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Drafting contracts of employment

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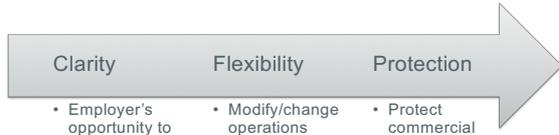
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Agenda

- 01** The approach to drafting a contract
- 02** Compliance with other sources of entitlements
- 03** Benefits of a written employment contract
- 04** Determining the type of employment
- 05** Key inclusions
- 06** Interaction with policies and procedures

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What should the approach to the contract be?



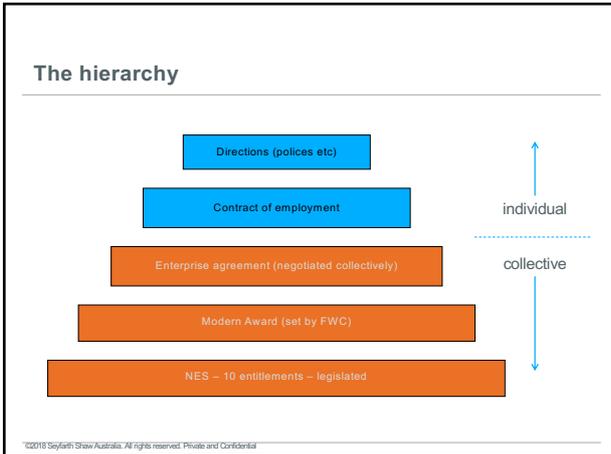
Clarity	Flexibility	Protection
<ul style="list-style-type: none">• Employer's opportunity to set clear obligations on the employee	<ul style="list-style-type: none">• Modify/change operations without needing to renegotiate the contract, triggering breach of contract or causing a redundancy	<ul style="list-style-type: none">• Protect commercial interests both during and after the employment relationship

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Benefits of a written employment contract

Written	Unwritten
<ul style="list-style-type: none">• sets out terms specific to the employee• can defer to industrial instruments or the NES as required• provides post-employment protections	<ul style="list-style-type: none">• verbal contracts are difficult to prove• exposure to 'reasonable' notice• unlikely to include post-employment protection terms

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How are contracts different to Act/awards/EAs?

Contracts	Act/awards/EAs
<ul style="list-style-type: none"> • State court systems • common law • breach of contract • loss and damage • injunctions • exposure to legal costs 	<ul style="list-style-type: none"> • Federal Ct system • statute • breach of provision • compensation • injunctions • penalties • no legal costs

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How do contracts interact with Act/Awards/EAs?

Contract determines scope of the employment – eg role, hours of work, etc

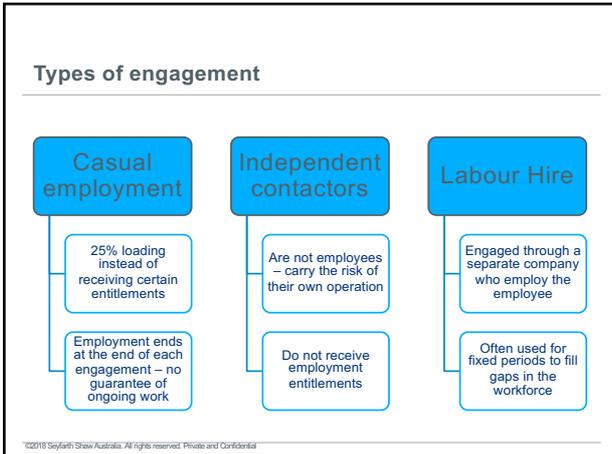
- consultation if want to change what contract sets
- redundancy if employer no longer requires a role set by the contract

Opportunity to do / agree that employer can do certain things permitted by Act/Awards/EAs

- make deductions from salary in certain circumstances
- notify employee of matters that award says you need to tell them (hours of work, roster arrangements etc)

