



# **Employment Contracts - Starting the Employment Relationship**

**July 2021 Edition**

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This Guide is not a substitute for independent professional advice, and appropriate professional advice should be sought relevant to the circumstances prior to acting upon information conveyed in this Guide.

# 1 Introduction

## Preface to the July 2021 Edition

The *Employment Contracts – Starting the Employment Relationship* guide provides a summary of the principles of establishing a contract of employment, in the context of Australian industrial law as it stands in July 2021 and takes account of contemporary Human Resource Management practice.

This Guide provides templates for various types of contracts and letters relevant to establishing and varying the employment relationship. In addition, we have provided some brief commentary to explain some of the issues around specific aspects of employment contracts.

Before using the material in this Guide, it is important to be aware of some general features of employment contracts.

- Every employee has a contract of employment, as a matter of common law. A common law contract can be verbal or in writing. Simply verbally offering someone a job and having them accept the offer and turn up and start to perform work is sufficient to establish a common law contract of employment even if it has never been recorded in writing.
- We strongly recommend that contracts should be written, in order to avoid disputes and misunderstandings.
- The contract of employment sits alongside a range of statutory rights and responsibilities such as the *National Employment Standards* (NES), modern awards, enterprise agreements and other legislation (e.g. superannuation, anti-discrimination, occupational health and safety). A provision in a common law contract which is less favourable to the employee than their minimum statutory entitlements is unlawful and is therefore not enforceable. So, you cannot ‘contract out of’ the award. For example, even if both the employer and employee agree in a contract that the rate of pay will be less than the relevant award rate, that agreement is not enforceable, and the employer is still required to pay the award minimum.
- Contracts for award-based employees in this sector don’t usually need to be long, a two- or three-page contract is often sufficient.

In the not-for-profit community sector, the terms and conditions of employment for most employees, including many managers, are regulated by a modern award (or by an enterprise agreement). As a result, in this sector the contract usually does not have to be very complicated. Most contracts simply need to cover a few key elements. However, executive level employees and award free employees may need to have more detail added.

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## 2 How to use this guide

This Guide has been produced for employers who members of Jobs Australia. Jobs Australia members are entitled to free phone advice on industrial issues as part of our membership service.

**This Guide is intended to supplement the free, more detailed advice that is available by contacting your Workplace Relations Adviser at Jobs Australia on our freecall number - 1800 331 915**

If you are drafting or reviewing your contracts, you can use this Guide as a starting point for producing drafts and identifying issues which may need further consideration. But remember that you can get further free advice to ensure that the contracts you use best suit the specific needs of your organisation.

This Guide provides some standard template letters and contracts which can be adapted to the needs of most not-for-profit community organisations. In addition, a range of sample optional clauses are provided which are less commonly needed but may be useful in particular circumstances.

**Simply copy and paste the relevant template from this Word document, then amend to suit your individual needs.**

**In each of the templates, any text that is in *italics* is intended to be replaced with the relevant detail that applies to your organisation.**

**Part 3 (Employment Type)** is the starting point and provides information to assist employers to establish the appropriate employment type in each case. Should the position being filled be a short-term contract, casual employee or permanent full or part-time employee? There are some important factors to consider. All of the options are legal but have their pros and cons depending on the circumstances.

**Part 4 (The Basic Contract)** contains general information about the commencement of the employment relationship. For most employees where there is an award or enterprise agreement in place, simply use the template provided in Part 6. This template contains the key elements which will ensure clarity in the employment relationship. Part 4 also provides advice on other documentation that is commonly relevant to the commencement of any employment relationship.

In **Part 9** a variety of 'optional extras' clauses are provided, together with some comments about when to use them and potential issues that might arise.

**Part 10** provides advice on how to modify the standard contract framework to deal with certain non-standard situations. These include casuals, fixed-term contracts, award free employees, and senior managers.

### **Western Australia**

This Guide assumes that the *Fair Work Act 2009* (Cth) applies. Since 1 January 2010 this has been the case for all employers in the not-for-profit community sector except for those in Western Australia who are not constitutional trading corporations and are therefore covered by the state IR system. The principles in this guide are applicable but some details may differ. Most of our WA members are constitutional corporations and covered by the *Fair Work Act*, but there can be exceptions. If in doubt, contact your WR Adviser at Jobs Australia.

## 3 Employment Type

Before commencing employment, the employer should consider the appropriate type of employment. There are several types of contracts for engaging workers:

- Employee
  - Full-time ongoing
  - Part-time ongoing
  - Fixed Term Contract – Full or Part-time
  - Casual
- Individual Contractor

### 3.1 Choosing the optimum type of employment

#### a) Full-Time ongoing

A full-time employee usually works 38 hours a week (or an average of 38 hours per week over a specified period).

