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# **advice relating to TEMPORARY EMPLOYMENT during THE covid-19 PANDEMIC**

## Purpose

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## The purpose of this document is to provide advice on the Government’s commitment to maintain temporary employment across the ACT Public Sector (ACTPS) during the current novel coronavirus (‘COVID-19’) pandemic.

## This advice should be read in conjunction with the latest communications from the Head of Service and the Government in relation to temporary employment arrangements across the ACTPS.

## Application

## This advice applies to temporary employees employed in the ACTPS under the Public Sector Management Act 1994.

## Background

## Attachment 1 summarises the relevant provisions under the Public Sector Management Act 1994, the Public Sector Management Standards 2016 and the Enterprise Agreements.

### Attachment 2 provides examples of Temporary Employment Scenarios to support the application of the advice in this document.

## Principles

The Government is committed to providing secure employment and maintaining the size of the ACTPS. The Government acknowledges that it has a responsibility to introduce measures to minimise the unemployment rate within the ACT during the COVID-19 pandemic.

As a result, the Government has made a policy decision to extend any existing temporary employment contracts for a further 3 months. The Government may consider further temporary employment contract extensions throughout the COVID-19 pandemic.

This commitment will apply to any temporary employment contract which is due to finish from April 2020 to September 2020. For example:

* if a temporary employee has a contract expiring in April 2020, the Government would offer an extension to July 2020;
* if a temporary employee has a contract expiring in July 2020, the Government would offer an extension to October 2020;
* if a temporary employee has a contract expiring in September 2020, the Government would offer an extension to December 2020.

The Territory would have considered whether existing temporary employees meet the requirements of an ‘eligible person’ under the PSM Act for the period of their existing contract. Where contracts are extended for temporary employees, an assessment will be undertaken to confirm that the requirements of an ‘eligible person’ are still met. For further information on the requirements of an ‘eligible person’ please see Attachment 1.

The contract extensions can be implemented under the current legislative framework and it is the intention that this policy will streamline the contract extensions across the ACTPS and ensure consistency in approach.

#### Temporary employees

Section 25 of the Public Sector Management Act 1994 (PSM Act) provides that a person may be employed to exercise the functions of an office on a temporary basis. Section 110 provides that the head of service may employ the person for a fixed term of:

a) less than 12 months; or

b) less than 5 years, if the head of service consults the principal union about the need for the temporary employment.

#### How to extend a temporary contract at this time to give effect to the Government policy decision to provide additional job security to its current temporary workforce:

Directorates and agencies will be required to undertake an assessment of their temporary employees to determine how existing contracts can be extended to meet the Government’s policy objective of providing further job security to its temporary workforce throughout the COVID-19 pandemic.

If the temporary employee has been employed under section 110 for a period of less than 9 months (with an expiry date of April 2020 to September 2020), their contract may be extended by three months with no merit process. The cumulative period of the temporary contract will not exceed 12 months.

If the temporary employee has been employed under section 110 for a period of more than 9 months (with an expiry date of April 2020 to September 2020), their contract may be extended by three months. The cumulative period of the temporary contract will not exceed 5 years.

For further information, please see the Temporary Employment Scenarios information at Attachment 2.

#### How will temporary employees be utilised?

The extension of contracts for temporary employees during this pandemic provides greater capability for directorates and agencies and more broadly across the ACTPS.

If directorates and agencies are unable to utilise a temporary employee in the same position, consideration will initially be given to reassigning the employee within the directorate/agency in accordance with the ACTPS guidance: [Emergency-Response-ACTPS-Staff-Entitlements-During-Novel-Coronavirus-COVID-19](https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0008/1484162/Emergency-Response-ACTPS-Staff-Entitlements-During-Novel-Coronavirus-COVID-19.pdf). After attempts have been made to find the employee another position at the same classification (as the classification level of their previous temporary contract) in which to place the employee within the directorate/agency, opportunities will be considered outside of the directorate/agency.

A process will be established through HR Council to identify temporary employees which need to be reassigned to exercise the functions of another office in a priority area across the ACTPS.

In the event that an employee cannot be given suitable duties, they may be placed on COVID-19 leave in accordance with the ACTPS guidance: [Emergency-Response-ACTPS-Staff-Entitlements-During-Novel-Coronavirus-COVID-19](https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0008/1484162/Emergency-Response-ACTPS-Staff-Entitlements-During-Novel-Coronavirus-COVID-19.pdf).

#### Does the Government’s policy position to provide additional job security to temporary employees also apply to casual employees?

The Government has recently outlined its commitment to supporting its casual workforce during the COVID-19 pandemic. Specific advice in relation to casuals can be accessed in the ACTPS guidance [Emergency-Response-ACTPS-Staff-Entitlements-During-Novel-Coronavirus-COVID-19](https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0008/1484162/Emergency-Response-ACTPS-Staff-Entitlements-During-Novel-Coronavirus-COVID-19.pdf).

