

## Managing employment contracts where funding comes to an end

Changes to the Fair Work Act, restricting fixed term contracts

2 May 2023

We respectfully acknowledge Aboriginal people as the Traditional Custodians of the lands on which we deliver our services to the communities throughout Western Australia. We acknowledge their enduring connection to the lands, waterways and communities and pay our respects to Elders past, present and emerging.

# Agenda



## **Fixed term contracts and the law**

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## **Managing Employment Contracts when funding comes to an end**

# Fixed term contracts and the law



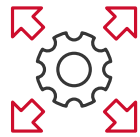
# What is a fixed term contract and why has the law changed?

## What is it?



- A fixed term contract is a contract with a specified termination date
  - A maximum term contract is similar, except that either party can terminate the contract prior to the specified date

## The change



- The *Fair Work (Secure Jobs, Better Pay) Act 2022* (Cth) introduced restrictions on these types of contracts as these “exacerbate job insecurity” – effective from **7 December 2023**

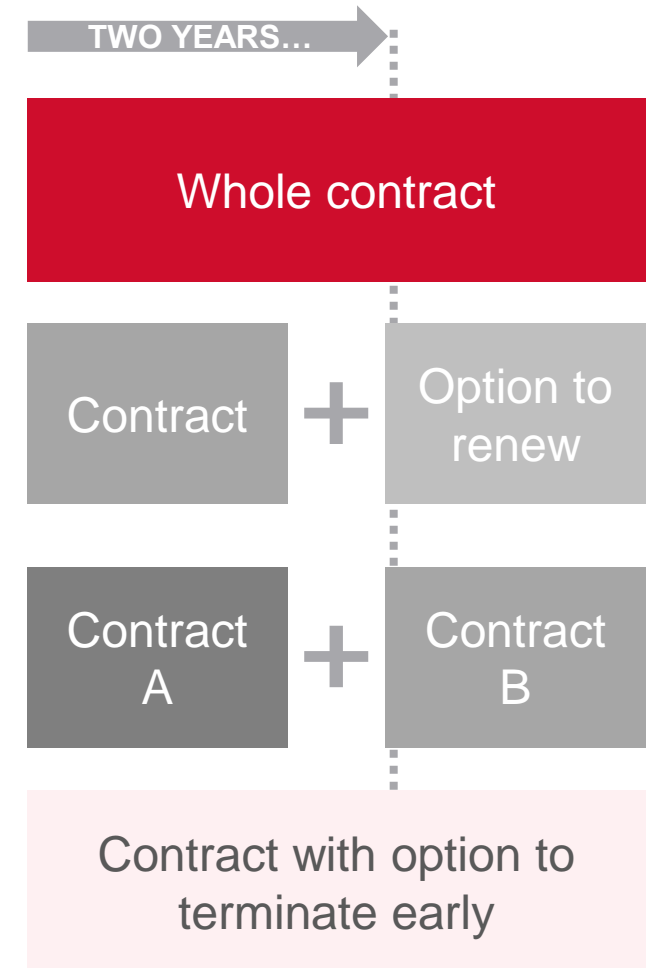
## Further legislation



- The Act also introduces:
  - anti-avoidance measures; and
  - a requirement for employees on fixed term contracts, to be provided with a Fixed Term Contract Information Statement before commencing employment

# What are the new restrictions and their effect?

- From 6 December 2023, the following types of (non-casual) contracts *cannot* be entered into by an employer and employee:
  - Contracts with a termination date exceeding 2 years;
  - Contracts with an option to renew, which if exercised, would exceed 2 years;
  - Consecutive contracts for substantially similar work, which added together, would exceed 2 years.
  - Any of the above, even if there is an option to terminate early (i.e., maximum term contracts are similarly prohibited)
- If such a contract is entered into and the date passes, “the employment contract would continue as if the fixed termination date has no effect, and the employee would be entitled to notice of termination and redundancy pay under the FW Act”

