



workchoices legislation:
an overview
legal studies association
seminar

23 march 2006

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legal studies syllabus

- student outcomes:
 - analyse legislation (H3.4)
 - analyse specific problems in accessing (H4.1)
 - assess effectiveness of dispute resolution outcomes (H4.2)

legal studies syllabus cont.

- students learn about “key legal concepts and features”
 - statutory framework: industrial awards, industrial relations, enterprise agreements, AWAs, state and federal tribunals
 - negotiations between employers and employees

legal studies syllabus cont.

- students learn about “legal issues and remedies”
 - wrongful dismissal
 - discrimination in the workplace
 - industrial relations
 - role of the courts

legal studies syllabus cont.

- key questions/issues for students
 - preference of bargaining over awards
 - response of legislation to “changing needs” of employers, employees and society
 - role of trade unions in 21st century.

summary

- in summary the changes we will be discussing are:
 - awards and the “FPCS”
 - personal leave (FPCS)
 - annual leave and shift work
 - unfair dismissal
 - overtime and penalty rates

summary cont.

- agreements
- industrial action / union rights of entry
- transmission of business.

what are awards? what will they be?

- federal awards - party or membership
- state awards - industry and occupation
- amendments:
 - rationalise and simplify 4,000 awards
 - introduce new employers and remove others
 - “freeze” awards, no longer the safety net.

new system - awards

- non-allowable matters immediately unenforceable
- new dispute settling procedure overrides
- preserved award terms - 2 types.

fair pay and conditions standard

- it is comprised of:
 - annual leave
 - personal leave
 - parental leave
 - ordinary hours of work
 - minimum award and classification wages

fair pay and conditions standard cont.

- it overrides:
 - less generous provisions in federal and state awards and common law contracts
- it will become:
 - the new safety net for agreements.

preserved award terms

- long service leave
- jury leave
- notice of termination
- superannuation (until 2008).

non-allowable award matters

include:

- automatic union right of representation in disputes
- transfers of types of employment
- quotas
- prohibitions on particular types of employees
- restrictions on hours of part-time employees

non-allowable award matters cont.

- restrictions re training arrangement
- enterprise flexibility provisions
- restrictions on independent contractors and labour hire
- union picnic days
- tallies.

“protected” award conditions

- public holidays
- rest breaks
- incentive-based payments and bonuses
- annual leave loadings
- allowances
- penalty rates
- shift / overtime loadings.

overtime and penalty rates

- cannot require employees work more than 38 hours plus “reasonable additional hours”
- the provisions of any applicable Award still apply unless enter into a workplace agreement
- if enter workplace agreement - rates of pay in Award (APCS under FPCS) will apply
- must still pay overtime and penalty rates unless expressly excluded or modified (protected award terms).

workplace agreements

- types:
 - AWAs
 - collective – union and non-union
 - greenfield
 - multiple business.

agreement - differences

- made more quickly (7 days notice vs 14)
- technical breach in most cases not fatal
- self assessment model – lodged not approved
- longer terms – 5 years vs 3
- now requires dispute resolution procedure
- prohibited content
- “safety net” now is FPCS and protected award terms

agreement – differences cont.

- unions now cannot be parties to non-union collective agreements
- termination after expiry doesn't require “approval”.

unfair dismissals

to whom will the new laws apply?

- current employers under the federal system
- now also constitutional corporations where such corporations are not within the federal system
- includes Australian employers with Australian employees overseas.

exempt employers under new unfair dismissal regime

- 100 employees or less
 - includes some casuals (employed for 12 months)
 - each part-time and casual is “one” employee
 - related companies count.

amendments for large employers

- if over 100 employees new exclusions:
 - seasonal workers - relevant to accommodation industry
 - 6-month qualifying period (FT and PT)
- number at time of termination or notice (earlier time)

amendments for large employers cont.

- redundancies exempt - “operational requirement”
- “operational requirement”:
 - technological
 - structural
 - economic
 - or “similar nature”.

commission powers - unfair dismissals

- now “on the papers” - commission can dismiss application without a hearing for:
 - jurisdictional challenges (eg, excluded class, size of employer)
 - if “frivolous, vexatious or lacking in substance”.

other forms of action

- unlawful termination
- freedom of association
- discrimination complaint (Federal or State)
- breach of contract
- *Trade Practices Act*
 - misleading or deceptive conduct.

other issues

- what about unfair contracts
- conciliators can't be arbitrators (where objected to)
- cannot have unfair dismissal clauses in workplace agreements.