## Responsibilities

HR Executives will be responsible for implementing this policy within their directorate or agency.

HR Executives will be required to provide regular updates to CMTEDD on the implementation of this policy through HR Council.

## Legislative References

The key principles of this Policy are aligned with the following authorised sources:

* *Public Sector Management Act 1994*
* *Public Sector Management Standard 2016*
* [ACTPS Enterprise Agreements](https://www.cmtedd.act.gov.au/employment-framework/for-employees/agreements).

## Further Information

HR areas that require further information can contact Public Sector Management on psm@act.gov.au.

## Attachment 1

## Background – employment framework

## Public Sector Management Act 1994

## The Public Sector Management Act 1994 (PSM Act) imposes obligations on the head of service, directors-general and executives to promote and uphold the public sector principles, which includes the merit and equity principle.

## Under section 8 of the PSM Act, the public sector principles are:

## the best practice principle; and

## the merit and equity principle.

## Under section 17 of the PSM Act, the head of service has a number of leadership functions which includes promoting and upholding in the service the public sector values, the public sector principles and the conduct required of a public servant, including by personal example. Directors-General and executives also have the same legislative functions to promote and uphold in the service the public sector values, the public sector principles and the conduct required of a public servant, including by personal example.

## A public servant is required to adhere to the best practice principle. Section 8 of the PSM Act defines the best practice principle and the merit and equity principle. A public servant does the public servant’s job in accordance with the best practice principle if the public servant—

## a) works efficiently, effectively and constructively; and

## b) is responsive, collaborative and accountable; and

## c) makes fair and reasonable decisions.

## The head of service exercises a function under the PSM Act in accordance with the merit and equity principle if the head of service is an equitable employer and employs a person in a job who is best able to do the job in all the circumstances.

## Section 17(3) of the PSM Act provides the head of service with the management function of engage, appoint or employ people on behalf of the Territory in accordance with the merit and equity principle.

## The head of service must ensure all eligible people have, as far as practicable, a reasonable opportunity to apply for selection and that the selection of the most suitable applicant is made based on a comparative assessment of the applicant’s relevant behavioural capabilities, skills, knowledge, qualifications, experience, and the potential for development in relation to the duties and responsibilities of the position.

## Section 27 of the PSM Act sets out how the merit and equity principle is applied. The head of service must ensure all eligible people have, as far as practicable, a reasonable opportunity to apply for selection and that the selection of the most suitable applicant is made based on a comparative assessment of the applicant’s relevant behavioural capabilities, skills, knowledge, qualifications, experience, and the potential for development in relation to the duties and responsibilities of the position.

## Under section 27(1)(e) the merit and equity principle applies to a person to be employed as a fixed term employee for a period of more than 12 months. Section 11(2) of the PSM Standards 2016 has a prescribed requirement that applications for short-term employment for 6 months or longer must be sought in the gazette. In summary, this means that the merit and equity principle requirements in section 27 do not apply to a person to be employed on a temporary contract under 6 months. This can be relied upon during an emergency situation (such as COVID-19) or where there is an urgent need and there is not sufficient time to undertake a thorough selection process. Having said this, while there is no legislative requirement under section 27 to apply the merit and equity principle for a person to be employed on a temporary contract under 6 months, there are other obligations and requirements within the PSM Act and the PSM Standards which provide for the merit and equity principle to be observed. It is clearly not the intention of section 27 of the PSM Act to provide that the merit and equity principle only be limited to those circumstances.

Under section 110 of the PSM Act the head of service can re-employ a person without a break in service if the cumulative period of employment does not exceed 12 months.

For periods of employment exceeding 12 months, the head of service can employ a person for a fixed term of up to 5 years after consultation with the principal union about the need for temporary employment.

Where contracts are extended for temporary employees, an assessment will be undertaken to confirm that the requirements of an ‘eligible person’ are still met. An eligible person means a person who:

1. satisfies any of the following:
2. is an Australian citizen;
3. is a permanent resident of Australia;
4. holds a visa that permits the person to work in the service; and
5. is capable of:
6. upholding the public sector values; and
7. exercising each function that the person is, or will be, employed to exercise, in accordance with the best practice principle; and
8. acting consistently with section 9 (public sector conduct); and
9. holds all qualifications required to lawfully exercise every function that the person is employed to exercise.

## Public Sector Management Standards 2016

## The prescribed selection method in Division 2.2 of the PSM Standards 2016 applies in the circumstances outlined in section 27(1) of the PSM Act. Division 2.2 outlines the requirements relating to advertising and comparative assessments as part of selection processes.

## Section 11(2) requires that applications for short-term employment for 6 months or longer must be sought in the gazette (on the Jobs website).