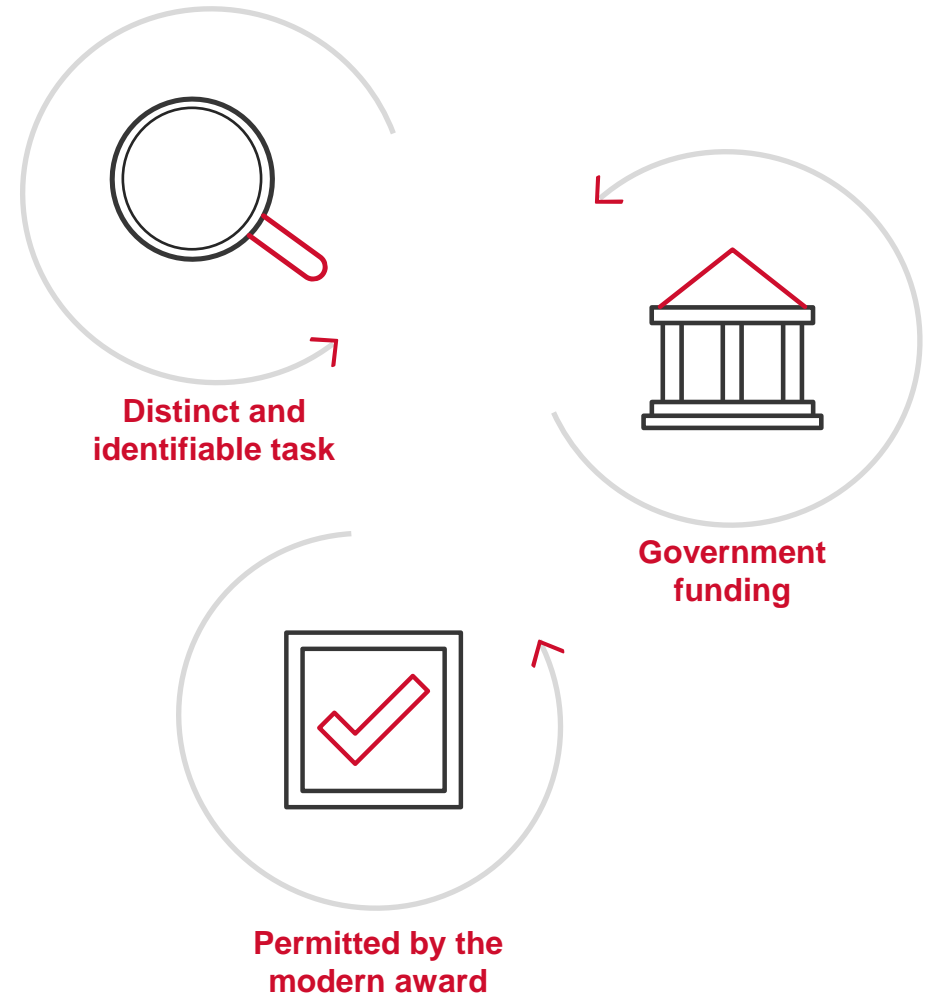


## 333F Exceptions to limitations

- 1) Subsection 333E(1) does not apply in relation to a contract of employment entered into by a person and an employee if:
  - a) the employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills; or
  - b) the employee is engaged under the contract in relation to a training arrangement; or
  - c) the employee is engaged under the contract to undertake essential work during a peak demand period; or
  - d) the employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee; or
  - e) in the year the contract is entered into the amount of the employee's earnings under the contract is above the high income threshold for that year; or
  - f) the contract relates to a position for the performance of work that:
    - i. is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and
    - ii. the funding is payable for a period of more than 2 years; and
    - iii. there are no reasonable prospects that the funding will be renewed after the end of that period; or
  - g) the contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
  - h) a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur; or
  - i) the contract is of a kind prescribed by the regulations for the purposes of this paragraph.

# What are the relevant exceptions?

- However, these contracts may be entered into if the:
  - employee is engaged to perform a distinct and identifiable task involving specialised skills;
  - contract is funded in whole or part by government funding that is payable for more than 2 years, but the funding is unlikely to be renewed; and/or
  - relevant awards permit fixed term contracts to be entered
    - The *Social, Community Housing and Disability Services* Award is unlikely to be amended to permit fixed term contracts
- Employers bear the evidentiary burden of establishing these exceptions exist





# 333L Disputes about the operation of this Division 7

## *Application of this section*

- 1) This section applies to a dispute between an employer and employee about the operation of this Division.

## *Resolving disputes*

- 2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

## *FWC may deal with disputes*

- 3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.
- 4) If a dispute is referred under subsection (3):
  - a) the FWC must deal with the dispute; and
  - b) if the parties notify the FWC that they agree to the FWC arbitrating the dispute—the FWC may deal with the dispute by arbitration.  
**Note:** For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)).