#### b) Part-time ongoing

A part-time employee has similar rights to a fulltime employee – they are guaranteed an number of hours per week (less than 38). Under most modern awards part-time employees are guaranteed only their contracted hours – but they can work beyond those hours (up to 38 in a week) by mutual agreement or as additional hours for either their ordinary rate or at overtime penalties, depending on the particular award.

#### c) Fixed Term Contract – Full or Part-time

A fixed term contract is well suited to jobs that have a known end date, such as to cover maternity leave or being used for a specific project with a set time frame.

#### d) Casual

Casual employees are employed to work irregular hours. Casual employees have no leave entitlements and have no responsibility to accept particular shifts or work a certain number of hours per week.

Casuals who have been employed for more than 12 months on a regular and systematic basis and with the expectation of the work continuing are ‘long-term casuals’ who are protected from unfair dismissal similar to the protections that apply to permanent employees, as well as other entitlements such as superannuation, and unpaid parental/ carer’s leave.

Under the *Fair Work Act*, a casual employee after 12 months with a regular and systematic pattern of work may exercise the right to convert to permanent part-time after 12 months and may also elect not to convert and remain casual. The employer is required to keep a record as evidence whether eligible casual employees have elected to convert.

It is important to ensure that employees are employed under the type of employment that best suits the nature of the work to be performed

#### e) Independent Contractor

An independent contractor invoices the employer for their work, they work with little or no supervision, and are employed to undertake a certain task.

The Fair Work Ombudsman describes an independent contractor as follows: *'Independent contractors run their own business. They usually negotiate their own fees and working arrangements and can work for more than one client at a time.'*<sup>1</sup>

Genuine independent contractors are not employees.

However, identifying whether the relationship is employment or contracting involves an objective test based on a range of indicators. Simply having an ABN and supplying invoices is not sufficient to show that it is not actually an employee relationship. Advice should be sought before engaging workers as independent contractors.

The following table presents a summary of the some of the HR and IR pros and cons for each of the contract types. In particular, the choice of strategy around contracts can have significant implications for strategies around recruitment and retention.

Contract type	Pros	Cons
<b>Permanent</b>	<ul style="list-style-type: none"> <li>Attract better pool of candidates</li> <li>Aligns with HR strategy for high performance and commitment</li> </ul>	<ul style="list-style-type: none"> <li>Redundancy costs</li> <li>Termination process</li> <li>Limits to flexibility of hours</li> </ul>
<b>Fixed term</b>	<ul style="list-style-type: none"> <li>No cost when contract expires</li> <li>Clarity where the work is for a clearly defined task or period</li> </ul>	<ul style="list-style-type: none"> <li>Restricts pool of candidates</li> <li>Over-use can undermine retention strategy and increase costs due to staff turnover</li> <li>Industrial risks if over-used</li> </ul>
<b>Casual</b>	<ul style="list-style-type: none"> <li>Easy to vary hours and end engagement – in the short term</li> <li>Manage peaks and troughs</li> </ul>	<ul style="list-style-type: none"> <li>Cost of loading – diminishing return over long-term</li> <li>May only be available for 12 months period subject to pattern of work cycle</li> <li>Not easily aligned with HR strategy for high commitment</li> </ul>
<b>Independent contractor</b>	<ul style="list-style-type: none"> <li>Flexible, easy to end contract</li> <li>Contractor assumes all risk</li> <li>Access outside expertise for specific tasks</li> </ul>	<ul style="list-style-type: none"> <li>Contract may be challenged if the terms of engagement align with an employment relationship.</li> </ul>

<sup>1</sup> <https://www.fairwork.gov.au/find-help-for/independent-contractors/6/11/15>

## 4 The Basic Contract

On commencement of employment, every employee should be provided with a written contract of employment. It is advisable to ensure that both the employee and the employer sign the contract before the commencement date of employment. If a new employee is not willing to sign the contract, it means there is a problem that needs to be addressed before commencing the employment relationship.

The contract is usually attached to a letter of offer. In addition, a Position Description and other documents and forms will also typically need to be provided to a new employee on their first day, or at least during their first week.

