
Draft Government Sector Employment Regulation 2014

Background to the Regulation

The *Government Sector Employment Act 2013* (the Act) empowers the making of the Government Sector Employment Regulation 2014 (the Regulation). A Regulation has the force of law, which means that it may contain legally enforceable rights and obligations.

As the Regulation is made by the Governor, it will be a statutory rule under the *Interpretation Act 1987*. This means that notice of making or amending the Regulation must be tabled in Parliament, and it may be disallowed by Parliament. If either House of Parliament disallows the Regulation, it is taken to have been repealed. A Regulation must be published on the NSW Legislation website.

Content of the Regulation

Generally, the Regulation may include matters required to be prescribed by the Act; or matters permitted to be prescribed by the Act; or matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Consultation draft Regulation contains:

- relevant regulations retained from the *Public Sector Employment and Management Regulation 2009* (PSEMR);
- provisions transferred from the *Public Sector Employment and Management Act 2002* (PSEMA);
- other matters that are required or permitted to be prescribed by the new Act.

Part 2 – Public Service employment

Division 1 – General provisions

This Division largely incorporates matters contained in the PSEMA and the PSEMR and updates the language in the clauses to reflect the new Act.

Clause 4 allows agency heads to arrange for acting arrangements within their own agency or a related agency. This was previously section 24 of the PSEMA. Secondments or transfers to other government sector agencies will be dealt with in the GSE Rules. Clauses 18 and 19 of the Regulation provide for a higher duties allowance to support employees acting in more senior roles.

Clause 5 requires employees (other than casual or part-time employees) to seek permission to undertake other

paid work. This provision is transferred from section 59 of the PSEMA.

Clause 6 requires employees to report charges and convictions for serious offences. This provision has been transferred from clause 27 of the PSEMR. A conviction for a serious offence is now dealt with as misconduct under the new Act.

Clause 7 requires employees to report bankruptcy. This provision has been transferred from section 58 of the PSEMA. It has been changed to allow agency heads to set a condition of engagement for an employee in a financial management role requiring the employee to declare any previous bankruptcy. Conditions of engagement are a feature of the new Act (see section 44 of the Act).

Clause 8 gives agency heads the authority to determine a person to be excess to requirements in accordance with PSC guidance. It also prevents the person's employment from being terminated unless reasonable steps have been taken over at least 3 months to transfer the person to other ongoing employment in the government sector. These requirements reflect the current approach to managing excess employees.

The PSC will update existing policy documents to reflect the new Act and Regulation.

Division 2 – General Conditions of Employment

This Division largely incorporates matters contained in the PSEMR and updates the language in the clauses to reflect the new Act.

Clause 9 provides that the requirements of this Division are subject to any State industrial instrument that may be applicable to the employee.

Clause 10 provides the entitlement to public holidays and the public service holiday. These provisions have been transferred from clause 10 of the PSEMR. The entitlements have been updated in accordance with the *Public Holidays Act 2010*, but the overall entitlement remains the same.

Clause 11 provides requirements for employees who are absent from duty, which have been transferred from clause 11 of the PSEMR. It requires employees to have a reasonable cause and explain their absences. It also gives agency heads the authority to deduct pay for unexplained absences. These obligations have not changed.

Clause 12 includes provisions transferred from clause 12 of the PSEMR for payment of increments. The wording in this clause has been revised to make an explicit link to the new Performance Development Framework

requirements. Payment of increments will now be subject to the performance requirements under the agency's performance management system and the satisfactory conduct of the employee. Currently, payment of increments is subject to the satisfactory performance of duties and the satisfactory conduct of the employee.

Agencies will be required to have performance management systems that are compliant with the Rules by section 67 of the new Act. Agencies are already required to have performance management systems in accordance with section 101A of the PSEMA. The PSC Performance Development Framework sets out the essential elements of performance management systems.

Clause 13 provides the fitness for duty system, which has been transferred from clause 13 of the PSEMR. It deals with the medical examination or other health assessment of an employee believed not to be fit for duty. The Regulation will continue to require a nominated medical assessor to be used for medical examinations and health assessments.

Division 3 – Leave

This Division largely incorporates matters contained in the PSEMA and the PSEMR and updates the language in the clauses to reflect the new Act.

Clause 14 and **Schedule 1** provide for extended leave for Public Service employees. Extended leave provisions have been transferred from Schedule 3 of the PSEMA. As per Government commitments, leave entitlements have not changed. The extended leave provisions that were contained in the PSEMA will be contained in the Regulation.

Employees who are entitled to extended leave or long service leave at the start of the new Act under legislation other than the PSEMA or industrial instruments will not be affected by the commencement of the Act.

Clause 15 applies leave arrangements in the *Crown Employees (Public Service Conditions of Employment) Award 2009* to Public Service senior executives and other non-executive employees who are not covered by a State industrial instrument. This provision has been transferred from clause 22 of the PSEMR.

Clause 16 provides for non-executive employees to cash out leave when they become an executive employee. This provision has been transferred from section 80 of the PSEMA.

Division 4 – Allowances

This Division largely incorporates matters contained in the PSEMR and updates the language in the clauses to reflect the new Act.

Clause 17 provides that the requirements of this Division are subject to any State industrial instrument that may be applicable to the employee.

Clauses 18 & 19 are designed to support acting in higher-paid roles by providing a higher duties allowance. These provisions have been transferred from clauses 17, 18 and 20 of the PSEMR and have been completely revised and simplified. The provisions for executive and non-executive employees are provided in separate

clauses. The Regulation generally maintains the status quo, however it now requires the proportion of the allowance paid to be set based on the duties to be performed *before* the employee starts to act in the role, rather than afterwards. Overall, this provides a fairer system for employees.