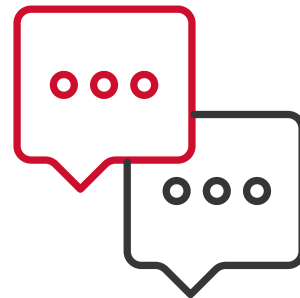
## *Representatives*

- 5) The employer or employee to the dispute may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
  - a) resolving the dispute; or
  - b) referring the dispute to the FWC; or
  - c) the FWC dealing with the dispute.  
**Note:** A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see 4 section 596).

# What does this mean for your organisation?



**Audit your current arrangements**

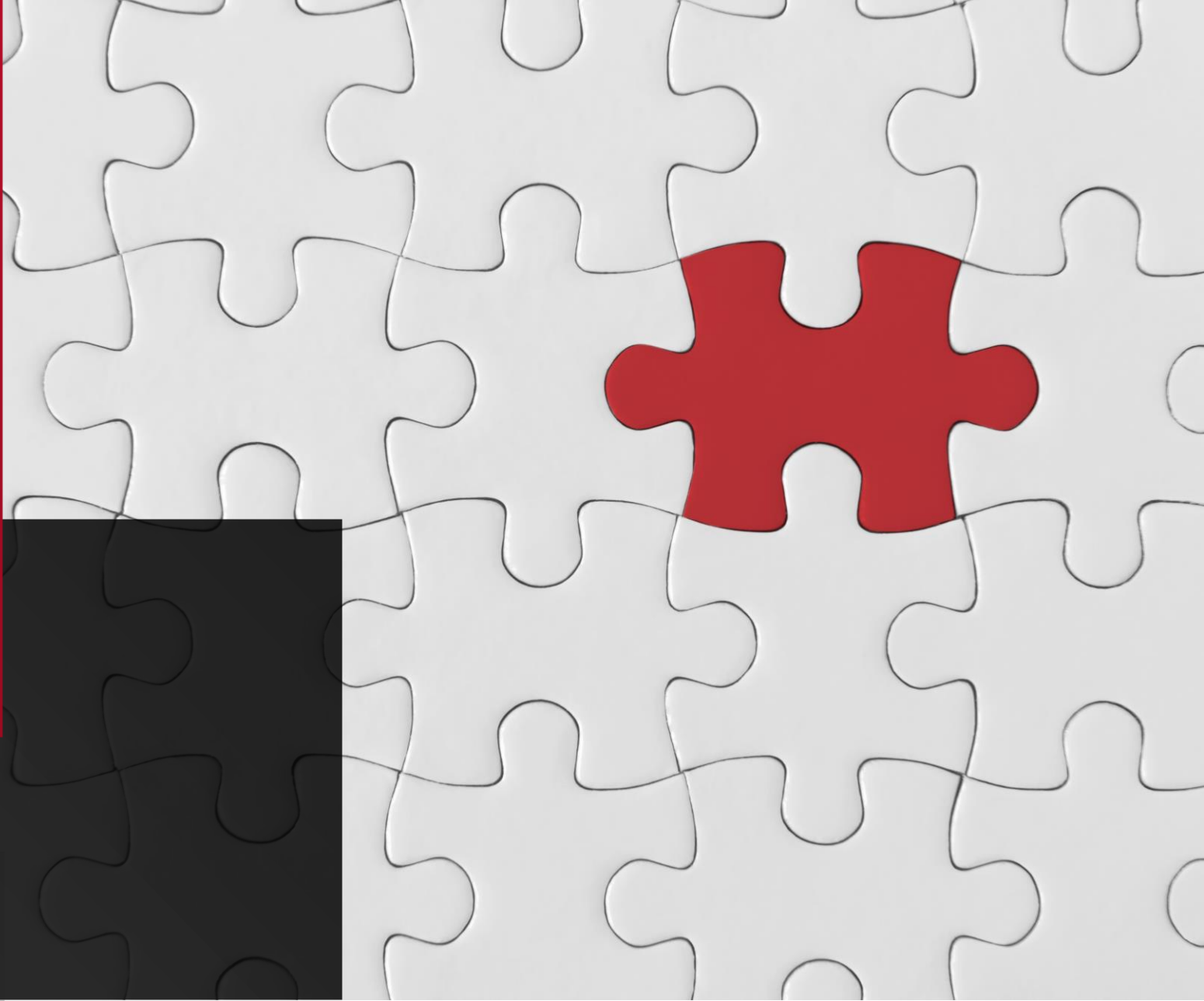


**Get advice as to whether an exception may apply**

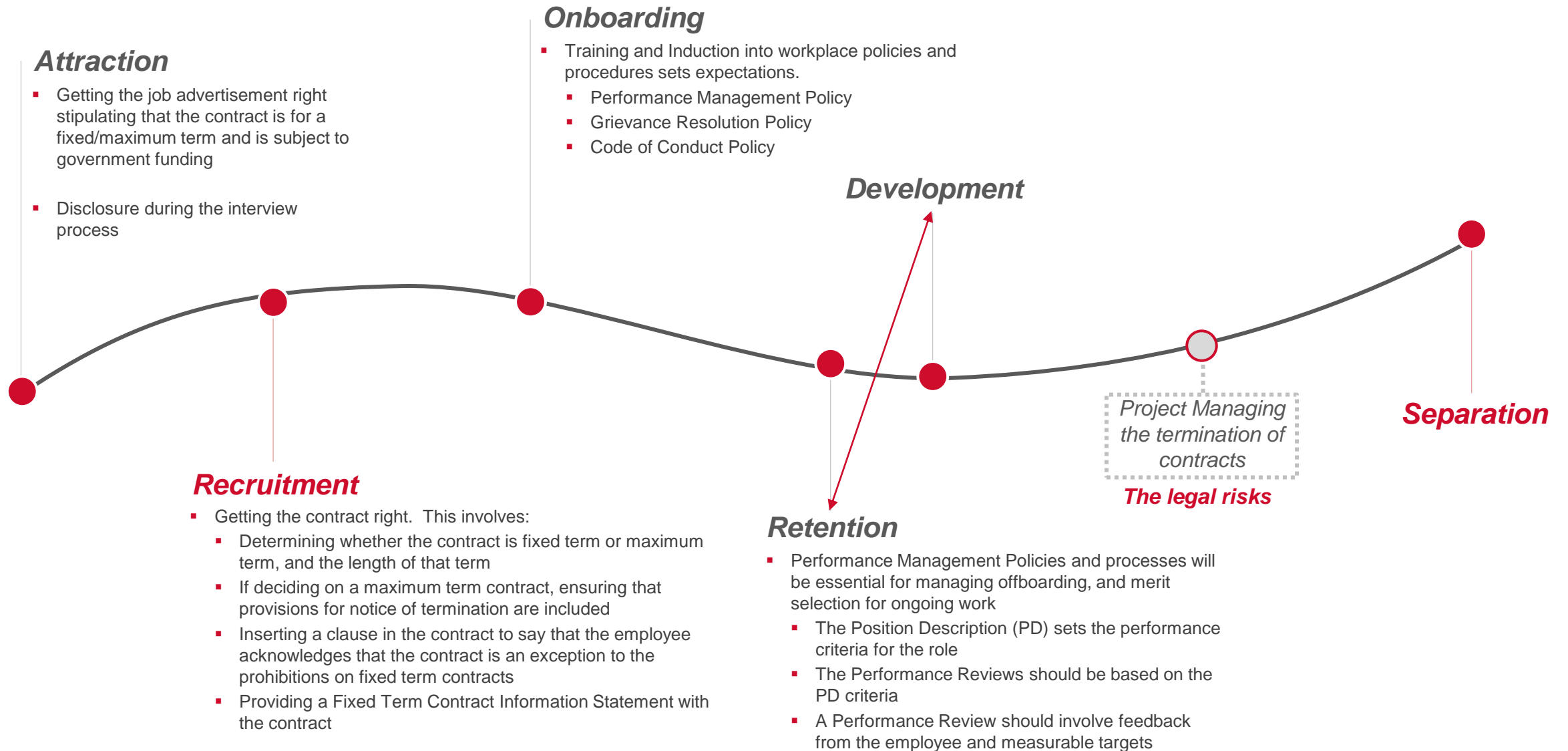


**Review your fixed term contracts for compliance.**

# Managing Fixed Term Employment Contracts where funding comes to an end



# The Employee Life Cycle Model



# Consultation about major workplace change

8.1 If an employer makes a definite decision **to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:**

- a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- b) discuss with affected employees and their representatives (if any):
  - i. the introduction of the changes; and
  - ii. their likely effect on employees; and
  - iii. measures to avoid or reduce the adverse effects of the changes on employees; and
- c) commence discussions as soon as practicable after a definite decision has been made.