This section provides templates for:

- A letter of offer
- A standard contract – this is a basic framework but will be sufficient for many positions
- A standard position description
- A variation to a contract

Other documents that may need to be provided to new employees include, but are not limited to:

- Copies of, or access to, the relevant Award or Agreement and the organisation's Policies and Procedures;
- Tax forms;
- Choice of superannuation form;
- Induction material;
- The *Fair Work Information Statement* (except for employers covered by the state system in WA). This can be downloaded from [www.fairwork.gov.au](http://www.fairwork.gov.au).

### 4.1 A note about “probation”

Probation is intended as an opportunity for both the employer and employee to assess how well the employee and the job match, and to be able to end the relationship easily if things are not working. It is advisable to use the probation period to actively assist the employee to settle into the new job and to identify potential problems early so they can be addressed before becoming intractable. If probation is used, there should be a policy that there be formal reviews every month or so to assist the employee to adjust to the requirements of their new job.

### 4.2 Minimum Employment Period

For all employers covered by the *Fair Work Act*, there is a 6-month minimum employment period before an employee is protected from unfair dismissal. (This is extended to 12 months for employers with fewer than 15 employees by head count<sup>2</sup>) This minimum employment period applies regardless of whether a probation period is established.

**NOTE: There is no reference to probation in the *Fair Work Act* and the minimum employment period of 6 or 12 months serves as a protection for employers from unfair dismissal. Therefore, there is no need to include a probation period for the purpose of being protected from unfair dismissal claims however probation remains an important process from a human resource management perspective.**

The WA IR system retains ‘probation’ as a matter that is relevant to consideration of whether an unfair dismissal claim can proceed.

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<sup>2</sup> Small Business Fair Dismissal Code

### 4.3 Unfair dismissal and other claims

The minimum employment period (and, in the WA state system, probation) excludes a dismissed employee from making unfair dismissal claims. Such an employee might still lodge a claim, but the employer is able to apply to have the claim dismissed.

However, employees are not prevented from making other claims relating to their termination, for example if they believe termination was for a discriminatory reason prohibited by relevant legislation. The types of claims that can be made by probationary employees in some circumstances include unlawful termination, anti-discrimination and equal employment opportunity, and breach of contract. The risk of alternative claims provides further reason for using proper procedures and ensuring a record is kept about performance management and termination of employment during probation.

### 4.4 Minimum Employment Period only for new employees

The exemption from unfair dismissal claims during the minimum employment period only applies at the beginning of the employment relationship. In other words, an existing employee who is transferred or promoted to a new role does not commence a new minimum employment period. An exception might be where the new position is an entirely different type of position such as a short-term casual employee appointed to a fulltime permanent position in a different work area.

Of course, even in the event of a routine transfer or promotion it might still be prudent to follow a probation type of process involving induction and regular feedback in the interests of assisting the employee to adjust to their new role with minimal difficulty.

### 4.5 Part-time contracts

Some awards require contract for part-time employment to specify the hours of work. For example, the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHCADS) at clause 10.3 (c) requires the contract to reflect agreement on:

*'...a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day...'*

An example of the type of wording that would satisfy that requirement would be:

*"Hours of Work: 18 hours per week, to be worked 9am – 3.30pm including meal break, Monday to Wednesday"*

Some jobs require more flexibility in hours of work. A shiftworker might be employed on a roster that changes from month to month. In that case the following wording would comply with the award:

*Your minimum ordinary hours will be 15.2 hours (2 days) per week.*

- a) Your ordinary hours will be worked between Monday to Sunday, and will initially be set as Monday and Tuesday upon commencement of employment. The days worked will vary across the week in accordance with a monthly roster set two weeks in advance.*
- b) Your initial roster is attached and shows the starting and finishing times for each day of work for the first 4 weeks of your employment.*
- c) You may be required to work reasonable additional hours to perform your duties.*
- d) It is agreed that you will not be rostered to work on Fridays or Saturdays (optional example where the employee is not available certain days of the week).*

Finally, an important element of most award provisions regarding part-time employment is 'reasonably predictable' hours of work. This does not prevent the employer from requiring an employee to work

reasonable additional hours of work from time to time, or from mutually agreeing to different hours as the need arises.

**The Fair Work Commission conduct a review of modern awards every 4 years (with the last review in 2018) and this guide will be updated if there are any changes applicable to contracts of employment.**

## 5 Sample letter of offer

Dear *(name of applicant)*

We are pleased to offer you the position of *(name of position)* with our organisation to commence on the *(date of commencement of employment)*. You will initially report to the *Job Title of Supervisor*.

We have enclosed the contract of employment and Position Description. The duties of the position are those described in the Position Description with more detailed duties to be arranged with your supervisor in line with the requirements of the organisation and broadly consistent with your role. By signing the contract, you will be accepting this offer and the conditions of employment offered and agreeing to carry out the duties as described in the Position Description.

