
ARRANGEMENTS FOR EMPLOYING PERSONS IN THE
ACT PUBLIC SERVICE

A GUIDE

May 2005

DISCLAIMER

This document contains information, explanation and some guidance to ACT agencies concerning the engagement of persons in the ACT Public Service.

This document is not intended to provide legal advice on these matters.

Agencies should consider seeking legal advice on their practices and procedures in dealing with particular cases.

PREFACE

Arrangements for Employing Persons in the ACT Public Service was first published and distributed by the ACT Chief Minister's Department in 2002 and republished in an updated version in May 2003.

Since that time several developments have occurred both within the ACT Public Service (ACTPS) and externally through changes to legislation and decisions of tribunals and the courts. Further, as the Guide illustrates, agencies now have a broader range of obligations regarding their employment practices as a result of the round of ACTPS enterprise bargaining negotiations that took place in 2004.

These developments have resulted in a need to revise and update the contents of the Guide.

The main intention of the Guide is to provide practical information to ACTPS agencies on current requirements and developments concerning arrangements for engaging persons for work in the ACTPS.

The Guide makes reference to recent industrial relations case law and the implications of the various obligations that ACTPS have in managing their employment arrangements. However the Guide is not designed to prescribe what type of employment arrangements agencies should have. Nor is it intended to address individual cases.

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1. AIMS OF THE GUIDE

1.1.1 The aims of this Guide are to:

- inform ACTPS agencies generally of current requirements and developments concerning the arrangements they may make for engaging persons for work in the ACTPS, and the implications of these arrangements;
- identify issues agencies need to consider in developing and managing their employment arrangements;
- inform agencies of responsibilities and obligations they have and the rights and entitlements their employees have under applicable legislation and industrial instruments, especially agency certified agreements; and
- provide guidance to agencies in developing employment arrangements that are transparent and fair.

2. BACKGROUND TO THE ACTPS EMPLOYMENT FRAMEWORK

2.1 General

2.1.1 Chief executives of ACTPS agencies have the ultimate responsibility for decisions on engagement of staff and on the nature of the employment arrangements they use. This is reflected formally in the powers given to chief executives under the *Public Sector Management Act 1994* (PSM Act) to engage staff in various categories.

2.1.2 Such decisions will need to comply with the specific requirements of the PSM Act regarding employment arrangements. They will also need to be consistent with the government's employment and industrial relations policies in the ACTPS and with any obligations an agency may have under its certified agreement and awards.

2.1.3 It should be noted that the employment framework in which the ACTPS operates includes a wide range of Commonwealth and Territory legislation (eg occupational health and safety, workers compensation, anti-discrimination, taxation and superannuation) and various public sector policies and practices. These include specific government employment requirements and policies such as those concerning the use of special employment arrangements provisions of the ACTPS certified agreements and policies relating to workers with disabilities and mature age workers.

2.1.4 This Guide does not address matters covered under this broader employment framework.

2.1.5 The main focus of this Guide is on:

- the employment powers and arrangements under the PSM Act;
- the responsibilities and obligations of agencies and the rights and entitlements of employees under the agency certified agreement and under ACTPS awards; and
- the implications of particular employment arrangements for access by ACTPS employees to redress under the termination of employment provisions of the *Workplace Relations Act 1996* (WR Act).

2.2 Potential implications for agencies and the persons they engage

- 2.2.1 It is important that agencies are fully aware of the implications that may arise from the specific employment arrangements they make, particularly in terms of the legal obligations and liabilities they may incur and the rights and entitlements of those persons engaged by agencies.
- 2.2.2 If the agency does not structure and manage the engagement of a person properly and the nature of the engagement is subsequently challenged, the agency may be liable to provide the person with significant additional benefits under the agency certified agreement or applicable awards, for example, entitlements to paid annual leave and long service leave. If termination occurs the agency may also be liable in certain cases to make redundancy payments under its certified agreement or the employee may be eligible to seek redress under the termination of employment provisions under the WR Act.
- 2.2.3 While the focus of this Guide is on formal requirements and obligations of agencies in managing their employment arrangements, the underlying objective is that ACTPS agencies should manage their employment arrangements in a manner that is transparent and fair to the people they engage.

2.3 PSM Act and Standards

- 2.3.1 The PSM Act provides the principal legislative basis for employment in the ACTPS. The operation and effect of the PSM Act in relation to particular categories of employment is discussed in each of the Sections of this Guide.
- 2.3.2 A review of the PSM Act was undertaken during 2001 and 2002. The results of this review are contained in the report presented by the Commissioner for Public Administration to the ACT Government in February 2003 – *Report of the Review of the Public Sector Management Act 1994*. Since the report was presented the Government has been considering various legislative proposals arising from the report, in consultation with agencies and the unions.
- 2.3.3 A review is also being undertaken by the Chief Minister's Department of the current ACTPS classification structure with the objective of aligning the national public sector competencies from the Public Sector Training Package (PSP04) to the public sector requirements of ACTPS work levels.

2.4 Agency Certified Agreements

2.4.1 Under the common core conditions in Part 1 of most ACTPS certified agreements (the ACTPS certified agreements):

- the terms of the certified agreement prevails over the terms of the PSM Act (and therefore the PSM Standards) to the extent of any inconsistency; and
- where there is any inconsistency between the terms of the certified agreement and an award that applies to an agency, the terms of the certified agreement prevail¹.

2.4.2 The ACTPS certified agreements contain some provisions that are specific to different categories of employees. In many cases these provisions impose specific obligations or requirements on agencies in relation to their employment arrangements. The implications of some of these provisions for particular categories of employees are discussed in the following Sections.

2.4.3 However, for the purposes of this Guide generally, the following provisions of the ACTPS certified agreements are noted here.

2.4.4 There are very specific provisions in clause 8 of the ACTPS certified agreements directed at ensuring that there is genuine consultation by agencies, especially in relation to proposed changes in the organisation or to existing work practices that may affect their employees. These provisions are reinforced by the quite specific definition of "consultation" in clause 5 and through the requirements in clause 8.4 for the establishment of formal consultative arrangements in agencies.

2.4.5 These requirements about consultation would have particular practical significance should an agency need to consider a possible excess or redundancy situation. In that event, the agency would need to take account of the requirements about consultation in clause 8 of the ACTPS certified agreements as well as the further consultation requirements set out in the redeployment/redundancy provisions of the ACTPS certified agreements – Section N².

2.4.6 Some ACTPS certified agreements contain additional provisions in Part 2 of their agreements dealing specifically with some matters that are relevant to the issues addressed in this Guide, such as conditions of employment for temporary employees and for casual employees.

2.5 ACTPS Awards

2.5.1 Agencies have certain obligations and employees have certain entitlements under awards that apply to them. These obligations and entitlements may vary depending on the type of employment involved³.

2.5.2 For the purposes of this Guide generally, it should be noted that agencies are under an obligation under some ACTPS awards to inform each employee in writing, at the time of engagement, of the terms of their engagement, including the type of employment, the period of any probation period and other relevant information⁴.

2.6 Workplace Relations Act

(a) Access by a person to the termination of employment provisions of the Workplace Relations Act

2.6.1 One of the most significant implications that may arise for agencies in managing their employment arrangements can be the scope that its employees may have to seek redress under the termination of employment provisions of the WR Act.

2.6.2 The WR Act (s170CE, Division 3, Part VIA) establishes two main grounds under which a claim may be made to the Australian Industrial Relations Commission (AIRC) for redress in circumstances where a person's employment is terminated:

- the **first** is for claims that the termination of employment was harsh, unjust or unreasonable – "unfair dismissal";
- the **second** is for claims that the termination of employment was unlawful because it breached specified provisions of the WR Act – "unlawful termination".

2.6.3 The WR Act sets out the categories of employees who are excluded from accessing redress from the AIRC on the ground of unfair dismissal and on some of the grounds of unlawful termination – s170CBA. The effect of these provisions on particular categories of employment is discussed in the following Sections.

(b) **Requirement that employees must have completed a qualifying period before they may apply a claim for unfair dismissal**

2.6.4 An employee is not permitted to make an application to the AIRC for redress for termination of employment on the ground of unfair dismissal, or on grounds that includes that ground, unless that employee has completed a "qualifying period" of employment with the employer – sections 170CE(5A) and 170CE(5B) WR Act. The following aspects of these provisions should be noted:

- they do not apply to an application by an employee based on the grounds of unlawful termination⁵;
- the time when the qualifying period of employment is to be regarded as being completed is described in s170CE(5A)⁶;
- 3 months is a default period in the absence of any other period agreed in accordance with s170CE(5B)⁷;
- to satisfy the requirements of s170CE (5B), any period other than 3 months must be:
 - determined by written agreement between the employer and employee before the commencement of the employment; and
 - if it is longer than 3 months, it must be a reasonable period having regard to the nature and circumstances of the employment.
- the requirement for a qualifying period applies whenever a new employment relationship is established, for example, where an employee converts from a casual or part-time to a permanent full time position with the same employer⁸.

2.6.5 Sections 170CBA, 170CE(1), 170CE(5A) and 170CE(5B) of the WR Act are set out in **Attachment A**. An extract from an Australian Industrial Registry document, providing information on the eligibility of employees to seek redress in cases of termination of employment, is set out in **Attachment B**.

3. EMPLOYEES ON PROBATION AND TRAINEES

This Section addresses **three** main issues arising from the engagement by agencies of employees on probation:

- **first** the formal requirements of agencies under the PSM Act;
- **second** issues arising from the ACTPS certified agreements and under relevant ACTPS awards; and
- **third** the possible access by employees on probation and trainees to the termination of employment provisions of the WR Act.

Finally the Section contains Guidance for agencies arising from consideration of these issues.

3.1 What are the main requirements for agencies for employees on probation and trainees under the PSM Act?

3.1.1 The appointment of a person to the ACTPS as an officer is generally made by an appointment on probation under the requirements of s70 of the PSM Act, or under s71 in the case of officers holding a prescribed training office or an office requiring teaching qualifications. The PSM Act provides that the chief executive may approve an appointment without probation, subject to some specified preliminary steps being satisfied – s70(2).

