in 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 (including any change in instructions from the client), judicial or arbitral decisions and legislative/regulatory 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 further instructions.

5.2. Dealing 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 Fair Work Commission, the Fair Work Ombudsman, the Australian Human Rights Commission, and other State/Territory courts, tribunals and agencies as appropriate.

The solicitor is able to prepare concise and focused submissions to and enter into negotiations with staff of these agencies in circumstances other than contentious/litigious matters (e.g. obtaining approval of a workplace agreement, seeking an exemption under the *Anti-Discrimination Act 1977* (NSW) in order to positively discriminate in favour of a particular group, seeking approval for organisation 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 organisations of employers or trade unions, or professional bodies.

5.3. Briefing counsel to advise

The solicitor recognises 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 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.



6. Conferences, mediations and short hearings:

The solicitor is able to act as an advocate in proceedings in the following tribunals:

- a) pleas in mitigation for offences and/or penalties under the *Fair Work Act 2009* (Cth) before the Federal Circuit and Family Court of Australia;
- b) interlocutory hearings and directions hearings before the Federal Circuit and Family Court of Australia and the Federal Court of Australia;
- c) pleas in mitigation for offences under the *Work Health and Safety Act 2011* (NSW) (or appropriate State/Territory Work Health and Safety laws) before the Local or District Court of NSW (or other courts as appropriate);
- d) appearances in conciliation conferences and hearings in unfair dismissal applications before the Fair Work Commission or appropriate State/Territory tribunals;
- e) appearances in conciliation conferences in general protections applications before the Fair Work Commission and mediations before the Federal Circuit and Family Court of Australia and the Federal Court of Australia;
- f) applications for approval of a workplace agreement before the Fair Work Commission or appropriate State/Territory tribunals;
- g) mediation and hearings (e.g. when other party is unrepresented) in courts and tribunals dealing with discrimination claims in employment related matters e.g. Australian Human Rights Commission, Fair Work Commission and other appropriate State/Territory tribunals; and
- h) mediation in all courts and tribunals in employment related matters.



C. Topics for assessment

Outline of knowledge requirements

The specialist needs to possess knowledge of a wide range of topics.

In practice of course, the client base and practice experience of the candidate will result in that candidate having a greater degree of familiarity with some of these topics than others. Over a period of years those topics with which the candidate will be most familiar within the specialty may fluctuate as the candidate's client base changes.

Nevertheless, every candidate needs to be aware that once accredited as a specialist in this area, the practitioner will be in effect holding themselves out to potential clients as having a knowledge of all of the topics that fall within the specialty. The examiners will expect that for some topics the candidate will have an advanced understanding, but for other topics only a basic or an intermediate understanding is required.

To assist candidates, a description of the levels of basic, intermediate and advanced as used in the knowledge requirements, is set out below:

Basic understanding

The candidate would be expected to have a general awareness or overview of the topic. For example, the candidate should be able to identify the names of relevant Acts and show awareness of general concepts and principles.

Intermediate understanding

The candidate would be expected to have more than a general awareness or overview of the topics. For example, the candidate should be able to identify and explain the relevant sections in legislation and key cases.

Advanced understanding

The candidate must have extensive knowledge of legislation and cases relevant to the topic. For example, the candidate would be expected to know:

- i) differences in the approaches (if any) adopted in the key cases relevant to the topic;
- ii) contending interpretations (if any) of relevant sections in legislation;
- iii) relevant government policies; and
- iv) relevant bills introduced into the Parliament.

Candidates will be assessed on the law as it stands on the day of the assessment.

Any matter relevant to practice in Employment and Industrial Law may be assessed. Candidates may be called on to demonstrate knowledge of any of the following topics.



Core Knowledge Areas

The topic areas for which a candidate is required to have knowledge are set out below.

