CEO Performance Review Standards

By Neil Douglas

A CEO performance review must be conducted at least once a year. How each review is conducted is determined under the provisions in –

(1) each local government's adopted standards for CEO performance reviews (which cannot be inconsistent with the model standards in the Local Government (Administration) Regulations 1996, Schedule 2 (Model Standards); and

(2) the CEO's employment contract (which should be consistent with the adopted standards).

General requirements

Among the requirements of the Model Standards are that (in broad terms) –

(1) the Council and the CEO must agree on the review process;

(2) the review process must be evidence based;

(3) the review must be endorsed by the Council; and

(4) the CEO must be informed in writing of the results of the review.

Agreement on process

In the past, a typical CEO employment contract contained provisions that gave the Council the power to determine (usually after consulting with the CEO) aspects of the review process, such as who would be the person or body conducting the review. Provisions of this type are now inconsistent with the Model Standards. Aspects of the performance review process, including who the reviewer is to be, must now be agreed by the CEO and the Council – not determined by the Council – and must be consistent with the Model Standards.

Any performance criteria in addition to those that are set out in the CEO's employment contract must also be agreed by the CEO and the Council.

Evidence based

There are now express requirements that –

(1) each performance review must be 'carried out in an impartial and transparent manner';

(2) evidence relating to performance criteria must be collected 'in a thorough and comprehensive manner'; and

(3) the CEO's performance must be reviewed, against the performance criteria, 'based on that evidence'.

As a result, a CEO's performance must now be assessed, by reference to each of the performance criteria, on the basis of thoroughly and comprehensively collected evidence (including data and factual information) – rather than subjective opinions, feelings or instincts.

Where, as is often the case, a consultant is engaged to assist a Council in respect of a CEO performance review, the terms of engagement should specify their obligation to meet these evidence based requirements – both in relation to the review process and the resulting written report.

Council endorsement

Whether a CEO's performance review is conducted by the Council itself, by a Committee or by a consultant, the Model Standards require that the Council must, by resolution of an absolute majority, endorse the review. The requirement for a Council resolution (which is to be publicly accessible) is consistent with the transparency objective underlying the Model Standards.

However, the requirement for the Council to 'endorse the review' does not preclude the Council, before any endorsement, from questioning aspects of a review conducted by a consultant or, where appropriate, from requiring a review to be conducted, and/or a review report to be compiled, in accordance with the evidence based requirements of the Model Standards.

CEO to be notified

It would generally be expected that a review process agreed by the CEO and the Council would include a step where a draft review report would be given to the CEO with an opportunity for the CEO to provide comments, and those comments would be taken into account by the reviewer before the report is finalised and given to the Council for its endorsement.

In any event, the Model Standards require that after the Council has endorsed the review, the CEO must be informed in writing of the results of the review and, if the review identifies any issues about the performance of the CEO, how the Council proposes to address and manage those issues.

Compliance

Section 5.39B(7) of the *Local Government Act* enables regulations to be made to provide for 'monitoring of compliance with adopted standards' and 'the way in which contraventions of adopted standards are to be dealt with'.

Regulations were made (in February 2021) requiring a local government's certification of compliance with its adopted standards relating to the employment or termination of a CEO. However, no regulations have yet been made requiring a local government's certification – or any other monitoring or compliance measures – in relation to a CEO's performance review.

In this situation, the potential remedies open to a CEO, in the event of a Council's non-compliance with its adopted standards relating to a CEO's performance review, would largely be confined to those remedies arising from a breach of an express or implied term of the CEO’s employment contract.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. Local governments requiring further assistance in relation to these issues are welcome to contact Neil Douglas on 9383 3133 or ndouglas@mcleods.com.au.

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