



Australian Government  
Australian Public Service Commission

PROBATION >>>



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## PROBATION

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## FOREWORD

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Probation is an important management tool for ensuring the suitability of a person engaged for a job. However, it needs to be used deliberately and carefully.

This booklet provides advice and guidance to Agency Heads, human resource practitioners and agency staff more generally on matters that should be considered in relation to engaging an employee on probation. It sets out the basic obligations that arise primarily out of the *Public Service Act 1999* (PS Act) and the *Workplace Relations Act 1996*, which agencies must observe, and around which they should establish appropriate agency specific arrangements. It also mentions some relevant case law covering matters dealt with by the Australian Industrial Relations Commission which are relevant to agencies when formulating their agency specific probationary arrangements.

The booklet is part of a series of guides issued by the Australian Public Service Commission (APS Commission) following the passage of the PS Act.

After the passage of the PS Act the APS Commission (as the PSMPC) published seven guides in the three series: Working with the Act, Working Together, and Values and Conduct.

Since early 2002, all APS Commission guides and advices have been published in this new series. Earlier guides are listed in sequence and given a number inside the front cover of all new booklets.

Under the PS Act, responsibility for employment decisions has generally been devolved to Agency Heads, giving them greater flexibility to manage their own workplaces, within the framework of the Act and subordinate legislation. These guides should therefore be regarded as providing assistance to Agency Heads and their senior managers in exercising their authority under the PS Act.

Both legislation and case law in the area are dynamic and therefore the information in this booklet may change at short notice. Updated information will be available on the Commission's web site or through the Commission's Helpline (02) 6272 3609.

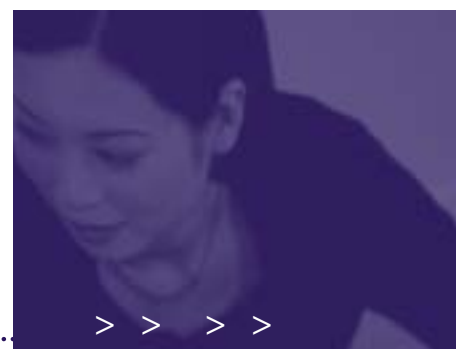


Andrew Podger  
Public Service Commissioner  
August 2003



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# INTRODUCTION

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Under the *Public Service Act 1999* (PS Act), responsibility for employing staff rests with the Agency Head. Section 22 enables an Agency Head to engage ongoing and non-ongoing employees at Senior Executive Service (SES) or non-SES classifications, and to impose conditions, such as probation, upon such engagements.

This booklet provides advice on the operation of the probation process, some guidance on how agencies can manage probationary employees, and options for continuing or terminating employment at the end of the probationary period. The booklet should be read in conjunction with other publications as they become available, namely:

- *Recruitment and Selection No 1: Ongoing employees*
- *Recruitment and Selection No 2: Non-ongoing specified term and task employees*
- *Recruitment and Selection No 3: Non-ongoing irregular or intermittent employees*
- *Training Classifications: Trainee, Cadet and Graduate Recruitment*
- *Citizenship and Other Conditions of Engagement*
- *Termination of Employment.*

## TERMINOLOGY

The PS Act uses specific terminology to describe staffing activities. The terms used in this booklet have the following meanings:

- 'Engage' refers to the engagement of either an ongoing or a non-ongoing employee in accordance with section 22 of the PS Act.
- 'Movement' refers to the move of an ongoing employee between agencies (under section 26 or section 72). The move will be associated with the assignment of duties at a similar, higher or lower classification and may relate to movement as a result of a machinery of government change.
- 'Non-ongoing employment' is a generic term which refers to the engagement of APS employees for either a specified term or for the duration of a specified task or for duties that are irregular or intermittent as mentioned in sections 22 (2)(b) and (c) of the PS Act. A person engaged on a non-ongoing basis is referred to as a non-ongoing employee.