1. The contract of employment

An **advanced** understanding of:

- i) the employment relationship, including its formation, and being able to distinguish it from other working relationships (e.g. independent contractor, partnership, volunteer);
- ii) contract construction, performance of a contract and variation of a contract (including when HR policies and industrial instruments will be incorporated into employment contracts and the effect of any such incorporation);
- iii) implied terms in contracts of employment (e.g. duties of confidentiality, fidelity, loyalty and good faith, entitlement to wages for being available for work, reasonable notice of termination, implied ownership of inventions);
- iv) the concept of vicarious liability;
- v) all aspects of termination of employment including termination on notice (express or implied), summary dismissal for misconduct, redundancy, constructive dismissal, and repudiation of contract;
- vi) the content and application of the doctrines of duress, unconscionability, undue influence and estoppel to employment issues;
- vii) remedies for breach or anticipatory breach of the employment contract;
- viii) basis of claims for damages for breach of the employment contract, including damages for loss of opportunity and the difference between a claim in debt and damages;
- ix) the employment relationship and activities outside of the workplace;
- x) post-employment restraints on trade (including the *Restraint of Trade Act 1976 (NSW)*) and on the use of confidential information; and
- xi) the key aspects of the economic torts including interference with contractual relations, intimidation, conspiracy and interference with trade.

2. Industrial relations systems (Commonwealth and appropriate State/Territory systems)

An **advanced** understanding of:

- i) the basic constitutional principles relating to the exercise of Federal power (including the use of the corporations power, the conciliation and arbitration power and external affairs power) and the coverage of the Federal system;
- ii) resolution of industrial disputes generally under the *Fair Work Act 2009* (Cth);
- iii) the core functions, powers and procedures of the Fair Work Commission (including the approval of enterprise agreements, enforcing good faith bargaining, regulating industrial action, resolution of disputes, the making and adjusting of wages and modern awards conditions, unfair dismissal, and general protection claims);
- iv) the interrelationship between various claims that can be commenced;
- v) the law (statutory and common law) relating to industrial action (including industrial action in the building and construction industry) including proceedings in the Fair Work Commission and the courts;
- vi) the core functions, powers and procedures of the Federal Court of Australia and Federal Circuit and Family Court in relation to breaches of the *Fair Work Act 2009* (Cth) (including enforcement of Fair Work Commission orders, *Australian Competition and Consumer Act 2010* (Cth) proceedings and underpayment claims);
- vii) the jurisdiction of State/Territory courts; and



- viii) the functions and powers of the Office of the Australian Building and Construction Commission.

3. Unfair dismissal claims

An **advanced** understanding of the unfair dismissal jurisdiction of the *Fair Work Act 2009* (Cth) including:

- i) time limits;
- ii) coverage and statutory exclusions;
- iii) conciliation and arbitration procedures;
- iv) criteria to determine whether a dismissal is unfair;
- v) the available remedies; and
- vi) circumstances which may give rise to costs orders including security for costs.

4. General protection claims

An **advanced** understanding of the availability or suitability of the general protections provisions contained in Part 3-1 of the *Fair Work Act 2009* (Cth), including:

- i) the meaning of 'adverse action';
- ii) the meaning of 'workplace rights';
- iii) the protected attributes and activities;
- iv) the operation of the reverse onus of proof;
- v) causation issues; and
- vi) the available remedies.

5. Workplace bullying and sexual harassment orders under the *Fair Work Act 2009* (Cth)

An **advanced** understanding of the Federal workplace bullying scheme including:

- i) who is a 'worker';
- ii) what constitutes bullying and sexual harassment under the *Fair Work Act 2009* (Cth);
- iii) the process adopted by the Fair Work Commission and the orders/remedies available; and
- iv) the relationship between workplace bullying, anti-discrimination laws and work health and safety.