3.1.2 The PSM Act prescribes a minimum duration of probation of 6 months – s70(3). However, under clause 19.2 of the ACTPS certified agreements, the period of probation is 3 months, or longer if this is reasonable having regard to the nature and circumstances of the employment. Under the ACTPS certified agreements, the reference in the PSM Act to 6 months is to be read as 3 months.

3.1.3 An appointment on probation may be terminated by the chief executive at any time before the appointment is confirmed – PSM Act s70(4). The grounds on which a chief executive may terminate an appointment on probation are set out in PSM Act s70(9). If an appointment has been neither confirmed nor terminated after two years, then the appointment is taken to be confirmed at the end of the 2 year period – PSM Act s70(7), subject to the person's standard of health and fitness being satisfactory – section 70(8).

3.1.4 The possible scope for an employee on probation or a trainee whose employment is terminated under these PSM Act provisions (or otherwise) to seek redress from the AIRC is discussed later in this Section.

3.2 What are the main obligations and requirements for agencies under their certified agreements?

3.2.1 In general, the terms and conditions of employment contained in agency certified agreements apply to employees engaged on probation – see the definition of 'employee' in clause 5 of the ACTPS certified agreements.

3.2.2 However, as explained in this Section 2 of this Guide, the ACTPS certified agreements contain some provisions that are specific to different categories of employees or that differentiate among different employee categories.

3.2.3 As outlined above, clause 19.2 of the ACTPS certified agreements provides that where a person is appointed on probation, the period of the probation will be 3 months, or longer if this is reasonable, having regard to the nature and circumstances of the employment⁹.

3.2.4 Agencies also have some specific obligations under clause 19 of the ACTPS certified agreements in relation to the managing the probation period of an employee and such employees have certain entitlements in relation to the processes. These include:

- a requirement that the agency inform the employee at the time of appointment of the criteria and objectives to be met for their appointment to be confirmed;
- a requirement that the first formal assessment of the employee should occur within one month of appointment on probation and the second within two months of appointment; and
- obligations on the agency concerning the processes by which the employee is to be informed about the assessment procedures and requirements that the employee be given an opportunity to respond to assessment reports.

3.2.5 The complete text of clause 19 of the ACTPS certified agreements is at **Attachment C**.

- 3.2.6 The potential significance for agencies of the specific obligations and requirements they have under their certified agreements is that if disagreements arise between an agency and the union(s) about how these provisions are being implemented or interpreted, it would be open to the union(s) to pursue the issue under the dispute avoidance/settlement procedures of the ACTPS certified agreements – clause 9. This may lead to the involvement of the AIRC in such matters.
- 3.2.7 Further, it is open to an employee (or their union/representative) to seek a review of any actions or decisions taken by the agency in relation to their employment during the period of probation under the internal review processes of the ACTPS certified agreements – Section L. However, it is not open to an employee to seek an internal review of a decision by an agency to terminate their appointment on probation or a review of the processes leading to any such decision.
- 3.2.8 The ACTPS certified agreements provide for rates of pay for trainees covered by the National Training Award 2000 and for apprentices – clause 16. The current employment arrangements in the ACTPS for trainees and apprentices are to be reviewed on a service-wide basis during the life of the ACTPS certified agreements – clause 16.2.
- 3.2.9 The possible scope for an employee on probation or for a trainee whose employment is terminated to seek redress from the AIRC is discussed later in this Section.

3.3 What are the main obligations and requirements for agencies under their awards?

- 3.3.1 Agencies are under an obligation under many ACTPS awards to inform each employee in writing, at the time of engagement, of the terms of their engagement, including the type of employment, the duration of any probation or training period and other relevant information.

3.4 Employees on probation – access to the termination of employment provisions in the WR Act

- 3.4.1 Under the WR Act certain kinds of employees are excluded from seeking redress in the AIRC on the grounds that the termination of their employment was harsh, unjust or unreasonable or on some of the grounds for unlawful termination – s170CBA(1).
- 3.4.2 An employee serving a period of probation is one of the kinds of employees so excluded – s170CBA(1)(c) WR Act.

3.4.3 This exclusion of an employee serving a period of probation will only apply if the requirements set out below have been satisfied.

(i) Requirement to set the probation period in advance

3.4.4 The first requirement is that the duration of the probation period or the maximum duration of the probation period must be determined in advance¹⁰ – s170CBA(1)(c) WR Act.

3.4.5 Although this section does not require that the probation period be set out in writing, the courts and tribunals have stressed the importance of doing so to ensure that the situation is clear to both the employer and employee involved before the employment on probation commences¹¹.

3.4.6 For purposes of the requirements of s 170CBA(1)(c) WR Act, an initial probation period may be extended, provided that this possibility and the maximum of this period is stipulated in advance and such extended period is deemed to be reasonable¹².

3.4.7 The letter of offer to the employee must be precise about the period of probation and about any maximum period of probation if provision is to be made for an extension of the initial period¹³.

3.4.8 In the case of the ACTPS, the existence of the legislative provisions of s70 and s71 of the PSM Act is sufficient to meet the requirement that the period of probation be set in advance, but the employee must be informed of the duration in the letter of offer and the period itself must be reasonable¹⁴.

3.4.9 Under the PSM Act, it is also open to a chief executive to extend an initial period of probation for a longer period up to two years in accordance with s70 and s71. This would satisfy the requirement for determining in advance the probationary period or the maximum of any extension of the period. However, the employee must be notified of any extension of the period of probation before the initial period had ended and that extended period must be reasonable¹⁵.

(ii) Requirement that the period of probation is reasonable

3.4.10 The second requirement is that the period of probation is 3 months or less, or where it is longer than 3 months it is reasonable, having regard to the nature and circumstances of the employment – s170CBA(1)(c) WR Act.

3.4.11 Where an aggrieved employee challenges a termination under the WR Act, the onus is on the employer to establish affirmatively that a particular maximum period of probation in excess of 3 months was reasonable having regard to the nature and circumstances of the employment at the date the employment commenced¹⁶.

3.4.12 In applying the provisions of s170CBA(1)(c) (or the previous Workplace Relations Regulation 30B), decisions of the AIRC have frequently adopted as guidance the following approach set out by Watson SDP¹⁷:

- the purpose of the probation period is to provide a period for training to do the work and to allow an assessment to be made of an employee's aptitude and capacity to do the work once trained;
- whether a probation period is reasonable is an exercise of judgment based on proved objective facts. The most important consideration will be the nature of the job;
- the AIRC must consider the entire circumstances of the employment and not merely the circumstances of the position held;
- it is relevant to consider a probationary employee's previous experience, training and employment in assessing the entire circumstances of employment; and
- regard should be had to the situation at the date the employment commenced.

3.4.13 The following considerations may be of particular relevance to the ACTPS:

- the fact that an award or certified agreement sets out a specific period of probation does not necessarily mean that it would be regarded as reasonable for purposes of s170CBA(1)(c) WR Act¹⁸;
- if there is some uncertainty about the agreed period of probation, then the AIRC will determine that the employment is not excluded under s170CBA¹⁹;
- it is important that any notice of termination be received by the employee before the expiration of the probation period for s170CBA WR Act to apply²⁰; and

- in the event the probation period is held to be reasonable, any action by a chief executive to terminate an employee needs to comply with the requirements of s70 of the PSM Act and the performance assessment processes set out in clause 19 of the ACTPS certified agreements²¹.

3.4.14 There have been various decisions by the AIRC that illustrate what periods of probation have been considered reasonable and what periods have been considered as not reasonable for the purposes of termination of employment claims by employees under the WR Act²².

3.5 Trainees – access to the termination of employment provisions in the WR Act

3.5.1 A trainee whose employment is under a traineeship agreement or under an approved traineeship which is for a specified period or is limited to the duration of the agreement is excluded from seeking redress in the AIRC on the grounds that the termination of their employment was harsh, unjust or unreasonable or on some of the grounds for unlawful termination – s170CBA(1)(e) WR Act.

3.5.2 For this exclusion to apply there must be a formal agreement between the employer and the employee that is consistent with the relevant training award (normally the National Training Wage Award 1994) and that is formally registered – s170CD(1) WR Act.

3.5.3 Even where the form of training arrangements in an agency do not comply with the definition of traineeship agreement in s170CD(1), the employees involved may be excluded from access to termination of employment claims if they are on a reasonable period of probation.

3.5.4 Provided there is clear evidence of a formal training agreement for a specified period, then the trainee involved will be excluded from seeking redress if their employment is terminated during the term of the traineeship agreement²³. The exclusion will not apply in circumstances where the period of the traineeship agreement period has expired and the employee continues in employment in an agency.

3.6 Requirement for a "qualifying period" of employment

3.6.1 The requirements in the WR Act that an employee must have completed a "qualifying period" of employment before they can seek redress from the AIRC for unfair dismissal would apply in the case of a person who

has been appointed without any period of probation. The manner by which these requirements are applied by the AIRC is considered in Section 2 of this Guide.

3.7 Guidance for Agencies

3.7.1 Agencies should consider carefully in each case whether an appointment should be made on probation or whether the circumstances of an appointment would support a decision that a period of probation is unnecessary.

3.7.2 Where an appointment is to be made on probation, the agency needs to determine the period of probation in each individual case. This determination should be based on the relevant provisions in the agency's certified agreement about any period of probation and on guidance from decisions of the AIRC referred to earlier in this Section.

3.7.3 On the basis of decisions of the AIRC made in the context of applications from employees challenging a termination of employment:

- a period of probation in excess of 3 months for the mainstream ACTPS administrative and general service classifications or their equivalents would not be reasonable unless very special circumstances apply;
- a period of probation of 5 months is considered reasonable for participants in the ACTPS Graduate Program;
- periods of probation in excess of 3 months for other positions in the ACTPS involving high levels of skills, training and responsibilities may be reasonable; and
- only in very rare cases is it likely that the AIRC would conclude that a probation period in excess of 12 months was reasonable for positions in the ACTPS.

3.7.4 In some cases an agency may determine that a period of probation longer than 3 months is necessary for a particular position or types of positions in the organisation. If in those circumstances the agency terminates the employment after more than 3 months the agency would have the onus to establish affirmatively that the probation period was reasonable having regard to the nature and circumstances of the employment if the termination was challenged in the AIRC by the employee.

