CEO contracts and the 10-year rule

By Neil Douglas

As a general proposition, if a local government wishes to continue to employ, as its CEO, a person who has been employed (or, on expiry of their current contract, would be employed) as its CEO for 10 or more consecutive years, then the local government must first carry out a recruitment and selection process in accordance with the relevant CEO Recruitment Standards[1].

The key provisions relating to this requirement are set out in clause 13 of the CEO Recruitment Standards.

Are there circumstances in which, in that situation, a local government may continue to employ the person as its CEO without carrying out a recruitment and selection process?

In my view, the answer is 'yes'. However, there are legal complexities and much depends on the particular circumstances, including the provisions of the CEO's current employment contract, whether the conditions in clause 13(2) of the CEO Recruitment Standards have been satisfied and the drafting of appropriate variations to the CEO's current employment contract.

Conditions under clause 13(2)

A local government is required to carry out a CEO recruitment and selection process in accordance with clause 13(3) of the CEO Recruitment Standards only if each of the 3 conditions described in clause 13(2) has been satisfied.

The first condition is that, upon the expiry of their current employment contract, the 'incumbent CEO will have held the position for a period of 10 or more consecutive years, whether that period commenced before, on or after the commencement day' (being 3 February 2021).

In some cases, issues have arisen in relation to a gap between the date of expiry of an earlier CEO employment contract and the date of commencement of a subsequent contract and, if so, the legal effect of a gap of that type in the context of the '10 or more consecutive years' criterion.

The second condition is that, upon the expiry of the incumbent CEO's employment contract, 'a period of 10 or more consecutive years has elapsed since a recruitment and selection process for the position was carried out, whether that process was carried out before, on or after commencement day'.

Typically, there would be little difficulty in establishing whether this condition had been satisfied.

The third condition is that 'the incumbent CEO has notified the local government that they wish to have their contract of employment renewed upon its expiry'. The terms and operation of this condition may be critical.

Unless, and until, each of these 3 conditions has been satisfied, a local government would not be required, under clause

13(3) of the CEO Recruitment Standards, to carry out a CEO recruitment and selection process (for the proposed continuation of the CEO's employment with the local government).

Renewal 'upon its expiry'

It is significant that the third condition under clause 13(2) of the CEO Recruitment Standards is not expressed in wider terms, such as to notify the local government of the CEO's wish to continue to be employed as the CEO. One of the ways that a CEO may continue to be employed in that position is to have their employment contract 'renewed upon its expiry'. But that is not the only way. It is not uncommon, for example, for the term of a CEO employment contract to be extended before its expiry.

If a CEO notified the local government that they wished to have the term of their current employment contract extended (or simply that they wished to continue to be employed as the CEO), the third condition under clause 13(3) would not have been satisfied. Nor would it have been satisfied if a CEO had not given any relevant notification to the local government.

In this context, it would be relevant to consider any applicable provisions of the CEO's employment contract. Typically, a CEO employment contract requires a CEO (at a particular time that might be 6 months or 9 months before the current expiry date) to notify the Council of the CEO's future employment intentions. Some contractual obligations of this type express the notification requirement by reference to a wish to 'renew' the contract, others by reference to a wish 'to extend the term' of the contract.

In any event, in the absence of any notification by a CEO to the local government that they wished to have their contract of employment renewed upon its expiry, the local government would not be required, under the CEO Recruitment Standards, to carry out a recruitment and selection process. In that situation, it would be open to the local government (and the CEO) to consider other ways in which the CEO's employment with the local government could be continued.

Extension of term

Where the term of a CEO employment contract with a local g=overnment is 'extended' (otherwise than by way of a 'renewal upon its expiry'), that may be done relying on section 5.39(4) of the *Local Government Act*, under which a CEO employment contract 'is to be renewable and … may be varied' (to the extent that the variation does not affect the application of any provision of section 5.39).

A variation to the expiry date (and, if appropriate, the commencement date) of a CEO employment contract would effect an extension to the term of the contract and, as a result, a continuation of the CEO's employment without carrying out a recruitment and selection process under the CEO Recruitment Standards.

This may be seen to be contrary to the spirit and intended purpose of clause 13 of the CEO Recruitment Standards.

However, it is significant that the CEO Recruitment Standards are subordinate to, and must be construed subject to, the provisions of the *Local Government Act*. The power under section 5.39(4) of the *Local Government Act* to vary a CEO employment contract is expressed to be subject only to the requirement that a variation is not to 'affect the application of this section' (ie section 5.39). There is nothing in section 5.39 that relates to the CEO Recruitment Standards or their application. Nor am I aware of any reason to conclude that appropriately drafted variations to a CEO employment contract would otherwise affect the application of section 5.39 of the *Local Government Act*.

As a result, there may be circumstances where the '10-year rule' under the CEO Recruitment Standards does not require a local government to carry out a recruitment and selection process before agreeing to continue to employ as its CEO a person who has been employed (or, on the expiry of their current employment contract, would be employed) for 10 or more consecutive years.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Neil Douglas by email to ndouglas@mcleods.com.au.

Footnote

[1] For the purposes of this article, I refer to the CEO Recruitment Standards as the standards adopted by the relevant local government in accordance with the requirements of section 5.39B(3) of the *Local Government Act 1995*, regulation 18FA and the *Standards for recruitment of CEOs* set out in Schedule 2, Division 3 of the *Local Government (Administration) Regulations 1996*.

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