

Use of Fixed Term Employment

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Authority and Application

Clause 18 of the *Victorian Public Service Enterprise Agreement 2024* (the Agreement) applies to Victorian Public Service (VPS) Departments and Agencies (Employers) and their Employees covered by the Agreement.

Overview

Clause 18 of the Agreement sets out the permissible reasons and maximum durations for the use of fixed term employment by Employers as well as the rights of Employees employed on a fixed term basis, to be converted to ongoing employment in certain circumstances.

Clause 18 of the Agreement is interrelated with clause 17 of the Agreement which acknowledges the positive impact of secure employment on Employees and the obligations on Employers to preference ongoing forms of employment over fixed term arrangements wherever possible. In assessing their obligations under clause 18 of the Agreement, Employers should be mindful of the commitment in clause 17.2 of the Agreement to give preference to ongoing forms of employment wherever possible.

Relevant provisions of the Agreement

Clause 18 - Use of Fixed Term Employment.

Supplementary Guidance Information

1. Interaction between the *Fair Work Act 2009* and clause 18 of the Agreement

- 1.1. The provisions of the *Fair Work Act 2009* (Cth) (FW Act) as they relate to fixed term contracts do not automatically apply to Victorian Public Service Employers and their Employees. This is because of the operation of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (Referral Act), which excludes from the Victorian Government's referral of its industrial relations powers to the Commonwealth, matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of Employees in the public sector who are not law enforcement officers.
- 1.2. However, while these provisions of the FW Act do not legally apply, the Victorian Government has taken a policy position, that public service Employers and Employees should be subjected to the same secure employment regime as all other Employers in Australia and has asked its Employers to apply the FW Act provisions as if they did legally apply.
- 1.3. Compliance with the Agreement will ensure that the *Fair Work Act 2009* (Cth) (FW Act) legislative regime are complied with by Employers and in particular the deeming arrangements in the FW Act, are not enlivened. This interaction is explained in further detail below.
- 1.4. The FW Act applies a limit on 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 limited exceptions. If one of the limited exceptions applies, then there is no limitation on the duration of fixed term contracts, which may go beyond two years (provided one of the limited exceptions continues to apply).
- 1.5. Where an Employer employs an individual on a fixed term contract for longer than the permissible duration and/or in the absence of an applicable exemption, the FW Act deems that Employee to be ongoing (without any action being taken by the Employer or Employee).

This creates a risk for Employers and Employees who may be unaware of a particular individual's employment status at any given time.

- 1.6. To address these risks and to maintain existing secure employment commitments, clause 18 of the Agreement:
 - 1.6.1. provides a list of permissible reasons for entering into fixed term employment, which align with the limited exceptions in the FW Act – see clause 18.3 of the Agreement, and
 - 1.6.2. allows for the parties to enter into a fixed term contract for one of these permissible reasons for a duration of up to three years (with some limited exceptions), consistent with the Government's secure employment commitments – as detailed in clause 18.4 of the Agreement.
- 1.7. Effectively, this means that where an Employer enters a fixed term contract on the basis of a permissible reason as per clause 18.3 of the Agreement, they would be compliant with the terms of the FW Act (because the permissible reasons in the Agreement are aligned to the limited exceptions in the FW Act) and would only need to be cognisant of the terms of the Agreement to ensure compliance. The Agreement then goes on to modify the duration on which an Employer may rely on the limited exceptions in the FW Act beyond the two years to a maximum of three years (or otherwise outlined) before an Employee may have conversion rights under clause 18.6 of the Agreement (whereas under the Act the permissible duration is unlimited). This additional limitation imposed by the Agreement is consistent with the Government's secure employment commitments.

2. Guiding Principles for the Use of Fixed Term Employment

- 2.1. Clause 18.1 of the Agreement sets out the overarching principles underpinning the use of fixed term employment in the VPS and provides that the Employer must not use fixed term contracts for the purpose of undermining the job security or conditions of full-time ongoing Employees.
- 2.2. Employers need to apply this principle in conjunction with clause 17.1 of the Agreement – Secure Employment, which provides that the Employer will give preference to ongoing forms of employment over casual and fixed term arrangements.
- 2.3. Further (and more generally), Employers should also be mindful of the Government's intention to facilitate more secure forms of work and position the VPS as a model Employer.
- 2.4. The operational impact of the new fixed term arrangements in the Agreement will depend on the context of the individual agency/department, particularly their workforce profile and the nature of their work and outputs. Employers must consider these overarching principles in workforce planning and decision making in relation to the treatment and/or creation of fixed term employment in the VPS.
- 2.5. Further, in considering whether any of the permissible reasons to use fixed term engagements or the exceptions to the right to convert outlined in the clause apply, Employers should

interpret and apply them in a manner that supports the fundamental guiding principles outlined above.