6. Anti-discrimination law

An **advanced** understanding of:

- i) the principles under various federal statutes providing rights and remedies in relation to anti-discrimination matters, including:
 - the relevant provisions of the *Fair Work Act 2009* (Cth);
 - *Racial Discrimination Act 1975* (Cth);
 - *Sex Discrimination Act 1984* (Cth);
 - *Disability Discrimination Act 1992* (Cth);
 - *Australian Human Rights Commission Act 1986* (Cth); and
 - *Age Discrimination Act 2004* (Cth);



- ii) the principles and remedies under State/Territory anti-discrimination laws;
- iii) the concepts of direct and indirect discrimination and reasonable adjustments / accommodation under legislation;
- iv) the core functions, rules and procedures of Commonwealth, State and Territory anti-discrimination tribunals; and
- v) family friendly measures under the *Fair Work Act 2009* (Cth), including the right to request flexible working arrangements, obligation to consult about roster changes, and parental leave changes.

7. Statutory safety net

An **advanced** understanding of:

- i) the operation and content of minimum employment entitlements ("**Minimum Entitlements**") under the *Fair Work Act 2009* (Cth) as established by the National Employment Standards;
- ii) the relationship between Minimum Entitlements, enterprise agreements and Individual Flexibility Agreements and arrangements under the *Fair Work Act 2009* (Cth), and common law contracts of employment;
- iii) the functions and powers of the Minimum Wage Panel of the Fair Work Commission;
- iv) how Minimum Entitlements are established;
- v) enforcement mechanisms in relation to Minimum Entitlements;
- vi) the review of modern awards; and
- vii) interpretation of modern awards and enterprise agreements.

8. Enterprise agreement making under the *Fair Work Act 2009* (Cth)

An **advanced** understanding of:

- i) the types and effect of available agreements;
- ii) the process of agreement making and good faith bargaining requirements;
- iii) bargaining including:
 - bargaining representatives;
 - bargaining orders;
 - suspension and termination of industrial action (including cooling off periods); and
 - workplace determinations;
- iv) protected industrial action including secret ballots;
- v) measures available in the Fair Work Commission and Federal and State courts in response to unprotected action;
- vi) the required and permissible content of agreements;
- vii) requirements for approval, lodgement, variation and termination of agreements;
- viii) better off overall test and the use of undertakings; and
- ix) enforcement of agreements including penalties for breaches.

9. Registered organisations

A **basic** understanding of the:

- i) system for registration of organisations (employer and employee) under the *Fair Work (Registered Organisations) Act 2009* (Cth);
- ii) legal status and judicial supervision of registered organisations and unregistered organisations (employer and employee);
- iii) accountability of officers of registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth);



- iv) rights of entry of permit holders of registered organisations under the *Fair Work Act 2009* (Cth) and applicable work health and safety laws; and
- v) powers and functions of the Fair Work Commission and the Registered Organisations Commission in relation to registered organisations.

10. Transfer of business issues

An **advanced** understanding of the operation of the *Fair Work Act 2009* (Cth) as it relates to transfer of business, including an understanding of:

- i) the obligations of the first employer to transferring employees, as well as employees to be terminated;
- ii) the obligations of the second employer to transferring employees, as well as new recruits;
- iii) the necessary connection between the first employer and the second employer and the consequences that flow from that connection;
- iv) transfer of employment situations that affect the obligation to pay redundancy pay;
- v) industrial instruments that are transferred;
- vi) the capacity of the Fair Work Commission to modify the outcomes in transfer of business situations; and
- vii) the effect on entitlements to long service leave for transferring employees.

11. Leave entitlements

An **advanced** understanding of:

- i) the entitlements, and enforcement of rights relating to leave under the National Employment Standards in the *Fair Work Act 2009* (Cth) and modern awards; and
- ii) the entitlements, and enforcement of rights relating to long service leave under applicable State/Territory long service leave legislation.

12. Workers' compensation

A **basic** understanding of:

- i) concepts and entitlements under State/Territory workers' compensation laws, including protection from dismissal and reinstatement remedies; and
- ii) rights and entitlements of impaired workers to common law remedies.

13. Work health and safety law

An **intermediate** understanding of:

- i) the relevant principles under the State/Territory Work Health and Safety laws, regulations and Codes of Practice;
- ii) the powers of inspectors;
- iii) prosecutions under State/Territory Work Health and Safety laws and the role of Prosecution Guidelines;
- iv) the Guidance Notes on workplace violence and bullying; and



- v) the liability of officers, workers and others under Work Health and Safety laws; and
- vi) rights of entry under Work Health and Safety laws.

