

GUIDELINES ON THE IMPACT OF FIXED TERM CONTRACT CHANGES TO THE BUV

1. As part of the Australian Government's Secure Jobs, Better Pay changes, rules about using fixed term contracts have changed in the Fair Work Act 2009 (Cth) (**FW Act**).

2. **WHAT CHANGED?**

New rules apply to the use of fixed term contracts made on or after 6 December 2023.

The new rules include a requirement for employers to give any employee they're engaging on a new fixed term contract a [Fixed Term Contract Information Statement \(FTCIS\)](#).

The rules also include limitations on how fixed-term contracts can be used. There are some exceptions to whom these rules apply to.

Learn more at [Fixed term contract employees](#).

3. This document covers the following:
 - (a) Overview of key changes;
 - (b) Available exceptions to the changes;
 - (c) Options available to BUV to manage regime; and
 - (d) Common concern and questions

SUMMARY OF GUIDELINES

4. In summary, we advise that:
 - (a) From 6 December 2023, all BUV congregations will be impacted by the changes to fixed term contracts in the FW Act;
 - (b) The changes do not apply to called Ministers of Religion.
 - (c) There are limited exemptions that may be relied upon by BUV congregations who individuals employed under the FW Act.

OVERVIEW OF FIXED TERM CONTRACT CHANGES

5. From 6 December 2023, the FW Act will prohibit fixed-term employment contracts that:
 - (a) contain a specified term of more than two years;
 - (b) are renewable and the total sum of all of the renewed contracts is more than two years;
 - (c) contain an option or right to extend or renew the contract more than once; and

- (d) are consecutive contracts, which is a series of contracts previously and contemplated in the future, and there is substantial continuity between the contracts.
- 6. Where a contract has a term specifying a period beyond that which is permitted, its effect is voided, and can result in the employee becoming permanent and ongoing.
- 7. In addition, from 6 December 2023 employers must also provide new employees before, or as soon as practicable after, the contract is entered into, a Fixed Term Contract Information Statement, which is provided by the Fair Work Ombudsman (**FWO**), together with the standard Fair Work Information Statement.

What happens if an employer attempts to avoid these provisions?

- 8. The legislation prohibits employers from trying to get around prohibited fixed-term contracts by:
 - (a) terminating an employee's employment for a period;
 - (b) delay re-engaging an employee for a period;
 - (c) not re-engage an employee and instead engaging another person to perform the same, or substantially similar, work;
 - (d) change the nature of the work or tasks the employee is required to perform; or
 - (e) otherwise alter an employment relationship.
- 9. If an employer is found to have engaged in the above, the employer may also be exposed to civil penalties.
- 10. Employers that are found to have engaged in prohibited fixed-term contracts may be subject to civil penalties up to \$187,800 or \$939,000 for a serious contravention. Individuals involved in the contravention may be subject to civil penalties of \$18,780 or \$93,900 for a serious contravention.

EXCEPTIONS TO THE CHANGES

- 11. There are two key exemptions to the fixed term contract regime;
 - (a) An individual Pastor is a Minister of Religion; or
 - (b) An individual is an employee covered by the FW Act but an exemption applies.
- 12. We detail the exceptions below.

Where an individual pastor is a called Minister of Religion

- 13. In order for a BUV Pastors to be affected by the Amendments, they must first be considered employees.

14. Traditionally, the relationship between a church and their pastor has been considered a spiritual relationship and not an employment relationship. Pastors and other religious roles have been considered a "call to office" rather than employment.
15. Recent case law indicates that there is no single rule for classifying religious leaders as employees or independent contractors. In *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8, the High Court determined that the agreement between an archbishop and the orthodox community in which he worked was intended to be legally binding.
16. Most recently, in *Rev. Hedley Wycliff Atunaisa Fihaki v Uniting Church In Australia, Qld Synod* [2023] FWC 1650 (**Fihaki**), the Fair Work Commission held that the relationship between the Uniting Church and a Minister was not an employment relationship. In making this decision, Commissioner Spencer observed that "*each of these 'minister' cases turns on its own facts*"¹.
17. Critically, the Commissioner accepted that where is a relationship between a minister and the Church, the following matters are relevant:

The ministry role within the Church creates a covenantal or spiritual relationship between the Church and the Minister ...