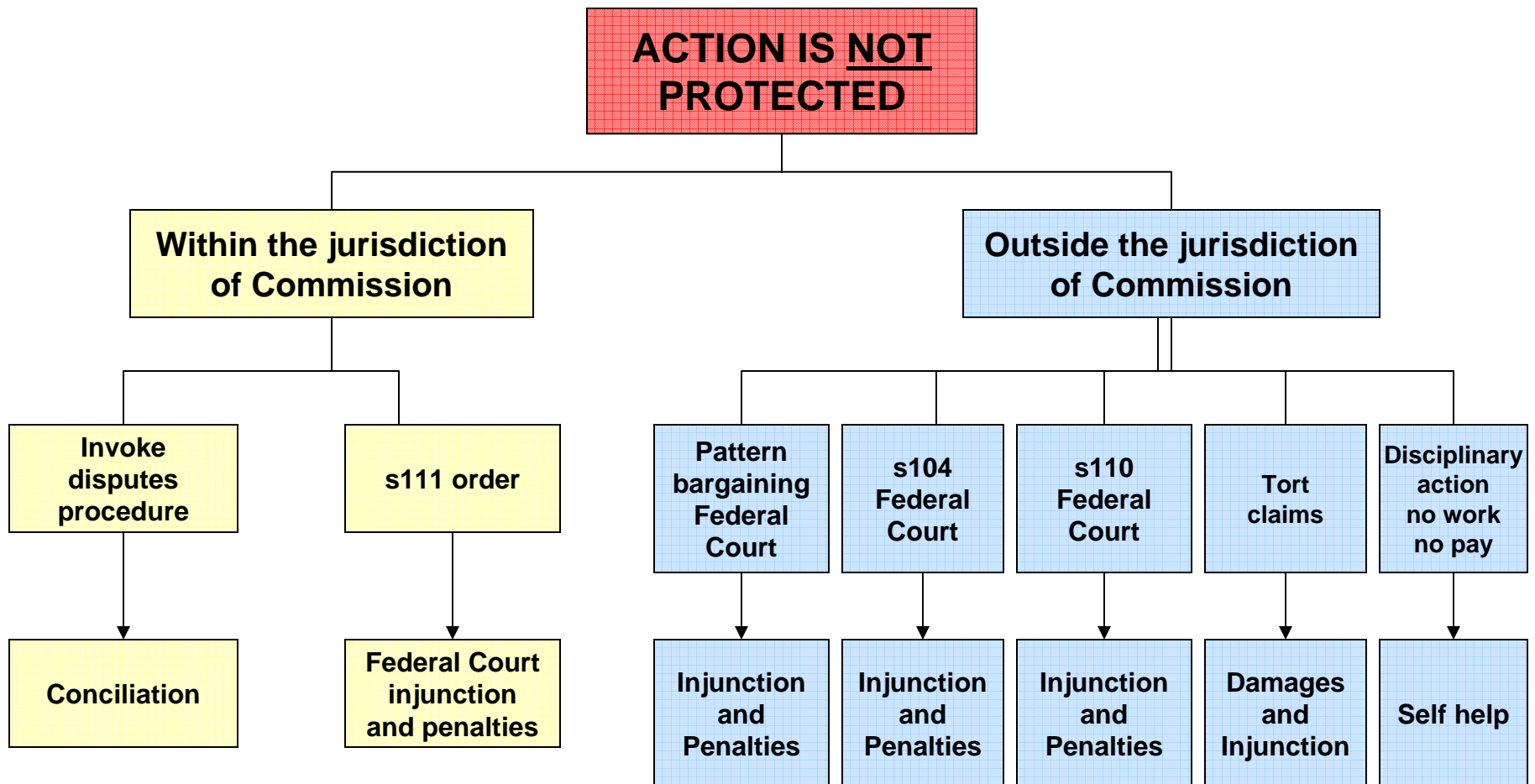
conclusion on unfair dismissals

- 100 employees or less
 - no unfair dismissal
 - other forms of action still available
 - some casuals and all part-timers count
- more than 100 employees
 - no hearings in certain cases (jurisdictional challenges, frivolous claims)
 - 6-month “qualifying” period
 - redundancies exempt.

industrial action under workchoices

- protected action
 - same system
 - introduces secret ballots
 - introduces pattern bargaining exclusion
 - total prohibition on action during nominal term
 - increased rights of third parties.