8.2 For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- a) their nature; and
- b) their expected effect on employees; and
- c) any other matters likely to affect employees.

8.3 Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

8.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

8.5 In clause 8:

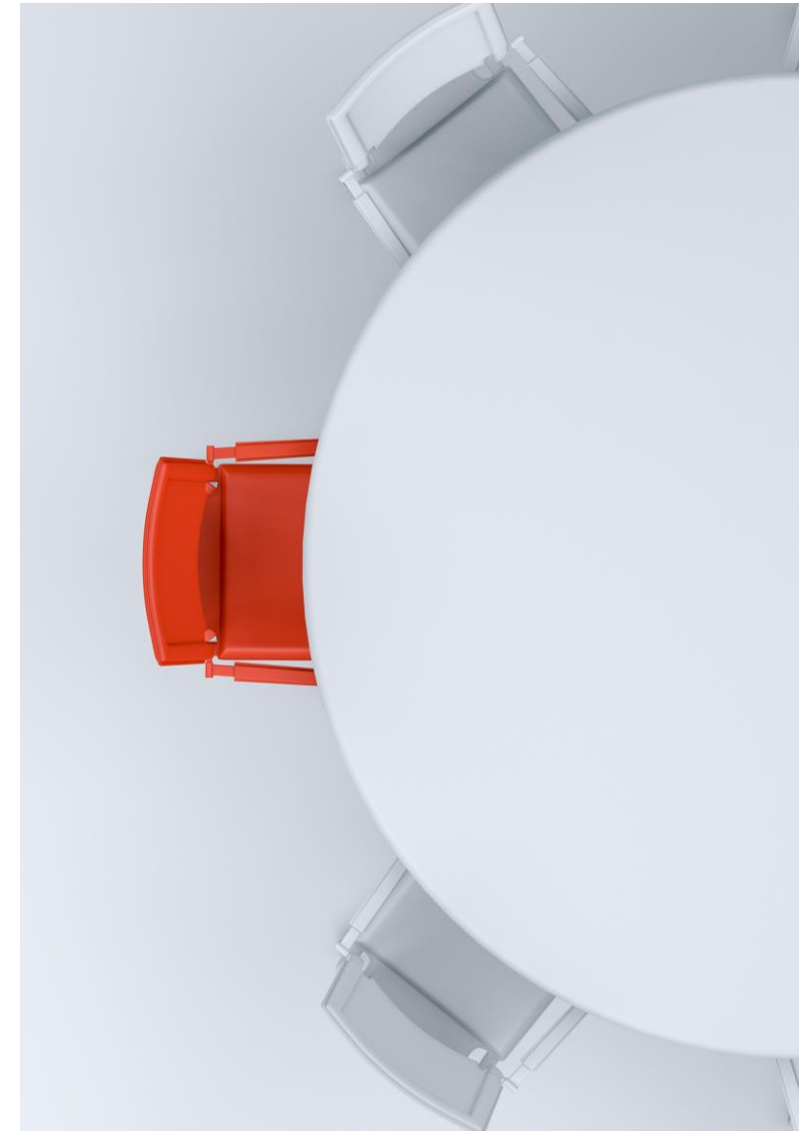
**significant effects**, on employees, includes any of the following:

- a) *termination of employment; or*
- b) *major changes in the composition, operation or size of the employer's workforce or in the skills required; or*
- c) *loss of, or reduction in, job or promotion opportunities; or*
- d) *loss of, or reduction in, job tenure; or*
- e) *alteration of hours of work; or*
- f) *the need for employees to be retrained or transferred to other work or locations; or*
- g) *job restructuring.*