Please note this appointment is subject to a minimum employment period in accordance with the *Fair Work Act*.

The terms and conditions of employment are set out in the *(name of Award/Agreement)* and the policies of the organisation. Copies of these documents are available in the office. Please check these documents to ensure you are fully aware of the terms and conditions of employment. Please feel free to contact me with any questions about the terms and conditions of employment. *Name of Organisation* can offer a salary packaging option, and your supervisor will advise you how to make the necessary arrangements if you choose to take that option.

To indicate your acceptance of this offer, please sign the enclosed contract of employment and return it to *(name of manager)* before the commencement of employment. A copy will be provided to you for your records.

I look forward to working with you.

Yours sincerely

Chairperson (or Manager)  
*(date)*

## 6 Template for standard contract of employment

(NAME OF ORGANISATION)

### Contract of Employment

NAME: \_\_\_\_\_

CLASSIFICATION: \_\_\_\_\_

SALARY \_\_\_\_\_

- Your salary will be paid fortnightly into a bank account of your choice.

TIME FRACTION/HOURS per WEEK<sup>3</sup>: \_\_\_\_\_

ORDINARY HOURS of DUTY: \_\_\_\_\_

DATE of COMMENCEMENT: \_\_\_\_\_

### PROBATIONARY EMPLOYMENT:

- The employment is subject to a six-month probationary period and formal performance reviews may be conducted during this period.

### PRIMARY FUNCTIONS:

- The duties are those described in the approved position description, a copy of which has been made available to you. You may be required to perform other duties as directed from time to time to suit organisational requirements and which are broadly consistent with your role.
- *List main functions as set out in "Purpose and Function" section of the Position Description.*

### CONDITIONS of EMPLOYMENT:

#### General

- The terms and conditions of employment are those applying under the (*insert either the name of the Award or of the relevant enterprise agreement*) in conjunction with the National Employment Standards. The NES and Award/Agreement are not incorporated into this contract as the employer is already required to provide these terms and conditions to their employees.
- All employees of (*insert name of organisation*) are bound by the properly approved policies and procedures of the organisation, as promulgated and varied from time to time. The policies and procedures are not incorporated into this contract.
- Your position is initially based at the *Address* office, but you may be required to work at other sites during the course of your employment.

<sup>3</sup> For part-time employees, see the discussion on page 9

- **Notice of termination.** Following the probation period, your employment may be terminated by either party by a period of notice as specified by the NES and the *Award/Agreement*. This does not affect the employer’s right to terminate your employment without notice where you are found to have engaged in serious and wilful misconduct.

**Specific (optional)**

*This heading can be used for adding any provisions not covered by the above general conditions. Several optional specific clauses are set out in Section 2 of this Guide. They are common clauses which may be useful but are not necessary for every organisation. Delete this **Specific** heading if you do not need to add additional clauses.*

Up to date copies of the award, conditions of employment, policies and procedures are *held in the office of (insert name of organisation)/available on the intranet.*

**I have read and understood the contents of this contract of employment and in signing the contract agree to be bound by the terms and conditions contained within the Contract.**

**Signature of Employee:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Signature of Employer:** \_\_\_\_\_ **Date:** \_\_\_\_\_

## 7 Position descriptions

The position description (PD) fulfils several important functions. A well drafted PD should provide an accurate overview of the key responsibilities and expectations of the job. This is important for potential applicants for the position, the person appointed to the role, and the supervisor. The PD is also a key document for future performance appraisal and planning, and for workforce planning.

As is the case with contracts, the document needs to be accurate but succinct and in plain English.

A PD which overstates the requirements of the position might deter applicants who wrongly feel under qualified, and attract over qualified applicants who are unlikely to stay for long if the position holds no challenges for them. An overstated PD could also lead to reclassification claims in the future.

On the other hand, a PD which understates the requirements of the role may make it difficult to ensure the employee performs at the level that is required by the organisation. Potential suitable applicants for the position may also be put off by what seems an undemanding position. Also, understating the requirements might attract other applicants who are ill equipped to fill the role the organisation really needs.

The PD needs to be comprehensive enough to ensure that the full scope of the position is clearly understood. However, just as importantly, PDs need to be reviewed on a regular basis to ensure they continue to reflect the organisation's needs, as well as reflecting any agreed changes to duties which might reflect professional development plans for the employee.

Generally, minor changes driven by organisational needs simply require consultation with the employee before finalising. There should be enough latitude in the PD to permit management to direct the employee to do things slightly differently, or to change some tasks, from time to time.

