

Dealing effectively with unsatisfactory performance in the Australian Public Service

Management of unsatisfactory performance is a longstanding challenge for the Australian Public Service (APS). The Australian Public Service Commission (APSC) continues to identify the management of underperformance as a serious challenge for the APS that requires close and constant attention by APS managers.¹

This briefing outlines:

- the legal framework for effective management of unsatisfactory performance
- why effective performance management is important
- impediments to effective management of unsatisfactory performance
- legal powers for dealing with unsatisfactory performance
- procedural requirements for exercise of those powers and potential consequences of failure to adhere to the requirements
- avenues of redress and associated legal risk exposures
- effective performance management policies and practices and steps that can be taken to minimise legal risks.



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Legal framework for performance management

Objects of Public Service Act

The main objects of the *Public Service Act 1999* (the PS Act) include to:

- establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public (s 3(a) of the PS Act)

¹ See the Explanatory Statement on the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014* made on 12 December 2014 and issued by the authority of the Australian Public Service Commissioner. See also Australian Public Service Commission 2014, *State of the Service report 2013–14*, p 154. The report states that only 20% of surveyed employees considered that their agency dealt with underperformance effectively. These reported perceptions are similar to reports for previous years. For example, the *State of the Service report 2008–09* at p 100 states that only 25% of employees considered that their agency dealt with underperformance effectively.

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- provide a legal framework for the effective and fair employment, management and leadership of APS employees (s 3(b) of the PS Act).

Consistent with these objects:

- performance management, including management of unsatisfactory performance, should be a tool to help to ensure that APS agencies efficiently and effectively serve the Government, the Parliament and the Australian public
- performance management should be an aspect of the effective management and leadership of APS employees
- systems for performance management should be fair.

‘...performance management should be an aspect of the effective management and leadership of APS employees’

Legislative changes in 2013

Legislative changes were made in 2013 to strengthen the legal requirements in the APS for effective performance, including:

- amendments to the APS Values and Employment Principles in the PS Act, effective 1 July 2013 (as described below)
- the *Australian Public Service Commissioner’s Directions 2013* (the Commissioner’s Directions), effective 1 July 2013 (as described below)
- the *Public Governance, Performance and Accountability Act 2013*, effective 1 July 2014.²

Significant amendments to the Commissioner’s Directions to do with effective performance will commence on 1 July 2015 (as described below). These amendments further strengthen the legal framework for performance management.³

APS Values and APS Employment Principles

Under the APS Values the APS is committed to service, is ethical and is accountable.⁴ The APS Value ‘Committed to service’ recognises the importance of the APS working efficiently to achieve the best results for the Australian community and the Government.

The APS Employment Principles include a provision that the APS requires effective performance from each employee.⁵

Agency heads and APS employees are required to behave in a way that upholds the APS Values and APS Employment Principles and the integrity and good reputation of the APS (ss 12, 13(11) and 14 of the PS Act).

² The APSC *State of the Service report 2013–14*, p 150, describes the purpose of the changes as being to strengthen the legal requirements in the APS for high performance.

³ As stated in the Explanatory Statement on the *Australian Public Service Commissioner’s Amendment (Performance Management) Direction 2014*, ‘Strengthening the legal framework pertaining to performance management is a critical success factor for improvement in this area’.

⁴ The APS Values are set out in s 10 of the PS Act. APS Values of particular relevance are as follows:

Committed to service

- (1) The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Ethical

- (2) The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Accountable

- (4) The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

⁵ See s 10A(1)(d) of the PS Act. The APS Employment Principles in s 10A(1) that are of particular relevance are as follows:

- (1) The APS is a career-based public service that:

- (a) makes fair employment decisions with a fair system of review; and ...
(d) requires effective performance from each employee.

Commissioner's Directions on APS Values and APS Employment Principles

The PS Act provides that the Australian Public Service Commissioner may issue directions in writing on each of the APS Values and APS Employment Principles to:

- ensure that the APS incorporates and upholds the APS Values and APS Employment Principles
- determine, where necessary, the scope or application of the APS Values and APS Employment Principles (ss 11(1) and 11A(2) of the PS Act).

The Commissioner's Directions are set out in the *Australian Public Service Commissioner's Directions 2013*.

Agency heads and APS employees are required by the PS Act to comply with the Commissioner's Directions (s 42(2) of the PS Act).

Commissioner's Directions on APS Values

Chapter 1 of the Commissioner's Directions sets out standards and outcomes that are required of agency heads and APS employees in upholding each APS Value. When complying with these requirements, regard must be had to the individual's duties and responsibilities.⁶

Chapter 1 of the Commissioner's Directions imposes the following requirements on individuals, having regard to the individual's duties and responsibilities:

- contributing to a culture of achievement⁷
- reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way⁸
- being answerable for individual performance through performance management systems.⁹

Consistent with the Commissioner's Directions, all APS employees are required to contribute to a culture of achievement and to participate in performance management systems. Depending on their duties and responsibilities, an APS employee might be required to report or address unsatisfactory performance.

Chapter 4 of Commissioner's Directions on Employment Principle of effective performance: 1 July 2013 to 30 June 2015

The APS Employment Principle in s 10A(1)(d) of the PS Act is that the APS requires effective performance from each employee.

