

# Managing injured and ill employees: Navigating the maze

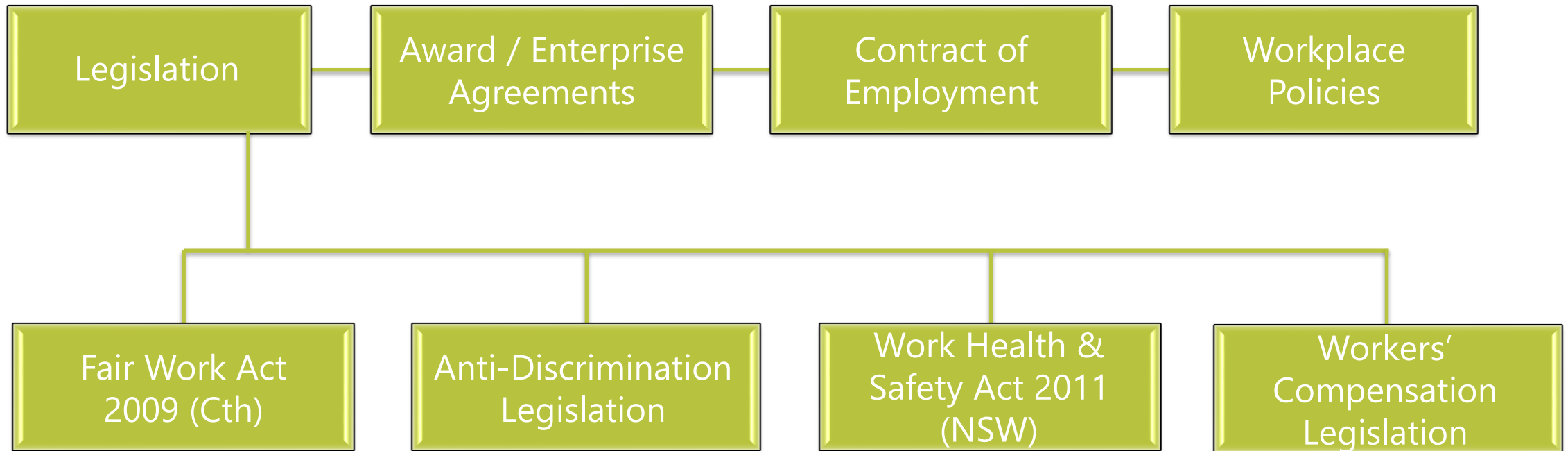
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## What we will cover

- ▶ Sources of obligations
- ▶ Case studies
- ▶ Tips and traps for navigating the maze
- ▶ Common conundrums
- ▶ Questions

## ► Source of obligations



## ► The minefield ....

- Prohibition on termination for temporary absence because of illness or injury
- General protections jurisdiction
- Disability discrimination and the obligation to make reasonable adjustments
- Work health and safety obligation to provide a safe workplace
- Unfair dismissal
- Workers' compensation



## ► Fair Work Act – temporary absence

- Employer must not dismiss the employee **because** of **temporary absence** from illness or injury
- What is **temporary absence**?
  - either
    - absence for less than **three months**; or
    - the total absences of the employee, within a 12 month period, have been less than **three months**
  - the employee has complied with evidentiary requirements (medical certificate or statutory declaration)
- The three month period is extended if the employee has an accrued personal/carer's leave balance and is using that leave

### Penalty provisions

- \$93,900 for employer
- \$18,780 for individual involved in contravention

## ► Fair Work Act – workplace rights

- An employer must not take **adverse action** against an employee
  - because an employee exercised, or to prevent an employee exercising, or
  - to prevent an employee exercising, a workplace right
- ‘Workplace right’ includes statutory entitlement to paid personal leave
- Reverse onus
- Damages (both economic and non-economic loss)
- Penalties