However, the PD is also part of the employment contract. Therefore, any proposed changes which would fundamentally alter the nature of the job cannot be unilaterally imposed. For example, it may be OK to amend a community development worker's PD to reflect an expectation that all staff take it in turns to tidy up the staff room. But it would not be OK to impose a requirement that a community development worker stop doing community development work and start doing cleaning full time.

Proposed major changes which are not agreed to by the employee may require formal restructuring and potential redundancy processes to be initiated. Employers should contact Jobs Australia for further advice where major change is proposed, before finalising any decisions.

## 7.1 Template position description

**POSITION:** Job Title  
**REPORTS TO:** Executive Officer  
**HOURS:** (Full-time) 38 hours per week  
**CLASSIFICATION:** Level xx

### **POSITION CONTEXT:**

For example,

The *Name of Employer* is a not-for-profit organisation providing *outline of the type of programs/services delivered by the organisation*. A statement about the organisation's values or philosophy could also be included in this section.

*Name of Employer* is managed by an elected Board of Directors.

There are xx members of paid staff, and this position is part of the *Name of Program* team.

### **PURPOSE AND FUNCTION:**

*Outline main objective(s) of the program/service/organisation*. The *Job Title* is responsible for *list main broad areas of responsibility*.

This position requires a background in *eg community development/ working with unemployed people etc* and requires abilities in *eg creative problem solving and in managing a demanding workload*.

### **MAIN DUTIES AND RESPONSIBILITIES:**

The *Job Title* will undertake the following duties:

#### **General Responsibilities**

- *Itemise general responsibilities*
- *For example, Work within Name of Organisations' philosophy and objectives*
- *Include supervisory responsibilities, if applicable*
- Performance of other duties as required.

#### **Specific Responsibilities**

*Heading 1 (e.g., Case work)*

- 
- 

*Heading 2 (e.g. Administrative duties)*

- 
- 
-

Heading 3 etc

- 
- 

### **Organizational Management and Teamwork**

For example,

- Participate in staff meetings and staff development workshops
- Produce reports and issues papers for the Board and subcommittees of the Board, as directed by the Executive Officer.

### **OTHER RELATIONSHIPS**

List any significant other relationships relevant to this position, for example, clients, external organisations etc

### **PHYSICAL DEMANDS & WORK ENVIRONMENT** (optional)

This section can be used to summarise physical issues which might have occupational health and safety implications. The purpose is to ensure that the successful applicant for the position clearly understands the demands and environment so that they are able to inform the employer if any reasonable modifications may be needed in order to accommodate a disability or other relevant attribute under equal opportunity law.

### **SELECTION CRITERIA:**

Essential

- 
- 

Desirable

- 
- 

### **CONDITIONS OF EMPLOYMENT:**

- Terms and conditions of employment will be based on the *Name of award or agreement*.
- *Other specific conditions relevant to the position description – e.g. shiftwork*

**Prepared by:**

**Approved by:**

**Date:**

## 8 Varying the contract

Changed circumstances can often lead the employer and employee to agree to change some of the terms of the original contract of employment. A common example might be a temporary, or permanent, change in the ordinary hours – such as moving from part time employment to full time employment. It makes sense that the change should be recorded in writing to avoid misunderstandings and disputes. However, it is not always necessary to produce a completely new contract if just one or two terms are changing.

### 8.1 Sample letter to vary the contract

Dear

#### **Contract Variation**

We confirm that you have accepted an extension of hours and duties for the period [*for example 30/4/21-31/10/21.*] This increase in hours is to cover added responsibilities [*see attached duty statement*] during the period that the [*Co-ordinator is absent on maternity leave/Co-ordinator position remains vacant*].

Upon the expiration of this contract variation on [*1/6/21*] you will return to your previous contracted hours of [*number of core hours*] and your duties as per [*title*] job description.

If you accept our offer, please sign below and return signed copy to the Executive Officer by [*date*].

Signed  
Executive Officer  
Date

Signed  
Employee  
Date

## 9 Optional Clauses for Contracts

**NOTE:** These clauses are only sometimes necessary because they are usually already covered by a relevant policy, award or agreement. But some organisations may find it useful to include some of the following clauses to highlight specific conditions or policies, or to expand on provisions of the relevant award or agreement.

The clauses can simply be copied and pasted into the appropriate place in the template contract in Section 1. We have provided some comments about how and when to use these clauses. The suggested clauses in this section are not exhaustive. If there is an issue that you think needs to be covered in a contract that is not include in this Guide, contact your WR Adviser.

