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# **Fixed term contracts in the public sector and higher duties**

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# Agenda

01

Fixed term contract limitations under the *Fair Work Act 2009* (Cth)

02

Fixed term contract limitations and non-ongoing employment under the *Public Service Act 1999* (Cth)

03

Higher duties

04

Questions

## What is a “fixed term contract”?

- Laws were introduced in December 2023 to address insecure "rolling" contracts.
- A fixed term contract is an employment contract with a specified end date or task.
- A fixed term contract may include:
  - A **fixed term contract**, which is contract with a specified end date that may be terminated earlier only in very limited circumstances (such as serious misconduct).
  - A **maximum term contract**, which is a contract with a specified end date that may be terminated earlier by either party giving notice.

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### *Public Service Act 1999* (Cth)

The Australian Public Service Commissioner's Directions 2022 (Cth) were amended to address the fixed term contract limitations.

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### Higher duties

High duties usually refers to an employee "acting" in a position that is classified at a higher classification level. Higher duties may, but usually does not, involve engaging an employee on a fixed term contract.

## The limitation

- A person must not enter into a fixed term contract in the following circumstances:
  - **Maximum Duration:** A contract cannot be for a period of more than two years, including renewals and extensions.
  - **Consecutive Contracts:** An employee cannot have more than two consecutive contracts for the same or similar work.

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## Consequences of a breach

- The contract's end date is not enforceable.
- The employee may gain new protections, including access to unfair dismissal laws.
- Breach of the limitation is a breach of civil remedy provision, meaning that a range of orders may be made by a court (including penalties being imposed).

*Note: Under the statement of common conditions, redundancy provisions will apply to the employee.*

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## Key exceptions

- Specialised skills for a distinct task.
- Training arrangements (e.g., apprenticeships).
- Peak demand, emergency, or temporary replacement work.
- High-income earners (over the “high-income threshold”).
- Time-limited governance positions.
- Roles funded by government for more than two years with no prospect of renewal.

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## Non-ongoing employees in the APS

- The *Australian Public Service Commissioner's Directions 2022* (Cth) were updated to align with the fixed-term contract limitations.
- The limits depend on the type of selection process used for the engagement:
  - For engagements using a **modified merit process**: A non-ongoing employee can be engaged for an initial period of 12 months, with the option to extend the contract up to a total period of 18 months.
  - For engagements using a **full merit-based process**: The previous 18-month initial term limit has been removed. However, these engagements are now subject to the Fair Work Act's fixed term limitations.

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## Non-ongoing employees in the APS

- If an exception under the Fair Work Act applies (such as for a high-income earner or a distinct task requiring specialised skills), an employee engaged via a full merit-based process may be engaged on a non-ongoing contract with a longer contract term:
  - A **non-SES employee** can be engaged for up to three years.
  - An **SES officer** can be engaged for up to five years.

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## Higher duties

# Performance of higher duties

- Usually, an employee performing “higher duties” will be a current employee, who is asked to perform the duties of a higher classification for a specified period.
- In this case:
  - There is no fixed term contract that is being “entered into” with the agency.
  - The fixed term contract limitations do **not** apply.

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# Other situations

- Generally, only an engagement under s 22 of the Public Service Act (or similar legislative provisions) has the capacity to trigger the application of the fixed term contract limitations
- Usually, the following circumstances will **not** trigger the application of the fixed term contract limitations:
  - Temporary moves between agencies.
  - Machinery of government changes.

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## Conclusion

# Key action items

- **Review your contracts:** Periodically (ie annually) review your existing fixed-term contract engagements.
- **Check the consecutive rule:** Be especially careful with the consecutive contract limitation. An old contract from before December 2023 can still count towards the two-contract limit if a new contract is offered.
- **Be careful of extensions:** Extensions may still trigger the consecutive contract limitations.
- **Provide the FTCIS:** Employers are now required to give every new fixed-term employee a *Fixed Term Contract Information Statement* (FTCIS). This is a mandatory document available on the Fair Work Ombudsman website.
- **Dispute Resolution:** If a dispute arises, it can be referred to the Fair Work Commission, who can assist with conciliation, mediation, or arbitration.

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Bede is a highly-regarded Partner in the Norton Rose Fulbright Employment and Labour team, specialising in Commonwealth government workplace relations, employment, and integrity matters.

Bede's clients say that he is more than a lawyer. The strength of his advice is premised on an excellent technical understanding of law, which Bede combines with a deep understanding of the people management function, organisational performance and accountability and his clients' operational settings.

Bede leads the field on a range of issues that are important to his Commonwealth government clients, including topical matters such as trauma-informed investigations and litigation, complex complaints management (particularly high conflict employees), gender-based harm in the workplace, and organisational integrity and accountability.



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