



Determination 1:

Merit, Engagement, Assignment of Duties and Transfer of Non-Executive Employees

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**Government
of South Australia**

Office of the Commissioner
for Public Sector Employment

Contents

Determination 1: Merit, Engagement, Assignment of Duties and Transfer of Non-Executive Employees	3
Who is covered by this Determination?	3
Determination Relating to Merit	4
Guidelines and Explanatory Notes Relating to the Concept of Merit.....	5
Merit-Based Selection Processes and Exceptions to Merit-Based Selection Processes.....	5
Public Sector Act 2009	5
Public Sector Regulations 2010.....	5
Determination Relating to Engagement	7
Attraction/Retention Allowance	8
Quarantining	9
Guidelines and Explanatory Notes Relating to Engagement and Assignment of Duties	10
Engagement as a Term Employee - Including the ‘Two-Year Rule’	10
Circumstances Under Which a Person May Be Engaged as a Term Employee	11
Public Sector Act 2009	11
Public Sector Regulations 2010.....	11
Assignment of Duties by a Public Sector Agency	11
Provision Of Additional Duties to An Employee by a Public Sector Agency.....	11
Payment of Additional Duties Allowance	12
Determination Relating to Transfer – Movement of Employees within the Public Sector	13
Transfer of an Ongoing Employee to Temporary Duties within a Public Sector Agency (Inter-Agency Transfer)	14
Transfer of a Term or Ongoing Employee to a Term Role/Temporary Duties within a Public Sector Agency (Intra-Agency Transfer)	14
Guidelines and Explanatory Notes Relating to Temporary Transfers	14
Employment Opportunity Programs	16
Traineeships, Cadetships, Apprenticeships and Graduate Employment.....	17
Aboriginal Employment Program.....	17
Disability Employment Program	17
Work Visas (Persons without Australian Residency)	17
Eligibility to Apply for Public Sector Roles	18

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WHO IS COVERED BY THIS DETERMINATION?

Under section 16(1) of the *Public Sector Act 2009* (“PS Act”) the Commissioner for Public Sector Employment:

“...may issue determinations relating to

(a) employment in the Public Service; and

(b) public sector employment outside the Public Service that is declared by another Act or the regulations under this Act to be employment to which this section applies.”

This Determination applies to:

- Employees in the Public Service employed in a public sector agency that is an administrative unit or attached office, as defined by the PS Act; and also
- Public sector employees whose employment has been declared by another Act or the regulations under the PS Act to be employment to which the above Section 16(1) of the PS Act applies.

If you are in any doubt as to whether this Determination applies to your employment, please contact your Human Resource Management unit.

Determination Relating to Merit

The Commissioner for Public Sector Employment (“Commissioner”) determines that public sector agencies must advertise all vacancies for the performance of duties for a period of twelve (12) months or longer in I Work for SA - except where a vacancy is filled without a merit-based selection process pursuant to the *Public Sector Regulations 2010*. This applies to both executive and non-executive vacancies.

Any vacancy that is to be filled through selection from a pool of applicants established under sub-regulation 16(3) of the *Public Sector Regulations 2010* does not need to be advertised in I Work for SA. The formation of the pool of applicants, however, needs to include merit-based selection via an advertising process.

GUIDELINES AND EXPLANATORY NOTES RELATING TO THE CONCEPT OF MERIT

This Determination does not apply to the filling of vacancies without a merit-based selection process in the circumstances prescribed in the PS Act and the *Public Sector Regulations 2010*.

All merit-based selection processes are to be open, competitive and free of bias, unlawful discrimination, nepotism and patronage - and decisions must be capable of objective review. In practice this means that agencies should document all stages of the selection process and ensure that such information is readily available for audit or review. The rationale for selection decisions should be clear and transparent.

Agencies can use a variety of methods to select and engage employees to meet the requirements of a merit-based selection process. They are not limited to specific types of selection tools, such as always having to conduct a selection interview. The selection procedures used should be appropriate for the nature of the vacancy.

Advertising – Agencies are to advertise all vacancies for the performance of duties for a period of twelve (12) months or longer - to be filled by merit selection process, in the I Work for SA. In addition, they may use other sources for identifying candidates, such as advertising in the external press, advertising via electronic media, using industry publications etc.

Diversity – Agencies are encouraged to use recruitment approaches that achieve a workforce that reflects the diversity of the community. South Australia's Strategic Plan contains a number of targets designed to promote diversity in the public sector workforce.

