

Conversion and Appointment of Fixed Term Contract and Casual Employees to Permanency

Guidelines

Introduction

In *Premier's Circular 2018/02* the State Government expresses its commitment to permanent employment in the public sector.

The Public Sector Commissioner has issued *Commissioner's Instruction No. 23 – Conversion and Appointment of Fixed Term Contract and Casual Employees to Permanency (CI)*, which:

- requires employing authorities to review current fixed term contract and casual employment arrangements;
- outlines the criteria to be considered and the process to be followed by employing authorities in conducting the review; and
- establishes the minimum requirements to be followed by an employing authority in permanently appointing or converting eligible fixed term contract or casual employees.

These guidelines assist in the practical application of the CI and should be read in conjunction with the *Public Sector Management Act 1994 (PSM Act)*, relevant legislation of the employing authority, and industrial instruments.

Scope and application of the CI

The CI commenced on 10 August 2018 and operates until rescinded.

The CI only applies to fixed term contract and casual employees employed at the date of commencement.

Nothing in the CI prevents employing authorities from applying the provisions of clause 7 of *Commissioner's Instruction No. 2 – Filling a Public Sector Vacancy (CI 2)* to convert a fixed term contract employee to permanency where the eligibility criteria in that clause are met.

Review process

Provision of information to the unions

The CI requires the employing authority to provide the relevant union/s with the names, business email addresses and work locations of fixed term contract and casual employees who will be subject to the processes in the CI, prior to commencing the review (see clauses 1.3 and 6.3).

Whilst the Government has released an interim privacy position for the WA public sector, that stipulates that employing authorities should ensure their actions are consistent with applicable Australian Privacy Principles, as set out in Schedule 1 of the *Privacy Act 1988 (Cth)*, employee information outlined in the CI is able to be provided to the relevant unions in accordance with the requirements of the CI.

The provision of employee information should only be made following acknowledgement from the relevant union/s of their obligations under the *Privacy Act 1988 (Cth)*, and confirmation that they agree to dispose of employee information when requested by an employee.

Employee submissions

Clauses 1.4(d) and 1.5 of the CI provide that each fixed term contract employee subject to the review (or their representative) may make a submission to support their conversion or appointment to permanency. Submissions for casual employees are included under clauses 6.4(d) and 6.5.

Such submissions are confined to the criteria to be considered by the employing authority under either clauses 2.1 or 7.1.

Eligibility criteria for fixed term contract employees

(a) the reason for engagement

The circumstances in which employees can be engaged on fixed term contracts are prescribed in industrial instruments. Please note these circumstances may vary between industrial instruments, and employing authorities should seek advice from Public Sector Labour Relations (PSLR) where needed.

Where human resource and/or payroll information is insufficient, the employing authority may request documented information from the employee's current or previous manager(s) as to the employee's reason for engagement.

(b) two or more years of continuous service in the same or similar role

Fixed term contract employees that meet the two-year eligibility criterion after the CI's commencement date are eligible to be reviewed for permanency at that point.

(c) employee is not subject to formal disciplinary or substandard performance action at the time of assessment

Disciplinary action is undertaken in accordance with the principles of the Discipline Standard and, depending on the employment arrangement, Division 3 Part 5 of the PSM Act, industrial instruments, agency policy, and/or common law.

Formal disciplinary action includes:

- when an external body has been notified of alleged conduct or misconduct of an employee; or
- where the employing authority has notified the employee in writing of allegations of breach of discipline.

Substandard performance action is, depending on employment arrangements, undertaken in accordance with Division 2 Part 5 of the PSM Act, industrial instruments, or agency policy.

Formal substandard performance action occurs when the employing authority has provided written notification to the employee that their performance has been identified as substandard.

This criterion only relates to a current disciplinary or substandard performance action.

Advertising and recruitment

Where a decision is made to advertise a role, its publication shall be limited to only those employees within the public sector body who meet the eligibility criteria in clauses 2.1 or 7.1 of the CI. For example, advertising may occur through publication on an internal jobs board

or an expression of interest process – limited to employees who meet the eligibility criteria in clause 2.1 or 7.1 – within the agency.

