

EMPLOYMENT CATEGORIES & SECURE EMPLOYMENT

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Authority and Application

Clauses 17 and 18 of the *Victorian Public Service Enterprise Agreement 2020* (the Agreement), applies to Victorian Public Service Departments and Agencies (Employers) and their Employees covered by the Agreement.

Overview

Clause 18 of the Agreement sets out the categories of employment in which an Employer can engage an Employee and the entitlements and restrictions which apply to each category. The clause also imposes a range of obligations on Employers to be carried out at the commencement of the Employee's employment and/or during the probationary period.

Clause 18 is interrelated with clause 17 of the Agreement, which acknowledges the positive impact of secure employment on Employees and the obligation on Employers to preference ongoing forms of employment over casual and fixed term arrangements wherever possible.

The operation of clause 17.3 of the Agreement with respect to fixed term employment must be read conjunction with the amendments to the *Fair Work Act 2009* (Cth) (FW Act) that apply a limit to the use of fixed term contracts for the same role or consecutive contracts beyond two years (including extensions and renewals) including where the contract provides for renewal more than once (even where the total period is less than two years), subject to various exceptions. These provisions came into operation on 6 December 2023 – see section 3 of this Policy for further information.

Relevant provisions of the VPS Agreement

Clause 17 – Secure Employment

Clause 18 – Employment Categories and Entitlements

Supplementary Guidance Information

1. Secure employment

- 1.1. Preference should be given to ongoing forms of employment where possible. Before entering into fixed term or casual engagements, Employers should consider whether it would be more appropriate in the circumstances to engage the Employee on an ongoing basis
- 1.2. In making this assessment Employer's must have regard to clauses 17.3 (see section 3 of this Policy for further guidance) and 17.4 of the Agreement which place restrictions on the engagement of fixed term and casual Employees.

2. Ongoing employment

- 2.1. The Employer should consider using ongoing employment where:
 - (a) the work has no foreseeable end date,
 - (b) there is a requirement to fill a vacancy and the criteria for fixed term or casual employment does not apply,
 - (c) there is funding available to enable the creation of a new ongoing role, or
 - (d) there is a need to fill an existing ongoing vacancy.
- 2.2. An Employer may be required to convert a fixed term employee engaged for one of the reasons outlined in clause 17.3 of the Agreement, in accordance with the section 3 of this policy.
- 2.3. In considering whether an individual position should be filled in an ongoing capacity, the factors above will need to be weighed against the appropriate use of fixed term employment (as outlined in clause 17.3 of the Agreement) or casual employment (as outlined in clause 17.4 of the Agreement) to determine the appropriate mode of employment in the circumstances.

3. Use of fixed term employment

- 3.1. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* made a number of significant amendments to the FW Act. Importantly, the amendments attempt to reduce the prevalence of fixed-term contracts of employment by applying a limit to the use of fixed term contracts for the same role beyond two years (including extensions or renewals) or consecutive contracts, including where the contract provides for renewal more than once (even where the total period is less than two years) subject to various exceptions. These obligations commenced operation on 6 December 2023.
- 3.2. In the VPS, these legislative amendments are to be integrated with existing obligations in clause 17.3 of the Agreement as follows.

- (a) the existing limitations on the circumstances where fixed term employment may be used, as outlined in clause 17.3 of the VPS Agreement, are to be maintained,
- (b) if a fixed term contract is being issued for one of the existing permissible reasons, its maximum duration will be no longer than 2 years duration (subject to points c and d below) for contracts issued from 6 December 2023,
- (c) if after this date, a fixed term contract meets one of the relevant exceptions to the two-year maximum contract duration as outlined in the FW Act, the contract may be longer than 2 years but no more than 3 years duration consistent with existing limitations,
- (d) the existing exceptional or unforeseen circumstances exclusion outlined in clause 17.3(c) of the Agreement, is to be maintained, alongside the exceptions relating to parental leave and an Employee being posted overseas (see clauses 17.3(c)-(d) of the Agreement) with exceptions beyond the 3 years subject to the application of the relevant exclusions outlined in the FW Act, and.
- (e) where fixed term contracts have been used consistent with the points above and the Employer wants to continue the role for a duration beyond the maximum permitted term then a process for conversion to ongoing employment will need to be followed (see **Attachment A** for further guidance).

