

/// Chief Minister's Department Governance Division

FORFEITURE OF OFFICE

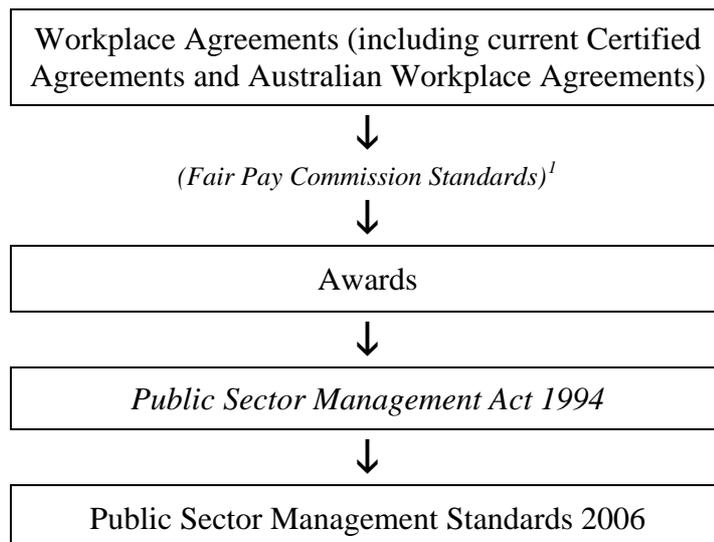
- **HR Directors / Managers**

Purpose

1. To provide Agencies with information about the use of forfeiture of office procedures. **Note:** this Information Note is not intended as a substitute for reading the legislative employment framework, and should be read in conjunction with the framework.

ACT Public Service Employment Framework

2. The main elements of the ACTPS legislative framework are detailed below. Background knowledge of this framework is useful for all employment related issues.
 - [Public Sector Management Act 1994](#) and [Management Standards 2006](#) (PDF file);
 - Agency Certified Agreements; and
 - Template Agreement comprising Part 1: Common Core Conditions and Part 2: Agency specific conditions;
 - Non Template Agreements (occupational specific agreements);
 - Awards.
3. The following diagram represents a basic view of the employment framework.



¹ Until the first Fair Pay Commission determination, expected in Spring 2006, the full effect of the Fair Pay Commission Standards in relation to the legislative employment framework is unknown.

4. The [PSM Act](#) and [Management Standards](#) (PDF file) are subordinate to Workplace Agreements and Awards. This is because Workplace Agreements and Awards are made under provisions of Commonwealth laws, which override inconsistent ACT laws. However, Awards are limited to minimum entitlements on a small number of allowable matters. If a condition is listed in the Award but more generous entitlements are available under the PSM Act or Standards, the more generous provisions in the PSM Act apply. Awards are not intended to reduce more beneficial entitlements.
5. See [Recruitment in the ACT Public Service](#) for further information on the legislative employment framework.

Application

6. This Information Note explains how and when an officer may be subject to forfeiture of office under the PSM Act. The note also explains the options available and actions required of Agencies, in accordance with the employment legislative framework. This note does not deal with arrangements under Part 2 Agency specific agreements or occupational specific agreements.

WHEN TO USE FORFEITURE OF OFFICE

7. Forfeiture of office occurs when, in specific circumstances, an officer² (including an unattached officer) is taken to have retired from the service due to non-attendance for duty. To be considered for forfeiture of office, and officer must:
 - have been absent from work without permission;
 - for a continuous period; of four or more weeks.
8. If these circumstances occur, and the relevant Chief Executive considers it appropriate to commence forfeiture of office proceedings, the relevant Chief Executive must send the officer a notice explaining the potential forfeiture of office. The notice must be sent to the last known address of the officer, and must be sent by registered post rather than ordinary mail.

Content of the Notice

9. In addition to alerting the officer to the potential of forfeiture of office, the notice:
 - Must explain that within two weeks from the date on which the notice was sent (not the date on which it was received) the officer must either:
 - return to duty; or
 - explain their absence and seek permission for any additional period of absence that may be needed.
 - Must also explain that unless the officer undertakes one of these courses of action, they may be subject to forfeiture of office, in which case they will be taken to be retired from the service.
 - Must explain that the officer needs to respond to the relevant Chief Executive within the time period specified in the notice they receive. After the two week period has expired, the officer will be taken to have retired from the service and their only option will be reappointment, which is only available in certain circumstances (see [paragraph 22](#)).
 - Should also explain that the officer may explain their absence to the relevant Chief Executive either orally, or in writing.

