

20 November 2023

Mr Conrad Kotnik
Director – Behavioural Economics and Education
Fair Work Ombudsman
414 La Trobe Street
MELBOURNE VIC

By email only: Education@fwo.gov.au

Dear Mr Kotnik

Feedback on the draft Fixed Term Contract Information Statement

Thank you for the opportunity to provide feedback on the draft Fixed Term Contract Information Statement (**Statement**).

About Circle Green

Circle Green is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Our services are aimed at assisting people who are face vulnerability and disadvantage in gaining access to justice. You can find more information about Circle Green's services on our website: <https://www.circlegreen.org.au/>.

Circle Green is the only community legal centre in WA that has a specialist workplace law practice that provides state-wide services to vulnerable and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, and education on state and national workplace law. This means Circle Green has expertise in providing legal assistance to vulnerable WA workers.

Circle Green has assisted many clients referred from the Fair Work Ombudsman, and we appreciate and value these referrals.

Feedback

Clarifying limits on maximum term contracts

We suggest minor amendments be made to clarify the section under the heading "What is a fixed term contract?" on page 1 of the Statement.

Many clients of Circle Green have expressed confusion about the difference between fixed term contracts and maximum term contracts, and the different conditions and entitlements associated with each type of contract. For this reason we consider that it would be helpful to provide further information to highlight the differences between fixed term contracts and maximum term contracts.

We note the definition¹ of a fixed term contract in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) extends to maximum term contracts² by way of the underlined words in the extract below:

contract of employment that includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period).

We also note that the Statement refers to fixed term contracts only as those with a set end date, for example a set period of time or a season.³

Circle Green suggests that the Statement include another brief sentence to explain that the limits the *Fair Work Act 2009* (Cth) (**Fair Work Act**) imposes on the use of fixed term contracts extend also to those which provide for termination before the set end date. This may help to clarify confusion over previous distinctions between fixed term and maximum term contracts.

For example, “A fixed term contract includes a contract with an option to terminate early by giving notice. These types of contracts have sometimes been called “maximum term” contracts”.

Clarifying eligibility for notice and unfair dismissal remedies for employees on maximum term contracts

Similarly, we propose that the purple shaded table in the left hand column on page 1 of the Statement more explicitly refer to the entitlements of employees engaged under maximum term contracts. We appreciate that the statement in its current form reflects the operation of section 386(2)(a), which provides that a person has not been dismissed in circumstances where:

the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season.

However, we note that in the case of maximum term contracts (or indeed rolling fixed term contracts) there are situations where an employee may indeed be entitled to notice of termination and/or be eligible to make a claim for unfair dismissal when, to echo the words in the Statement, their employment finishes at the end of the contracted period. These are noted in the Fair Work Commission’s Unfair Dismissals bench book (**Benchbook**) under the heading ‘Contract for a specified period of time’.⁴ Of particular note is *White v Sydney College of English Pty Ltd [2010] FWA 7644*, cited in the Benchbook as an example where a contract containing an unqualified right to terminate the employee’s employment was found not to be a contract for a specified time.

We appreciate the need for the Statement to be in plain language and as clear and simple as possible considering its purpose and audience. However, we nonetheless consider that further clarification should be included to alert employees on maximum term contracts to the possibility that

¹ Including but not limited to section 333E which limits the use of fixed term contracts, and 333K requiring the Fair Work Ombudsman to provide the Statement.

² Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022, [577].

³ Statement p1.

⁴ Fair Work Commission, ‘Contract for a specified period of time’, Unfair dismissals benchbook, (Bench Book, 3 July 2023), <https://www.fwc.gov.au/contract-specified-period-time>.



they may be entitled to a notice of termination or redundancy, and may be eligible to make an unfair dismissal claim, when their employment finishes at the end of the contracted period.

While the current text of the Statement is not technically inaccurate because of the qualifier “Generally”, Circle Green considers that many employees will take the statement at face value. Vulnerable and disadvantaged employees are less likely to have the knowledge or capacity to look further into the specifics of this qualifier. As a result, it is likely that the most vulnerable and disadvantaged employees will miss out on workplace entitlements, if they are not specifically prompted to consider the issue further when there is an early termination clause.

We suggest that this may be achieved by inserting an asterisk after the heading “Fixed term” in the table, and adding a paragraph immediately following the table with words to the effect of:

**Where your contract sets out circumstances where you or your employer can terminate your employment before the set end date, you may be entitled to notice, redundancy pay and/or to make a claim in relation to the end of your employment. Seek legal advice if you are unsure about your employment conditions and entitlements.*

Alternatively, Circle Green suggests including this content in a yellow textbox similar to that already below the table which explains the difference between fixed term employees and independent contractors.

Summary

In summary, Circle Green suggests that the Statement be amended to:

1. clarify that a maximum term contract is considered a fixed term contract for the purpose of the limits set out in the statement; and
2. note that complexities may arise where an employee is on a maximum term contract and recommend employees seek further legal advice as required.

We note that the Statement needs to be published in a short time-frame. We ask that, if these suggested amendments cannot be incorporated into the initial version of the Statement, that they be considered for future revisions.

Thank you for taking the time to consider Circle Green’s feedback. Please contact Imogen Tatam, Senior Lawyer (Law Reform) – Workplace, at imogen.tatam@circlegreen.org.au or (08) 6148 3660 with any questions or if we can provide further information.

Yours sincerely



Celia Dufall
Chief Executive Officer