3.3. The approach to implementation is explained in further detail in **Attachment A**.

3.4. Where fixed term employment is used consistent with the above, Employers must ensure that the employment has a specified start and end date and on commencement, a fixed term employee is issued with the Fixed Term Contract Information Statement (FTCIS) issued by the Fair Work Ombudsman.

3.5. The FTCIS needs to be given when the Employee enters, or as soon as possible after entering, the fixed term contract. This requirement applies in addition to the existing requirement to provide the Fair Work Information Statement (FWIS). The FTCIS provides fixed term employees with information about fixed term employment, including the rules about when fixed term contracts are allowed to be made. A copy can be downloaded from the Fair Work Ombudsman's website.

3.6. Continuous paid service under a fixed term arrangement will be taken into account where the Employee is subsequently engaged on an ongoing basis (including in determining any probation period required (see clause 18.3(c) of the Agreement).

4. Casual Employment

4.1. The use of casual Employees is limited to short-term or seasonal work demands or specialist skill requirements which are not required on a continuing basis and would not be anticipated to be met by existing Employee levels.

4.2. Employment of casuals must be in accordance with clause 17.4 of the Agreement. In addition to this, Employers must also ensure that casual employment complies with the definition of casual employment set out by section 15A of the *Fair Work Act 2009*.

5. Movement between employment types

5.1. The Agreement does not provide an automatic right to move between employment types (for example from casual or fixed term employment to ongoing employment).

5.2. Movement from fixed term to ongoing employment or from casual employment to any other type of employment may occur in accordance with the arrangements applying to fixed term employees outlined in this policy, or the Employer's recruitment and selection policy and processes.

Making decisions under this policy

Under section 20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

Dispute resolution

- An Employee who is directly affected by a decision made or action taken pursuant to clause 17 or clause 18 may apply for a Review of Actions under the Employer's Review of Actions policy.
- However, clause 17.5 of the Agreement prescribes an obligation upon an Employee or Union (union being defined in clause 2 of the Agreement as the CPSU), where it is considered that a fixed term or casual Employee has been engaged inconsistent with the criteria in clauses 17.3 or 17.4 of the Agreement to first refer the matter to the Employer for resolution.
- Parties should note that clause 17.5 of the Agreement prescribes a jurisdictional obligation upon parties to first attempt to resolve a matter pertaining to the engagement of a fixed term or casual Employee before the Resolution of Disputes procedure may be utilised. Parties should in the first instance follow this procedural requirement, prior to commencing a Resolution of Disputes process in accordance with clause 13 of the Agreement.

Further Information

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

Related policies or documents

VPS Enterprise Agreement Common Policies

- Probation
- Review of Action
- Secondments and Temporary Assignments

All policies in the VPS Enterprise Agreement common policies collection can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>

Additional Policies

- Fixed Term Employment – Policy Position to Integrate FW Act Amendments

Authorised by Industrial Relations Victoria:

Key Details	
Version	Final as Approved (as amended for FW Act amendments commencing on 6 December 2023)
Date	January 2024

If you print and store this document, you may be looking at an obsolete version. Always check the latest version of this document on the intranet.

Fixed Term Employment Implementation Approach

The information below provides further guidance on the intended integration of the existing restrictions outlined in clause 17.3 of the Agreement and the amendments to the FW Act, pertaining to the use of fixed term contracts, which commenced operation on 6 December 2023.