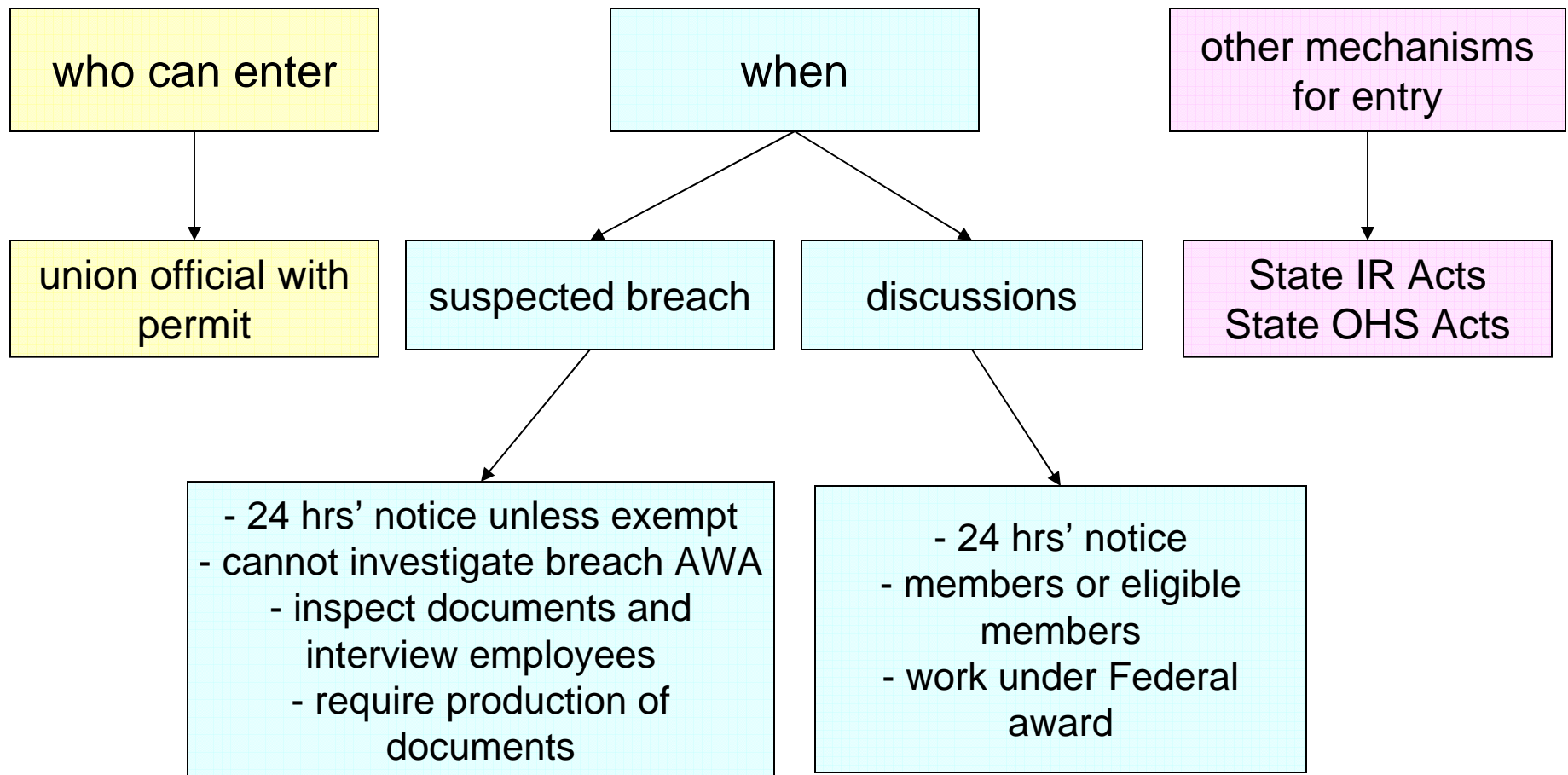
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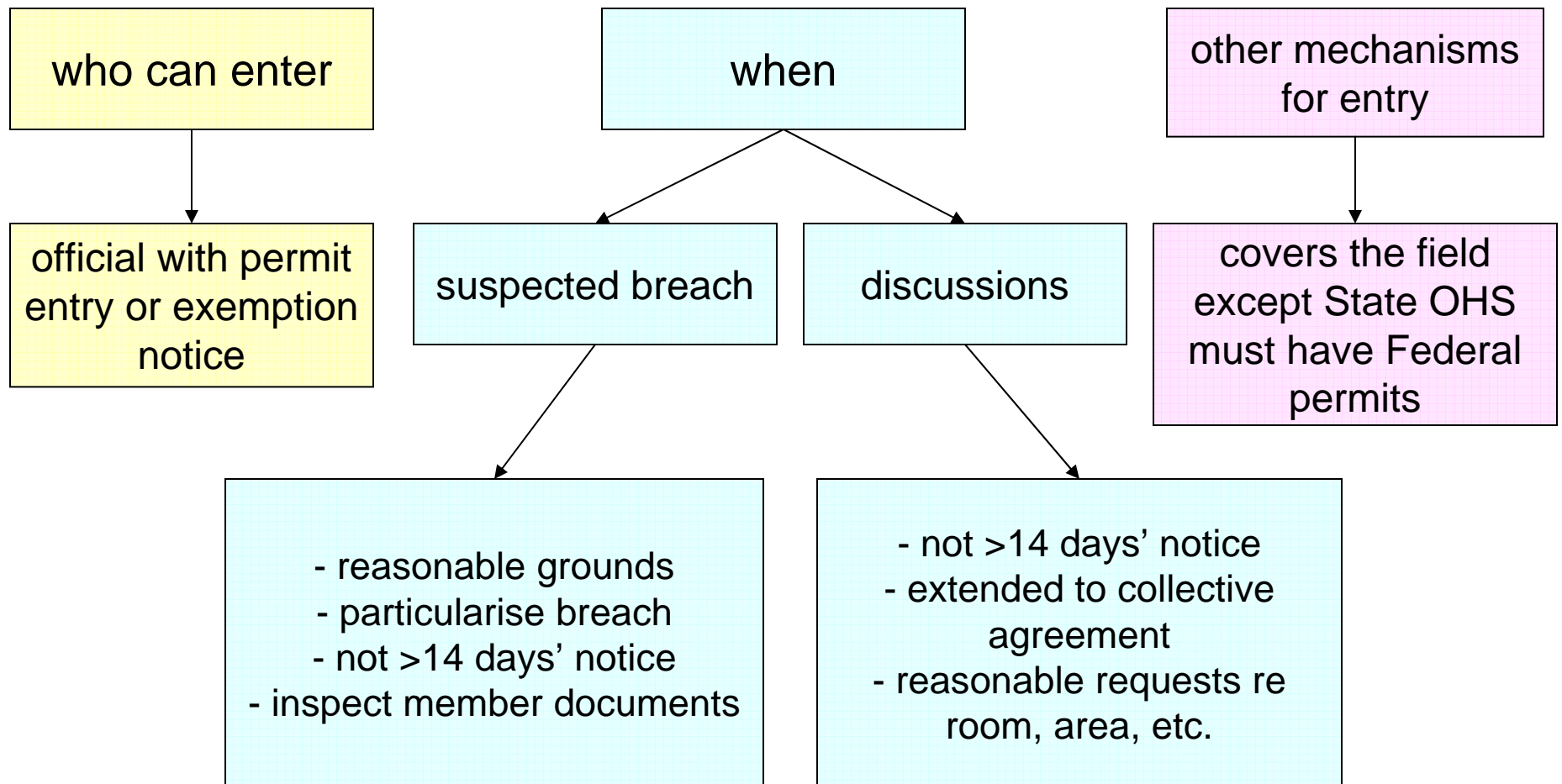
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- summary of important changes
 - s496 orders mandatory
 - s496 interim order required within 48 hours
 - s496 orders extend to third parties and to state action
 - tort claims available
 - pattern bargaining exclusion.

