

FAQs – review of non-permanent employment

Effective: **1 March 2023**

What priority should be given to the different conversion reviews when they are undertaken at the same time?

There is no specified priority for considering reviews for multiple employees under the directives relating to review of acting or secondment at higher classification level and review of non-permanent employment. Each review must be considered individually and in accordance with the criteria and timeframes that apply under the relevant directive and provisions of the *Public Sector Act 2022* (the Act).

The directives do not allow for an agency to use a comparative process where there are multiple employees eligible for review.

What is included in documented and unresolved performance concerns?

Clause 10.1(c) of Directive 02/23 Review of non-permanent employment provides that a public sector employee is to be considered suitable to perform the role where:

- the employee is not subject to any unresolved and documented conduct or performance matters that have been put to the employee in writing, and
- where required, managed in accordance with a relevant directive, such as the directives relating to positive performance management or discipline.

It would be at the discretion of the decision maker to determine whether the employee meets this criteria, with context being relevant in each circumstance in terms of what would be reasonable in that circumstance.

However, at the very least, specific performance concerns need to have been raised in writing with the employee and they need to have had an opportunity to address the concerns. Where a structured process to manage unacceptable work performance has been commenced (such as a formal performance improvement plan), the decision maker must be satisfied that the process has been managed in accordance with the requirements of the directive relating to positive performance management.

Are there any appeal rights for deemed decisions?

A deemed decision refers to circumstances where a chief executive does not make a decision in the relevant timeframe provided for under the Act, and consequently, the chief executive is taken to have decided not to convert the person's employment to a permanent basis.

A written notice is not required to be prepared to support a deemed decision.

However, within 14 days of a deemed decision occurring, a chief executive must inform the employee in writing of:

- the employee's right to make an additional request for employment on a permanent basis under section 116 of the Act, if the deemed decision occurred under section 114(7) or 115(6) of the Act

- any relevant appeal right available to the employee.

The employee may have the right to appeal a deemed decision in circumstances where the employee has been continuously employed in the same public sector entity for at least two years as per section 131(1)(a) of the Act.

Note that under section 132(1)(j) of the Act, a decision under section 114 not to convert a non-permanent public sector employee to a permanent basis is not appealable if the employee has been continuously employed in the same public sector entity for less than one year.

Is there a set or defined meaning for 'work cycle' or 'rostering period'?

Clause 11.1 of the directive provides that unless there are exceptional circumstances, when deciding the hours of work to be offered when a decision is made to offer to convert an employee's employment to a permanent basis under chapter 3, part 9, division 1 of the Act, the chief executive should offer hours of work no less than the greater of the following amounts:

- the hours worked by the employee in the continuing role or role that is substantially the same, in the employee's work cycle or rostering period, whichever is applicable, immediately before the chief executive's decision
- the average hours per week worked by the employee in the continuing role or role that is substantially the same, over the last two years.

The terms work cycle and rostering period are not defined in the directive.

They are intended to derive their meaning from the context of the employment arrangements/circumstances that apply to the employee who is being reviewed. In some circumstances, this meaning might be informed by a relevant industrial instrument, or a department, agency or entity policy.

I have an employee who is in Australia on a temporary work visa. Are they eligible for permanent appointment following a review in accordance with the review of non-permanent Directive 02/23?

Yes. Providing that an employee meets the citizenship or residency requirements under section 47 of the Act, they are eligible to be converted from non-permanent employment to permanent employment as a public sector employee under the Act and directive.

Public sector entities will need to seek their own advice about whether or not a particular type of temporary visa meets the requirements under section 47(1)(b) (i.e., a person who resides in Australia and has permission, under a Commonwealth law, to work in Australia).

Can an employee request a review under section 113 of the Act if they have recently been reviewed by the entity as required under section 115?

Yes. If the employee is eligible to apply for a conversion review under section 113 but has not done so in the previous 12 month period, they may request the review at any time, even when a section 115 review has recently been undertaken.

Can a role that is a different classification level be considered as substantially the same?

When undertaking a review of a non-permanent employee for conversion to permanent employment, the decision maker must consider whether there is a continuing need for someone to be employed in the role the employee is currently engaged in, or a role that is substantially the same.

The test of whether a role is substantially the same will depend on the individual facts of each review and the duties and responsibilities of each role. The term substantially the same is not necessarily synonymous with the same classification level. However, at the very least, a role at a different classification level must have a compelling characteristic of sameness.

Where an employee has been engaged in several non-permanent roles at different classification levels, the roles may be considered substantially the same, particularly if the employee has progressed in a particular workstream.

However, depending on the varying duties and responsibilities in each role, it will not automatically follow that they are substantially the same. For example, a role that includes supervisory responsibilities may be considered different from lower classified roles in the same area.

A non-permanent employee has advised they do not want to be appointed to a permanent position – is the entity still required to undertake a review in accordance with section 115 of the Act?

Yes. Section 115 of the Act requires a chief executive to review the status of a non-permanent employee if the person has been continuously employed in the same entity for two years or more. An employee may choose to decline an offer of permanent employment if they wish to remain as a non-permanent employee.

Does the review of non-permanent employment directive apply to employees who are part of a graduate program?

Yes. The provisions of the Act relating to non-permanent conversions apply to any person who has been continuously employed as a non-permanent employee in the same public sector entity. Prior to making a conversion decision, the chief executive should consider the individual circumstances of the graduate employee and the criteria provided in the Act.

When considering whether there is a continuing need for the graduate to be employed in their role, or a role that is substantially the same, the entity may consider the examples provided in section 81(3) of the Act about when employment of a person on tenure may not be viable or appropriate. This section provides that employment of a person on tenure may not be viable or appropriate if the employment is to perform work for a particular project or purpose that has a known end date, for example, employment for a set period as part of a training program or placement program.