3. Permissible Reasons for the use of Fixed Term Employment

- 3.1.** Fixed Term appointments may be used only for the following reasons (Clause 18.3 of the Agreement):
- 3.1.1.** replacement of Employees during temporary absences (approved leave or vacancy resulting from temporary assignment or secondment); or
 - 3.1.2.** undertaking essential work during a peak demand period; or
 - 3.1.3.** work during emergency circumstances; or
 - 3.1.4.** undertaking distinct and identifiable task involving specialised skills, which is funded for a specified period; or
 - 3.1.5.** undertaking a contract in relation to a training arrangement;
 - 3.1.6.** senior Technical Specialist, Principal Scientist, Senior Regulatory Analyst or Senior Medical Adviser roles; or
 - 3.1.7.** temporarily filling a vacancy where:
 - if after an appropriate selection process – a suitable ongoing Employee is not available; or
 - the Employee is filling a vacant role whilst a review of the area is undertaken.

These permissible reasons are aligned to the exceptions in the FW Act.

- 3.2.** Employers should anticipate that these permissible reasons will be interpreted narrowly. Whether a permissible reason will apply should not be the only consideration when determining whether it is appropriate to engage an Employee on a fixed term basis. Employers should also consider the appropriateness of the engagement as a fixed term engagement in the context of the underlying secure employment commitments in clause 17 and 18.1 of the Agreement. Permissible reasons should only be utilised to facilitate fixed term contracts up to the stated time limits set out in the Agreement when the Employer has formed the view that it is genuinely necessary and suitable in the circumstances.
- 3.3.** If an Employer considers that a permissible reason will apply, it should carefully assess the application of that reason. The Employer needs to be confident that the permissible reason applies and is supported by evidence that substantiates the application of that permissible reason.
- 3.4.** In the event of a dispute, the Employer will be required to prove that a permissible reason applies. It is appropriate that the Employer bears the evidential burden in relation to these exceptions as they are best placed to articulate why fixed term employment was necessary in their particular circumstances.
- 3.5.** It is best practice for Employers to include the permissible reason relied on and the basis on which they consider the permissible reason applies within the terms of the fixed term contract or other engagement correspondence.
- 3.6.** Employers are encouraged to seek further advice from their local Human Resources or People and Culture Unit (or equivalent) on specific circumstances where they are unsure

whether a role meets the requirements of a permissible reason (or the nature of the evidence required to substantiate the application of permissible reason to a particular circumstance).

- 3.7. Entering into a fixed term contract for a reason other than a permissible reason or where an Employer cannot substantiate the permissible reason, they rely on would be in breach of the Agreement and would enliven the legislative regime from the FW Act, including the deeming provisions once the maximum permissible duration in the FW Act is surpassed.

3.8. Permissible Reasons - Training Arrangements (clause 18.3(e) of the Agreement)

3.8.1. The FW Act defines a training arrangement as a 'combination of work and training that is subject to a training agreement, or training contract, that takes effect under a law of a State or Territory relating to the training of Employees'.

3.8.2. In order to enliven this permissible reason, Employers need to ensure that any fixed term engagements entered into on the basis of this reason meet the requisite definition of 'training arrangement' consistent with the FW Act.

4. Maximum permissible duration

- 4.1. Fixed Term appointments are subject to a maximum of three years duration (Clause 18.2 of the Agreement).

- 4.2. Clause 18.4 of the Agreement provides exceptions to the three-year maximum term. Various maximum terms apply based on the specific exception. These exceptions are:

4.2.1. Exception permitting maximum terms beyond the three year maximum term until the permissible reason no longer applies:

- Exceptional or unforeseen circumstances (*Clause 18.4(a) of the Agreement*).
- Where the fixed term engagement is backfilling another Employee who is on parental leave (*Clause 18.4(c) of the Agreement*).
- Where the Employee is posted overseas (*Clause 18.4(f) of the Agreement*).
- Where the Employee is engaged on a training arrangement of longer than three years duration (*Clause 18.4(g) of the Agreement*).