14. Independent contractors

An **advanced** understanding of:

- i) the law relating to independent contractors including:
 - at common law, in particular as to the differences between an independent contractor and an employee;
 - under the *Independent Contractors Act 2006* (Cth);
 - under the *Fair Work Act 2009* (Cth) including sham contracting; and
 - under applicable State/Territory laws; and
- ii) developments in relation to gig economy workers, including decisions from Courts/tribunals, inquiries and legislative/regulatory changes.

15. Fair Work Act compliance

An **intermediate** understanding of the:

- i) powers of the Fair Work Ombudsman;
- ii) record keeping and payslip obligations under the *Fair Work Act 2009* (Cth) and *the Fair Work Regulations 2009* (Cth);
- iii) civil remedy provisions of the *Fair Work Act 2009* (Cth);
- iv) strike pay provisions of *the Fair Work Act 2009* (Cth); and
- v) penalties for failing to comply with a notice given by or a requirement of a Fair Work Inspector.

16. Modern slavery

An **intermediate** understanding of:

- i) the entities to which the *Modern Slavery Act 2018* (Cth) applies;
- ii) what 'modern slavery' is defined to mean under the Act;
- iii) the principal obligation the Act imposes on an entity;
- iv) the mandatory criteria that apply to an entity's reporting statement;
- v) the sanctions for non-compliance with the Act; and
- vi) the main differences between the Cth and NSW Acts (noting that the commencement of the NSW Act has been delayed).

17. Whistleblowing

An **intermediate** understanding of:

- i) when the whistleblowing protections in the *Corporations Act 2001* (Cth) apply;
- ii) who is an 'eligible whistleblower';
- iii) who is an 'eligible recipient';
- iv) what disclosures are protected;
- v) what is a 'personal work-related grievance'; and



- vi) how an eligible whistleblower is protected.

18. COVID-19 pandemic

An **advanced** understanding of the key issues arising from the COVID-19 global pandemic including:

- i) the availability of stand down directions and the management of such disputes;
- ii) the ability to require the taking of leave and other options to manage workplace disruption and labour costs;
- iii) the ability of the industrial relations system and employment law to respond to the pandemic and the need for award and legislative change (and its effectiveness);
- iv) the concept of a lawful and reasonable direction and its application in the workplace;
- v) legislative responses to the COVID-19 pandemic including the role and application of *Public Health Orders*;
- vi) the introduction of a vaccination policy in the workplace and the key employment law issues arising including consultation requirements and privacy issues;
- vii) managing requests for exemption from vaccination and the key legal issues arising as a result;
- viii) employment related claims and decisions from Courts/tribunals; and
- ix) living with COVID-19 and the key employment law issues to manage including safety in the workplace and working from home/remotely.

19. Casual Employment

An **advanced** understanding of the key issues pertaining to casual employment including:

- i) Tests for characterisation and recognition of casual employment;
- j) Recent case law including High Court decisions;
- k) Relevant provisions of the *Fair Work Act 2009* (Cth);
- l) Changes to Modern Awards in this area;
- m) Rights of casual conversion and implications if not observed;
- n) Effect of service as a casual on accrual of employment related benefits; and
- o) Forums for disputes about casual employment.

20. Miscellaneous Federal and State statutory topic areas

A. Privacy

An **intermediate** understanding of the application of the following legislation to the employment relationship, specifically to the monitoring of employee activities and the collection of personal information from employees and job candidates:

- i) *Privacy Act 1988* (Cth) and the employee records exemption;
- ii) *Telecommunications (Interception and Access) Act 1979* (Cth); and
- iii) State/Territory privacy and surveillance laws.