MERIT-BASED SELECTION PROCESSES AND EXCEPTIONS TO MERIT-BASED SELECTION PROCESSES

Public Sector Act 2009

46 – Merit-based selection processes

1. *The following may only occur as a consequence of selection processes conducted on the basis of merit in accordance with the regulations:*
 - a) *engagement of a person as an employee of a public sector agency;*
 - b) *promotion of an employee of a public sector agency to a higher remuneration level;*
 - c) *changing the basis on which a person is engaged as an employee of a public sector agency to engagement as an ongoing employee.*
2. *Subsection (1) does not apply –*
 - a) *to the engagement of a casual employee; or*
 - b) *to the promotion of an employee by way of reclassification of the employee's remuneration level; or*
 - c) *to the engagement of an employee under an employment opportunity program; or*
 - d) *in circumstances prescribed by the regulations.*

Public Sector Regulations 2010

17 – Exceptions to merit-based selection processes (section 46(2)(d) of Act)

1. *Section 46(1) of the Act does not apply –*
 - a) *to the transfer of an employee between public sector agencies provided, subject to paragraphs (b) and (c), that the employee is not promoted to a higher remuneration level; or*

- b) *to the engagement of a person as a term employee, or the temporary promotion of an employee (including through a temporary transfer between public sector agencies), for duties required to be performed because of the absence of another employee or while selection processes are conducted in respect of the duties; or*
 - c) *to the engagement of a person as a term employee, or the temporary promotion of an employee (including through a temporary transfer between public sector agencies), for duties that are otherwise of a temporary nature provided that the term of the engagement or temporary promotion does not continue beyond a total of 2 years; or*
 - d) *to changing the basis on which a person is engaged as an employee of a public sector agency to engagement as an ongoing employee, or re-engaging a person as a term employee, if the person was engaged following a selection process conducted on the basis of merit and the person is to continue to perform the same or similar duties; or*
 - e) *to the return of an employee to a home agency following a movement within the public sector to which regulation 6 applies; or*
 - f) *to the engagement of an employee in accordance with a rehabilitation and return to work plan under the Return to Work Act 2014; or*
 - g) *to the engagement of an employee who is excess to the requirements of a public sector agency; or*
 - h) *to the promotion of an employee as the result of a determination of the Commissioner affecting classification structures; or*
 - i) *if, in a particular case, a chief executive or principal officer of a public sector agency determines that special circumstances exist warranting the engagement of a person without the conduct of merit-based selection processes in accordance with these regulations taking into account –*
 - i. *the person’s abilities, aptitude, skills, qualifications, knowledge, experience (including community experience) and personal qualities relevant to the carrying out of the duties in question; and*
 - ii. *if relevant –*
 - A. *the manner in which the person carried out any previous employment or occupational duties or functions; and*
 - B. *the extent to which the person has potential for development.*
2. *The chief executive or principal officer may not delegate the power to make a determination under subregulation (1)(i).*
 3. *A public sector agency must report to the Commissioner any determinations made under subregulation (1)(i) (providing details of the circumstances warranting the determinations) within 1 month after the end of the financial year in which they were made.*
 4. *In this regulation –*
 - absence of an employee from duties means the absence of an employee in circumstances in which the employee may return to the duties.*

Determination Relating to Engagement

ATTRACTION/RETENTION ALLOWANCE

The Commissioner determines that the chief executive, agency head or a delegate can approve the payment of an allowance for the purposes of attracting or retaining the services of a suitable person. This allowance is distinct from an Additional Duties Allowance under section 50 of the PS Act.

The payment of an attraction/retention allowance cannot form the basis for term employment. The allowance can be paid regardless of employment status. The payment of an attraction/retention allowance cannot be made on an ongoing basis but rather must apply for a specific period whereupon it is to be reviewed to determine if future payment of the allowance is appropriate. An attraction/retention allowance may only be paid for a maximum period of two years whereupon the circumstances must be reviewed, including a comprehensive evaluation of whether the continuation of the allowance is warranted.

Attraction/retention allowances may only be paid to attract and/or retain employees to critical roles, where it has proved difficult to attract or retain employees in the absence of such allowances as a result of:

- occupational and/or skills shortages, including highly specialist skill sets;
- strong labour market competition (e.g. as a result of significant remuneration differentials between the public and private or community sectors);
- rural or remote geographical issues; or
- a combination of these factors.

Unless there are bona fide exceptional circumstances and a chief executive, agency head or delegate has obtained the approval of the Commissioner, agencies will not pay attraction/retention allowances to either seek to attract an existing public sector employee from employment in one agency to employment in another agency; nor for the purpose of preventing employees from moving to employment in another agency.