- 3.7.5 Where an agency determines that a period of probation longer than 3 months is necessary for a person appointed to a mainstream ACTPS classification, the agency should proceed on the basis that if it decides to terminate the employment at any time after 3 months of appointment, then it is likely that the AIRC would permit the employee to challenge the termination.
- 3.7.6 In this event the agency will need to demonstrate that the processes that it followed were consistent with the termination of employment provisions of the WR Act, in particular the factors that the AIRC must consider in determining whether a termination was harsh, unjust or unreasonable – s170CG (3).
- 3.7.7 The proposed period of probation, and the fact that this period may be extended under the PSM Act, should be set out as part of the written offer of employment that is given to the employee before the commencement of the employment. It is essential that the duration of the intended probationary period (both the initial period and any maximum period) be expressed in precise and unambiguous terms. A reference in the offer of appointment to the period of probation in the ACTPS certified agreements would not be adequate.
- 3.7.8 Agencies should have in place procedures for the management of employees on probation. These procedures should include processes that give effect to the obligations agencies have under clause 19 of the ACTPS certified agreements for the formal assessment processes to be undertaken and the entitlements employees have in relation to the assessment processes.
- 3.7.9 If there is provision for an extension of the period of probation and the agency decides to extend the period, the employee must be so informed before the end of the initial probation period.
- 3.7.10 If an agency decides to terminate the employment of an employee on probation, then the agency should ensure that the employee receives a written notice of termination before the end of the period of probation. Any such decision will need to be taken in accordance with the principles of natural justice.
- 3.7.11 Where an agency continues the employment of a person who has completed a formal training agreement period with the agency then any

decision by the agency to terminate the employment will need to comply with all the requirements of the termination of employment provisions under the WR Act, as the employee will be entitled to seek redress from the AIRC.

4. TEMPORARY EMPLOYMENT

This Section addresses **three** main issues for agencies arising from the engagement by agencies of employees on a temporary basis:

- **first** the formal requirements of agencies under the PSM Act;
- **second** issues arising from the ACTPS certified agreements and under relevant ACTPS awards; and
- **third** the possible access by temporary employees to the termination of employment provisions of the WR Act.

Finally the Section contains Guidance for agencies arising from consideration of these issues.

4.1 What are the main requirements for agencies under the PSM Act?

4.1.1 The PSM Act empowers a chief executive, in certain circumstances, to engage a person in temporary employment for a fixed term not exceeding 5 years – sections 106 and 108. The PSM Act also provides that, subject to specified requirements, the chief executive may extend the initial period of employment – s108.

4.1.2 There are also provisions in the PSM Act for the chief executive to terminate the temporary employment of a person by giving reasonable written notice at any time before the end of that employment – s112.

4.1.3 The terms and conditions applying to the person engaged on a temporary basis are as provided under the terms of the particular contract of employment between the agency and the person, the applicable provisions of the agency's certified agreement, any applicable awards and the PSM Act and Standards.

4.2 What are the main obligations and requirements for agencies under their certified agreements?

4.2.1 In general, the terms and conditions of employment contained in agency certified agreements apply to employees engaged on a temporary basis – see the definitions of "employee" and "short-term temporary employee" in clause 5 of the ACTPS certified agreements.

- 4.2.2 However, as already explained in Section 2 of this Guide, the ACTPS certified agreements contain some provisions that are specific to different categories of employees or that differentiate among different employee categories.
- 4.2.3 In relation to their temporary employees, agencies have some specific obligations under clause 32 of the ACTPS certified agreements.
- 4.2.4 These obligations include a commitment to endeavour to minimise the use of temporary and casual employment, in line with the Government's policy to promote permanent employment in the ACTPS.
- 4.2.5 Under clause 32.2 of the ACTPS certified agreements, agencies have agreed to the use of temporary employees only where:
- there is no employee available in the ACTPS with the expertise, skills or qualifications required for the duties; or
 - temporary assistance is required for the performance of urgent or specialised work and it is not practical in the circumstances to use the services of an existing employee²⁴.
- 4.2.6 There is also a requirement for the parties to review the operation of clause 32 during the life of the certified agreement.
- 4.2.7 The potential significance for agencies of the specific obligations and requirements they have under their certified agreements is that if disagreements arise between an agency and the union about how these provisions are being implemented or interpreted, it would be open to the union to pursue the issue under the dispute avoidance/settlement procedures of the ACTPS certified agreements – clause 9. This may lead to the involvement of the AIRC in such matters.
- 4.2.8 It may also be open to a temporary employee (or their union/ representative) in some circumstances to seek a review of actions or decisions taken by the agency in relation to their employment under the internal review processes of the ACTPS certified agreements – Section L. However, it is not open to a person engaged on a temporary basis to seek an internal review of any decisions by an agency regarding the temporary contracts themselves.
- 4.2.9 The provisions of the ACTPS certified agreements dealing with Managing Under-Performance (Section J) and Redeployment/ Redundancy (Section N) do not apply to any category of temporary

employee. The discipline provisions of these certified agreements (Section K) apply to temporary employees only where they are engaged for a period of 12 months or more.

4.2.10 The possible scope for a temporary employee whose employment is terminated by an agency to seek redress from the AIRC is discussed later in this Section.

4.3 What are the main obligations and requirements for agencies under their awards?

4.3.1 In general, the terms and conditions of employment contained in applicable ACTPS awards apply to temporary employees, subject to its terms. For example, temporary employees are expressly excluded from the redundancy pay and notice of termination provisions of the Employment Conditions ACTPS Award 2000 – clause 8.1.2.

4.3.2 In addition, there is a requirement under most applicable ACTPS awards that, at the time of engagement, the chief executive will inform the employee in writing of the terms of their engagement. This includes, if the person is engaged for a fixed term under s108 PSM Act, details about the project or task in relation to which the person has been engaged and/or the duration of the engagement.

4.4 Temporary employees – access to the termination of employment provisions in the WR Act

4.4.1 Under the WR Act certain kinds of employees are excluded from seeking redress in the AIRC for unfair dismissal and for some types of unlawful termination – s170CBA WR Act.

4.4.2 An employee engaged under a contract of employment for a specified period of time or for a specified task is one of the kinds of employees so excluded – s170CBA(1)(a) and s170CBA(1) (b) WR Act.

4.4.3 However, this exclusion will not operate if a substantial purpose of the engagement under the contract is, or was at the time of the employee's engagement, to avoid the employer's obligations under the unfair dismissal provisions and some types of unlawful termination – s170CBA(2) WR Act.

4.4.4 In determining whether a person has been engaged under a contract of employment for a specified period of time or for a specified task (thereby excluding the person from seeking redress under the WR Act

for unfair dismissal and some forms of unlawful termination), the following factors have been considered by the AIRC to be significant:

- in cases of contracts for a specified task, the precise scope and nature of the task must be clearly identified at the outset in the contract of employment, with no suggestion that the contract might be open-ended²⁵;
- in cases of contracts for a specified period, the contract of employment must contain a precise and fixed expiry date²⁶;
- a contract of employment that contains provisions that give the employer a broad or unconditional right to terminate the employment at any time and that right was not conditioned upon a breach of any term will not be regarded as a contract for a specified period and will not be excluded under s170CBA WR Act²⁷;
- a contract of employment that contains provisions that give the employer a right to terminate the employment on the ground of misconduct or for other breach of the contract will be regarded as a contract for a specified period and will be excluded under s170CBA WR Act²⁸;
- in the case of a contract of employment for a specified period, where an employer unilaterally terminates the employee before the end of that period, the contract will be excluded from the unfair dismissal provisions of the WR Act (note, however, that in such circumstances the employer may be liable for damages for breach of contract)²⁹;
and
- where there is a contract of employment for a specified period and the employment ceases at the end of that period, then such termination will not be at the initiative of the employer and will therefore be excluded from the unfair dismissal provisions of the WR Act³⁰.

4.4.5 The fact that an agency has engaged a person on a series of fixed-term contracts may result in the employment being regarded as continuous and the employee would be characterised as a permanent employee, especially where circumstances showed that the employee had a reasonable expectation that the contracts would be "rolled-over"³¹. There may be serious consequences for agencies that engage persons on a "temporary" basis under arrangements that are subsequently held to constitute a permanent ongoing employment relationship. In these

cases, such persons are likely, for example, to be entitled to the benefits available to permanent employees under the ACTPS certified agreement and awards, including severance benefits in certain cases³².

- 4.4.6 Such circumstances may also be regarded as evidence that the main purpose of the agency in making such arrangements was to avoid its obligations under the termination provisions of the WR Act. In that event s170CBA(2) WR Act would apply so that the employee may be able to seek redress under the WR Act if the employment is terminated.

4.5 Guidance For Agencies

- 4.5.1 Agencies have the responsibility for deciding whether it is necessary for them to employ persons on a temporary basis.
- 4.5.2 In considering whether to engage a person on a temporary basis, the agencies need to take account of the Government's employment and industrial relations policies, the various obligations and responsibilities they may have under relevant legislation, certified agreements and awards, which are outlined in paragraphs 4.1 to 4.3.
- 4.5.3 In particular, agencies must take into account the obligations they have under clause 32 of the ACTPS certified agreements to minimise the use of temporary and casual employment and to use temporary employees only in specified circumstances.
- 4.5.4 Agencies also need to give effect to obligations they have under relevant ACTPS awards to inform the employee in writing at the commencement of the employment of the terms of the engagement, including the fact that the engagement is on a temporary employment basis.
- 4.5.5 Agencies should give very careful consideration to any proposal to engage a person on a temporary employment basis over a long period and where there is an expectation that the engagement could extend over a long period. Agencies should take into account the factors set out in paragraphs 4.4.4 to 4.4.5 to assess whether the proposed employment arrangement is likely to be regarded as temporary employment or is one that creates a continuing relationship, thereby opening the possibility that they may be liable to provide the employee with entitlements that are available to a permanent employee.