B. Statutory regimes relating to misleading conduct

An **intermediate** understanding of:

- i) the relevance of the Australian Consumer Law (ACL) set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA) to representations made to job candidates;



- ii) the relevant sections of the CCA, relating to unconscionable conduct, misleading or deceptive conduct, misleading conduct in relation to employment and representations as to future matters:
 - Part 2-2 ACL– unconscionable conduct;
 - Part 2-1 ACL– misleading or deceptive conduct; and
 - section 31 ACL– misleading conduct in relation to employment;
- iii) the remedies for breach of these sections; and
- iv) the relevant provisions of applicable State/Territory legislation.

C. Taxation and superannuation

A **basic** understanding of:

- i) the PAYG system;
- ii) the difference in taxation of earnings for independent contractors compared to employees;
- iii) the taxation rules applicable to employment termination payments and redundancy payments;
- iv) the law relating to superannuation, in so far as it relates to contribution rates and the Superannuation Guarantee legislation including choice of fund; and
- v) deemed employees/contractors and the obligation to pay superannuation contributions to deemed employees/contractors.

D. Corporations Act 2001 (Cth) matters

A **basic** understanding of the:

- i) priority of employee entitlements in an insolvency;
- ii) system for enforcement of employee priority rights in an insolvency;
- iii) *Fair Entitlements Guarantee Act 2012* (Cth), which provides limited financial entitlements on the insolvency of an employer;
- iv) restrictions on retirement and severance payments to directors, officers and employees under the *Corporations Act 2001* (Cth); and
- v) duties of officers (as defined) and employees under the *Corporations Act 2001* (Cth) and potential director liability.

E. Public sector employees

A **basic** understanding of:

- i) the law relating to the appointment and termination of public sector employees; and
- ii) the jurisdiction of State courts and tribunals for those matters.

F. Other

A **basic** understanding of:

- i) *Workplace Gender Equality Act 2012* (Cth); and
- ii) State/Territory laws relating to child protection.



NOTE

Any matter relevant to practice in **Employment and Industrial Law** may be examined, including the areas listed above. Candidates may be asked questions arising under any legislation, related regulations and other materials listed in these guidelines. This is not intended to be an exhaustive list.



D. Legislation

Legislation – Commonwealth

Age Discrimination Act 2004 (Cth)

Australian Competition and Consumer Act 2010 (Cth)

Australian Human Rights Commission Act 1986 (Cth)

Australian Human Rights Commission Regulations 1989 (Cth)

Civil Dispute Resolution Act 2011 (Cth)

Corporations Act 2001 (Cth)

Disability Discrimination Act 1992 (Cth)

Disability Discrimination Regulations 1996 (Cth)

Fair Work (Registered Organisations) Act 2009 (Cth)

Building and Construction Industry (Improving Productivity) Act 2016 (Cth)

Fair Work Act 2009 (Cth)

Fair Work Regulations 2009 (Cth)

Independent Contractors Act 2006 (Cth)

Independent Contractors Regulations 2007 (Cth)

Modern Slavery Act 2018 (Cth)

Paid Parental Leave Act 2010 (Cth)

Privacy Act 1988 (Cth)

Public Interest Disclosure Act 2013 (Cth)

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Sex Discrimination Regulations 1984 (Cth)

Superannuation Guarantee (Administration) Act 1992 (Cth)

Superannuation Guarantee Charge Act 1992 (Cth)

Surveillance Devices Act 2004 (Cth)

Telecommunications (Interception and Access) Act 1979 (Cth)

Workplace Gender Equality Act 2012 (Cth)



Legislation – NSW

Anti-Discrimination Act 1977 (NSW)

Child Protection (Working with Children) Act 2012 (NSW)

Civil and Administrative Tribunal Act 2013 (NSW)

Employees Liability Act 1991 (NSW)

Orders under the Public Health Act 2010 (NSW)

Fair Trading Act 1987 (NSW)

Industrial Relations Act 1996 (NSW)

Industrial Relations (Child Employment) Act 2006 (NSW)

Health Records and Information Privacy Act 2002 (NSW)

Long Service Leave Act 1955 (NSW)

Payroll Tax Act 2007 (NSW)

Privacy and Personal Information Protection Act 1998 (NSW)

Protected Disclosures Act 1994 (NSW)

Restraints of Trade Act 1976 (NSW)

Work Health and Safety Act 2011 (NSW)

Workers Compensation Act 1987 (NSW)

Workplace Injury Management and Compensation Act 1998 (NSW)

Workplace Surveillance Act 2005 (NSW)

This list indicates the range of matters which could be addressed in the assessment program. This is not necessarily an exhaustive list. Candidates will be assessed on the law as it stands at the date of assessment.