4.2.2. Exception permitting one extension beyond the three year maximum term of no more than 12 months:

- Employee engaged as a Senior Technical Specialist, Principal Scientist, Senior Regulatory Analyst or Senior Medical Officer (*Clause 18.4(d) of the Agreement*).
- Employee engaged to undertake distinct and identifiable task involving specialised skills, which is funded for a specified period in accordance with clause 18.3(d) of the Agreement, and the funding is payable for a period of more than three years and there are no reasonable prospects that the funding will be renewed after the end of that period (*Clause 18.4(e) of the Agreement*).

4.2.3. Exception permitting 12-month maximum term only (three year maximum does not apply).

- Temporarily filling a vacancy where following an appropriate selection process, a suitable ongoing Employee is not available; or
- the Employee is filling a vacant role whilst a review of the area is undertaken. (*Clause 18.4(b) and 18.3(g) of the Agreement*).

4.3. Employers must not offer an initial contract length of greater than three years or the maximum permissible contract duration under the Agreement, whichever is the shorter, even where the Agreement permits the contract to be extended beyond the three-year maximum. In cases where the Employer wishes to extend a contract beyond the three-year maximum where permitted by the Agreement, this should only occur at the point the contract is approaching its maximum duration where an assessment should be made by the Employer whether the permissible reason for entering into the fixed term contract continues to apply, whether an exception to permit extension beyond the three year maximum duration is expressly provided under the Agreement and/or whether converting the position to ongoing would be more appropriate in the circumstances.

4.4. Subject to the transitional arrangements outlined in clause 18.6 of the Agreement, in determining whether an Employee has reached the maximum permissible duration, the Employer should include the original contract duration plus any renewed or consecutive contracts for the same or substantially similar roles with the Employer.

5. **Effect of clause 18 of the Agreement on contracts entered into prior to the commencement of the Agreement**

5.1. Clause 18.7 of the Agreement provides for transitional arrangements for existing fixed term contracts entered into prior to the commencement of the Agreement:

5.1.1. Fixed term contracts entered into on or after 6 December 2023 but before the commencement of the Agreement (19 August 2024), are only eligible to be considered for conversion when the contract is renewed or extended after the commencement of the Agreement. *(Clause 18.7(c) of the Agreement)*.

5.1.2. Further to the above, fixed term contracts entered into on or after 6 December 2023 but before the commencement of the Agreement (19 August 2024) shall have their served term/s count towards determining eligibility for conversion.

5.2. Contracts entered into prior to 6 December 2023, do not count towards determining an Employee's eligibility for conversion under clause 18 of the Agreement. At the point a contract entered into prior to 6 December 2023 comes up for renewal or extension, the Employer must confirm the engagement is consistent with one of the permissible reasons to enter into a fixed term contract as prescribed in clause 18.3 of the Agreement.

5.3. Where a permissible reason:

- applies, the Employer, subject to the considerations in paragraph 4.4 below, may:
 - enter into a further fixed term contract up to the maximum duration prescribed by clause 18 of the Agreement, or
 - use its discretion to convert the position to ongoing employment.
- does not apply, the Employer may either:
 - end the fixed term contract through the passage of time, or
 - use its discretion to convert the position to ongoing employment where there is an ongoing need for the work to continue.

5.4. Before exercising their right to enter into a further fixed term contract by renewing or extending a contract that was entered into prior to 6 December 2023, the Employer must:

- have regard to the principles in clause 18.1 of the Agreement,

- have regard to the Government’s secure employment commitments enshrined in clause 17 of the Agreement,
- consider the total duration of the fixed term employment in the same or substantially similar roles in the VPS, and
- the impacts of further fixed term employment on the employee’s job security.

5.5. An Employer must ensure that exercising its rights to enter into a further fixed term contract in these circumstances does not result in an Employee continuing as a fixed term engagement beyond the maximum duration that would apply to new contracts entered into or under the Agreement unless there is genuine operational reason to do so and a permissible reason provided in clause 18.3 of the Agreement applies.