*It is grounded in a call from God to ministry, confirmed by the church. Although in a general sense ministry agents serve their congregation, or the particular group or community of people to whom they minister, and are responsive to it, they are not 'paid' or 'remunerated' for particular services to the congregation or other group involved. There is always a broader vision and a broader range of needs to be considered, and their calling makes them responsible to God and the whole church for their choices. They are ministers of the gospel of Jesus Christ serving God's reign not simply carrying out prescribed responsibilities."*²

18. In determining whether a pastor is an employee or an independent contractor, courts will have regard to the intention of the parties. Where written documents (i.e. employment contracts) record the intention of the parties, the decisions of the High Court in *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* [2022] HCA 1 confirm that the contractual terms will determine the nature of the relationship between the parties, not the manner in which the contract was performed.
19. **As a general rule, Ministers of Religion are not deemed employees under the FW Act, and therefore exempt from the fixed term contract changes. We would however encourage the church to carefully examine the language in Ministerial letters of appointment to ensure that they do not otherwise create an employment relationship.**

Where an individual is covered by the FW Act

20. Where an employee is employed under a fixed-term contract and covered by the FW Act, there are a number of statutory exemptions that the BUV or its congregations can rely upon:
 - (a) the employee is engaged to perform only a distinct and identifiable task involving specialised skills;

¹ *Rev. Hedley Wycliff Atunaisa Fihaki v Uniting Church In Australia, Qld Synod* [2023] FWC 1650 at [3]

² *Ibid*, at [12] - [13]

- (b) the employee is engaged in relation to a training arrangement;
 - (c) the employee is engaged to undertake essential work during a peak demand period;
 - (d) the employee is engaged to undertake work during emergency circumstances or during a temporary absence of another employee;
 - (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;
 - (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;
 - (ii) the funding is 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;
 - (g) the contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons;
 - (h) a modern award that covers the employee includes terms that permits a fixed-term arrangement; or
 - (i) the contract is of a kind prescribed by the regulations.
21. **We have considered whether any of the following exceptions apply to BUV, and have identified the following potential exceptions:**
- (a) Governance position exception;
 - (b) Distinct and identifiable task exception;
 - (c) Government funding exception.
22. **We do not believe the other exceptions apply because:**
- (a) BUV ministers are not covered by an Award that permits fixed term contract to be longer than 2 years;
 - (b) BUV ministers are not paid more than the unfair dismissal threshold, which is currently \$167,500 plus superannuation.
 - (c) BUV ministers are not performing essential work or appointed on a training contract.
23. The fixed term contract changes are not impacted by changes to a church's constitution that may extend a minister's term of office.
24. We now explore the three nominated exceptions below.

Governance position

25. We've considered whether a 'governance position' may apply to Ministers or any other positions in a religious body.
26. The explanatory memorandum to the FW Act amendments states, "*the employee is appointed under governance rules of a corporation or other association, where those rules specify the length of time that the appointment can be in place*".
27. In taking a narrow interpretation, the ordinary meaning of governance in the dictionary is:
- "the act or process of governing or overseeing the control and direction of something"*³ or "*the governance of a company or organization is the way in which it is managed*."⁴
28. Further we considered the term '*governance*' in the context of the operation of BUV's organisation under the Australian Charities and Not for Profits Commission Act 2012 (**ACNC Act**). The ACNC Act sets out the governance standards that charities and not for profits must meet in order to be registered, such as "governing rules". The ACNC defines "governing rules" as follows:
- "governing rules, of an entity, means written rules that:*
- (a) govern the establishment or operation of the entity; and*
- (b) can be enforced against the entity."*
29. If we adopt the same narrow interpretation of "governance rules" and "governing rules" to have the same purpose and meaning in the context of rules that 'govern' a corporation or association, **then we understand that BUV's "governing rules" as per the ACNC is under BUV's Constitution as opposed to an individual church's constitution.**
30. Whereas BUV's constitution stipulates a term of office for its directors and Executive Officer, these are limited to BUV and do not apply to roles in affiliated churches or agencies.

Employee is engaged to perform only a distinct and identifiable task involving specialised skills

31. We do not consider that the distinct and identifiable task exemption can apply to BUV congregations. The Explanatory Memorandum states that this exception applies to employees that have "*specialised skills that the employer does not have, but needs, to complete a specific task*".
32. A minister's role is not performed as one discrete task, and therefore would not meet this exemption.
33. The type of roles that could fall under this exception is quite narrow. If you have other employees performing the same duties and does not require a specialist skill, it may not be covered under this exception. Again, where you have a member of pastoral team, this provision exempts people from a fixed term contract.