Under section 10 of the PSM Standards, temporary employment registers can be established by the head of service or directors-general.

## Enterprise Agreements

The ACTPS Enterprise Agreements contain a number of commitments to promote permanent employment and job security for employees and to minimise the use of temporary and casual employment.

Temporary employees are only used where there is no officer available with the expertise, skills or qualifications required for the duties to be performed or the assistance of a temporary nature is required for the performance of urgent or specialised work within a particular business unit of the ACTPS and it is not practical in the circumstances to use the services of an existing officer (see clause A2.2 – retaining our people).

Enterprise Agreements provide for temporary and non-ongoing employees to apply in writing to their manager/supervisor to request an examination of their employment status where they have been engaged on a regular and systematic basis for at least twelve months and where they have a reasonable expectation that such arrangements will continue (see clause B2 – review of employment status).

A Joint Union and ACT Government Taskforce into insecure work and outsourcing has been established by the ACT Government as a way to promote permanent employment and job security for employees within the ACTPS. The Taskforce is examining the current use of these practices and is proposing ways to monitor and minimise the use of insecure work practices (see clause B12 - Taskforce on Insecure Work and Outsourcing).

## Attachment 2

## Temporary Employment Scenarios

## This attachment outlines some scenarios to implement the Government’s commitment to provide some job security to its current temporary workforce.

## All temporary contracts that expire between April 2020 and September 2020 will be extended by a minimum of 3 months. The table below outlines how the contracts ending between April 2020 and September 2020 will be extended:

|  |  |
| --- | --- |
| **Contract ending in** | **Extension** |
| April 2020 | July 2020 |
| May 2020 | August 2020 |
| June 2020 | September 2020 |
| July 2020 | October 2020 |
| August 2020 | November 2020 |
| September 2020 | December 2020 |

## Legislative provisions - temporary employment

## The legislative power to engage temporary employees under 12 months is section 110(1)(a) of the PSM Act. The legislative power to engage temporary employees over 12 months but less than 5 years is section 110(1)(b) of the PSM Act. Consultation is required with the principal union about the need for the temporary employment under section 110(1)(b). CMTEDD (Public Sector Workplace Relations) can facilitate consultation with the principal union under section 110(1)(b) as a group.

## Scenarios

## The table below outlines some examples to outline how contracts can be extended to implement the Government’s commitment:

|  |  |
| --- | --- |
| **Legislative employment power** | **Scenarios** |
| Section 110(1)(a): less than 12 months | **Scenario 1*** No merit process was undertaken for an individual who was offered a temporary contract of 5 months.
* Government is offering a 3 month extension (cumulative period of 8 months).

Solution:* Offer the individual a new contract for 3 months (without a merit process) commencing the day after the previous contract.

**Scenario 2*** No merit process was undertaken for an individual who was offered a temporary contract of 11 months.
* Government is offering a 3 month extension (cumulative period of 14 months).

Solution:* Extend the individual’s contract for 3 months (without a merit process) commencing the day after the previous contract**.**

**Scenario 3*** A merit process was undertaken for an individual who was offered a temporary contract of 11 months.
* Government is offering a 3 month extension (cumulative period of 14 months).

Solution:* Extend the individual’s contract for 3 months (without a merit process) commencing the day after the previous contract**.**
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| * Section 110(1)(b): 12 months to 5 years
 | **Scenario 4*** A merit process was undertaken to offer an individual a temporary contract for 2 years. Contract is ending between April 2020 and September 2020.
* Government is offering a 3 month extension (cumulative period of 2 years and 3 months).
* This scenario assumes that consultation with the principal union had previously occurred as required under section 110(1)(b).

Solution:* Extend the individual’s contract for 3 months (without a further merit process) commencing the day after the previous contract. *NB: the contract is still within the maximum limit of 5 years.*

**Scenario 5*** A merit process was undertaken to offer an individual a temporary contract for 5 years. Contract is ending between April 2020 and September 2020.
* Government is offering a 3 month extension (cumulative period of 5 years and 3 months).
* This scenario assumes that consultation with the principal union had previously occurred as required under section 110(1)(b).

*NB: there is no legislative authority to extend a contract beyond 5 years.*Solution:* The individual would need to have a minimum break of 1 day and then the Territory offers a temporary contract under section 110(1)(a) for 3 months without a merit process.
* Given the extraordinary circumstances of the COVID-19 pandemic and the Government’s policy decision to extend existing temporary contracts for 3 months, under section 88 of the PSM Standards 2016, if asked by the public servant, the head of service may state that the employee’s prior employment is eligible employment. This would ensure that the employee’s personal leave and annual leave accruals are recognised and rolled over. Prior service for long service leave purposes can be recognised under section 64 of the PSM Standard 2006 (repealed).
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