5.6. The table below illustrates the effect of the transitional arrangements.

Scenario	Rationale
<p>John is appointed on a fixed term basis on 1 July 2022. Approaching the end of the initial contract on 30 June 2025, the Employer reviews the engagement and decides that further work is required beyond the current end of the contract.</p> <p>As the contract was entered into prior to 6 December 2023, the transitional arrangements in clause 18.7 apply and John is not automatically entitled to be considered for conversion under clause 18.6 of the Agreement. However, before renewing or extending John’s fixed term contract, the Employer is required to make an assessment as to whether one of the permissible reasons in clause 18.3 of the Agreement applies.</p> <p>If one of the permissible reasons applies, then the employer must weigh up the factors outlined in paragraph 4.4, and then may decide to either enter into a further fixed term contract up to the permissible duration prescribed in clause 18 of the Agreement or use its discretion to convert the position to ongoing.</p> <p>If one of the permissible reasons to enter into a fixed term contract under clause 18.3 of the Agreement does not apply, the employer can decide whether to let John’s contract come to its natural conclusion or convert the position to ongoing.</p>	<p>In this example, the Employer considers one of the permissible reason does apply and before renewing or extending the contract, the Employer considers the total duration of John’s fixed term employment in the same or substantially similar roles in the VPS (in this case three years), the fact that a further fixed term contract would potentially allow for fixed term employment of up to six or seven years (where an extension applies) and considering these factors in conjunction with its secure employment commitments, elects to use its discretion to convert John’s role to ongoing.</p>

6. Applying the permissible reasons for fixed term contracts - Scenarios

6.1. Below is some further guidance for Employers on the permissible reasons for the use of fixed term contracts. Where relevant, this guidance may also assist Employers in understanding and utilising the permissible reasons up to the maximum permissible duration outlined in the Agreement.

Permissible Reason	Scenario	Rationale
Replacement of Employees during a	Laura goes on parental leave for an initial period of 12 months. At the conclusion of the	Greg is appointed to a fixed term role for a permissible reason.

Permissible Reason	Scenario	Rationale
temporary absence of another Employee	<p>initial period of parental leave she seeks to extend her leave for a further three months (a total of 15 months). Laura then seeks a further three-month extension taking the total period of 18 months).</p> <p>Greg is appointed on an initial 12-month fixed term contract, which the Employer extends twice to reflect the extensions agreed with Laura.</p>	The exception in clause 18.3(a)(i) of the Agreement is enlivened and despite the fact there has been more than one contract renewal and consecutive contracts, the fixed term conversion does not apply in this case.
Undertaking essential work during peak demand period	Jim has been appointed to perform maintenance work in national parks on a seasonal basis. The work must be undertaken in the summer.	The exception in clause 18.3(b) of the Agreement is enlivened and Jim is appointed to a fixed term role for a permissible reason.
Undertaking work during emergency circumstances	The Employer is a response agency and needs to urgently fill roles on a short-term basis to undertake processing work for emergency support and grants for affected community members and to undertake community engagement. The Employer wants to appoint all Employees on a fixed term basis for six months.	The exception in clause 18.3(c) of the Agreement is enlivened and the Employer may appoint to these roles on a fixed term basis.
Distinct and identifiable task involving specialised skills funded for a specified period	An Employer needs to engage an IT developer to install and build a new project tracker and to train the Employer's existing staff to use and to maintain the system. The task has been estimated to take three years to complete and once it is complete, there are no other requirements in relation to this project. The Employer has no access to IT developers or Employees with these skills internally. Funding has been provided to the Employer for three years to develop and install the new project tracker. The Employer undertakes a merit-based process and engages an IT developer with the necessary specialist skills on a fixed-term contract for three years.	In this case the Employee is appointed on a fixed term contract for a permissible reason because they are appointed to perform a distinct and identifiable task involving specialised skills, which is funded for a specified period. (see clause 18.3(d) of the Agreement)
Distinct and identifiable task involving specialised skills, which is funded for a specified period	The Employer has received stand-alone funding to build an infrastructure project. It is expected the project will take six years to complete and require specialised engineering and project management skills. The Government has identified a forward work plan and at the end of the initial project it is likely the Employer will be asked to build a similar infrastructure project at a different location.	While the project involves a distinct and identifiable tasks involving specialised skills funded for a specified period, which in other circumstances may be a permissible reason to engage Employees on fixed term contracts, given the Government's secure employment commitments and the circumstances of this case, employment should be provided on an ongoing basis.
No permissible reason	The Employer has an ongoing vacancy for an enduring ongoing function but has decided to offer an initial fixed term contract of 18 months because it is the manager's preference to initially appoint all new staff on a fixed term	A permissible reason for entering into a fixed term contract has not been established.

Permissible Reason	Scenario	Rationale
	basis to allow them to assess the successful candidate's aptitude for the role before deciding whether to appoint the person to the ongoing role.	Ongoing vacancies for an enduring function should be filled on an ongoing basis. Employers who appoint an Employee to a fixed term position without a permissible reason risk breaching the terms of the enterprise agreement and enlivening the legislative arrangements, including the deeming arrangements in the FW Act.