- 'Ongoing employment' refers to the employment of an APS employee as an ongoing employee as mentioned in section 22(2)(a) of the PS Act. The employee is referred to as an ongoing employee.
- 'Promotion' means the ongoing assignment of duties to an ongoing employee at a higher classification than the one held by the employee (Direction 4.6). It will also involve a "movement" if the promotion is to another Agency. (The allocation of an operational classification to an employee in an ongoing training classification is not a promotion.)

#### FURTHER ADVICE

Further advice on the probationary process for both ongoing and non-ongoing employees can be obtained through the Commission's Helpline on (02) 6272 3609.

Any future changes to the legislation or policies relevant to probation will be notified to agencies through Commission circulars. Agencies can assess the latest information through the Commission's web site at <http://www.apsc.gov.au/>.

# 1 – PRINCIPLES UNDERLYING PROBATION

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## 1.1 THE PURPOSE OF PROBATION

The primary purpose of probation is to allow an employer to assess an employee's suitability for employment. It is an important tool available to help employers manage the risk that the person they chose to engage may not, in fact, be up to the job. It is particularly important for ongoing employment where the implication of getting it wrong may be greatest, but it may also be useful for non-ongoing engagement depending on the length and nature of the engagement.

Investing time and resources in the assessment of performance during the period of probation of ongoing employees and longer-term non-ongoing employees can deliver longer-term benefits for the agency, whether the person's employment is terminated or continued. An Agency Head may also consider it appropriate to engage some, or all, of their short-term non-ongoing employees on probation. There is, however, no requirement to impose a period of probation, and an Agency Head is free to engage an employee without imposing the condition.

*The Workplace Relations Act 1996* (WR Act) also facilitates employers who wish to use probationary arrangements before confirming an employment decision. Where an employee's services are terminated during the 'qualifying period' under the WR Act, the employee cannot seek a remedy in the Australian Industrial Relations Commission (AIRC) for unfair dismissal. The 'qualifying period' is usually the first three months of employment, but can be a longer or shorter period.

Much of the probationary process will be focused on an assessment of the employee's performance against the set of duties for the position. It may also relate to the broader requirement of people at that level in an agency or specific tasks set out in the agency's performance management arrangements. The requirements of the APS Code of Conduct may also be particularly relevant.

For the probationary process to work properly, however, it is necessary for the employee to be fully aware of the expectations against which performance will be measured (both job specific and more generally) before they take up the employment.





## 1.2 PROBATION AS A CONDITION OF ENGAGEMENT

Section 22(6) of the PS Act enables an Agency Head to impose conditions upon the engagement of an employee. Each of these conditions is separate and probation is only one such condition.

It is unlikely that a condition, other than probation, that is imposed on an engagement under section 22(6) will have an impact on the probationary process. It may still remain a condition of engagement even after the period of probation is completed. It is possible, therefore, for a person to have successfully completed their period of probation, but for their engagement to remain subject to other specific conditions such as citizenship or medical assessment.

Probation, therefore, should focus on the employee's performance.

Further information on other conditions of employment can be found in the booklet *Citizenship and Other Conditions of Engagement*.

## 1.3 APS VALUES AND CODE OF CONDUCT

The APS Values and the Code of Conduct in sections 10 and 13 of the PS Act are important to the way in which an employee is introduced to the APS, including during their period of probation. The probationer should be made aware of their obligations to uphold the APS Values and comply with the Code of Conduct, and supervisors should model commitment to the Values in their dealings with the probationer.

The Values impose obligations on both probationers and their supervisors. In particular, the probationary process is supported by the following Values:

- The APS is a public service in which employment decisions are based on merit.
- The APS focuses on achieving results and managing performance.

Agencies should not therefore shy away from firm use of probationary arrangements.

The probationary process must also be consistent with the following Values:

- The APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves.
- The APS establishes workplace relations that value communication, consultation, cooperation and input from employees on matters that affect their workplace.
- The APS provides a fair, flexible, safe and rewarding workplace.
- The APS promotes equity in employment.
- The APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government.
- The APS provides a fair system of review of decisions taken in respect of APS employees.