Clause 20 provides agency heads with the ability to pay allowances for expenses that are not adequately covered by an existing allowance or where there is no existing allowance. This provision has been transferred from clause 16 of the PSEMR.

Division 5 – Special provisions relating to Public Service senior executives

This Division includes matters relating to senior executives that were contained in the PSEMA and PSEMR, and also includes some new matters.

Clause 21 prescribes a number of additional matters that are to be dealt with in senior executive contracts, including confidentiality, intellectual property and capability assessments.

Clause 22 allows senior executives to cash out any accrued annual or extended leave at any time. This is a new provision that replaces the ability for senior executives to cash out leave between contracts, which given the move to ongoing contracts, will no longer be a trigger for this to occur. Cashing out of leave is subject to the requirement for senior executives to take at least 10 days of annual leave per year in accordance with the *Crown Employees (Public Service Conditions of Employment) Award 2009* as that award is applied to senior executive employees by clause 15 of the Regulation.

Clause 23 combines section 75 of the PSEMA regarding travelling and subsistence allowances for senior executives as well as clause 21 of the PSEMR. This clause will provide for travelling, subsistence, relocation and other allowances as determined by the executive's employer.

Part 3 – Employment in Public Service and other government sector agencies

Division 1 – General provisions

This Division primarily contains new matters, however also includes a matter transferred from the PSEMR.

Clauses 24 & 25 formalises the policy for employees who receive severance or redundancy payments and are then re-employed in the public sector. These requirements were previously in administrative policy documents. Clause 25 specifically refers to the applicable payments and how they are calculated.

As well as being directly employed by a public sector body, re-employment also includes employment as a contractor to the employer, through labour hire arrangements with the employer or through a company or

partnership that provides the services of the former employee to the employer.

Clause 26 allows agencies to employ a person when a current employee intends to end their employment with the agency. To facilitate a smooth transition, the Regulation allows for two employees to be employed in the same role or position for a period and jointly exercise authority or functions. This provision has been transferred from section 100A of the PSEMA.

Division 2 – Compensation for termination of employment of public service sector senior executives

This Division contains new matters that deal with compensation for termination of employment for senior executives. Previously dealt with by SOORT and other mechanisms, the Regulation now standardises compensation available to executives on termination, including:

- 4 weeks if terminated for any or no stated reason during or at the end of a period of probation specified as a condition of engagement for the executive
- 38 weeks if terminated for any or no stated reason outside of a period of probation, and
- 13 weeks if terminated for unsatisfactory performance

Executives will receive no compensation if terminated for misconduct.

Clause 28 provides for the payment of pro-rata compensation for part-time executives upon termination of their employment.

Division 3 – Cross-government sector leave arrangements

This Division contains recognition of prior service provisions that have been transferred from the PSEMA.

Clause 30 provides that the requirements of this Division are in addition to any State industrial instrument that may be applicable to the employee.

Clause 31 and **Schedule 2** provide for recognition of prior service for the purposes of extended leave. These provisions are transferred from section 94 and Schedule 3A of the PSEMA.

Clause 32 provides for the transfer and cashing out of annual leave for non-executive employees between government sector agencies. These provisions have been largely transferred from section 94 of the PSEMA. The provisions for cashing out of leave allow non-executive employees to cash out annual leave when moving between government sector agencies *including* Public Service agencies. This provides extra flexibility for employees who have accrued leave while also making sure that employees have enough rest as required by industrial instruments. Non-executive employees in the Public Service are required to take at least 10 days leave every year under the *Crown Employees (Public Service Conditions of Employment) Award 2009*.

Clause 33 provides for the transfer of sick leave between government sector agencies in provisions transferred from section 96 of the PSEMA.

Clause 34 provides recognition of service for leave where a minimum period of service is an eligibility requirement (such as parental leave) in provisions transferred from section 97 of the PSEMA.

Clause 35 includes transitional provisions for accessing forfeited sick leave for eligible employees that have been transferred from section 98 of the PSEMA

Clause 36 provides for the Treasurer to give directions on the transfer of funds between employers for leave liabilities. These provisions have been transferred from section 99 of the PSEMA.

Division 4 – Workforce diversity

This Division further supports the workforce diversity system under section 63 of the Act. The special selection provisions currently contained in clause 6 of the PSEMR will be transferred to the Rules.

Clause 37 prescribes certain universities into the definition of government sector agency for the purposes of workforce diversity. This continues arrangements for Universities who are currently covered by Part 9A of the *Anti-Discrimination Act 1977*.

Clause 38 allows existing EEO Management Plans to be extended for a period of 12 months following the commencement of the Act and Regulation to allow for agencies to transition effectively to the new workforce diversity requirements.

Part 4 – Miscellaneous

Part 4 includes a number of miscellaneous provisions that are both new matters and matters transferred from the PSEMR.

Clause 39 requires the Public Service Commissioner, Industrial Relations Secretary (currently the Secretary of the Treasury), and agency heads to notify affected employees of decisions made under the Regulation. This provision has been transferred from clause 24 of the PSEMR.

Clause 40 provides for deductions to be made from a person's salary as rent for residential premises belonging to the Government being used by the employee in provisions transferred from clause 25 of the PSEMR.

Clause 41 provides support to the operation of the Act and Regulation by prescribing statutory bodies as being part of the government sector for specific purposes. For example, this clause will prescribe State owned corporations, the Internal Audit Bureau, the Treasury Corporation and some Universities as government sector agencies for the purposes of providing reports and information under section 16 of the Act.