Optional Clause	Comments
<p><b>Superannuation.</b> You will be entitled to an employer contribution to the superannuation fund of your choice, in accordance with the relevant <i>legislation/award</i>. If you do not choose a fund, the default fund is <i>xyz</i>.</p>	
<p><b>Personal Leave.</b> You will be entitled to paid sick leave, and paid and unpaid carers leave in accordance with the <i>NES/Agreement</i>, and subject to the provision of appropriate documentation as required in accordance with our policy. You will be required as soon as possible on each occasion, and at least within 24 hours, to inform the organisation of your inability to attend, and as far as practicable the estimated duration of absence.</p>	<p>This is normally comprehensively covered by the <i>NES</i> and policy. But if there is some specific policy aspect you wish to highlight it could be done here.</p>
<p><b>Salary Packaging.</b> <i>Name of organisation</i> is a Public Benevolent Institution (PBI) and so can offer you the option of packaging your salary into a salary component and a fringe benefits component (capped up to a maximum set by legislation, for not-for-profit employees is currently \$15,900 grossed up). This option will continue to apply whilst <i>Name of organisation</i> continues to have PBI status and has exemption from Fringe Benefits Tax within prescribed limits. Salary packaging is not compulsory and is offered at the employer's discretion. The Salary Packaging Policy sets out the arrangements in more detail.</p>	<p>The detail of salary packaging arrangements should be set out in a separate salary packaging agreement for each employee.</p>
<p><b>Return of Property.</b> On termination, you are to return to the organisation all property of the organisation under your control or in your possession.</p>	
<p><b>Confidentiality.</b> You will not either during the employment or at any time thereafter, except in the proper course of your duties under the employment or as required by law, or by the Employer, use or disclose to any person any confidential</p>	<p>Most organisations already have policies around confidentiality, particularly in relation to clients. The general clause in the contract regarding the application of policies and</p>

<p>information, and will use your best endeavours to prevent the unauthorised use or disclosure of any such information by third parties.</p>	<p>procedures should normally be sufficient. This clause is an option if you wish to emphasise this issue.</p>
<p><b>Intellectual Property.</b> All Intellectual Property rights in the products of your services under this contract (including any contributions made to any software and any know-how) are owned by Name of organisation. By accepting the offer contained in this contract, you assign to Name of organisation upon creation any existing and future Intellectual Property rights you may have in such products. In this contract, ‘Intellectual Property’ includes:</p> <ul style="list-style-type: none"> <li>any and all intellectual and industrial property rights (whether or not registered or registrable) including any rights in respect of copyright (including future copyrights), inventions and discoveries (including patents and patent applications), trademarks (including trade mark applications), designs, circuit layouts, trade secrets, and know-how; and</li> <li>any rights in respect of a concept, idea, information, data or formula.</li> </ul> <p>You must do all things necessary or desirable to give full effect to this clause, including executing any documents which are reasonably required by Name of organisation to be executed. Your obligations under this clause survive termination of this contract.</p>	
<p><b>Restraint of Trade.</b></p> <p>In order to protect our good will and in consideration of your employment, if and when you leave our employ, you agree not to perform work for our clients or competitors, (<i>within a 100 km radius from our head office/ the state of xxxxx</i>) in the type of occupation in which you were employed by us with whom you worked in the 12 months prior to your employment ending for the period of the restraint.</p> <p>The period of the restraint is:</p> <ul style="list-style-type: none"> <li>12 months after the end of your employment; or, if that is not enforceable;</li> <li>6 months after the end of your employment; or, if that is not enforceable;</li> <li>3 months after the end of your employment</li> </ul> <p>When we refer to “work” we mean this in the broadest sense. This includes but is not limited to working as a</p>	<p>This clause would normally only be used for senior, key employees. It is important to note that the Courts will always try to strike down restraint of trade clauses and therefore a range should be provided to demonstrate that the restraint being applied is reasonable.</p> <p>If in doubt about what is reasonable for this purpose, we suggest a conservative approach – ie, a shorter time period and a geographic restriction that is fairly local. It would rarely be reasonable to prevent a Tasmanian from working in the Northern Territory.</p>

<p>principal, employee, agent, partner of, or consultant to, a business which may perform work for those clients and being a director or shareholder of any company or being a beneficiary of any trust that performs work for those clients.</p>	
<p><b><u>Hours of Work – Executives</u></b></p> <p><b>1.1</b> The usual hours of work for this position are worked within the span of 6.00 am and 8.00 pm, Monday to Friday. However, to perform the job effectively the Employee may be required to work reasonable additional hours as appropriate.</p> <p><b>1.2</b> The salary specified in this contract is deemed to cover payment for the overall performance of the job, and overtime will not be payable.</p>	<p>This clause should only be used where the rate of pay is well above the award rate, and you are confident that the remuneration really is more than the employee would otherwise receive through overtime payments. It would normally only apply to senior executive roles in medium to large organisations.</p>

## 10 Non-standard Contracts

The standard contract described in Section 1 provides a good starting point for most situations. However, there are some common situations which require the standard contract to be modified.