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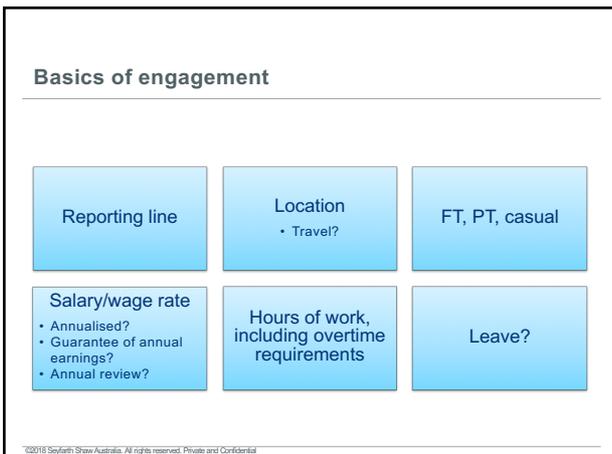
- ### What clauses should be included?
1. basics of engagement – FT, PT, casual, etc
 2. duties and obligations – what the employee must do
 3. restrictions/prohibitions – what employee must not do
 4. confidentiality & intellectual property
 5. termination
 6. post-termination
- 
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The future of these types of engagement

- *Skene v Workpac* – there is a lot of uncertainty regarding the future of casual employment. Need to keep in mind that casual employment should be regularly reviewed.
- *Vulnerable workers amendments* – sham contracting is already on the Fair Work Ombudsman's radar.

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Restrictions and prohibitions

- Operation of equipment/machinery unless licenced
- Conflict of interest:
 - accept any payment/benefit as inducement
 - employment/engagement/interest in any other business or occupation (whether paid or unpaid);
 - engagement in other activity/interests giving rise (or expected to give rise) to a conflict of interest
 - appointments as director or other officer of any other entity



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Termination of employment

- Fixed term, maximum term, indefinite
- Summary dismissal
- Notice of termination
 - Length of notice
 - Probationary periods?
 - Gardening leave
- Payment in lieu of notice
- Return of property
- Deducting amounts due



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Post-employment restraints

RESTRAINT OF TRADE VOID UNLESS:		Consider	Accurate Drafting
Reasonable to protect legitimate business interests	Protectable interests	Trade secrets Confidential information Customer connections	Targeted information only Which customers are in scope?
	Goes no further than necessary	Staff connections	Essential staff only Business Unit specific
Scope		Non-solicit Non-solicitation Non-poaching Not "soliciting business"	What are the business' most important assets and how do you protect them?
Duration		What is the length of the company business cycle? Replacement time/lapse effectiveness timeline	How long will it take to find and integrate an effective replacement?
	Geography	Client passives Use of technology	Where and how does the business interact with its clients? Additional considerations Does it interact with third parties? Confidentiality and intellectual property issues

- SUCCESS FACTORS**
- Restraint targeted to protect legitimate business interests only
 - Restraint specifically paid for
 - Restraint negotiated/explained and employee received legal advice prior to signing
 - Former employee generated business goodwill
 - Restraint agreed in a sale of business context
 - Injunction! Employer's commercial interests not protected by damages only
 - Injunction! Employer acts without delay

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What other clauses should be included?

<p>Award coverage?</p> <ul style="list-style-type: none"> • necessary? • set off clause 	<p>Consent</p> <ul style="list-style-type: none"> • privacy • pre-employment checks 	<p>Notification</p> <ul style="list-style-type: none"> • privacy • workplace surveillance
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What other clauses should be included?

- Dealing with possibilities that might arise during employment
 - medical examination
 - suspension during an investigation
- Covering particular employment arrangements
 - working from home
 - immigration visas



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Other clauses?

Superannuation

Salary packaging

Working from home

Mutual trust and confidence disclaimer

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Clauses to avoid ...

- Hard-wiring in/incorporating certain arrangements
 - Particular duties, reporting lines or locations
 - Policies & processes
 - Wage increases
 - Award clauses
 - Non-salary benefits, such as share schemes, incentives, bonuses, car parking
- Onerous obligations on employer
 - Lengthy notice periods
 - Generous redundancy packages

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Duties and obligations

- Compliance with policies
 - Ability to change policies
- Best interests of the employer – conflicts
- Follow directions to work/not work
- Taking care of safety, company property/equipment

Job/position description

- does it need to be in the contract?
- flexibility to adapt to change
- managing to the requirements of the role

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Policies and Procedures

If contractual...

- issues with making unilateral changes
- exposure to breach of contract claims

If not contractual...

- provide outline of expectations
- opportunity to amend, vary, rescind or withdraw at employer discretion

If contract is silent on policies...

- Leaves it up to a court/FWC in the case of a dispute
- Lack of **clarity**

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Tips

- Only promise things that you know you can deliver on
- How to deal with changes – variations
- Think about the structure of your contractual arrangements across your business
 - levels of contract – senior down to junior
 - what will the differences be
 - creating consistency across the business
 - ease of use

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