Surplus (registrable and registered) employees must be considered prior to any advertising. This occurs in accordance with the provisions of the *Public Sector Management Act (Redeployment or Redundancy) Regulations 2014* and associated instruments.

Clauses 5.2 and 5.3 of the CI only apply to public service employees appointed to a fixed term contract under s. 64(1)(b) of the PSM Act and reflect requirements prescribed under s. 64(4).

Section 64(4) does not apply to a public service officer employed under s. 64(1)(b) who applied for the position after it was appropriately advertised by the employing authority as a public sector notice or in a daily newspaper with a possibility of permanency.

Clause 5.3 of the CI provides that, in order to meet the requirement of s. 64(4) to advertise a vacancy as a public sector notice, the employing authority can publish a notice of the vacancy internally within the public sector body.

A public sector employee (not employed under Part 3 of the PSM Act) who is currently on a fixed term contract, and whose role was advertised for a fixed term only, is able to be employed on a permanent basis in accordance with this CI and without the need for further advertising.

An employee whose role was previously advertised with the possibility of permanency is able to be employed on a permanent basis in accordance with this CI and without the need for further advertising.

Eligibility criteria for casual employees

- (a) employee has completed two or more years in the same or similar role, and the work pattern over the two-year qualifying period has been regular and systematic

Casual employees that meet the two-year eligibility criteria after the CI's commencement date are eligible to be reviewed for permanency at that point.

- (d) employee is not subject to formal disciplinary or substandard performance action at the time of assessment

The information provided about formal disciplinary or substandard performance action for fixed term contract employees also applies to casual employees.

Outcome of review for fixed term contract employees

The employing authority shall offer to convert or appoint a fixed term contract employee to permanency, in accordance with clause 4 of the CI, where:

- the employee meets the criteria in clause 2.1 of the CI; and
- there is not a suitable, permanent, registrable or registered employee available to fill the relevant role (see clause 12 of the CI).

Outcome of review of casual employees

The employing authority shall offer to appoint a casual employee to permanency at the employee's base level of classification, in accordance with clause 9 of the CI, where:

- the employee meets the criteria in clause 7.1 of the CI; and

- there is not a suitable, permanent, registrable or registered employee available to fill the relevant role (see clause 12 of the CI).

Ongoing Funding

Employing authorities need to confirm that ongoing funding is available in order for conversion or permanent appointment to occur.

Employing authorities should ensure that decisions regarding the nature of funding arrangements are defensible, transparent and capable of review.

An employing authority's Chief Finance Officer would be the first point of contact in relation to the nature of funding arrangements.

Proper assessment of merit

Given that there is a general requirement for a proper assessment of merit to be undertaken when appointing or employing an employee, it is expected that a proper assessment of merit would have occurred when the employee was engaged. Clauses 3 and 8 of the CI reflect this general requirement, which is typically determined by reviewing the employee's records and employment history.

Where the employing authority determines that a proper assessment of merit has not occurred for a fixed term contract or casual employee, the CI enables the employing authority to conduct an individual assessment of merit in order to meet this requirement.

Redeployment clearance

The usual redeployment and redundancy obligations continue to apply when undertaking the CI's processes. Information about the redeployment and redundancy process can be found on the Public Sector Commission's website at www.publicsector.wa.gov.au.

Dispute resolution procedures and Breach of Standard Claims

The processes to be followed in dispute settlement procedures (DSPs) in industrial instruments can vary. It is important that employing authorities are familiar with all relevant DSP's.

It is expected that the DSP could be accessed at any time from the commencement of the review up to any decision made under this CI, other than in circumstances where recruitment action is initiated.

In such circumstances, the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* will apply, and notification of the ability to lodge a claim will need to be provided to unsuccessful applicants, where:

- a recruitment, selection and appointment process is conducted (applies to both public service officers and public sector employees); and
- a fixed term public service officer's role needs to be advertised, in accordance with clause 5 of the CI, to meet the requirements of s. 64(4) of the PSM Act as a public sector notice.

Nothing in this CI provides for a 'claim or an appeal to be made on the basis of competitive merit', that is, one person having a greater claim over another in relation to an appointment.

Questions and answers

Section 1: General

What is the role of unions in the processes under the CI?