### 10.1 Fixed Term contracts

Sometimes it makes sense to specify an end date for the employment, for example if the job is a one-off project, or a short-term replacement for an employee on leave. In these sorts of situations fixed term employment is appropriate.

#### a) Fixed Term or ongoing?

Generally, the 'default' form of employment is ongoing. Ongoing or permanent employment simply means that there is no pre-determined date of termination. Employment may terminate for reasons such as redundancy, poor performance or misconduct, retirement, resignation or ill health. This can be the case even where a position is recurrently funded, and the funding is confirmed or renewed annually. From an industrial perspective, if the work is expected or intended to continue, all things being equal, then the nature of the work is ongoing and permanent, and the contract of employment should reflect this. If funding is subsequently lost or cut, the position may then become potentially redundant.

When a fixed term contract expires, the employer is exempt from the unfair dismissal jurisdiction. However, the *Fair Work Act* provides that when an employer uses a fixed term contract merely to avoid industrial obligations (such as redundancy entitlements) they may not be excluded from unfair dismissal claims. This also applies to an employee who has more than one fixed term engagement and is not engaged for maternity leave backfill or for a project with a defined end date. A fixed term contract may otherwise be extended or renewed once – and if intending to renew again the employer should consider what is the valid reason for fixed term engagement. In those circumstances an employee should be offered an ongoing contract of employment and be eligible to access redundancy (unless less than 15 employees by headcount<sup>4</sup>) if funding is not renewed or available. More importantly, from a human resource management perspective, fixed term contracts are less attractive to potential employees. The unnecessary use of fixed term employment may undermine your recruitment and retention strategy.

Nevertheless, it is quite common for circumstances to arise which make it sensible to use a fixed term contract. Fixed term contracts are widely used in the community sector. The template provided on the next page is based on the standard template in Section 2, but with the addition of a provision regarding the date of expiry of the contract.

#### b) Fixed Term expiry

A genuine fixed term contract is one which sets a clear expiry date. If the contract is not renewed, it simply ends through "the effluxion of time". An employee on a genuine fixed term contract is excluded from the unfair dismissal provisions in all jurisdictions in Australia. Because it is a contract guaranteeing an end date, if there is a need to terminate the employment before the end of the contract, it will usually be necessary to pay out the balance of the contract. An exception is in the case of serious and wilful misconduct where summary dismissal may be justified.

The need to pay out the balance of the contract can be avoided by providing that the contract can be terminated early, with a notice period (which must be at least in accordance with the NES). The fixed term exclusion from unfair dismissal claims will only apply where the contract expires at its end date. Any early termination during the term of the contract will be subject to the unfair dismissal jurisdiction.

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<sup>4</sup> Small business Fair Dismissal Code

## 10.2 Template Fixed term contract

(NAME OF ORGANISATION)

### Fixed Term Contract of Employment

NAME: \_\_\_\_\_

CLASSIFICATION: \_\_\_\_\_

SALARY \_\_\_\_\_

- Your salary will be paid fortnightly into a bank account of your choice.

TIME FRACTION/HOURS per WEEK: \_\_\_\_\_

ORDINARY HOURS of DUTY: \_\_\_\_\_

TERM of APPOINTMENT: from \_\_\_/\_\_\_/\_\_\_ to \_\_\_/\_\_\_/\_\_\_

The duration of the employment is limited to the term stated. There is no expectation of continuing employment after [contract expiry date].

### PROBATIONARY EMPLOYMENT:

- The employment is subject to a six-month probationary period and formal performance reviews may be conducted during this period.
- During this period either party may terminate this contract by providing one week's notice to the other party.