Without exception, a detailed business case must be made setting out the justification and bona fides of the payment of an attraction/retention allowance. A business case supporting a proposal to pay an employee (or prospective employee) an attraction/retention allowance must, as a minimum:

- outline the rationale for offering the allowance, including the way(s) in which the role has a clear and significant impact on Government priorities and/or critical service delivery;
- provide objective evidence demonstrating there are significant difficulties with attracting and/or retaining suitable employees to the relevant role, including (as appropriate) a detailed labour market assessment, vacancy history, previous strategies undertaken to fill the role and associated outcomes;
- provide evidence that the role is appropriately classified; and
- recommend the period the allowance should be payable (to a maximum of two years).

The payment of an attraction/retention allowance up to a maximum rate of 20% (or greater than \$25,000 per annum) of the relevant base salary must have the approval of the chief executive (or Head) of the relevant Public Sector Agency. Sub-delegation by a chief executive or agency head below this level must have the approval of the Commissioner.

If a chief executive or agency head believes there is a bona fide need to pay an allowance at a rate higher than 20% (or greater than \$25,000 per annum) of the relevant base salary, the authority of the Commissioner must be sought. The maximum rate of an allowance the Commissioner may authorise is 40% of the relevant base salary in metropolitan locations and 60% in remote or very remote locations. In all cases, a chief executive or agency head must present a business case in support of the proposal to pay the particular allowance.

Where there is an identified need within an agency to offer an attraction/retention allowance to a group of similar roles within a skill shortage area, and it has been identified that the allowance should be greater than 20% (or greater than \$25,000 per annum) of the relevant base salary, approval may be sought from the Commissioner. The approval may be sought on an annual basis and will be for the named roles, for a 12-month period, and will allow for the agency, within this period, to offer individuals engaged into these roles, the attraction and/or retention allowance for a maximum of two years.

Agencies must maintain adequate records of the payment to employees of Attraction and/or Retention allowances and these must be provided to the Commissioner upon request.

Agencies may contract with employees providing for repayment to the State, on a diminishing scale, of a proportion of any attraction/retention allowance payment made to them should the employee resign from the role whilst in receipt of an attraction/retention allowance. If an agency is contemplating such an arrangement, it should seek the assistance of the Crown Solicitor's Office to draft suitable contract clauses.

QUARANTINING

The Commissioner determines that for the purpose of an organisational restructure, a chief executive or delegate of a public sector agency may quarantine non-executive roles from the normal requirements for filling vacancies required by the PS Act and the *Public Sector Regulations 2010*, and the determination of the Commissioner relating to merit-based selection, subject to the following criteria:

- agencies are to develop principles and procedures relating to organisational restructuring in consultation with employees and relevant employee representative organisations;
- a quarantining process can only apply to workplaces and employees directly affected by a restructure;
- a quarantining process can only be used to engage employees in the new structure at their substantive classification/remuneration level; and
- roles are to be quarantined for a maximum period of 12 months and quarantining ceased once all vacant roles have been filled, or no further employees can be engaged in the new structure at their substantive classification level without seeking application from persons outside the workplace.

Existing employees currently working in an affected workplace, or on leave, or currently on term assignment/engagement elsewhere with a right to return to employment in the areas affected, are to be given priority consideration for engagement per assignment or transfer to a role in the new organisational structure at their substantive classification level.

GUIDELINES AND EXPLANATORY NOTES RELATING TO ENGAGEMENT AND ASSIGNMENT OF DUTIES

Public sector employees who are not able to carry out the inherent duties of their role as a result of a compensable injury or illness, or who are excess to requirements - and therefore require alternative duties - are to be given priority for available duties¹. Such employees must be assigned or transferred to available duties if they could achieve the outcomes of the duties to a reasonable standard, or within a reasonable period of time with a reasonable period of training if required and depending upon the terms of any Rehabilitation and Return to Work Plan. Note that in the absence of a vacancy, obligations under the *Return to Work Act 2014* may require an employee to be provided with duties in any event, pursuant to a Rehabilitation and Return to Work Plan.

The PS Act facilitates mobility of employees across the public sector, a concept that is also supported by clause 13 of the *South Australian Public Sector Enterprise Agreement: Salaried 2021*. Mobility of employees across the public sector provides developmental opportunities and experience which in turn enables a high-performing, flexible and responsive workforce.