4.5.6 For each occasion involving a specific period or task, agencies should prepare a written contract of employment (in conjunction with GSO as necessary), that is based on the following:

- it should describe in specific terms the nature of the work involved, the applicable terms and conditions of the temporary employment;
- it should state in a precise and unambiguous manner the duration of the fixed period of the contract or a precise description of the task to be completed (note that phrases such as "expected date of completion" are not adequate);
- it should contain a provision that the agency has the right to terminate the employment on the ground of misconduct or for other breach of the contract by giving reasonable notice at any time before the end of the date specified or the completion of the task; and
- it should provide for any entitlements accrued during the term of the contract to be paid out at the end of the contract (this is particularly important in cases where it is likely that the person may be engaged by a different agency when the initial or previous contract ends). Similarly it should specifically exclude the agency from liability for any entitlements that may have accrued to the person under previous contracts.

4.5.7 Agencies should also have specific procedures in place for reviewing their employment requirements before the expiration of each contract to determine what further temporary contract arrangements, if any, may be needed.

4.5.8 At this time agencies should consider the following options:

- a continuation of the current arrangements;
- entering into new arrangements with the same person or with another person on the same basis; or
- entering into different employment arrangements, for example by using permanent part-time arrangements to replace temporary or casual employment arrangements.

4.5.9 In some circumstances, an agency may conclude that it is desirable to continue to engage the same person on a series of contracts for a specified term or for a specific task.

- 4.5.10 In such cases, the agency needs to give careful attention to the manner in which this decision is put in place to avoid the possibility that the relationship may be regarded as one of continuing employment and the person therefore would be deemed to be a permanent employee. Specifically, an agency should not give the employee any indication or expectation that the temporary contract will be extended at the end of its term.
- 4.5.11 This would be the likely outcome especially where the employee is allowed by the agency to continue in employment after the contract expires, without entering into a new contract with the employee.
- 4.5.12 In that event, the agency could incur significant additional liabilities as a result of the person being able to claim the benefits of a permanent employee under applicable awards and certified agreements. This situation may also result in the person, if their employment is terminated, being entitled to seek redress under the termination provisions of the WR Act.
- 4.5.13 If, after completion of this process, the agency decides to re-engage the same person as a temporary employee, this should be done by a separate new contract, not by an exchange of correspondence agreeing to extend the initial or previous temporary employment contract.
- 4.5.14 This new contract should contain the features set out in paragraph 4.5.6. The contract should differentiate the circumstances between it and the initial or earlier contracts, by including descriptions of the particular requirements of the agency under the new contract. It should also include a statement that there is no commitment by the parties to extend or renew the contract and a statement that the parties do not intend to create a permanent employment relationship.

5. CASUAL EMPLOYEES

This Section addresses **three** main issues for agencies arising from the engagement by agencies of employees on a casual basis:

- **first** the formal requirements of agencies under the PSM Act;
- **second** issues arising from the ACTPS certified agreements and under relevant ACTPS awards; and
- **third** the possible access by casual employees to the termination of employment provisions of the WR Act.

Finally the Section contains Guidance for agencies arising from consideration of these issues.

5.1 What are the main requirements for agencies under the PSM Act?

5.1.1 The PSM Act empowers a chief executive to engage a person for temporary employment on a casual basis – s110; such employment is not to be regarded as employment for a fixed term – s110(2).

5.1.2 The PSM Act also provides that the chief executive may terminate the employment of a person on a casual basis at any time before the end of that employment – s112.

5.2 What are the main obligations and requirements of agencies under their certified agreements?

5.2.1 As already explained in Section 2 of this Guide, the ACTPS certified agreements contain some provisions that are specific to different categories of employees or that differentiate among different employee categories.

5.2.2 In relation to their casual employees, agencies have some specific obligations under clause 32 of the ACTPS certified agreements.

5.2.3 These obligations include a commitment to endeavour to minimise the use of temporary and casual employment, in line with the Government's policy to promote permanent employment in the ACTPS.

5.2.4 Under clause 32.3 the parties recognise that there may be circumstances in which the agency has to undertake a program or task

which requires dedicated resources by persons with skills or experience and those persons are needed to be engaged on a casual basis for the operational requirements of the agency.

5.2.5 However this is subject to the following provisions in the certified agreement:

- where the proposed arrangements will involve a regular and systematic pattern of work and the person has a reasonable expectation that the employment arrangements will continue, then the agency should consider engaging the person on a permanent or temporary basis – clause 32.4; and
- where a position has been nominally vacant for a continuous period of more than twelve months, there is an obligation on the agency to consult with the union(s) on the feasibility of filling the position on a permanent basis – clause 32.5.

5.2.6 There is also a requirement for the parties to review the operation of clause 32 during the life of the certified agreement – clause 32.5.

5.2.7 The potential significance for agencies of the specific obligations and requirements they have under their certified agreements is that if disagreements arise between an agency and the union about how these provisions are being implemented or interpreted, it would be open to the union to pursue the issue under the dispute avoidances/settlement procedures of the ACTPS certified agreements – clause 9. This may lead to the involvement of the AIRC in such matters.

5.2.8 Further, it may also be open to a casual employee (or their union/representative) in some circumstances to seek a review of actions or decisions taken by the agency in relation to their employment under the internal review processes of the ACTPS certified agreements – Section L.

5.2.9 The provisions of the ACTPS certified agreements dealing with Managing Under-Performance (Section J), Redeployment/Redundancy (Section N) and Discipline (Section K) do not apply to casual employees.

5.2.10 The possible scope for a casual employee whose employment is terminated by an agency to seek redress from the AIRC is discussed later in this Section.

5.3 What are the main obligations and requirements of agencies under their awards?

5.3.1 There is a requirement under many awards that apply in the ACTPS that, at the time of engagement, the chief executive will inform the employee in writing of the terms of their engagement. This includes informing the employee of the type of employment.

5.3.2 The GSO Award also contains provisions containing various conditions of employment and entitlements of casual employees covered by that award³³.

5.3.3 Various awards applying in the ACTPS provide for casual employees to be paid a loading of 20% of the applicable rate of pay in lieu of normal paid leave and public holidays³⁴.

5.3.4 Casual employees are not covered by the redundancy provisions of the Employment Conditions ACTPS Award 2000. However, this exclusion may not operate in circumstances where the casual employment arrangement is challenged and the employee is held to be a permanent rather than a casual employee³⁵.

5.4 Casual employees – access to the termination of employment provisions in the WR Act

5.4.1 Under the WR Act certain kinds of employees are excluded from seeking redress in the AIRC for unfair dismissal and for some types of unlawful termination – s170CBA WR Act.

5.4.2 A casual employee engaged for a short period is one of the kinds of employees so excluded – s170CBA(1)(d) WR Act.

5.4.3 A casual employee is to be regarded as having been engaged for a short period unless:

- the employee has been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and
- the employee would have had a reasonable expectation of continued employment by the employer had the employment not been terminated – s170CBA(3) WR Act.

- 5.4.4 There may be two shorter periods of employment with the same particular employer provided that the break of employment is not longer than 3 months and the total length of the 2 periods is at least 12 months – s170CBA(3A) WR Act.
- 5.4.5 As the Territory rather than an individual ACTPS agency is the “ particular employer” of staff in the ACTPS for the purposes of these provisions, there may be situations where a person is engaged as a casual employee on a regular and systematic basis by 2 different ACTPS agencies in a manner that meets the requirements of s170CBA(3A) WR Act³⁶.
- 5.4.6 The effect of the provisions contained in s170CBA WR Act is "a casual employee with regular and systematic engagements and a reasonable expectation of continuing employment is by definition engaged for a short period, provided the employee's sequence of periods of employment does not last for 12 months"³⁷.
- 5.4.7 However, the provisions contained in s170CBA WR Act for excluding certain casual employees from seeking redress in the event is terminated are all predicated on the fact that the person was in fact engaged as a casual employee³⁸. Whether a person is regarded by the courts and tribunals as having been engaged as a casual may vary depending on the legislative context of the case³⁹.
- 5.4.8 There may be serious consequences for agencies which engage casuals under arrangements that are subsequently held to constitute a permanent ongoing employment relationship. In these cases, such persons are likely, for example, to be entitled under awards or agreements to paid leave and, in some circumstances, to severance payments⁴⁰.

5.5 Which factors are considered in determining whether an employee is employed as a casual?

5.5.1 In determining whether a person is engaged as a casual, the tribunals and the courts have taken an approach based on the following considerations:

- the determination requires an objective test (ie what is reasonable) based on an examination of all the relevant facts in each case;

- the relevant time at which the nature of the employment arrangements should be examined is at the time of termination, not the time of initial engagement⁴¹;
- it is not necessarily decisive to determining that a person is a casual that an applicable award classifies the employee as a casual or that the agency treats the employee for personnel purposes as a casual (for example being required to fill out a "casual timesheet")⁴²;
- the ultimate decision depends on whether it is established that there is a continuing employment contract⁴³; and
- the employment of a person for a consistent and regular pattern of hours over a lengthy period with the same employer is likely to support the conclusion that there is a continuing contract of service, even if this did not involve work for the employee on a daily basis but regularly on a seasonal basis⁴⁴.

5.5.2 The following list of factors have been used in some AIRC cases to determine whether there is a continuing employment contract⁴⁵:

- the number of hours worked per week;
- whether the employee worked according to a roster system that was published in advance and whether the employment pattern was regular and systematic or was informal, uncertain and irregular⁴⁶;
- whether there was a reasonable expectation of continuing employment;
- whether the employer required notice before the employee was to be absent or on leave;
- whether the worker reasonably expected that work would be available; and
- whether the worker had a consistent starting time and set finishing time.

5.6 Requirement for a "qualifying period" of employment

5.6.1 Even if an employee who is making a claim for unfair dismissal is successful in establishing they were not in fact engaged as a casual for purposes of s170 CBA WR Act, the employee may still be precluded

from seeking redress under the WR Act if they have not served a "qualifying period" of employment. The application of these requirements by the AIRC is considered in Section 2 of this Guide.

5.7 Guidance For Agencies

5.7.1 Agencies have the responsibility for deciding whether it is necessary for them to employ persons on a casual basis.