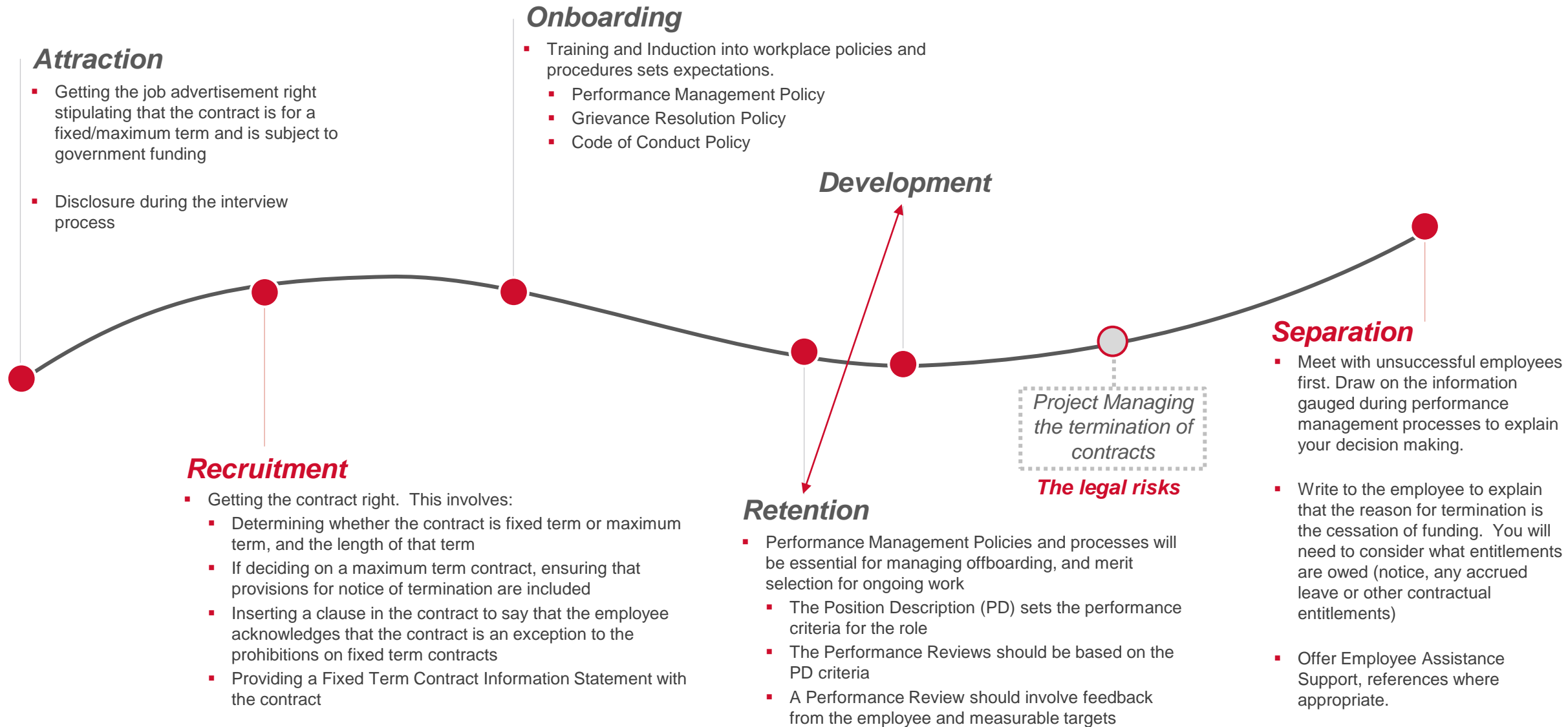
8.6 Where this award makes provision for alteration of any of the matters defined at clause 8.5, such alteration is taken not to have significant effect

# Consultation and Selection

- Meeting with employees – discussing the change, the effect on employees, and measures to reduce the impact.
- Consider an EOI process for ongoing employment in circumstances where there is funding for some roles but not others. Be transparent about the selection process
- Legal Risks in the Selection Process
  - The General Protections:
    - Discrimination (s.351 of the *Fair Work Act 2009* (Cth)):
      - *race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*
    - Temporary Absence due to Illness or Injury (s.352 of the *Fair Work Act 2009* (Cth))
    - Exercise of a workplace right (s.341 of the *Fair Work Act 2009* (Cth))
    - Engages in industrial activity (s.347 of the *Fair Work Act 2009* (Cth))
  - *Work, Health and Safety Act 2011* (Qld) and *Work Health and Safety Regulations 2011* (Qld)



# The Employee Life Cycle Model





# Questions >



For more information



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