7. Contract Renewals and Contract Extensions

- 7.1. A contract renewal is where an existing fixed term engagement is extended beyond the original contract period.
- 7.2. A consecutive contract is where a new fixed term engagement is offered to an Employee and commences immediately following the expiry of a previous fixed term contract.
- 7.3. The FW Act limits the use of fixed term contracts for the same or substantially similar roles, to two years or two consecutive contracts (whichever is the shorter). The FW Act rules may apply if the fixed term contract is not entered into for a permissible reason provided in the Agreement. Employers should ensure they do not enter into a series of short-term contracts with a view to avoiding their obligations under clause 18 of the Agreement, as doing so would enliven the deeming provisions of the FW Act. This means an Employee may be taken to be an ongoing Employee without any action having been taken by the Employer or Employee (if the Employee is not engaged for one of the permissible reasons in the Agreement).
- 7.4. Subject to the provisions of clause 18 of the Agreement, Employers may continue to renew or enter into consecutive contracts up to the maximum permissible duration in the Agreement (or for a longer duration if an exception in clause 18.4 of the Agreement applies) provided the contract has been entered into for one of the permissible reasons outlined in clause 18.3 of the Agreement.

8. Where an Employer must make an ongoing Employment offer – Clause 18.6 of the Agreement.

- 8.1. An Employer must make an offer of ongoing employment prior to the conclusion of the Employee's fixed term contract where:
 - 8.1.1. **Clause 18.5 of the Agreement:** Continuing a fixed term engagement will exceed the prescribed maximum term (see clause 18.4 of the Agreement for exceptions to this); or
 - 8.1.2. **Clause 18.6(a) of the Agreement:** Where an Employer no longer has a permissible reason for renewing or engaging an Employee on a consecutive fixed term basis but wishes to continue Employing an individual to perform the function or duties (see clause 18.3 of the Agreement).
- 8.2. Where an Employer must make an offer of ongoing employment, the offer must be:
 - 8.2.1. in writing; and
 - 8.2.2. an offer to convert to ongoing employment at the same VPS Classification or equivalent as the Employee's fixed term role; and
 - 8.2.3. consistent with the Employee's existing number of ordinary hours; and

8.2.4. provided to the Employee at least 21 days (earlier if possible) before their fixed term employment has reached its prescribed maximum term (see clause 18.4 of the Agreement).

9. Where an Employer is not required to make an ongoing employment offer - reasonable business grounds or exceptional or unforeseen circumstances.

9.1. An Employer is not required to make an offer of ongoing employment, prior to the conclusion of the Employee's fixed term contract where:

9.1.1. There are reasonable business grounds not to do so (clause 18.6(a)(i) of the Agreement, or

9.1.2. In exceptional or unforeseen circumstances (clause 18.6(a)(ii) of the Agreement).

9.2. Clause 18.6(b) of the Agreement provides for two examples of reasonable business grounds (noting reasonable business grounds is not limited to these two examples):

9.2.1. There is no ongoing vacancy or funding for an ongoing position at the same VPS classification or equivalent available in which to place the Employee to undertake the same or similar work that they were performing in the fixed term position (clause 18.6(b)(i) of the Agreement; or

9.2.2. The Employee's position will cease to exist in the coming 12 months (clause 18.6(b)(ii) of the Agreement).

9.3. With respect to clause 18.6(b)(i) of the Agreement, proving that there is no ongoing vacancy or funding for an ongoing position the onus will be on the Employer to provide evidence of either or both of these circumstances in the event the matter is disputed.

9.4. Similarly, with respect to clause 18.6(b)(ii), the evidentiary burden will be with the Employer to prove that an ongoing offer of employment cannot be made due to exceptional or unforeseen circumstances. It is expected that a high evidentiary bar will apply and normal budget or funding cycle vagaries are unlikely to meet this threshold.

9.5. Where the circumstance in clause 18.6(b) of the Agreement means the Employer is not required to make an offer of ongoing employment, this does not mean an Employer may continue fixed term employment for a duration that is longer than the maximum prescribed in clause 18.4 of the Agreement. Where the reasonable business grounds apply meaning the Employer is not required to make an offer of ongoing employment, the fixed term contract will end by the passage of time and any remaining duties will, after considering any workload implications, need to be re-distributed to other Employees within the unit.