5.7.2 In considering whether to engage a person on a casual basis, the agencies need to take account of the Government's employment and industrial relations policies, the various obligations and responsibilities they may have under relevant legislation, certified agreements and awards, which are outlined in paragraphs 5.1 to 5.3.

5.7.3 In particular, agencies must take into account the obligations they have under clause 32 of the ACTPS certified agreements to minimise the use of casual employment and to consider the use instead of permanent or temporary employment.

5.7.4 Agencies also need to give effect to obligations they have under relevant ACTPS awards to inform the employee in writing at the commencement of the employment of the terms of the engagement, including the fact that the engagement is on a casual employment basis.

5.7.5 Agencies should give very careful consideration to any proposal to engage a person on a casual employment basis over a long period and where there is an expectation that the engagement could extend over such a period. Agencies should take into account the criteria set out in paragraphs 5.4.3 to 5.4.5 to assess whether the proposed employment arrangement is likely to be regarded as casual employment or is one that creates a continuing relationship, thereby opening the possibility that they may be liable to provide the employee with entitlements that are available to a permanent employee.

5.7.6 Where agencies decide that it is necessary to engage a person on a casual basis, then the arrangements entered into by the agency and the employee should be fair and transparent, involving a clear understanding by both parties that the employment is to be on a casual basis. Agencies also need to ensure that the arrangements they enter into will be regarded as being of a genuine casual employment character and not one that creates a continuing relationship. The agency should not give the person any grounds for expecting that the agency will provide it with continuing employment.

5.7.7 On each occasion that an agency engages a person on a casual basis, the agency should prepare a written contract of employment (with the assistance of GSO as necessary) that addresses the following matters:

- the fact that the employment is to be on a casual basis;
- the duration of the contract;
- the nature of the task or tasks to be undertaken under the contract;
- the terms and conditions of employment that apply to the employee under relevant awards and agreements; this should include a clear provision that a payment of a loading to be made to the employee is in lieu of any paid leave and public holidays; and
- a statement that there is no commitment by the parties to extend or renew the contract and a statement that the parties do not intend to create a permanent employment relationship.

5.7.8 Agencies should also have specific procedures in place for reviewing on a regular basis their employment requirements to determine what further casual employment arrangements, if any, may be needed.

5.7.9 These procedures should be similar to those set out in paragraphs 4.5.5 to 4.5.7.

6. INDEPENDENT CONTRACTORS

This Section addresses **three** issues that agencies should take into account when they are proposing to engage a person as an independent contractor. (Note: for the purpose of this Guide references to an independent contractor includes persons engaged as consultants):

- **first** the obligations agencies have under the ACTPS certified agreements when they are considering whether to engage a person as an independent contractor;
- **second** the implications generally for agencies when they engage a person as an independent contractor; and
- **third** the criteria the courts/tribunals apply in determining whether a person is an independent contractor.

Finally the Section contains Guidance for agencies arising from consideration of these issues.

6.1 What are the main obligations for agencies under the ACTPS certified agreements when they are considering whether to engage a person as an independent contractor?

6.1.1 The terms and conditions of employment contained in the ACTPS certified agreements apply to employees and not to independent contractors. An employee is defined in clause 5 in terms of persons employed under the PSM Act, other than chief executives and executives.

6.1.2 However, agencies have made certain commitments and have some obligations in relation the use of independent contractors under Section D – Job Security of the ACTPS certified agreements.

6.1.3 These include:

- a commitment by the parties to promoting permanent employment in the ACTPS – clause 31.1;
- a Joint Working Party is established to provide advice and recommendations to the Joint Council on, among other issues, strategies to minimise the use of independent contractors across the ACTPS, strategies to minimise the use of sub-contractors and

increase the use of direct employment in the ACTPS and the development and implementation of mechanisms to protect the rights of sub-contractors – clauses 31.2 and 31.3;

- recommendations from the Working Party that are endorsed by Joint Council are to be referred to agency chief executives for implementation – clause 31.4;
- agencies are obliged to inform their Joint Union Management Consultative Committee (JUMCC) about any such recommendations – clause 31.5;
- agencies are obliged to provide the JUMCC with regular reports on their use of independent contractors – clause 31.5;
- each agency is committed to effectively implement the government's procurement policy, including ensuring that the employees of any contractors receive fair and reasonable pay and conditions having regard to applicable awards and certified agreements – clause 31.6.

6.1.4 The Government's procurement legislation, policies and guidelines apply to all ACTPS agencies. These includes requirements relating to the tender processes and to certain contract documentation.

6.1.5 The potential significance for agencies of the obligations and requirements they have under their certified agreements is that if disagreements arise between an agency and the union about how these provisions are being implemented or interpreted, it would be open to the union to pursue the issue under the dispute avoidance/settlement procedures of the ACTPS certified agreement – clause 9. This may result in the involvement of the AIRC in the matter.

6.2 What are the implications generally for agencies when they engage a person as an independent contractor?

6.2.1 There are very significant differences between the rights and obligations that a contracting agency and an independent contractor have under a contract for services and the rights and obligations an employer agency and an employee have under an employment contract.

6.2.2 For the purposes of this Guide, the most significant implications of the engagement of an independent contractor are:

- the terms and conditions of the engagement of the independent contractor will be those that are provided for under the contract for services; and
- the provisions of the PSM Act/Standards and of agency certified agreements and applicable ACTPS awards will not apply to the independent contractor; and
- the provisions of the WR Act on termination of employment provisions of the WR Act will not apply to the independent contractor.

6.2.3 This position will apply provided the arrangements put in place by agencies for the engagement of a person as an independent contractor are confirmed by a court or tribunal (if challenged) as being those of an independent contractor rather than those of an employee.

6.2.4 There are other potentially significant differences between the rights and entitlements of both parties under a contract for services and an employer/employee contract. These rights and entitlements relate to matters arising, for example, under applicable taxation, workers compensation, superannuation guarantee and corporations legislation⁴⁷.

6.3 What are the criteria that the courts/tribunals apply in determining whether a person is an independent contractor?

6.3.1 A threshold issue for courts/tribunals in many cases involves determining whether a person has been engaged as an independent contractor or as an employee.

6.3.2 The resolution of this threshold issue can be a complex matter, as it requires the application to each particular case of the various tests that have been adopted by the High Court, other courts and industrial tribunals⁴⁸.

6.3.3 In summary these tests normally applied by the courts/tribunals are based on the following⁴⁹:

- it is the totality of the relationship between the parties which must be considered, involving an examination of all of the contractual arrangements and the conduct of the parties from the start of the "selection/engagement" process⁵⁰;

- various tests are normally applied, including control, the nature of the work and how it is performed, business independence and organisation integration⁵¹:
 - the higher the degree of control or of the right to exercise control by the organisation over the manner the work is performed, the more likely the contract will be regarded as one establishing an employer/employee relationship⁵²;
 - the extent to which it is apparent from the contractual arrangements that the contractor maintains a business independent of that of the contracting agency, the more likely the contract will be regarded as that of an independent contractor⁵³;
 - the stronger the public association of the person with the organisation and with its daily functions and operations, the more likely the contract will be regarded as one establishing an employer/employee relationship⁵⁴;
- the tests are essentially objective ones (ie rather than ones necessarily based on the label the parties give to it); the fact the contract itself states that the intention is not to establish an employer/employee relationship may assist, but is not necessarily decisive, in treating the contract as that of an independent contractor⁵⁵;
- the intention of the parties as reflected in the terms of the contract and in their subsequent conduct is likely to be given more weight where the application of all of the other tests gives rise to an inconclusive outcome⁵⁶;
- a provision giving the person the right to decide to delegate or to assign responsibilities to undertake work under the contract would strongly support a conclusion that the person is an independent contractor⁵⁷;
- where the contract includes provisions normally included in employment contracts, such as paid leave, the stipulation of hours, participation in agency rosters and performance management arrangements, the more likely the arrangements will be deemed to be one establishing an employer/employee relationship⁵⁸;

- the inclusion of provisions for payment by account upon the completion of the project/task will support a conclusion that there is not an employer/employee relationship⁵⁹; and
- generally, if a contract is made by the agency directly with a company or a partnership then this will be conclusive that the person involved is an independent contractor, except when the arrangements are held to be a contrivance or a sham⁶⁰.

6.3.4 Similar tests have been applied to arrangements involving the use of labour hire companies to determine the effect of the relationship between the person involved in providing the services, the labour hire company and the organisation receiving the services. The outcomes of many of these cases have been different, reflecting the varied background and circumstances involved⁶¹.

6.3.5 The fact that an employer has engaged a person on a series of ongoing "independent contracts" may result in the employment being regarded as continuous and the person being characterised as a permanent employee. In some cases, the courts/tribunals will examine the circumstances behind a series of on-going contracts with the same person in order to examine whether the main purpose of the arrangements was to avoid obligations under the WR Act or under other relevant legislation. Where such a conclusion is reached, then in most circumstances the person will be regarded as an employee for the purposes of this legislation⁶².

6.4 Guidance For Agencies

6.4.1 In deciding whether to engage a person as an independent contractor agencies need to take into account the government's employment and industrial relations policies and to ensure they comply with the requirements and obligations that have under their certified agreement, as outlined earlier in this Section. In particular, agencies need to implement the commitments made and obligations they have under clause 31 of the ACTPS certified agreements.

6.4.2 For the purpose of implementing clause 31 of ACTPS Certified Agreements, a Joint Working Party with Union and Government representatives has been established to provide advice and recommendations to Joint Council about strategies to minimise the use of consultants/contractors across the ACTPS.