² Forfeiture of office **cannot** apply to employees, as they do not hold an office. Agencies should deal with unauthorised absences by employees as a disciplinary matter or, where applicable, as a breach of contract. If an Agency plans to argue breach of contract legal advice may need to be sought. In all cases, procedural fairness should be applied.

- Should advise the officer that the Commissioner for Public Administration (the Commissioner) is able to revoke the notice (see [paragraph 12](#)).

10. When an officer has responded, the relevant Chief Executive should consider any explanation provided to them as soon as practicable. As indicated in the table below, the requirements on the relevant Chief Executive depend on the actions of the officer.

Response of the Officer	Effect / Requirement on Relevant Chief Executive	Authority
Within the two week period specified in the notice: <ul style="list-style-type: none"> • the officer returns to duty. 	No further action should be taken under the forfeiture of office provisions. Discipline action in relation to the unauthorised absence may be appropriate if the absence is not satisfactorily explained. Other potential actions are listed at paragraph 29 and may be used as appropriate).	
Within the two week period specified in the notice: <ul style="list-style-type: none"> • the officer explains his or her absence; and • seeks permission from the relevant Chief Executive for a further period of absence. 	As soon as practicable the relevant Chief Executive shall consider the matter and may, by written notice, inform the officer either: <ul style="list-style-type: none"> • that he or she has been granted leave of absence for the period, and on the conditions, specified in the notice; or • that he or she is required to return to duty within a specified period (at least two weeks from, and including, the day on which the notice is sent). Subject to Commissioner revocation of the notice (see paragraph 12), if the officer does not return to duty within this time, they will be taken to have retired from the Service. 	PSM Act section 221(3).
Within the two week period specified in the notice: <ul style="list-style-type: none"> • the officer does not return from duty; and • fails to provide any explanation for their absence. 	Subject to Commissioner revocation of the notice (see paragraph 12), the officer is taken to have retired from the ACTPS on the day immediately following the end of the two week period specified in the notice.	PSM Act section 221(2).

11. All written correspondence referred to in the table is to be sent to the last know address of the officer, and should be sent by registered post.

Commissioner Revocation of Notice

12. The Commissioner is able to revoke the notice sent to the officer explaining their potential forfeiture of office. It is envisaged this would occur following a written request from either the officer facing forfeiture of office procedures, or the Chief Executive who commenced the

procedure. The Commissioner would then be required, having consideration of all the elements of the case, to make a decision based on the merits of the case.

13. Revocation will make the notice void, and it will cease to have any effect. The Commissioner must send the revocation to the last known address they have for the officer.

PROCEDURAL FAIRNESS

14. As with every decision-making processes, it is crucial that procedural fairness be followed. This is particularly important given the consequences of forfeiture of office. Agencies should have a sound understanding of the requirements of procedural fairness.
15. Generally, procedural fairness requires that:
 - People against whom an adverse decision may be made must be informed of any allegations against them in as much detail as possible;
 - Wherever possible, people must be provided with an opportunity to put their case, and to hear the case against them, whether at an oral hearing or otherwise;
 - Where a decision has to be made between competing interests, all parties to a matter must be heard and all arguments considered;
 - No person should consider a case in which they have a direct interest; and
 - Decision makers must act fairly and without bias.
16. In particular procedural fairness with regard to forfeiture of office requires that:
 - The notice of forfeiture of office should be accompanied by a letter explaining the effect of the notice, including;
 - The background to the decision to give notice of possible forfeiture;
 - How the forfeiture of office process works;
 - How officers may explain their absence;
 - The options available to the relevant Chief Executive after considering any explanation; and
 - The date by which the explanation must be received in order to remain valid.
 - If the officer's explanation for their absence is accepted, and leave is authorised, they should be notified and a letter should be sent which includes reasons for the decision and explains that any absence after the approved leave may be unauthorised.
 - If the officer's explanation is rejected they should be notified and an accompanying letter should explain the reasons for the decision.

Absence Awaiting the Outcome of an Internal Review

17. It is possible that an officer may be absent from duty pending the determination of an internal review for refusal to grant leave. If an officer lodges a review of a decision not to grant leave it would be expected that they return to duty until the review is determined. However, if this is the reason for the absence from duty, forfeiture of officer should generally not commence until the review is finalised.
18. Following the internal review and if the leave is not granted, forfeiture of office action should be commenced.

Absence Awaiting the Outcome of a Fitness for Duty Assessment

19. An officer may be absent from duty where the relevant Chief Executive has yet to determine an officer's fitness for duty. If the relevant Chief Executive decides, in accordance with the legislative employment framework, that it is appropriate for the officer to return to duty because

they are medically fit, the relevant Chief Executive may direct the officer to return to duty (see section 486). If the officer does not return to duty as directed, the relevant Chief Executive may, after four weeks, proceed with forfeiture of office action.