Taken together with the requirements of the *Administrative Decisions (Judicial Review) Act 1977* and the *Privacy Act 1988* these Values do require agencies to ensure that probationers:

- are treated fairly and courteously
- receive appropriate feedback
- are given a reasonable opportunity to correct any perceived problems in their work performance or conduct
- are given an opportunity to state their case before a decision which is likely to be unfavourable to them is made
- are judged by a decision maker who is (and who appears to be) unbiased
- are afforded the appropriate level of personal privacy.

Should an Agency Head terminate the employment of a person for failing to have successfully completed their period of probation, and the former employee can demonstrate that they were not treated in accordance with the above principles, an external review body may find that the Commonwealth has acted improperly and may order reinstatement.

#### 1.4 MOVEMENT OR PROMOTION DURING THE PERIOD OF PROBATION

Probation relates only to engagements to the APS. There is no equivalent measure to help manage the risk of errors when decisions are taken to promote or move an employee at level.

Given that the purpose of probation is to judge the person's suitability for employment, it will generally be desirable to wait until the probation has been satisfactorily completed before giving effect to any promotion or movement of an employee. Any decision regarding the continuity or otherwise of a period of probation when an employee accepts a movement at level or a promotion should be clearly conveyed to the employee as soon as possible.

Whether a period of probation may continue when an employee moves during their period of probation may be dependent upon whether the wording of the original notice is sufficiently flexible to allow for the possibility.

When an employee agrees to a movement at level within the agency before their period of probation has been completed, the Agency Head may consider it appropriate for the probation to continue until the full period of probation has been completed. If the employee moves at level to another agency before their period of probation has been completed, the gaining Agency Head may wish the probation to continue in the new agency until the full period of probation has been completed.

In the unusual situation of an employee gaining a promotion either within the agency or with another agency before their period of probation has been completed, it is open for the relevant Agency Head to continue the probation until the full period of probation has been completed.

The continuation of the period of probation may be appropriate in these circumstances to ensure that the employee meets both the performance and conduct requirements incumbent upon them as an APS employee. If an Agency Head decides that the full period of probation need not be served, the Agency Head should advise the employee that the period of probation has been satisfactorily concluded.

## 1.5 MOVEMENT WHILST ON PROBATION DUE TO MACHINERY OF GOVERNMENT CHANGES

In circumstances where an administrative rearrangement under section 72 of the PS Act results in the movement of an employee from one APS agency to another, and the APS employee who is to be moved is still on probation, the period of probation will continue to apply to the employee's employment in the gaining agency.

The Agency Head of the gaining agency will then be responsible for determining whether the period of probation has been successfully completed. The Agency Head may, where appropriate, have regard to reports prepared in the employee's original agency when making this decision. For more information on the effect of machinery of government changes, contact the Commission Helpline on (02) 6272 3609.

## 1.6 PROBATION AND THE WORKPLACE RELATIONS ACT

The decision on whether to impose a period of probation in respect of any engagement rests with the Agency Head. The flexibility that an Agency Head may exercise in this area will be affected by the interaction of the WR Act and the PS Act.

Whilst the WR Act provides a remedy for unfair or unlawful dismissal, people serving a 'qualifying period' or a period of probation are not able to have their terminations reviewed under the WR Act if the termination occurs during that period. The regulations made under the WR Act recognise such a period as:

a period of probation or a qualifying period of employment, if the duration of the period or the maximum duration of the period, as the case may be, is determined in advance and, either:

- (i) the period, or the maximum duration, is 3 months or less; or
- (ii) the period, or the maximum duration:
  - (A) is more than 3 months; and
  - (B) is reasonable, having regard to the nature and circumstances of the employment;

The WR Act also provides that persons who are serving a 'qualifying period' are not able to have their terminations reviewed under the WR Act.