Decisions to assign or transfer an employee to duties should be based on the business needs of the agency and, where relevant, the developmental needs of the employee, including a proper assessment of the skills, abilities and qualifications of the employee against the requirements of the agency and role.

ENGAGEMENT AS A TERM EMPLOYEE - INCLUDING THE 'TWO-YEAR RULE'

Ongoing employment is the primary form of public sector employment, however, term employment is permitted in the specific circumstances prescribed by section 45(3) of the PS Act and Regulation 15 of the *Public Sector Regulations 2010*.

Project-based term engagement can only be used where it is anticipated that projects relating to the engagement will, when planned, not extend beyond five years. Projects that are anticipated to take longer than five years to complete are to be carried out using ongoing employees. The Act recognises that notwithstanding best efforts, it is not always possible to finalise projects that were predicted to be finalised within five years and thus the Act allows for the extension of the engagement of an employee – including beyond five years – in such circumstances (section 45(3)(a)).

Where a person is employed to perform duties of a temporary nature, the duration of such employment (either a single period or the aggregate term of several engagements) is not to exceed two years (section 45(3)(d)). This is what is commonly referred to as the 'two-year rule'. Where this 'rule' is breached - i.e. an employee is employed for a single or aggregate period to perform duties of a temporary nature (the same or substantially similar duties) they effectively become an on-going employee. Agencies should note that periods of term employment to perform duties of a temporary nature only aggregate when the duties performed pursuant to each engagement are the same or substantially similar.

Where term employment relates to duties required to be performed due to the absence of another employee or while selection processes are conducted (section 45(3)(b)), the limit on the term of the employment is the duration of the absence of the other employee or selection processes

¹ Note that in respect of employees with a compensable disability whose term contract has expired but for whom there are rehabilitation and return to work obligations under section 58B of the *Workers Rehabilitation and Compensation Act 1986* or section 18 of the *Return to Work Act 2014*, a contract of employment is not required but instead the rehabilitation and return to work program is to run its course. Note also that where a work-injured or excess employee is employed on a term basis, there is no requirement to 'convert' them to ongoing status as a result of assignment or transfer of them to different duties

CIRCUMSTANCES UNDER WHICH A PERSON MAY BE ENGAGED AS A TERM EMPLOYEE

Public Sector Act 2009

45 – Engagement of employees

- 3) *A person is only to be engaged as a term employee, and the person's engagement is only to be extended, as follows:*
- a) *a person may be engaged as a term employee for duties required for the carrying out of a project of a duration not exceeding 5 years and the engagement may be extended (including beyond a total of 5 years) but not so that the term extends beyond the duration of the project;*
 - b) *a person may be engaged as a term employee for a specified term for duties required to be performed because of the absence of another employee or while selection processes are conducted in respect of the duties and the engagement may be extended but not so that the term extends beyond the absence of the employee or the completion of the selection processes;*
 - c) *a person may be engaged as a term employee for a specified term not exceeding 5 years in cases of a special or exceptional kind prescribed by the regulations and the engagement may be extended but not so that the term extends beyond a total of 5 years;*
 - d) *a person may be engaged as a term employee for a specified term not exceeding 2 years for duties that are otherwise of a temporary nature and the engagement may be extended but not so that the term extends beyond a total of 2 years.*

Public Sector Regulations 2010

15 – Engagement as term employee (section 45(3)(c) of Act)

A person may be engaged as a term employee for a specified term not exceeding 5 years if –

- a) *the functions are to cease to be public sector functions within a period of 5 years; or*
- b) *the public sector agency is satisfied that the engagement is to be funded wholly or substantially by grants or payments from a government other than the State Government or from a private or community body; or*
- c) *the engagement is as a result of a transfer under section 9 of the Act and immediately before the transfer the person was a public sector employee to whom Part 7 of the Act did not apply and the person's employment was under a contract for a fixed term.*

ASSIGNMENT OF DUTIES BY A PUBLIC SECTOR AGENCY

A public sector agency can assign duties to an employee employed under Part 7 pursuant to section 47 of the PS Act. Under section 47, a public sector agency can also determine the place or places at which the duties are to be performed by an employee.

PROVISION OF ADDITIONAL DUTIES TO AN EMPLOYEE BY A PUBLIC SECTOR AGENCY

A public sector agency may also direct an employee under section 50 of the PS Act to perform specified duties in addition to those which the employee would normally perform and on which the employee's remuneration level is based - that is, at a higher classification level, in which case additional remuneration can be paid. Additional remuneration paid must be appropriate to the tasks being undertaken and reflect the level of responsibility.