### PRIMARY FUNCTIONS:

- The duties are those described in the approved position description, a copy of which has been made available to you. You may be required to perform other duties as directed from time to time to suit organisational requirements.
- List main functions as set out in "Functions" section of PD

### CONDITIONS of EMPLOYMENT:

#### General

- The terms and conditions of employment are those applying under the (*insert either the name of the Award or of the relevant enterprise agreement*) in conjunction with the National Employment Standards. The NES and Award/Agreement are not incorporated into this contract as the employer is already required to provide these terms and conditions to their employees.
- All employees of (*insert name of organisation*) are bound by the properly approved policies and procedures of the organisation, as promulgated and varied from time to time. The policies and procedures are not incorporated into this contract.
- Your position is initially based at the *Address* office, but you may be required to work at other sites during the course of your employment.

- **Notice of termination.** Following the probation period, your employment may be terminated by either party by a period of notice as specified by the NES and the *Award/Agreement*. This does not affect the employer’s right to terminate your employment without notice where you are found to have engaged in serious and wilful misconduct.

**Specific (optional)**

*This heading can be used for adding any provisions not covered by the above general conditions. The optional specific clauses on the next page are common clauses which may be useful, but are not needed for every organisation. Delete this **Specific** heading if you do not need to add additional clauses.*

Up to date copies of the award, conditions of employment, policies and procedures are held in the office of *(insert name of organisation)*.

**I have read and understood the contents of this contract of employment and in signing the contract agree to be bound by the terms and conditions contained within the Contract.**

**Signature of Employee:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Signature of Employer:** \_\_\_\_\_ **Date:** \_\_\_\_\_

### 10.3 Parental leave replacement

A common award provision regarding parental leave prior to award modernisation was that an employee who is hired as a temporary replacement for someone on maternity leave must be advised that their employment is as a temporary replacement. Although this is not specified in the National Employment Standard for parental leave, it remains a sensible practice to adopt. In this case the following fixed term clause could be used.

**Term of Appointment:** from \_\_/\_\_/\_\_ to \_\_/\_\_/\_\_

This employment is as a temporary replacement for an employee on parental leave. The duration of the employment is limited to the term stated. There is no expectation of continuing employment after the (*contract expiry date*).

### 10.4 Casual contracts

By their nature, casual engagements are often quite informal and short term. Nevertheless, it is prudent to have something in writing at the outset to ensure that expectations are clear.

Often it will be sufficient to provide a contract on the first occasion the employee works for you, then simply ensure subsequent work is recorded on timesheets, perhaps together with a note confirming the hours required on each occasion.

The template provided in Section 1 can be used, with the following addition after the Date of Commencement clause:

**Expected term of appointment:** from \_\_/\_\_/\_\_ to \_\_/\_\_/\_\_  
(if any)

This is a casual employment appointment. As a casual employee, there is no expectation of any further employment at the expiration of this contract.

While it is expected that employment will be available for the above period, it should be noted that casual employment may be terminated at any time when there is no work to be performed.

Long term casuals (defined by the *Fair Work Act* as casuals who have been employed for at least 12 months on a regular and systematic basis for a sequence of periods of employment) are entitled to certain types of leave such as unpaid parental and carer's leave, and have protections from unfair dismissal under the *Fair Work Act*.

## 10.5 Executive contracts

In many small to medium sized not-for-profit community organisations, the most senior manager is still covered by the relevant award, even though they may be paid significantly more than the highest rate of pay contained in the award. In such cases, the standard contract described in Section 1 will usually be sufficient.

However, it can be the case that Chief Executive Officers, and in large organisations other senior managers, are either award free or employed on conditions well enough above any applicable award to make the award conditions not very relevant. In this industry it is common that an employee may still be covered by an award even if their remuneration exceeds the high-income threshold (\$158,500 in 2021-22, indexed annually). Award employees paid above this threshold can be offered a High Income Guarantee in exchange for the award no longer applying. Generally, executive contracts should contain more detail about conditions.

In addition to the standard contract provisions described in Section 1, a typical Executive contract might contain clauses dealing with:

- Fixed term of employment;
- Hours of work;
- Leave provisions;
- Confidentiality;
- Restraint of trade;
- Gardening leave (which allows the employee to be stood down during a notice period, rather than being required to work);
- Performance review and Key Performance Indicators;
- Dispute resolution;
- Use of equipment and facilities - such as vehicles, laptops, mobile phones;
- Specific organisational policies;
- Intellectual property; and
- Completeness (providing that this contract completely replaces any previous contract or agreement).

As with all contracts, executive contracts must also meet statutory minimum conditions. In the federal system, these include the minimum standards of the *Fair Work Act*. In the WA state system, the relevant state industrial legislation will apply.

Because executive contracts require more detailed drafting, and the question of award coverage can be complex, advice should be sought from your Workplace Relations Adviser at Jobs Australia.