

Reviewing your CEO Employment Contract

By Neil Douglas

Model standards for CEO recruitment, performance and termination (**CEO Model Standards**) took effect earlier this year. One consequence of this is that various terms typically included in CEO employment contracts are now inconsistent with aspects of the CEO Model Standards.

To the extent that they are inconsistent, the contract terms would be inoperative and have no legal effect. As a result, it would be prudent for local governments to review the current terms of their CEO employment contracts.

The CEO Model Standards

The CEO Model Standards comprise standards for –

- (1) the recruitment of CEOs;
- (2) the review of the performance of CEOs; and
- (3) the termination of the employment of CEOs.

They are set out in Schedule 2 to the *Local Government (Administration) Regulations 1996* (**Administration Regulations**) which came into force on 3 February 2021.

Under amendments to the *Local Government Act 1995*, local governments were required (within 3 months of 3 February 2021) to adopt the CEO Model Standards.

In addition to the CEO Model Standards, amendments to the Administration Regulations require that, whenever a CEO is employed or whenever a CEO's employment is terminated, the Council must pass a resolution (by absolute majority) certifying that the employment or termination was in accordance with the adopted CEO Model Standards. A copy of each resolution must be given to the Department within 14 days.

There are 3 sets of provisions in a typical CEO employment contract that may be affected by the CEO Model Standards and the associated legislative amendments. These relate to –

- (1) renewal of a contract;
- (2) performance criteria and performance review processes; and
- (3) termination of employment processes.

Contract renewal

The largest part of the CEO Model Standards deals with the standards to be observed by local governments in their recruitment of a CEO. In the context of the terms in a CEO employment contract, the most significant of these standards is the '10-year rule'.

In essence, if a CEO has been in the role for 10 years or more, their employment contract cannot be renewed unless the local government advertises the position and carries out a recruitment and selection process (in accordance with the CEO Model Standards) and the CEO is selected under that process.

Renewal provisions in a contract that are inconsistent with these restrictions would have no legal effect. Before the CEO Model Standards came into force, typical renewal provisions enabled a CEO employment contract to be renewed simply with the agreement of the Council and the incumbent CEO.

As a result, renewal terms in a CEO employment contract now need to be drafted (and, in many cases, need to be amended) to be consistent with the 10-year rule.

Performance reviews

A typical CEO employment contract includes terms that (to varying degrees) deal with the CEO's annual (or more frequent) performance reviews, including the selection of the reviewer, the process and procedures to be adopted for the review and the Council's role and responsibilities in relation to each review report.

Each of these matters is affected by the CEO Model Standards. Particular care needs to be taken to ensure that the terms of a CEO employment contract are consistent with the requirements under the CEO Model Standards. Among these are the requirements that –

- (1) the CEO and the local government must agree on the performance review process;
- (2) the CEO and the local government must also agree on any performance criteria to be met by the CEO that are in addition to the contractual performance criteria;
- (3) the local government is required to 'collect evidence regarding the CEO's performance in respect of the contractual performance criteria and any additional performance criteria in a thorough and comprehensive manner'; and
- (4) the Council must resolve, by absolute majority, to endorse each review of the CEO's performance.

Termination

The CEO Model Standards impose obligations on a local government in relation to the termination of a CEO's employment that would rarely, if ever, be included in a typical CEO employment contract drafted before the Standards came into force.

For example, CEO employment contracts commonly contain provisions empowering a Council to terminate the employment of a CEO for performance related issues – by giving a specified period of notice (such as 4 weeks). However, as a result of the CEO Model Standards, that (contractual) power could not be exercised unless the Council first complied with the additional procedural requirements set out in clause 22 of the CEO Model Standards.

These additional procedural requirements focus on earlier identification of performance issues in the course of carrying out the CEO's annual (or more frequent) performance reviews, and actions that are required to be taken to give the CEO a reasonable opportunity to address and implement a plan to remedy the performance issues.

Conclusions

As a result of the CEO Model Standards, the legal position affecting recruitment, performance review and termination of employment of CEOs has changed. Various aspects of a CEO employment contract need to be drafted or amended to be



consistent with the CEO Model Standards. This would also help to reduce the risks of non-compliance and invalidity resulting from relying on contract terms that are inoperative and have no legal effect because they are inconsistent with the CEO Model Standards.

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.

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