## ► Case Study – Wildman v IMCD

- Employee on paid personal leave from 19 January 2018 to 4 May 2018, when the employer dismissed
- Successive medical certificates, but did not disclose nature of illness
- From 2017, IMCE planned to relocate its operations to Western Sydney and believed the employee was:
  - not happy about the move
  - abusing personal leave entitlements (noting two trips taken by Mr Wildman during leave)
- Directed him to attend an IME, attend the office for a meeting about his illness, sought his consent to correspond with his doctor
- Ultimately, summarily dismissed him for failing to comply with directions
- The Court found dismissal unlawful:
  - because he exercised his workplace right to take personal leave
  - for reasons that included his temporary absence
- The Court also found the directions were unlawful coercion not to exercise his workplace right

## ► Fair Work Act – general protections

- An employer must not take **adverse action** against an employee because of **disability**
- Reverse onus
- Damages (economic and non-economic loss)
- Penalties





## ▶ Case Study – Westin Unions Business Solutions v Robinson

- Employee continuously absent for 7 months
- Provided successive medical certificates variously stating 'medical condition', 'work stress', 'depression and anxiety'
- Employer requested him to attend IME; employee declined
- Employer terminated on basis of 'serious concerns about your capacity to return to work'
- Employee alleged this amounted to termination because of mental disability
- On appeal, Court found no unlawful conduct
- Relevant factor: decision maker did not genuinely believe employee ill
- Court accepted that 'turning up for work' can be an inherent requirement of the role

## ► Disability discrimination

- Under the *Disability Discrimination Act 1992* (Cth)
  - positive obligation to make '**reasonable adjustments**'
  - an adjustment is a reasonable adjustment unless making the adjustment would impose an **unjustifiable hardship**
- Defences – discrimination will not be unlawful if
  - the worker cannot perform the **inherent requirements** of the **particular work**, even after reasonable adjustments
  - if avoiding the discrimination would impose an **unjustifiable hardship**
- Obligation in connection with **substantive position**



## ► Case study – Watts v Australian Postal Corporation

*“To what does the adjustment relate? By s [5\(2\)](#), it is made **“for” the person with a disability. It is not made “to” the position the person occupies.** It is not made “to” the equipment a person uses. In the context of discrimination at work in Div [1](#) of Part 2 of the [DDA](#), it is an alteration or modification “for” the person, which operates on the person’s ability to do the work she or he is employed or appointed to do’: [23]*

*“If the employer makes (or were to make) all adjustments for the person that do not cause the employer unjustifiable hardship, and the disabled person cannot perform the inherent requirements of the particular work, only then does the [inherent requirements] exception apply’: [54]*

# Unfair dismissal



- ▶ Unfair dismissal
  - valid reason related to the employee's capacity
  - procedural fairness
  - 'harsh, unjust or unreasonable'
- ▶ Obligation not just limited to substantive position
- ▶ Remedies for unfair dismissal include:
  - reinstatement (former position)
  - re-employment (different position)
  - compensation (up to six months remuneration)

## ► Workers' compensation (NSW)

- Employer must not dismiss an injured worker within **six months** of injury, unless
  - the compensable injury was not the reason for the dismissal
  - the worker would not undergo a medical examination reasonably required to determine fitness
- Penalty: 100 penalty units
- If an employer does dismiss an employee with compensable injury
  - injured workers can apply for **reinstatement for up to two years** of dismissal if certified fit
  - any replacement worker during that two-year period must be informed that the dismissed worker may be entitled to their job back



## ► Common conundrums

- An employee is due to have a performance discussion and has said they cannot attend and have provided a medical certificate. What can I do?
- I think the employee is lying. Can I challenge the medical certificate?
- The medical certificate says 'medical condition'; can I ask for more details?
- Can I require the employee to have an 'independent medical examination'?
- Should I require the employee to have an IME?
- Should I terminate?



# Practical tips

- ▶ Be aware of the myriad of obligations and relevant timeframes for action
- ▶ Make evidence-based decisions
- ▶ Medical evidence if appropriate
- ▶ Afford procedural fairness
- ▶ It's a minefield – seek help!

Questions





## Contact



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