- 6.4.3 The Joint Working Party will be provided with quarterly reports on the use of contractors/consultants across the ACTPS. CMD will liaise with Agencies in gathering this information.
- 6.4.4 The information provided to the Joint Working Party will also assist Agencies in meeting their obligations under clause 31.5 of the Certified Agreement where they are required to provide Agency JUMCCs with regular reports on the use of consultants/contractors in the Agency.
- 6.4.5 Agencies are obliged to apply the government's requirements in relation to the tender processes and contract documents that are contained in the ACTPS Procurement Guidelines. The written contract used for engaging the services should be based on the guidance in the ACTPS Procurement Guidelines and in this Guide (using the assistance of GSO as required).
- 6.4.6 Agencies need to ensure that the nature of the contracts they enter into when engaging independent contractors, and the associated arrangements they put in place, will meet the tests applied by the courts and industrial tribunals in determining whether those engaged are in fact independent contractors.
- 6.4.7 To assist in this objective, agencies should consider including the following provisions in the contracts to be used for independent contractors:
- provisions giving the agency general rights to manage and supervise the activities of the contractor, but not including comprehensive provisions giving the agency detailed control over the way the work is to be performed;
 - comprehensive provisions acknowledging the essential nature of the skills and qualifications of the contractor that are being purchased by the agency and the high degree of professional competence that is required of the contractor (to the extent relevant);
 - provisions that specifically acknowledge and take into account the fact that the contractor is to be able to continue to conduct a separate independent business concurrently with work performed for the agency;
 - provisions for payment to be made by account upon the completion of the project or task;

- risk management and maintenance of any relevant professional and public liability insurance to be the responsibility of the contractor; and
- express statements that the contract is one for the provision of specific services and that nothing in the contract is to be construed as establishing an employer/employee relationship for any purpose.

6.4.8 Conversely, any proposed contracts for services with an independent contractor should not contain:

- provisions about matters normally found in employment instruments, such as forms of paid leave, holidays or hours of attendance;
- provisions that suggest or require a close integration by the contractor with the general business of the agency or public association by the contractor with the operations of the agency; or
- provisions that rely on or refer to the PSM Act.

6.4.9 Agencies should also ensure that their conduct and the actual arrangements they put in place for implementing the contract are consistent with its terms and reflect the intention to establish an independent contractor relationship and not a relationship normally associated with one of their employees.

6.4.10 To meet its particular requirements, an agency may decide to re-engage the same person as an independent contractor.

6.4.11 However, as in the case of renewed contracts for a temporary employee or for a casual, any such decision would need to be implemented in a manner that it did not appear to be equivalent to a de facto automatic extension of the first contract (a "rolling over" of the contract) and so leave open the possibility that the relationship may be characterised as one of continuing employment and the person thereby deemed to be a permanent employee.

6.4.12 In that event, agencies could incur significant additional liabilities as a result of the person being able to claim the benefits of a permanent employee under applicable certified agreements and awards. This situation may also result in the person being able to challenge any attempt by an agency to terminate the arrangements by applying for redress under the termination of employment provisions of the WR Act.

6.4.13A decision to renew a contract with an independent contractor should normally involve a new tender process or at least there should be sound grounds for selecting the same person again. A separate new contract should be made, not an exchange of correspondence agreeing to extend the initial contract. This new contract should, to the extent possible, differentiate the circumstances between it and the initial contract by including statements about the particular and any different requirements of the agency under the new contract.

7. SUMMARY

- 7.1.1 This Guide is directed primarily at the employment powers of ACTPS chief executives under the PSM Act, the obligations agencies have and the rights employees have under the ACTPS certified agreements and the issues that agencies should take into account when they develop and implement their employment arrangements.
- 7.1.2 Chief executives have the responsibility to develop and implement employment strategies and arrangements and to make specific employment decisions that are best suited to achieve the agency's business goals and objectives.
- 7.1.3 The employment arrangements and decisions that chief executives make should be consistent with the government's employment and industrial relations policies and need to take into account the general employment framework in which ACTPS agencies operate.
- 7.1.4 These employment arrangements and decisions also need to be applied in a way that reflects various commitments and obligations agencies have under their certified agreements.
- 7.1.5 The Government is committed to promoting permanent employment within the ACTPS, while recognising that employment of temporary and casual employees and engagement of independent contractors may be necessary in certain circumstances to meet particular requirements of the agency.
- 7.1.6 This commitment is reflected in some of the provisions of the ACTPS certified agreements that were negotiated and adopted towards the end of 2004. This Guide addresses the nature of the commitments and of the obligations agencies have under their certified agreements and how these should be applied in relation to different types of employees and to any independent contractors they may engage.
- 7.1.7 For the purposes of this Guide, the most significant of these commitments and obligations relate to employees on probation (clause 19), the use of independent contractors (clause 31) and the use of casual and temporary employees (clause 32).
- 7.1.8 The ACTPS certified agreements also contain clear obligations on agencies to engage in genuine consultation with employees and unions,

particularly in cases of proposed changes in the organisation or to existing work practices that affect employees and in circumstances where an agency may need to consider a possible excess or redundancy situation (clause 8 and Section N).

7.1.9 The potential significance for agencies of the commitments and obligations they have under their certified agreements is that if disagreements arise between an agency and the union about how these provisions are being implemented or interpreted, it would be open to the union to pursue the issue under the certified agreement's dispute avoidance/settlement procedures. This could lead to the involvement of the AIRC in such matters.

7.1.10 In determining the particular category of engagement and the contract arrangements they propose to put in place, agencies need to have regard to the following considerations:

- the arrangements need to be designed in a manner that not only meet the best interests of the agency but are transparent and fair for the persons involved;
- the arrangements operate in a manner that is consistent with the ACTPS employment framework, the government's employment and industrial relations policies and the obligations agencies have under their certified agreements;
- the tests applied by the AIRC and the courts to determine whether a person is a casual, temporary or independent contractor are based on an objective examination of all the circumstances, including the terms of the contractual arrangements and the conduct of the parties;
- the label the agency gives to a person it engages (eg as a "casual employee" or as an "independent contractor") will not necessarily mean that the person will be categorised as such by the AIRC or the courts;
- the arrangements must not be developed and structured for the purpose, directly or indirectly, of avoiding obligations the agency may have, or of avoiding entitlements employees may have, under its certified agreement and applicable awards, the PSM Act or under the WR Act or other legislation; and

- any extension of a current contract or re-engagement of the same person on the same basis, for example as a casual, as a temporary employee or as an independent contractor, may be regarded as establishing a continuing relationship, thereby inadvertently creating a permanent employer/employee relationship.

7.1.11 Each agency should structure and manage its employment arrangements properly in accordance with these considerations.

7.1.12 If an agency does not and the nature of the engagement is subsequently challenged successfully, the agency may be liable to provide the person with significant additional benefits that are available to permanent employees under its certified agreement or under applicable awards, for example, entitlements to paid annual leave and long service leave. If termination occurs and the arrangement is challenged successfully, the agency may also be liable in some circumstances to make severance payments under its certified agreement or the employee may be eligible to seek redress under the termination of employment provisions under the WR Act.

7.1.13 Sections 3 to 6 of this Guide provide agencies with specific information and guidance about managing the various types of engagement of persons in the ACTPS.

ATTACHMENT A

Workplace Relations Act 1996

As at January 2005.

170CBA Exclusions

Exclusions from Subdivisions B, D, E and F and sections 170CL and 170CM

- (1) The following kinds of employee are excluded from the operation of Subdivisions B, D, E and F and sections 170CL and 170CM:
- (a) an employee engaged under a contract of employment for a specified period of time;
 - (b) an employee engaged under a contract of employment for a specified task;
 - (c) an employee serving a period of probation, if the duration of the period or the maximum duration of the period, as the case may be, is determined in advance and, either:
 - (i) the period, or the maximum duration, is 3 months or less; or
 - (ii) the period, or the maximum duration:
 - (A) is more than 3 months; and
 - (B) is reasonable, having regard to the nature and circumstances of the employment;
 - (d) a casual employee engaged for a short period, within the meaning of subsection (3);
 - (e) a trainee whose employment under a traineeship agreement or an approved traineeship:
 - (i) is for a specified period; or
 - (ii) is, for any other reason, limited to the duration of the agreement;
 - (f) an employee:
 - (i) who is not employed under award conditions; and
 - (ii) to whom subsection (5) or (6) applies.

*Note 1: The expression **employee engaged under a contract of employment for a specified period of time** (used in paragraph (a)) has been addressed in a number of cases before the Industrial Relations Court of Australia, including, in particular, *Cooper v Darwin Rugby League Inc* (1994) 57 IR 238, *Andersen v Umbakumba Community Council* (1994) 126 ALR 121, *D'Lima v Board of Management, Princess Margaret Hospital for Children* (1995-1996) 64 IR 19 and *Fisher v Edith Cowan University* (unreported judgment of Madgwick J, 12 November 1996, No. WI 1061 of 1996).*

Note 2: An employee who is excluded from the provisions of the Act specified in this subsection may still be eligible to apply for a remedy in relation to the termination of employment under a State law.

Note 3: The definitions in section 170CD apply for the purposes of this section.

- (2) Subsection (1) does not apply to an employee engaged under a contract of a kind mentioned in paragraph (1)(a) or (b) if a substantial purpose of the engagement of the employee under a contract of that kind is, or was at the

time of the employee's engagement, to avoid the employer's obligations under Subdivision B, D or E or section 170CL or 170CM.

- (3) For the purpose of paragraph (1)(d), a casual employee is taken to be engaged for a short period unless:
- (a) subject to subsection (3A)–the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) the employee has, or but for a decision by the employer to terminate the employee's employment, would have had, a reasonable expectation of continuing employment by the employer.

(3A) If:

- (a) a casual employee was engaged by a particular employer on a regular and systematic basis for a sequence of periods during a period (the first period of employment) of less than 12 months; and
- (b) at the end of the first period of employment, the casual employee ceased, on the employer's initiative, to be so engaged by the employer; and
- (c) the employer subsequently again engages the employee on a regular and systematic basis for a further sequence of periods during a period (the second period of employment) that starts not more than 3 months after the end of the first period of employment; and
- (d) the total length of the first period of employment and the second period of employment is at least 12 months;

paragraph (3)(a) is taken to be satisfied in relation to the employment of the employee.