9.6. Where an Employer is not required to make an offer to convert an Employee to ongoing employment because of the operation of clause 18.6(a)(i) or (ii) of the Agreement, written notice needs to be provided to the Employee. The notice must:

9.6.1. Advise the Employee that the Employer is not making an offer of ongoing employment; and

9.6.2. Provide the reasons for not making the offer, including the reasonable business grounds and/or details of any exceptional or unforeseen or other circumstances that apply; and

9.6.3. Be given to the Employee at least 21 days before their fixed term employment has reached its applicable maximum duration.

9.7. If employment ceases at the end of a fixed term contract by the passage of time and that period is within the applicable maximum duration under clause 18.4 of the Agreement, written notice is not applicable as the fixed term contract was for a permissible reason and did not extend past its applicable maximum duration.

10. Case Studies – Conversion Scenarios:

10.1. The scenarios below are intended to illustrate, in a general sense, the operation of the conversion to ongoing employment requirement. These scenarios are not intended to be comprehensive and full advice with respect to actual fixed term scenarios will depend on the circumstances in each case. Employers are encouraged to seek their own advice where they are unsure of their conversion obligations in any fixed term scenario.

Scenario	Rationale
After being on a fixed term contract for two years, Cara is offered a new three-year fixed term contract for a completely different role, for one of the permissible reasons in clause 18.3 of the Agreement, with the same Employer.	While Cara has been employed with the same Employer for longer than three years in total on consecutive contracts, she is not eligible for conversion because the contracts do not relate to the same or substantially the same position.
Gurpreet is offered a new fixed term contract (first contract) on 7 December 2023 for six months for one of the permissible reasons in clause 18.3 of the Agreement	In this scenario, Gurpreet is not eligible to be considered for conversion as his contract does not exceed three years. Should he accept additional fixed term contract(s) in the same or substantially similar position, he may be eligible to be considered for conversion to ongoing employment if the combined contracts exceed three years at the time a contract is extended or renewed after the Agreement commenced operation.
Chin is employed for one of the permissible reasons in clause 18.3 of the Agreement on a 24-month fixed term contract from 1 December 2022 which expires on 30 November 2024.	Chin is not eligible to be considered for conversion under the Agreement as his fixed term contract commenced on 1 December 2022 (enlivening the transitional arrangements) and the contract does not exceed three years. At the end of the initial contract period the contract may end because of the passage of time or, where a permissible reason is still applicable, be extended up to the three-year maximum with an additional extension of up to 12 months.
Tristan has been employed on a fixed term contract for one of the permissible reasons under clause 18.3 of the Agreement for a period of three years commencing on 20 August 2024. At the end of the initial contract the duties and functions will continue due to an additional three-year funding being provided.	While the program Tristan is engaged to work on is funded for a specified period, the engagement has reached its maximum duration and a further extension would go beyond the maximum permissible duration in clause 18.4(e) of the Agreement. Tristan’s role is converted to ongoing following the process in clause 18.6 of the Agreement.
Emma has been employed on a fixed term basis for three years to implement an IT system upgrade. The initial appointment is for a permissible reason under clause 18.3 of the Agreement. Towards the end of the initial period, it is clear the project will require a further six months work in order to complete but after that period there will be no further work to complete.	While in this case the role has reached the maximum permissible duration and ordinarily would be a candidate for conversion, the fact the role will cease to exist in the coming 12 months renders the role ineligible for conversion (as per clause 18.6(b)(ii) of the Agreement and the Employer may extend the contract once beyond the three year maximum in accordance with clause 18.4(e) of the Agreement.

Scenario	Rationale
<p>Harry is employed on a fixed term basis for one of the permissible reasons in clause 18.3 of the Agreement. At the end of the initial contract duration, the Employer reviews the role and believes the functions should continue but there is no ongoing vacancy or funding for an ongoing position at the same VPS classification or equivalent available</p>	<p>In this case while ordinarily the role could be considered for conversion, because the Employer has formed the view there is no ongoing vacancy or funding for an ongoing position in accordance with clause 18.6(b) of the Agreement, Harry's contract ends due to the passage of time and the Employer, after considering the workload obligations of the other team members, re-distributes the duties to other ongoing Employees. In this scenario it is not open to the Employer to continue the employment on a fixed term basis.</p>
<p>Jemma is employed as a Senior Technical Specialist on a fixed term contract for three years. At the conclusion of the initial contract period, the Employer elects to extend her employment by a further 12 months in accordance with clause 18.4(e) of the Agreement. At the end of the fourth year of employment, the Employer wishes to continue her employment in the same or substantially the same position.</p>	<p>While employment as a Senior Technical Specialist, Principal Scientist or Senior Regulatory Analyst or Senior Medical Officer is a permissible reason to engage a fixed term Employee, in this case the Employer has reached the maximum duration permitted by the Agreement to continue the role beyond the fourth year of employment, the Employer must convert the role to ongoing.</p>