Use of Fixed Term Employment

- a) The Employer will not use fixed term contract positions for the purpose of undermining the job security or conditions of ongoing Employees.
 - b) In accordance with the principle set out in (a), the use of fixed term employment in all areas covered by this Agreement is limited to:
 - replacement of Employees proceeding on approved leave; or
 - meeting fluctuating client and employment needs and unexpected increased workloads; or
 - undertaking a specified task which is funded for a specified period; or
 - filling a vacancy resulting from an Employee undertaking a temporary assignment or secondment; or
 - temporarily filling a vacancy where, following an appropriate selection process, a suitable ongoing Employee is not available; or
 - filling a vacant role whilst a review of the area is undertaken, provided that such appointment does not exceed a period of twelve months.
 - c) Other than in the circumstances described in (d) below, fixed term appointments to a specific position, or consecutive fixed term appointments involving the same or substantially similar work, will be for a maximum of two years duration¹. Without limitation, when considering whether work is the same or substantially similar the Employer must consider:
 - the role's position description
 - the role's key duties
 - the location of the role and the effect of any difference on the employee
 - whether the role is in the same or different branch and/or VPS employer
 - the role's VPS Grade and Value Range
 - any other relevant information
 - d) Fixed term appointments, or consecutive fixed term appointments involving the same or substantially similar work, may be extended to a maximum duration of no greater than three years, where:
 - one of the permitted reasons for using fixed term employment, as outlined in (b) continues to apply, and
 - if:
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- the employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills; or
- the employee is engaged under the contract in relation to a training arrangement; or
- the employee is engaged under the contract to undertake essential work during a peak demand period; or
- the employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee; or
- the contract relates to a position for the performance of work that:
 - is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and
 - the funding is payable for a period of more than 2 years; and
 - there are no reasonable prospects that the funding will be renewed after the end of that period;

(together, the Exceptions)

In other than exceptional or unforeseen circumstances, fixed term appointments to a specific position or consecutive fixed term appointments involving the same or substantially similar work, will be for a maximum of three years duration, other than when in relation to a parental leave back-fill role or in relation to an Employee who is posted overseas.

- e) If exceptional or unforeseen circumstances apply, at least one of the relevant exemptions outlined in (b) and at least one of the relevant exemptions outlined in (d) must also apply to the extension of the specific position beyond a maximum duration of three years.

Process for conversion where fixed term employment in the same or a substantially similar position exceeds the maximum duration

- f) The Employer must, assuming they wish to retain the Employee, make an offer of ongoing employment to a currently employed fixed term Employee under this clause if the Employee has been employed on fixed term contract(s) involving the same or substantially similar work:
- If no Exception applies, then before 2 years' employment;
 - If an Exception applies, then before 3 years' employment.

The offer must:

- Be made in writing; and
 - Be an offer to convert to ongoing employment at the same VPS Classification or equivalent as the Employee's fixed term role; and
 - Be consistent with the employee's existing number of ordinary hours; and
 - Be given to the Employee within the period of 21 days after their fixed term employment has reached its maximum duration under this clause, or within 21 days after the Commencement Date of this Agreement where the maximum duration has already been exceeded.
- g) Notwithstanding (f), the Employer is not required to make an offer under that section to an Employee if there:
- are reasonable business grounds not to do so (h) below, or
 - the role in question relates to a parental leave back-fill role or the back-fill of an Employee who is posted overseas, or
 - are exceptional or unforeseen circumstances under (e).

In this event, the Employer must give written notice to the Employee. The notice must:

- Advise the Employee that the Employer is not making an offer of ongoing employment; and
 - Provide details of the reasons for not making the offer, including the reasonable business grounds and details of any exceptional or unforeseen circumstances; and
 - Be given to the employee within the period of 21 days before their fixed term employment reaches its maximum duration under this clause.
- h)** For the purposes of **(g)**, and without limitation, reasonable business grounds include:
- There is no ongoing vacancy available in which to place the Employee
 - The Employee's position will cease to exist in the coming 12 months
 - The Employee is engaged under the contract in relation to a training arrangement of longer than 3 years duration
- i)** If an employer fails to make an offer of ongoing employment to an eligible fixed term Employee, the Employee may request in writing conversion to ongoing employment. Approval to convert to ongoing employment will not be withheld unless one of the exceptions in **(g)** applies.