- (4) For the purposes of subparagraph (1)(f)(i), an employee is taken not to be employed under award conditions unless the employer is bound, in relation to the employee's wages and conditions of employment, by an award, a certified agreement, an AWA or an old IR agreement.
- (5) For the purposes of subparagraph (1)(f)(ii), this subsection applies to an employee if:
- (a) the employee's remuneration immediately before the termination of employment was not wholly or partly determined on the basis of commission or piece rates; and
 - (b) the rate of remuneration applicable to the employee immediately before the termination exceeds a rate specified, or worked out in a manner specified, in the regulations (the specified rate).
- (6) For the purposes of subparagraph (1)(f)(ii), this subsection applies to an employee if:
- (a) the employee's remuneration immediately before the termination of employment was wholly or partly determined on the basis of commission or piece rates; and

- (b) in accordance with the regulations, the rate of remuneration that is taken to be applicable to the employee immediately before the termination exceeds the specified rate.

Exclusions from sections 170CL and 170CM and Subdivisions D and E

- (7) The following kinds of employee are excluded from the operation of sections 170CL and 170CM and Subdivisions D and E:
 - (a) a casual employee, except a casual employee engaged for a short period within the meaning of subsection (3);
 - (b) a daily hire employee:
 - (i) who is performing work in the building and construction industry (including work in, or in connection with, the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or
 - (ii) who is performing work in the meat industry in, or in connection with, the slaughter of livestock;
 - (c) a weekly hire employee who is performing work in, or in connection with, the meat industry and whose termination of employment is determined solely by seasonal factors.

Note 1: An employee who is excluded from the provisions of the Act specified in this subsection may still be eligible to apply for a remedy in relation to the termination of employment under a State law.

Note 2: The definitions in section 170CD apply for the purposes of this section.

Relationship between subsections (1) and (7)

- (8) If, but for this subsection, an employee would be covered by both subsections (1) and (7), the employee is taken only to be covered by subsection (1) (and so is subject to the broader range of exclusions provided for by that subsection).

Subdivision B – Application to Commission for relief in respect of termination of employment

170CE Application to Commission to deal with termination under this Subdivision

- (1) Subject to subsections (5) and (5A), an employee whose employment has been terminated by the employer may apply to the Commission for relief in respect of the termination of that employment:
 - (a) on the ground that the termination was harsh, unjust or unreasonable; or
 - (b) on the ground of an alleged contravention of section 170CK, 170CL, 170CM or 170CN; or
 - (c) on any combination of grounds in paragraph (b) or on a ground or grounds in paragraph (b) and the ground in paragraph (a).

- (2) Subject to subsection (6), an employee whose employment is proposed to be terminated by the employer may apply to the Commission for relief on the ground of an alleged contravention of section 170CL.
- (3)...
- (4)...
- (5)...
- (5A) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, unless the employee concerned had completed the qualifying period of employment with the employer at the earlier of the following times:
- (a) the time when the employer gave the employee the notice of termination;
 - (b) the time when the employer terminated the employee's employment.
- (5B) For the purposes of subsection (5A), the *qualifying period of employment* is:
- (a) 3 months; or
 - (b) a shorter period, or no period, determined by written agreement between the employee and employer before the commencement of the employment; or
 - (c) a longer period determined by written agreement between the employee and employer before the commencement of the employment, being a reasonable period having regard to the nature and circumstances of the employment.

ATTACHMENT B

Extract From "Termination Of Employment – General Information" – Australian Industrial Registry, July 2004

9. Who can apply?

In determining if you are eligible to make a claim for unfair dismissal or unlawful termination you will need to look at the relevant sections of the Act and related regulations. There are three main types of applications.

1. harsh, unjust or unreasonable (unfair dismissal);
2. in breach of discrimination provisions (unlawful termination); and/or
3. in breach of minimum notice provisions (unlawful termination).

Slightly different eligibility criteria apply to each of the above. The tables below summarise the key factors.

Unfair dismissal	
Harsh, unjust or unreasonable	
Relevant section of the Act or regulation	s.170CE, s.170CBA Regulation 30BB
Who can apply?	<p>(1) An employee must have been:</p> <ul style="list-style-type: none"> • covered by a federal award or agreement and whose employer is a constitutional corporation; or • employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer; or • a Commonwealth public sector employee; or • employed in Victoria or in a Territory. <p>(2) The employee must have completed a qualifying period of employment of at least three months before dismissal. A shorter or longer period may apply provided it has been agreed in writing before the employment begins. A period longer than three months must be reasonable given the nature and circumstances of the employment.</p>
Who is excluded?	<p>Fixed term or specified task – an employee engaged under a contract of employment for a specified period of time or for a specified task (unless the main purpose of such engagement was to avoid the employer's obligations under the termination provisions).</p> <p>Probationary – an employee serving a period of probation or qualifying period, the duration of which is <u>determined in advance</u>, and is three months or less, or otherwise reasonable given the nature and circumstances of the employment.</p> <p>Casuals – a casual employee engaged for a short period. (Note: a casual employee is not considered to be engaged for a short period if that person was employed by a particular employer on a regular and systematic basis over a period of at least 12 months and the employee had a reasonable expectation of continuing employment by the employer.)</p>

Trainees – a trainee whose employment under a National Training Wage traineeship or an approved traineeship (as defined in s.170CD(1)) is for a specified period, or is, for any other reason, limited to the duration of the agreement.

Non-award, high-income earner – an employee not employed under award conditions whose remuneration exceeds \$90,400 per year (or such amount as altered annually by indexation).

Unlawful termination		
	Discrimination	Minimum notice provisions
Relevant section of the Act or regulation	s.170CK Regulation 30BB	s.170CM, s.170CBA Regulation 30BB
Who can apply?	All employees nationally. A qualifying period of employment is not required (see Commission decision PR942259).	All employees nationally – subject to the exclusions set out below. A qualifying period of employment is not required (see Commission decision PR942259).
Who is excluded?	No excluded classes of employees.	<p>Same classes of employees excluded as in the unfair dismissal table above.</p> <p>In addition, the following classes of employees are also excluded:</p> <p>All other casuals – including long-term casuals;</p> <p>Daily hire employees – in the building and construction industry;</p> <p>Daily hire employees – in the meat industry (in connection with livestock slaughter);</p> <p>Weekly hire employees – in the meat industry, whose termination is determined solely by seasonal factors;</p>

ATTACHMENT C

ACTPS Certified Agreements 2004 – 2007 – Probation

Clause 19 Probation

- 19.1 The provisions of the PSM Act and of relevant awards concerning employment on probation will continue to apply, as modified by clauses 19.2 to 19.8.
- 19.2 Where a person is appointed on probation under the PSM Act, the period of probation will be 3 months, or longer if this is reasonable, having regard to the nature and circumstances of the employment. For the purposes of this Agreement, the reference in section 70(3) of the PSM Act to 6 months will be read as 3 months.
- 19.3 At the time of an offer of employment on probation, the Agency will inform the employee in writing of the period of probation that will apply.
- 19.4 At the time a person is appointed on probation, the Agency will inform the person in writing of the criteria and objectives to be met for the appointment to be confirmed.
- 19.5 Probation will provide a supportive process for the employee during which mutual evaluation and decisions about permanent appointment can be made.
- 19.6 The first formal assessment of an employee during the probationary period will occur within one month of the appointment on probation. The Agency must provide the employee with a copy of the assessment report. The employee must be provided with an opportunity to respond within seven working days. If the assessment is sufficiently negative for the Supervisor/Manager to consider recommending that the Delegate terminate the employment, that opinion will be included in the assessment report.
- 19.7 The second formal assessment of an employee during the probationary period will occur within two months of the appointment on probation. The Agency must provide the employee with a copy of the assessment report. The employee must be provided with an opportunity to respond within seven working days. If the assessment is sufficiently negative for the supervisor/manager to consider recommending that the Delegate terminate the employment, that opinion will be included in the assessment report.
- 19.8 Where the period of probation is longer than 3 months, the assessment reviews should be carried at intervals of one month for the first two months and then on a regular basis. The timing of these assessment reviews will be determined in advance and notified to the employee at the time of appointment on probation.

Endnotes

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- ¹ See clause 4 of the ACTPS certified agreements. Note also that awards and certified agreements are subject to the operation of the WR Act – R McCarthy v NT Friendship & Support Inc AIRC Print PR 925075 at [27].
- ² Notes: (1) See in particular the decision by Smith C in CPSU v Vodafone – AIRC Print PR911257 which emphasised the need for the employer to engage in genuine consultations where redundancies are likely in the organisation. 2. The redeployment/redundancy provisions in Section N of the ACTPS certified agreements do not apply to temporary and casual employees or to employees on probation.
- ³ A list of awards that apply in an agency is contained in clause 4.5 of the ACTPS certified agreements.
- ⁴ See for example, clause 14.1 of the General Service Officers and Related Classifications (ACTPS) Award 2001 AW809074 (GSO Award) and clause 14A2.1 of the CPSU Award 1998 AW775437 (CPSU Award.).
- ⁵ O'Hara v State of Victoria AIRC Print PR942259
- ⁶ For an illustration of how this is applied see Elena Amerikow v Tactiplan Pty Ltd AIRC Print PR929975 at [23].
- ⁷ McCarthy (1) at paragraph 25.
- ⁸ See for example Wilkinson v Skippers Aviation AIRC Print 903635 and Roscoe Jewell v Australasian Correctional Management Pty Ltd AIRC Print PR927056.
- ⁹ Notes: 1. A similar provision to clause 19.2 applies to ACTPS medical officers and to ACTPS nurses under the Interim Medical Officers Agreement 2004–2005 and the ACT Public Sector Nursing Staff Agreement 2004–2007 respectively. 2. There is provision for a 12 month period of probation for most ACTPS teachers under the ACT Department of Education and Training Teaching Staff Certified Agreement 2004–2006. 3. There is provision for a 7 month probation period for ACT firefighters under the ACT Fire Brigade Certified Agreement 2004 –2006.
- ¹⁰ CFMEU & Hornett v Borg Manufacturing Pty Ltd (1997) 72 IR 263.
- ¹¹ Nicolson v Heaven & Earth Gallery Pty Ltd (1994) 1 IRCR 199.
- ¹² Rodjak v British Aerospace Flight Training (Australia) Pty Ltd AIRC Print S6255; Justin Lightbody v Centrelink AIRC Print 939825.
- ¹³ Karella Mitchell v Symphony Holdings Pty Ltd AIRC Print PR912909.
- ¹⁴ Potter v ACT Federal Court 17 September 1997, unreported.
- ¹⁵ Dai Le v Australian Broadcasting Corporation (1995) 38 AILR 3–144; Justin Lightbody v Centrelink AIRC Print PR939825.
- ¹⁶ Mann v State Rail Authority [1999] FCA 273; T. K. Sankar v Health Insurance Commission AIRC Print PR945432 at [8].
- ¹⁷ Pisa and Merritt v Country Fire Authority [AIRC Print TO960].
- ¹⁸ Karella Mitchell v Symphony Holdings Pty Ltd [AIRC Print PR912909]; Marks v Department of Defence (1998) 43 AILR 3–781.
- ¹⁹ Villaflor v Peddle Thorp Architects (2000) 48 AILR 4–334 (76).
- ²⁰ Pamela T Wilson v ATO [AIRC Print PR913265].
- ²¹ Pamela T Wilson (20).
- ²² Notes: 1. The following periods of probation in public sector employment were **deemed not reasonable** in the application of WR Act s170CBA or the previous Regulation 30B:
- a 6-month probation period for a base grade clerical employee was not reasonable – Karella Mitchell, Marks (18);
 - a 6-month period of probation for a customer service officer was not reasonable – Campbell v Centrelink AIRC Print PR914692;
 - a 6-month probation period for a corrections officer was not reasonable given that the person had undertaken the same work over the previous 6 months under different earlier employment contracts – Warrick David Dunstan v Department of Justice AIRC Print PR 926337;
 - a 4-year probation period for an ambulance officer to complete a formal training course was not reasonable – Ballard v ACT Ambulance Service AIRC Print PR910100.
2. The following periods of probation in public sector employment were **deemed reasonable** in the application of WR Act s170CBA or the previous Regulation 30B:

- a 2-year probation period for an ASO 2 officer was reasonable given the unusual circumstances and characteristics of the employee at the time of appointment – Potter (14);
- a 6-month probation period was reasonable for career fire fighters, despite the fact that the employees had prior fire-fighting experience as volunteers and held various fire-fighting qualifications – Pisa and Merritt (17);
- an 8-month probation period for a psychologist appointed to a professional officer classification in the APS was reasonable – Williams v Centrelink AIRC Print PRS4669;
- a 15-month probation period for a medical practitioner, with a maximum extension to 2 years, was reasonable – Ealing v Department of Veteran's Affairs (1998) 44 AILR 3-845;
- a 6-month probation period for a senior information technology officer Class C was reasonable to assess suitability and capacity for the employee to undertake the particular work required by the employee, despite relevant prior IT work experience – T. K. Sankar v Health Insurance Commission AIRC Print PR945432;
- a provision for a Centrelink employee that a maximum probation period may be extended in the event that more than 1 months leave was taken in that period was reasonable – Justin Lightbody(12).

²³ Qantas Airways Ltd v Fetz, Duhigg & Hennessy (1998) 84 IR 52; Liam Hodgson v Hungry Jack's Pty Ltd AIRC Print PR917195.

²⁴ Similar requirements are contained in s108 PSM Act.

²⁵ Potts v Rail Infrastructure Corporation [AIRC Print PR910027]; C G Henderson v John Holland Pty Ltd [AIRC Print PR 917230].

²⁶ Stuart Stocker v NT Department of the Attorney-General [AIRC Print 916930]; Primus v State Rail (Passenger Fleet Maintenance) (1996) 46 AILR 4-140.

²⁷ O'Hara v Victorian Department of Education and Training AIRC Print PR942259; Anderson v Umbakumba Community Council (1994) 126 ALR 121.

²⁸ Jeannie Ledington v University of Sunshine Coast AIRC Print PR937250 – see paragraph 34 for a summary of relevant decisions by Hampton DP in Ogilvie v Walkukurlangu Artists Aboriginal Association Incorporated AIRC Print PR921908 about the right to terminate provisions in contracts and their effect.

²⁹ University of Newcastle v Nikulin (1996) 46 AILR 4-151; National Gallery of Australia v Jane Douglas [1999] ACTSC 79.

³⁰ Fisher v Edith Cowan University (1997) 41 AILR 3-540.

³¹ Notes: 1. Examples of cases where contracts **were held to be ongoing** – Hoare v Curtin University of Technology (1999) 45 AILR 4-067; D'Lima v Board of Management/Princess Margaret Hospital (1995) 64 IR 19; Minister for Health v Ferry (1996) 65 IR 374.

2. Examples of cases where contracts **were held not to be ongoing** – Krajewska v University of Adelaide (1993) SAIR 515; Fisher (31).

³² Australian Municipal, Administrative & Clerical Services Union v Auscript [AIRC Print P9721].

³³ See in particular clause 16 of the GSO Award.

³⁴ See for example clause 14A.5 of the CPSU Award and clause 16.3.1 of the GSO Award.

³⁵ See for example the Auscript decision [34].

³⁶ For examples where the requirement to have been engaged by a "particular employer" was decisive see Murray v Sukkar Investments t/as Burwood Motel AIRC Print S2990 and Aysun Salih v Dajoni Pty Ltd AIRC Print 951603.

³⁷ B Nightingale v Little Legends Childcare AIRC Print PR948229 at paragraph 9. The exclusion provisions in s170CBA relating to casual employees are therefore broader in their scope than those set out in the previous Regulation 30B, which s170CBA replaces.

³⁸ This is illustrated in Nightingale (40) when the initial issue addressed by the Full Bench of the AIRC was whether it was open to the AIRC at the initial proceedings to find that the person had been a casual employee, which the Full Bench so held.

³⁹ Note also that different requirements may apply in relation to casual employees under, for example taxation, workers compensation and superannuation guarantee legislation.

⁴⁰ Auscript (38).

⁴¹ Cetin v Ripon Pty Ltd t/as Parkview Hotel AIRC Print PR938639 at paragraph 20.

⁴² CPSU v State of Victoria [2000] FCA 14.

⁴³ Notes: 1. Examples of cases where "casual employees" were held to have an **ongoing employment relationship** – Auscript (34); Ryde-Eastwood Leagues Club (1995) AILR 5-010 and Lucas v Bungalow Bowling and Recreation Club Ltd (1995) AILR 5-068.

2. Examples of cases where "casual employees" were held **not to have an ongoing employment relationship** – Markwell Pacific Ltd v AWU FIME Amalgamated Union NSW (1995) AILR 5-044; Bluesuites Pty Ltd v Graham [AIRC Print SO282].

⁴⁴ Ransom v Arthur Anderson 1999 AILR 4-063; D Grey v Ardmona Foods [AIRC Print TO994].

⁴⁵ Licensed Clubs Association of Victoria v Higgins (1988) 4 V.I.R. 43.

⁴⁶ For an illustration of how this factor has been applied see Hayes v Marine Harvest AIRC Print PR954809.

⁴⁷ The ATO has published various Rulings and draft Rulings on the issues addressed in this Guide in the context of taxation and superannuation legislation. See for example (1) TR2004/14 – Income Tax: Pay As You Go – withholding from payments to employees and (2) SGR 2004/D1 Draft Superannuation Guarantee Ruling – Superannuation guarantee: who is an employee?

⁴⁸ The outcomes of a case may vary depending on the legislative context involved. For the purposes of this Guide most of the decisions cited below arose from applications made under the termination of employment provisions of the WR Act.

⁴⁹ Notes: 1. The description of the relevant tests that has been adopted and applied in several recent decisions of the AIRC is the description set out in the decision in May 2003 of a Full Bench of the AIRC in Abdalla, Abraham v Viewdaze Pty Ltd t/as Malta Travel AIRC Print 927971 – see paragraph 34.

2. In developing these tests the Full Bench stated that it took into account the decision of the High Court in Hollis v Vabu (2001) 207 CLR 21.

3. For examples of the application of the Abdalla tests see Josie Bianchi v Staff Aid Services AIRC Print 945924 at [23 – 28] and the decision of Williams SDP in ACT Visiting Medical Officers Association AIRC Print PR946319 at [65].

⁵⁰ Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16; Damevski v Guidice [2003] FCAFC 252.

⁵¹ Hollis v Vabu Pty Ltd (2001) HCA 44.

⁵² Zuijs v Worth Brothers Pty Ltd (1955) 93 CLR 561.

⁵³ Notes: 1. This was expressed in Abdalla [52] as follows: "The ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business on his or her own: that is, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own".

2. See also Sammartino v Mayne Nickless Express AIRC Print S6212.

⁵⁴ Hollis (54).

⁵⁵ Ferguson v John Dawson and Partners (Contractors) Ltd (1976) 3 All ER 817.

⁵⁶ Notes: 1. For an illustration of this see Building Workers Industrial Union & Ors v Odco Pty Ltd (1991) FCR 104.

2. For an explanation of the weight given to the intention of the parties as expressed in the contract and to their subsequent conduct see Abdalla (52) at point (3) of paragraph 34.

⁵⁷ Scout Association of Australia v Australian Workers' Union 1987 AILR 380.

⁵⁸ Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539.

⁵⁹ Stevens (53) – Mason J.

⁶⁰ Anthony Zammit v Blue Suits Pty Ltd [AIRC Print PR 918845].

⁶¹ Notes: 1. In some circumstances it has been held that the person involved in providing the services was an independent contractor and not an employee either of the labour hire company or the organisation being provided the services; see Building Workers Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104.

2. In another case, the organisation receiving the services was held to have been an employee of the organisation receiving the services; see Damevski v Guidice [2003] FCAFC 252.

3. In a further case, the provider of the services was held to be an employee of the labour hire company; see Josie Bianchi v Staff Aid Services AIRC Print 945924. 4. The future regulation of labour hire and independent contractor arrangements under federal law was referred to the Commonwealth Parliament Committee on Employment, Workplace Relations and Workforce Participation in January 2005.

⁶² The circumstances in *Arends v Department of Defence* AIRC Print PR935265 provides an illustration of this. In that case a person who had been engaged by the Department as a radiologist over on an ongoing basis for about 8 years was found to be an employee and therefore possibly entitled to applicable long service leave and other benefits.

NOTE: Current decisions by the AIRC on issues raised in this Guide can be found on the AIRC website – www.airc.gov.au.