20. Alternatively, in accordance with the legislative employment framework, an officer may be considered medically fit to be redeployed. If the officer fails to return to duty, in a position appropriate for their medical condition, the relevant Chief Executive may, after four weeks, commence forfeiture of office proceedings.
21. **Note:** if the relevant Chief Executive is aware of any evidence of a fitness for duty issue, the appropriate fitness for duty procedures must be followed. In the case of a dispute over fitness for duty no forfeiture of office procedure should be taken until the matter is determined.

REAPPOINTMENT OF OFFICERS

22. If an officer is taken to have retired through forfeiture of office processes, they may be reappointed. In order to be reappointed, the former officer needs to apply, in writing, to the relevant Chief Executive.
23. Upon receiving such an application the relevant Chief Executive must decide if they are satisfied, in all the circumstances, that the applicant had reasonable grounds for the absence that resulted in their forfeiture of office. **Note:** the relevant Chief Executive must decide if there were reasonable grounds for the absence, not whether there are reasonable grounds to reappoint the former officer.

Where a person is reappointed

24. Under PSM Act section 222(2)(a), if the relevant Chief Executive is satisfied there were reasonable grounds for the former officer's absence, they can reappoint the applicant to either:
 - the office occupied by the applicant immediately before they were taken to have retired from the service, or an equivalent office; or
 - if such an office is not available—an available office as nearly as possible equivalent to the office occupied by the applicant immediately before he or she was to be taken to have retired from the service; or
 - with the written consent of the person, another office.
25. The reappointment of unattached officers should be to an office where the duties and the classification are as nearly as possible equivalent to those applicable to the officer immediately before they were considered to have retired.
26. If a person is reappointed to the ACTPS they are taken to have continued in the service for the period between the day after they were taken to have retired and the day before they are reappointed. For this period they are taken to have been on leave without pay. The relevant Chief Executive has discretion to determine whether that period, or any part of that period is to form part of the officer's period of service (and the purposes for which it is to form part of the period of the officer's period of service).

Where a person is not reappointed

27. If the relevant Chief Executive is not satisfied that there were reasonable grounds for the absence that led to the forfeiture of office, they may refuse the application. If the relevant Chief Executive refuses an application for reappointment, they must:
 - notify the applicant of the decision in writing;

- ❑ give the applicant the reasons for the refusal; and
- ❑ give the Commissioner the reasons for the refusal.

28. The former officer is then able to make an application to the merit protection agency to have the decision of the relevant Chief Executive reviewed. The decision can then be reviewed in accordance with section 43 of the *Merit Protection Act*. The relevant Chief Executive should advise the former officer that this review is available.

OTHER PROCEDURES AVAILABLE

29. If the relevant Chief Executive does not wish to pursue forfeiture of office proceedings, or if they commence forfeiture of office proceedings, but cease the process because they feel that an officer's absence is justified (see [paragraph 10](#)), they may wish to pursue another course of action. Depending on the circumstances, there are a variety of alternative procedures that could be pursued, provided this is done in accordance with the legislative employment framework.

These options include:

- Counselling;
- Making up time;
- Deducting pay; or
- Discipline proceedings.

30. The options listed above, may also be able to be used where an officer has broken periods of absence of less than four weeks, meaning forfeiture of office is not an option available to the Agency. In particular clause 74.1(c) of the Template Agreement specifies that disciplinary action can be taken where an officer returns from an unauthorised period of absence and fails to provide a satisfactory explanation.

31. Where an officer is on probation, the probation process may have mechanisms to deal with unauthorised absences.

32. **Note:** Agencies must ensure they are familiar with legislative requirements associated with the dismissal of officers and employees, and must note that it is unlawful to terminate a staff member's employment in certain circumstances, for example, due to temporary absence from work due to illness or injury. This Information Note does not deal with the processes for the dismissal of staff.

Further Information

33. HR areas that require further information regarding forfeiture of office can contact:

- Policy Officer on (02) 6207 5586; or
- Senior Policy Officer on (02) 6207 1255.

34. Employees requiring further information are advised to contact their HR area for advice.

Definition

relevant chief executive, in relation to a person who is to be taken to have retired from the service in accordance with section 221 (2) or (4) of the PSM Act, means the chief executive of the administrative unit in which the person held an office, or was included, immediately before being taken to have so retired or, if that administrative unit has ceased to exist, the chief executive of such administrative unit as the commissioner directs.