PAYMENT OF ADDITIONAL DUTIES ALLOWANCE

There is no minimum statutory requirement relating to the number of days that additional duties are to be performed in order for an employee to be paid an allowance for performing such duties (i.e. a minimum of 5 days is not required to enable a payment to be made).

In deciding whether an additional duties allowance ought to be paid to an employee, and if so, what quantum of allowance is to be paid, the following considerations are to be taken into account:

- an employee is entitled to be paid for the value of the duties they are required to perform;
- chief executives and delegates should consider each situation on a case-by-case basis having regard to the nature and responsibilities of the requisite duties, including whether or not the employee is required to exercise delegated authority;
- a reasonable estimated value of the additional (higher) duties required to be performed by the employee;
- the extent to which some or all of the duties of an absent employee are being performed; are likely to be performed; or are shared or distributed amongst other employees;
- if some or all of the relevant duties are performed in the absence of another employee, the difference in remuneration payable to that employee and the normal substantive remuneration payable to the person directed to perform the additional (higher) duties; and
- the period during which the duties are to be performed.

Determination Relating to Transfer – Movement of Employees within the Public Sector

TRANSFER OF AN ONGOING EMPLOYEE TO TEMPORARY DUTIES WITHIN A PUBLIC SECTOR AGENCY (INTER-AGENCY TRANSFER)

Where an on-going employee is transferred from one agency (the home agency) to term or casual employment in another agency (the host agency), their underlying on-going status is not affected by the transfer. This is so regardless of whether the transfer is at the employee's initiative or that of an agency.

Employees who transfer or are transferred to term or casual employment in another (host) agency have a right of return to the home agency, unless the chief executive of that agency has declared (pursuant to sub-regulation 6(9)(a)) that there is no right of return to employment in a particular part of the agency's operations.

When an employee has been absent from the home agency for a period of two (2) years or more – or other period as agreed prior to the transfer between the agencies – because of a transfer to term or casual employment, the home agency may require the employee to make an election to return to employment in the home agency on or before a specified or agreed date. If the employee fails to make an election or elects not to return to the home agency, they will lose their right of return to the home agency.

In circumstances where either an employee has no right of return to a home agency as a result of a declaration by its chief executive OR they have failed to make an election or elected not to return to employment in the home agency; they will, at the conclusion of the relevant term or casual employment, become an on-going employee in the host agency at their substantive remuneration level.

TRANSFER OF A TERM OR ONGOING EMPLOYEE TO A TERM ROLE/TEMPORARY DUTIES WITHIN A PUBLIC SECTOR AGENCY (INTRA-AGENCY TRANSFER)

Where a term or ongoing employee transfers within an agency (intra-agency) to a term role/duties of a temporary nature², whether as a result of selection on merit or transfer at the initiative of the agency, the employee will retain their ongoing status. At the end of the temporary/term employment, the employee will be assigned duties appropriate to their skills, abilities and classification level and these duties need not be the same duties the employee was performing prior to the term/temporary employment.

Note that intra-agency transfer occurs when an employee not employed under Part 7 of the PS Act moves or is moved between different roles/duties or in employment covered by Part 7, when an employee moves or is moved from a role under Part 7 to one not covered by that Part or vice versa (i.e. public service to weekly paid employment or weekly paid to public service).

GUIDELINES AND EXPLANATORY NOTES RELATING TO TEMPORARY TRANSFERS

Where employees move between roles/duties under different employment Acts, their employment will be governed by the Act that applies to the role/duties they transfer to. This is so whether they are appointed to a role/duties on the basis of merit or are transferred at the initiative of an agency under section 9 of the PS Act. So, for example, if an employee employed under an Act other than the PS Act is selected for or transferred to duties governed by the PS Act, their employment will be governed by the PS Act and associated industrial instruments.

Section 9(3) of the PS Act provides that where an employee is transferred to other employment within the public sector, it will be on conditions that maintain the employee's substantive remuneration level or

² In the case of a term employee, to a shorter term/period.

that are agreed to by the employee. Section 9(3) may be used for term transfers of both executive and non-executive employees.

Regulation 6 of the *Public Sector Regulations 2010* provides a right of return to employees who move between agencies to temporary or casual employment. This is so where the movement is as the result of selection on merit or where an employee is transferred by an agency under section 9 of the PS Act. A right of return does not apply where the chief executive of a public sector agency has determined Regulation 6 does not apply to a specific part of the agency (see sub-regulation 6(9)). A chief executive cannot delegate this decision and may only make a determination after ensuring that employees who would be affected by it are aware of the proposed determination and its affect. A proposed determination under sub-regulation 6(9) is something that a chief executive must consult with employees and relevant employee associations about.