³ <https://www.merriam-webster.com/dictionary/governance>

⁴ <https://www.collinsdictionary.com/dictionary/english/governance>

Government funding

34. We understand that BUV does not receive government funding. Crucially, as congregations are supported by the generous giving of their members and attendees, the funding source a BUV church receives from church members does not meet the definition of the phrase "subject to funding" because the position is not subject to *government* funding.
35. Currently "funding of a kind prescribed by the regulations" only relates to philanthropic organisations receiving government funding. The exemption does not contemplate churches.

MANAGING THE FIXED TERM CONTRACT CHANGES

36. There are a number of ways that BUV congregations can manage the fixed term contract changes:

Implement the fixed term contract changes

37. BUV congregations can implement the new fixed term contract for all fixed term contracts from 6 December 2023.
38. After 6 December 2023, if there is an existing contract that is able to be renewed, it can do so only once and for a period that is less than 2 years. This is unless it is part of a series of consecutive contracts that have been renewed twice or more already.

Apply for an exception

39. BUV congregations could attempt to apply an exception, such as the employee is engaged to perform only a distinct and identifiable task involving specialised skills.
40. However, once this contract expires this employee would not be able to be employed for another position under this exception unless it is distinctively different and would be only be providing a specific skill.
41. There is risk with this option as to where it would fall under the anti-avoidance provisions to specifically avoid the prohibited fixed-term contracts.
42. The remainder of employees who do not fall under this exception would need to be offered permanent employment.

Engage ministers on an ongoing basis (but make their duties subject to change)

43. BUV congregations can offer permanent employment to all of its employees that are currently on fixed term contracts.
44. The downside of this approach is that once the position ends and is made redundant, the congregation may be required to pay a redundancy payment to the employee.
45. If a BUV congregation can guarantee giving and its budget year on year (which can be a difficult position to maintain in the current economic climate), there is nothing to prevent BUV congregations from change an individual's minister's duties rather than the position. By this we mean, that congregations would engage an individual on an ongoing basis, but contract to change the minister's duties every three years.

CONCLUSION

Regrettably, there are limited exceptions that BUV congregations can easily rely upon at this time.

Practically, it may be most useful to extend contracts at this time for the maximum period and then seek to engage with this issue down the track, as the law may change.

ANSWERS TO COMMON QUESTIONS AND CONCERNS

1. ***It is our understanding that in Victoria our churches are employers under the National Employment Standards and therefore are not exempt from the scheme and its expectations.***

This is the case where a church has deemed a minister to be an employee and not otherwise treated the minister as "called" minister of religion. A "called" minister does not refer to whether someone believes that are called by God, but rather whether they are called to serve in office irrespective of time or location - stated differently - once a minister, always a minister.

As a general guide, senior ministers can be classified as "called" because within the terms of most constitutions, there is a process in which a minister is called to an office, or otherwise ordained.

The upshot of this different in employment status is that the FW Act will only apply to employees and not to "called" ministers of religion.

2. ***There is already a tension point between an ATO definition of duties undertaken by a minister of religion which are heavily oriented towards pastoral care and preaching roles and other members of a ministry team who have less pastoral aspects to their role, such as an executive minister position. Is it feasible to add more governance duties?***

Under the proposed amendments, unless a role is dedicated entirely to governance (such as a Director) it is unlikely that such a role will meet the exceptions, and therefore it may not be useful approach.

3. ***We are concerned about the only other alternative for us being ongoing contracts.***

Unless you can meet one of the exemptions, mentioned above, then ongoing employment after two years may be the only option. This means that where a contract proceeds longer than 2 years, your ability to end an agreement will be limited to termination by mutual agreement, genuine redundancy, or performance management.

4. ***Can I offer back to back contracts?***

Yes. You can offer back to back contracts and still fit within a fixed term contract - provided the total period of the contracts does not exceed 2 years.

5. ***Can I offer a person a different role on a fixed term contract after 2 years?***

Yes. You can offer back-to-back contracts provided that the person is completing an entirely different role to the previous position that a person fulfilled and there is no overlap between the old and new position.