The following principles are derived from a significant body of case law in the AIRC concerning probationary periods for the purposes of the WR Act:

- The employee must be aware in advance of the engagement that their employment is subject to the satisfactory completion of a probationary period.
- The maximum period of probation must be determined in advance of the engagement and can only be extended if the employee was advised prior to the engagement that the probationary period might be extended. A maximum period of extension must also be specified in advance and an agency needs to be precise when specifying the circumstances in which an extension of probation may occur.

- The period (or maximum period) of probation must be reasonable if it extends beyond three months. The AIRC has considered the following factors to be important when determining a reasonable period of probation:
  - The purpose of probation is to provide a period for training to do the work and to allow an assessment to be made of the employee's aptitude and capacity to do the work once trained.
  - Whether a period of probation is reasonable is an exercise of judgment based on proved objective fact, and the most important consideration will be the nature of the job.
  - Consideration must be given to the entire circumstances of the employment and not merely the circumstances of the position held.
  - It is relevant to consider a probationary employee's previous experience, training and employment in assessing the 'entire circumstances' of the employment.
  - Regard should be had to the situation at the date the employment commenced.
- A person's engagement cannot be terminated on the grounds of a failure to satisfy probationary conditions if the termination occurs after the period of probation has expired. A notice of termination is not effective until it is communicated to and received by the employee, despite the fact that the instrument may be expressed as taking effect from an earlier date.

### 1.7 PROBATION AND AGENCY AGREEMENTS

An Agency Head must comply with any provisions of the Agency's Certified Agreement or an individual's Australian Workplace Agreement (AWA) concerning the rights and entitlements of a probationary employee.

It may therefore be important for an Agency Head to consider whether the full scope of the Agency Certified Agreement, AWA or Agency Head Instructions should apply to the employee whilst they are on probation. It may be appropriate to draft such documents in such a way as to:

- specifically exclude staff who are engaged on probation from those elements of the documents that cover inefficiency (in the same way as they are excluded from an agency's redeployment, reduction and retrenchment provisions relating to the management of excess employees)
- provide for different misconduct provisions to apply to staff who are still serving a period of probation.

Failure to do this may nullify the whole basis for probationary engagement because the employee may be subject to the full process specified for other employees of the agency before their employment can be terminated.

## 2 – MANAGEMENT OF PROBATIONARY EMPLOYEES

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### 2.1 SETTING THE GROUND RULES

Prior to engagement, for the probationary system to work effectively, a prospective employee should be advised of:

- their status as a probationary employee
- the duration (or maximum duration) of their period of probation
- whether that period can be extended (and the maximum duration of the period of probation) and under what circumstances
- what their probationary performance will be measured against and the mechanism by which it will be measured.

Upon commencement, staff should then be advised of:

- their work responsibilities (both their immediate duties and any additional requirements in respect of ability to perform other jobs and/or to interact appropriately with other staff and customers)
- the standards of work expected of them
- the standard of conduct expected of them.

It is important to ensure that these matters have been explained to, and are clearly understood by, the employee.

The period of probation can then be used to monitor the employee's achievements against these criteria. This assessment may incorporate an assessment of the impact of the employee's attendance on his or her ability to achieve an appropriate standard against these criteria.

As this process of setting the objectives of the probationary process and measuring the employee's achievements is an important one, it is preferable that both steps be recorded in writing.



## 2.2 PROBATION MONITORING

A simple method of documenting this process and ensuring that the employee is aware of how the period of probation will be managed is to link the probationary reporting system to the agency's performance appraisal system.

There is no legislative requirement concerning how an employee's work performance is to be monitored, but whatever monitoring mechanism is adopted by the agency needs to comply with the overarching principles outlined in Part 1 of this booklet. Generally such processes will involve ongoing feedback and one or two written reports being submitted, by the supervisor, to the Agency Head or the delegate.

