

Local Government CEO Employment Contracts: do they comply with the amended Local Government Act?

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For many years, local governments have relied on the Model CEO employment contract issued jointly in 2016 by LG Professionals WA and WALGA.

Civic Legal has reviewed a number of CEO employment contracts since the 2019 amendments to the *Local Government Act 1995 (WA)* and the model standards prescribed by the *Local Government (Administration) Amendment Regulations 2021*.

This article outlines some of the findings of our reviews.

When undertaking reviews of the CEO employment contract, we have considered:

- the *Local Government Act 1995 (WA)* (the **Act**);
- the *Local Government (Administration) Regulations 1996 (WA)* (the **Regulations**); and
- the *Department of Local Government, Sport and Cultural Industries Operational Guidelines for Local Government CEO Recruitment and Selection, Performance Review and Termination (Operational Guidelines)*.

Key findings:

1. Civic Legal found that none of the CEO employment contracts it was asked to review, complied with s 5.39 of the Act.
2. Performance criteria aspect is often an area of the contract that is drafted inadequately.
3. All the CEO employment contracts in the review work contained a clause that the employment contract can be terminated at any time and for any reason. Such provisions are no longer compliant with the Act, as they do not comply with the model standards relating to the termination of employment.

Employment contract requirements

Findings from our reviews

As a result of the amendments, Civic Legal found that none of the CEO employment contracts it was asked to review, complied with s 5.39 of the Act.

All CEO employment contracts must satisfy the requirements of section 5.39 of the Act and the necessary provisions of the Regulations. If a CEO employment contract does not satisfy the requirements of s 5.39, that contract will be of no effect.

We therefore recommend that all local governments review their CEO employment contracts. This is important if no review has been done since the amendments were rendered complete by the publication of the model standards in about April 2021.

Compliance requirements

Section 5.39 requires that the contract term be no longer than five years (one year for an acting or temporary CEO). In addition, the employment contract is of no effect unless it contains:

- the expiry date;
- performance review criteria; and
- the maximum amount of money that a CEO is entitled to be paid if the contract is terminated before the expiry date.¹

Performance review criteria

Findings from our reviews

From our reviews, we discovered that the performance criteria aspect is often an area of the contract that is drafted inadequately. The requirement to have performance review criteria stated in the contract is actually not new.²

We found that in some of the contracts we reviewed, the schedule that is supposed to contain the performance criteria was left blank.

In some other contracts, we found wording to the effect that the criteria would be agreed within 3 months of the start date.

And in other contracts, we found that the criteria had been drafted so vaguely that it would have been impossible for any meaningful performance review to be undertaken against them.

Compliance requirements

To ensure compliance with the Act, local governments must ensure that the council approves sufficiently detailed and meaningful performance review criteria. These criteria must be incorporated into the contract at the outset of the contract term.

When a local government prepares the performance review criteria, it should take account of the Operational Guidelines. They state that the criteria must be '*specific, relevant, measurable, achievable and time-based*'.

In order to support the evolving nature of the performance criteria, we recommend local governments and CEOs have a separate additional document called a "*performance agreement*".

¹ *Local Government Act 1995* (WA) s 5.39(3)(c) and Regulation 18B.

² *Ibid.* s 5.39(3)(b)

The performance agreement should include the performance review criteria in the employment contract, performance indicators in relation to specific projects and how the criteria will be assessed.

Model standards in relation to performance reviews

The Regulations prescribe the model standards for local governments in relation to CEO's recruitment, performance reviews and termination of the employment.³

The model standards regarding CEO performance review are based on the principles of fairness, integrity and impartiality.

In our view, these model standards are highly likely to be an implied term in the contract of employment. We recommend that employment contracts be amended to incorporate the model standards. This explicit incorporation will promote greater clarity and certainty in the relationship between CEO and council.

It is also recommended in the Operational Guidelines that the council engages in regular discussions with the CEO.

Such regular discussions would be to review the CEO's performance against the applicable performance criteria, including their progress and in meeting the criteria and the ways in which they can be supported.

Any changes to the CEO's performance agreement should also be discussed and agreed between the council and the CEO, as the matter arises. Such changes might include changes to the performance criteria themselves, for example.

"... the CEO employment contract can no longer be terminated earlier than the expiry date at any time and for any reason."

³ *Ibid.* s 5.39A

Termination of employment

Findings from our reviews

All the CEO employment contracts in our review work contained a clause that the employment contract can be terminated at any time and for any reason.

Such provisions are no longer compliant with the Act, as they do not comply with the model standards relating to the termination of employment.

Compliance requirements

The model standards relating to the termination of employment are based on the principles of fairness and transparency. The Operational Guidelines state that the employment contract should clearly outline grounds for termination and the termination process, in accordance with the model standards.

It follows that the contract can only be terminated by the local government prior to the expiry date for certain reasons, for instance poor performance or misconduct.

As a result of the implementation of the model standards, the CEO employment contract can no longer be terminated at any time or for any reason, prior to the expiry date.

In our view, these are improvements. Councils are now accountable in the arena of appointment, management and termination of their CEOs. Their decisions can now be measured against more objective criteria.

These changes also impact other provisions of the employment contract if it is based upon the Model CEO employment contract. Care should therefore be taken when reviewing CEO employment contracts, so that amendments are made to the document as a whole, rather than just to one particular issue, so as to ensure compliance by the whole document, and not just the selected part.

Summary

Local governments would do well to check if existing local government CEO employment contracts need review, in light of the 2019 amendments and the 2021 model standards.

It may seem that these changes make documenting the contract more time-consuming and potentially cumbersome. However, both CEOs and councils should benefit from the parties being tied to more precise measures of performance.

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