The engagement of an employee who is covered by a chief executive's determination pursuant to sub-regulation 6(9)(a) will result in the employee transferring to the agency on an ongoing basis - unless other arrangements are negotiated between the home and host agencies.

An ongoing employee can be transferred from one agency to another agency, pursuant to section 9 of the PS Act, to duties at the same or equivalent remuneration level without the need for a merit-based selection process, providing that there is agreement between the agencies involved. An ongoing transfer is not subject to Regulation 6.

Regulation 6 does not apply where an ongoing or term employee of an agency accepts an offer of, or is transferred to, term or casual employment within the agency.

Employment Opportunity Programs

The Premier has declared the following employment programs to be employment opportunity programs pursuant to Section 65 of the PS Act.

TRAINEESHIPS, CADETSHIPS, APPRENTICESHIPS AND GRADUATE EMPLOYMENT

South Australian public sector agencies may seek applications from persons eligible to participate in State public sector traineeships, cadetships, apprenticeships or graduate employment.

South Australian public sector agencies may, on the basis of merit and following a merit-based selection process, engage persons aged from 17 years for the specified period of a traineeship or cadetship up to a maximum period of five years.

South Australian public sector agencies may, on the basis of merit and following a merit-based selection process, engage persons aged 17 years and older for the specified period of the traineeship or cadetship, up to a maximum period of five years who:

- are of Aboriginal or Torres Strait Islander descent;
- have a declared disability;
- are currently or have been under the Guardianship of the Chief Executive of the Department for Child Protection; or
- are deemed long term unemployed (greater than 12 months).

South Australian public sector agencies may, on the basis of merit and following a merit based selection process, engage persons for a specified period of an apprenticeship, up to a maximum period of five years.

South Australian public sector agencies may, on the basis of merit and following a merit-based selection process, engage persons for the specified period of a graduate program up to a maximum period of five years.

ABORIGINAL EMPLOYMENT PROGRAM

The Aboriginal Employment Program assists job ready Aboriginal and Torres Strait Islander persons on the Aboriginal Employment Register to gain employment in the public sector.

South Australian public sector agencies may, on the basis of merit and following a merit-based selection process, engage eligible persons referred to roles on a term basis through the program for a maximum period of five years or on an ongoing basis.

DISABILITY EMPLOYMENT PROGRAM

The Disability Employment Register assists job ready persons registered with a Disability Employment Service (DES) provider to gain employment in the public sector. South Australian public sector agencies may, on the basis of merit and following a merit-based selection process, engage eligible persons referred to roles through the program on a term basis for a maximum period of five years or on an ongoing basis.

WORK VISAS (PERSONS WITHOUT AUSTRALIAN RESIDENCY)

South Australian public sector agencies may on the basis of merit and following a merit-based selection process appoint persons as public sector employees who have a visa that permits them to work in Australia. The appointment may be on a term basis for any period up to the maximum term of the work visa so long as such period does not exceed five years.

In addition to employment in an Employment Opportunity Program established by the Minister under section 65 of the PS Act, agencies may, on the basis of merit and following a merit-based selection

process, appoint as public sector employees into casual, term or ongoing roles, applicants who have a Visa that permits them to work in Australia, whether that be temporary, provisional or permanent.

Should a person who holds a temporary or provisional Visa who is employed in the South Australian public sector lose the right to work in Australia, the employment contract may be deemed frustrated. Specialist industrial or legal advice should be sought in such circumstances.

To determine applicants' or employees' work rights, the online visa verification tool provided by the Department of Home Affairs is available at <https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online>.

ELIGIBILITY TO APPLY FOR PUBLIC SECTOR ROLES

For a period of three years following the date of their effective termination from employment in the South Australian public sector, following successful completion of the relevant training/program, the following persons may apply for public sector vacancies which would normally be available only to existing public sector employees:

- Former public sector trainees;
- Former public sector apprentices;
- Former public sector cadets; and
- Persons formerly employed as part of a public sector graduate program.

Persons who are currently registered with either the Aboriginal Employment Program or the Disability Employment Program may apply for public sector vacancies which would normally be available only to existing public sector employees even though such persons are not currently in employment in the South Australian public sector.

Persons applying for roles must provide evidence of their eligibility in order to be considered for an offer of employment as part of a merit-based selection process.

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