11. Transitioning from fixed term to ongoing Employment – merit-based employment and exemptions to the requirement to advertise

- 11.1. Merit in employment processes is a fundamental concept in the Victorian Public Sector/Service. The *Public Administration Act 2004* provides that employment decisions in the public sector must be made based on merit and that employment processes need to reflect this. (see s.3,7 and 8 of the Public Administration Act 2004).
- 11.2. Given the application of the *Public Administration Act 2004*, VPS Employers should not use the fixed term provisions of the Agreement to bypass the requirement for merit-based recruitment. Employers must proactively manage their merit-based recruitment processes to support the transition from fixed term to ongoing employment in circumstances where it is identified that there is an ongoing need for work to be performed or where conversion must be offered.
- 11.3. The general principle is that an offer of ongoing employment can only be made where a candidate is found suitable either through a merit-based process for the role or a merit-based process for a similar role. Employers are expected to ensure that any employment decisions have merit processes or justifications properly documented.
- 11.4. Where an Employee has been appointed to a fixed term position following a merit-based selection process and the role becomes eligible for conversion because of the operation of clause 18 of the Agreement, Employers may apply for an exemption to advertising and convert the incumbent Employee to an ongoing form of employment without the need for a further merit selection process at the point conversion arises under clause 18 of the Agreement.
- 11.5. Where it is identified prior to the end of a maximum term fixed-term engagement that a role will be required on an ongoing basis and believes a further merit selection process is necessary, the Employer could commence a merit-based recruitment process sufficiently prior

to the end of the fixed-term engagement and invite the occupant to apply for the ongoing position.

12. Effect of fixed term conversion on entitlements

- 12.1.** Continuous paid service under a fixed term arrangement will continue to be recognised where the Employee is subsequently engaged on an ongoing basis (including in determining any probation period required).
- 12.2.** An Employee who is converted to ongoing by the operation of clause 18.6 of the Agreement will have their entitlements maintained and the entitlements will not be paid out.

13. Anti-Avoidance Provisions

- 13.1.** Clause 18.6(f) of the Agreement prevents the Employer from doing any of the following actions with the intention of avoiding its conversion obligations under the clause:
 - 13.1.1.** Terminating employment, or
 - 13.1.2.** Delaying the re-engagement of an Employee, or
 - 13.1.3.** Not re-engaging an Employee but instead engaged another person to perform the same or substantially similar work, or
 - 13.1.4.** Change the nature of the work or task an Employee is asked to perform.
- 13.2.** These provisions effectively prohibit Employers from changing the timing or terms of a fixed term contract to avoid the operation of fixed term conversion requirement at clauses 18.5 and 18.6 of the Agreement.
- 13.3.** Even where there are multiple reasons for making changes to the fixed term engagement, as long as one of the reasons is the avoidance of the operation of clause 18.5 or 18.6 of the Agreement, then the anti-avoidance measures at clause 18.6(f) of the Agreement would be enlivened.
- 13.4.** An Employer needs to document the rationale for decisions to ensure it can demonstrate substantive operational reasons for a decision related to fixed term employment. Employers must avoid having any decision related to fixed term employment primarily motivated by (or appearing to be motivated by) the avoidance of the conversion obligations under clause 18 of the Agreement. This is paramount in ensuring clarity if there is a dispute over whether a decision was made to avoid obligations by demonstrating there is a clear rationale for why particular decisions were made.
- 13.5.** Some examples of anti-avoidance actions could include:
 - 13.5.1.** Where a fixed term Employee's contract ends and the Employer deliberately delays re-engagement for two months for the purpose of avoiding clauses 18.5 and/or 18.6 of the Agreement.
 - 13.5.2.** Where a fixed term Employee's contract ends and at the conclusion of that contract, an Employer engages a new fixed term Employee to perform the same or substantially similar work for the purpose of avoiding clauses 18.5 and/or 18.6 of the Agreement.
 - 13.5.3.** Where a fixed term Employee's contract ends and the Employer offers the Employee a new fixed term contract in a different role for the purpose of avoiding clause 18.5 or 18.6 of the Agreement and proceeds to fill the original role by way of a new fixed term arrangement.