There may also be a number of other materials such as textbooks, bench books and loose-leaf services which may assist.



E. Methods of assessment

1. Written Examination

Assessment Overview

The written examination comprises two parts:

Part A

This section will test general knowledge across all areas of Employment and Industrial Law. Questions in this section will require only brief answers.

Candidates must answer **3 out of 6** questions which may be taken from the following knowledge and topic areas:

Knowledge areas

1. The contract of employment
2. Industrial relations systems
3. Unfair dismissal claims
4. General protections claims
5. Workplace bullying and sexual harassment orders
6. Anti-discrimination law
7. Statutory safety net
8. Enterprise agreement making
9. Registered organisations
10. Transfer of business issues
11. Leave entitlements
12. Workers' compensation
13. Work health and safety law
14. Independent contractors
15. Fair Work Act compliance
16. Modern slavery
17. Whistleblowing
18. COVID-19 pandemic
19. Casual employment
20. Miscellaneous Federal and State statutory topics



Part B

Candidates will be asked to evaluate a complex fact situation, identify the key issues to be addressed, and prepare appropriate advice. The answer should include clear descriptions of any assumptions made and of any additional enquiries which it is considered should be undertaken.

NOTE

Answers provided are required to demonstrate an advanced understanding of these topics.

Written examination conditions

The written examination is:

- a) 2 hours plus thirty minutes for reading and planning; and
- b) closed book - candidates may take legislation into the examination room.

NOTE

All candidates will be advised of specific written exam conditions closer to the date of assessment.

Assessment criteria

Candidates will be assessed on their:

- a) ability to identify relevant issues from a given fact situation;
- b) knowledge of relevant law (including significant recent decisions) and skill in applying that knowledge in practice;
- c) knowledge of the procedural rules;
- d) ability to provide practical, clear and comprehensive advice; and
- e) awareness of practical considerations in dispute resolution.

NOTE

Candidates must pass both part A and part B of the Written Examination in order to pass this assessment piece overall.

Date: Saturday, 16th July 2022

Venue: TAFE NSW

**Candidates will be advised of their written examination time in June.*



2. Peer Interview

Candidates will be interviewed by a panel of two accredited specialists (for approximately 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 by the candidate in the examination that constitutes the first form of assessment (written examination).

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.

Candidates will be assessed on their ability to:

- a) demonstrate clear oral expression;
- b) think quickly and incisively under pressure and without references to note or other materials;
- c) engage productively in dialogue with professional colleagues; and
- d) show that knowledge acquired of the area can be brought to immediate use in a coherent and meaningful way.

Date: Sunday, 17th July 2022

Venue: Online

*Candidates will be advised of their interview time in June.



3. Simulated Interview

Candidates will be required to conduct a simulated interview with a person or persons acting the role of a client. The exercise will take up to 60 minutes and will be video recorded for assessment purposes. The exercise is intended to assess a wide range of performance standards, including those relating to:

- a) listening and questioning the client at the initial interview;
- b) appraising the situation;
- c) taking instructions and responding to all aspects of the situation;
- d) identifying options; and
- e) assisting the client to choose a course of action.

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.

Candidates will be assessed on the following:

- a) ability to actively listen, and elicit all available relevant information;
- b) capacity to establish rapport with the client;
- c) ability to identify client objectives and offer options with likely consequences and timeframes; and
- d) ability to explain legal concepts to the client in a way that the particular client will understand and which takes into account their commercial objectives and reality.

Date: Sunday, 17th July 2022

Venue: Online

*Candidates will be advised of their interview time in June.

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