Employing authorities shall engage and work cooperatively with the relevant union/s in application of the CI. This includes:

- recognising that the relevant union/s have a legitimate role to represent their members; and
- providing union representatives or delegates with appropriate access to fixed term contract and casual employees, to explain, organise or participate in an educative process to inform those employees of the requirements of the CI.

When do we have to review fixed term contract and casual employment arrangements?

You shall commence the review process as soon as possible on release of the CI and aim to complete it in a timely manner.

It is noted that employees who meet the two-year eligibility criterion after the CI's commencement date are eligible to be reviewed for permanency at that point. This will mean that provision of information to relevant union(s), in accordance with clauses 1.3 and 6.3, will also need to continually occur as employees meet the two-year eligibility criterion.

The CI's implementation will be monitored and evaluated at regular intervals in accordance with clause 14.

What happens if the number of available roles is less than the number of employees who meet the eligibility criteria in the CI?

When conducting the review processes provided in the CI, you may find that the number of employees (fixed term contract and/or casual) who meet the eligibility criteria in the CI exceeds the number of roles which are available to be filled.

In this situation, you could choose to conduct a competitive assessment of merit by conducting a recruitment process limited to those employees who are eligible for conversion or appointment.

Section 2: Fixed term contract employees

Can we convert or appoint a public sector (not Part 3, PSM Act) fixed term contract employee whose role was not advertised and who did not have a competitive assessment of merit?

The CI does not prevent a public sector, fixed term contract employee from being converted or appointed to permanency because the employee has not been subject to a competitive assessment of merit. The role is not required to be advertised.

The onus is on you to demonstrate that a proper assessment of merit has not been undertaken. In these situations, a proper assessment of merit is to occur in accordance with clause 10 of the CI.

Can we appoint a public service (Part 3, PSM Act) fixed term contract employee whose role was not advertised and who did not have a competitive assessment of merit?

If the person was appointed on a public service, fixed term contract under s. 64(1)(b) of the PSM Act, and their appointment was not a result of the permanent role having been advertised as a public sector notice or in a daily newspaper, then the role will need to be advertised as a public sector notice. This is required by s. 64(4) of the PSM Act.

The CI allows for advertising to occur via a public sector notice within your agency that is limited to those employees who are eligible to be considered for appointment under the CI. For example, through publication on the agency's internal jobs board or as an expression of interest.

What if we advertised for a public service, fixed term contract role (s. 64(1)(b) of the PSM Act) with a possibility of permanency, but it is now over the two year period outlined in clause 7 of CI 2?

If you have a public service employee who:

- was employed under s. 64(1)(b), Part 3 of the PSM Act; and
- applied successfully for a role which had been advertised with a possibility of permanency; and
- meets the other eligibility criteria in clause 2.1 of the CI.

then appointment to permanency may occur, because this CI overrides *Commissioner's Instruction No. 2 – Filling a public sector vacancy* (CI 2) to the extent of inconsistencies between the two instructions.

We have advertised under clause 7 of CI 2, and a current fixed term contract employee has met the criteria in that clause. Can I convert before the two years' continuous service mentioned in CI 23?

Yes, clause 7 of CI 2 may still be used as an alternative to the processes in this CI. Clause 7 of CI 2 remains in place until a new CI 2 is released.

What happens if a fixed term contract employee is eligible for conversion or appointment to permanency and concurrently holds more than one fixed term contract?

Where a fixed term contract employee holds, in the public sector, more than one fixed term contract on a part time basis, the relevant employing authority is to consider each fixed term contract in relation to the criteria contained in clause 2.1 of the CI separately.

If both contractual arrangements are at different substantive levels and/or made under different industrial instruments, and the employee is found to meet the criteria in clause 2.1 of the CI, you shall offer to appoint or convert the employee to permanency in respect to the different roles, subject to the following conditions:

- redeployment obligations have been met;
- an employee is not performing work that is equivalent to more than 1 FTE; and
- an employee who is appointed to more than one public service (Part 3 of the PSM Act) role must seek the approval of the Public Sector Commissioner for the dual appointments, pursuant to s.67(f) of the PSM Act.