13.6. Despite the operation of the anti-avoidance provisions, it may be possible that an Employer takes actions listed in the anti-avoidance provisions for reasons that do not include an intent to avoid the operation of either clauses 18.5 and/or 18.6 of the Agreement.

13.6.1. For example: a fixed term Employee completes an 18-month contract to deliver a project, and the Employer makes an assessment that all requirements of the project have been delivered and no further work is required. Six months after the end of the fixed term Employee's contract, the Government requests the Employer complete a second phase of the project and allocates funding. The Employer then reengages the Employee to undertake the second phase. In this case, the second phase of the project was not initially contemplated prior to the conclusion of the Employee's previous contract and therefore the Employer has not acted to avoid the fixed term provisions.

13.7. In such cases it will be important for the Employer to demonstrate a clear rationale for why particular decisions were made.

14. Fixed Term Contract Information Statement

14.1. An Employer must ensure that a fixed term Employee is issued with the Fair Work Ombudsman Fixed Term Contract Information Statement (FTCIS).

14.2. The FTCIS needs to be provided when the Employee enters, or as soon as possible after enters, the fixed term contract. This is 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 – www.fwo.gov.au.

14.3. In addition to the FTCIS, the Employer must provide a fixed term Employee with access to this Policy to explain the differences between the FTCIS and the fixed term provisions permitted by the Agreement and how they apply to the Employee.

15. Implications for Employers

15.1. Consistent with the Victorian Government's commitments, these legislative and industrial reforms aim to reduce the prevalence of fixed term employment and promote secure employment. These arrangements should be implemented with this objective in mind.

15.2. The intent of the Parties in drafting Clause 18 of the Agreement was to remove the ambiguity in previous iterations of the enterprise agreement regarding what happens when the fixed term contract duration is reached, by providing a process for conversion to ongoing employment, subject to limited exceptions including reasonable business grounds. The Parties also sought to remove the ambiguity between the restrictions on the use of fixed term employment in the previous iteration of the enterprise agreement and the FW Act's recently created fixed term limitations/conversion regime. This conversion process is consistent with the FW Act obligations.

15.3. While the Agreement will eliminate or significantly reduce risk and complexity, fixed term contracts that are for a reason other than a permissible reason, will continue to expose Employers to being in breach with the FW Act, highlighted above at paragraph 1.5 and 5.7 of this Common Policy (as well as potential breach of the Agreement). Employers should have robust processes in place to ensure that contracts are only entered into or extended for permissible reasons.

15.4. It is recommended that Employers take other measures to mitigate risks, for example:

15.4.1. by not using fixed term contracts to facilitate secondments within the VPS, and/or

- 15.4.2.** making full use of mobility arrangements in the Agreement to deploy fixed-term Employees whose duties have come to an end or who are converted as a result of these obligations, and/or
- 15.4.3.** undertaking targeted change processes as required where Employees have been converted as a result of these arrangements and their duties subsequently end and after a reasonable period of time have not been able to be mobilised into other roles.
- 15.5.** Employers need to ensure they have clear and efficient processes for managing re-engagement of a fixed term Employee to a further contract extension or renewal in order to avoid circumstances where delayed administration of a contract offer results in the Employee finishing their existing contract before the extension is provided, so as to ensure the administrative inefficiency is not used or does not appear to give the appearance of the Employer attempting to avoid their obligations under clause 18 of the Agreement.
- 15.6.** Further, to implement these arrangements effectively it is recommended Employers put in place operational practices including:
- 15.6.1.** identifying in job advertisements for fixed term roles the possibility of the role being converted, subject to meeting the requirements of clause 18 of the Agreement, at some point in the future, to ensure a competitive merit-selection process which make it valid for a later request for an exemption to advertising a vacancy as per section 11.4 of the policy, where they wish to appoint the occupant to the ongoing role, and
- 15.6.2.** communicating with fixed term employees in a timely manner whether they will be offered an extension, or their employment will end with the effluxion of time, to allow Employee's appropriate time to make decisions about their future employment opportunities.

Making decisions under this policy

Under s.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 Employer. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Employer 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 18 of the Agreement may apply for a review of actions under the Employer's review of actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at 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

Common Policies

- Employment Categories and Secure Employment
- Mobility and Mobility Payment

- Secondments and Temporary Assignments
- Review of Actions

All policies can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.

Authorised by Industrial Relations Victoria:

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If you print and store this document, you may be looking at an obsolete version. Always check the latest version of this document at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.