previously - right of entry



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conclusion on action and entry

- better remedies to stop action that is not protected
- protected action is narrowed
- requirements to enter premises tightened.

transmission of business common questions

- on what terms should the purchaser offer employment?
- what entitlements need to be observed?

entitlements and terms

- s595(d) *Workplace Relations Act 1996 (Cth)*
 - awards transfer to new employer

summary of old system for transmission

- awards and collective agreements to transfer to new employer
- no limitation on how long the transferred terms will apply
- on “transfer”, no requirement for written terms and conditions.

new system

- on transmission, if **no** employee accepts employment - Federal awards or agreements do not transfer
- employee **accepts** employment, the awards, collective agreements and AWAs will apply for the transmission period

new system cont.

- new employer's instruments apply after the transmission period
- after the transmission period, if no applicable award or collective agreement, the Australian Fair Pay and Conditions Standard will apply

new system cont.

- written information required
- notification obligations on purchaser and vendor
- Fair Pay & Conditions Standard applies universally.

summary of changes

- 85% of NSW workforce is now in the federal system
- FPCS “replaces” safety net of awards
- awards will still exist – rationalised/simplified
- agreement making focuses on enterprise
- more difficult to bring unfair dismissal actions
- changes to commission’s and Office of Employment Advocate’s roles

summary of changes

- introduction of new bodies – Fair Pay Commission and Office of Workplace Services
- more difficult to bring industrial action
- more formalities regarding union rights of entry.

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