The employee should be fully aware of any report submitted as part of the probationary process. In most situations the employee is asked to read and sign the probation report before it is forwarded to the relevant authority. Such a signature is an acknowledgment of the fact that the employee has seen the report, not of their agreement with its contents. The employee is at liberty to submit their own statement in relation to the report if they wish to do so.

The monitoring mechanism adopted within an agency should be sufficiently flexible and comprehensive to:

- allow the person providing the report to discuss any perceived shortcomings with the employee
- provide the employee with a reasonable opportunity to correct any perceived failings
- enable a sound decision to be reached in respect of the employee's suitability before the end of the period of probation and to allow retention or termination action to be finalised before the expiration of the period of probation.

Where the process leads to a decision that the person will remain in employment the feedback process may facilitate open discussion of future career paths and opportunities in the agency.

## 2.3 WORK PERFORMANCE

Reports on an employee's work performance should generally include information in relation to both the work responsibilities assigned to the employee and the standard to which the employee is performing these duties.

Where an employee is either not performing their work responsibilities, or is not performing them to a satisfactory standard, it is good practice to raise this with the employee as soon as it becomes apparent so that the probation report is essentially a reiteration of these discussions. With a three-month probation period, of course, this may not always be practicable. The report should, nevertheless, include a record of how and when the concerns were drawn to the employee's attention, and how they were to be addressed.

## 2.4 CONDUCT

The period of probation should be used to ensure that the employee is aware of, and able to comply with, the Code of Conduct as an essential element underpinning their engagement in the APS, and that failing to comply with the Code at any time during their career may result in the termination of their employment.

Where there is concern about an employee's behaviour, this should be brought to their attention by their supervisor as soon as possible. Preferably reference to such a concern in the probation report should be no more than a reiteration of what has already been discussed with the employee, and include a record of any agreement to rectify or change the relevant behaviour.

Where there is a suspected serious breach of the Code of Conduct, it should be drawn to the attention of the Agency Head or an appropriate delegate as soon as it occurs. Where an Agency Head or delegate becomes aware that an employee may have breached the Code of Conduct (to the extent that would merit dismissal) the Agency Head can take action in accordance with agency procedures to investigate the matter immediately. If it appears, as a result of that investigation, that a serious breach has been committed by the employee, then the Agency Head can terminate the engagement immediately, without waiting for the period of probation to run its normal course.

## 3 – END OF PROBATION

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### 3.1 WHERE THE EMPLOYEE IS TO REMAIN IN EMPLOYMENT

Where an employee has successfully completed their period of probation it is good practice to advise the employee that their employment is no longer subject to probation. It is preferable for this advice to reach the employee as soon as practicable after the expiration of the period of probation.

There is no longer any formal requirement for an employee on probation to be 'confirmed' following the successful completion of their period of probation.

An employee who is subject to a number of conditions should be reminded that they must still satisfy the other condition(s) imposed under section 22(6) and that failure to do so could still lead to their employment being terminated. For example, a person may successfully complete a period of probation but be terminated because they have failed to successfully complete a cadetship program. Each condition of engagement needs to be imposed and addressed separately.

### 3.2 WHERE THE EMPLOYMENT IS TO BE TERMINATED

An Agency Head will usually wish to terminate the employment of an employee who has not been able to:

- fully perform all of their assigned work responsibilities
- perform their work responsibilities to a satisfactory standard
- maintain an appropriate standard of conduct.

To achieve this successfully and without the risk of messy processes, it is important first to have:

- followed any established agency procedures and legal requirements that apply to probationers
- given the employee reasonable opportunity to achieve an appropriate standard in respect of the shortcoming
- given the employee reasonable opportunity to show why termination should not occur





- notified the employee of the intention to terminate
- effected the termination before the expiration of the period of probation.

It is also important to be, and to be seen to be, free from bias.

It is preferable to document the process and to ensure that relevant information and decisions are conveyed to the employee in writing.

Further information on termination of employment can be found in the booklet *Termination of Employment*.