The Commissioner's Directions on this Employment Principle that apply in the period 1 July 2013 to 30 June 2015 set out the elements of the performance management system that agency heads must implement as follows (cl 4.1):

In upholding and promoting APS Employment Principle 10A(1)(d), an Agency Head will support employees to achieve effective performance by ensuring that the Agency:

- (a) builds the capability necessary to achieve the outcomes properly expected by the Government;
- (b) has fair and open performance management processes and practices that support a culture of high performance, in which all performance is effectively managed;
- (c) provides each APS employee with a clear statement of the performance and behaviour expected of him or her, and an opportunity to discuss his or her responsibilities;

6 See cl 1.2, 1.3, 1.4, 1.5, 1.6 and 1.8.

7 See cl 1.2(g) about upholding the APS Value in s 10(1), 'Committed to service'.

8 See cl 1.3(f) about upholding the APS Value in s 10(2), 'Ethical'.

9 See cl 1.5(g) about upholding the APS Value in s 10(4), 'Accountable'.

- (d) requires employees to participate constructively in agency based performance management processes and practices;
- (e) invests in building the capability of managers to manage performance effectively; and
- (f) uses its performance management processes to guide salary movement and reward.

New Chapter 4 of Commissioner's Directions on Employment Principle of effective performance: from 1 July 2015

The annexure to this briefing (see p 23) sets out new Chapter 4 of the Commissioner's Directions, which is to be in force from 1 July 2015.¹⁰ The new Commissioner's Directions spell out in detail the obligations of the agency head, supervisors and employees. These requirements reflect current best practice. It is significant that policies and practices for effective performance management will now be imposed by way of obligations in the Commissioner's Directions.

The purpose of the changes is to:

- strengthen the obligations on agency heads with respect to the effective performance Employment Principle
- make provision for certain obligations on supervisors and employees relevant to the effective performance Employment Principle
- encourage APS best or better practice by including a requirement to periodically assess and compare an agency's performance management policy and associated processes and practices.¹¹

The Explanatory Statement on the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014* sets out the following reasons for the changes:

Case studies of APS agencies, agency self-assessments, capability reviews and results of the APS employee census all indicate that the effective management of individual employee performance (both talented performers and underperformers) remains a serious challenge for the APS.

Australian Public Service Commission (APSC) research indicates that the management of employees who are not performing effectively, in particular, was severely hampered by the absence of a formal or relevant record setting out the performance expectations in relation to an employee's duties, the lack of timely feedback on employee performance, and the absence of clear measurable goals, the importance of which had not been effectively communicated to employees. In addition, employees have failed to engage constructively with management in remedying performance issues.

Further, performance management has tended to focus on managing underperformance to the exclusion of nurturing talent. Studies suggest the APS should be focusing attention on 'high performance' and lifting the bar on what is expected of the performance management system.

Improving the skills and authority of supervisors to support more effective performance management is likely to lead not just to the better management of poor performers, but also better talent identification and development, and more systematic identification and development of appropriate skills and capabilities in the APS workforce.

Reform of the legal framework for employee performance management is part of a broader drive for improvement of APS performance systems. The implementation of the *Public Governance, Performance & Accountability Act 2013* (PGPA Act) has strengthened the requirements around institutional performance.

¹⁰ The amendments are made by the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014* and helpfully explained by the Explanatory Statement made on 12 December 2014 and issued by the authority of the Australian Public Service Commissioner.

¹¹ See new cl 4.1(2) and the Explanatory Statement on the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014*.

Managers' responsibilities and leadership

Under the PS Act, APS managers have the following responsibilities:

- agency heads are required to uphold and promote the APS Values and APS Employment Principles (s 12 of the PS Act).
- SES employees have a function of promoting the APS Values and APS Employment Principles by personal example and other appropriate means (s 35 of the PS Act).

As noted, all APS employees are required to behave in a way that upholds the APS Values and APS Employment Principles (s 13(11) of the PS Act).

One of the APS Values is that the APS demonstrates leadership (s 10(2) of the PS Act). Upholding the APS Value on leadership includes an obligation to have the courage to address difficult issues (cl 1.3(c) of the Commissioner's Directions).

Leadership and good supervision are important to the successful implementation of effective performance management.¹²

Effective management of employee performance is a core responsibility of all supervisors in the APS.¹³ The APSC states that, to improve in this area, all APS managers are required to accept responsibility for managing performance to ensure that it receives close and constant attention.¹⁴

'...Upholding the APS Value on leadership includes an obligation to have the courage to address difficult issues...'

APS managers, particularly agency heads and SES employees, who fail to adequately deal with poor performance are not upholding aspects of the APS Values and the APS Employment Principle that the APS requires effective performance from each employee.

As noted, from 1 July 2015, Chapter 4 of the Commissioner's Directions will spell out in detail the obligations of the agency head, supervisors and employees in upholding and promoting the Employment Principle of effective performance.

Importance of effective performance management

Performance management is critical to support the development and maintenance of a high-performing APS. It is an issue that affects every aspect of an agency's operation, from the performance of individual employees through to the implementation of organisational outcomes that Government expects.¹⁵

Performance management within the APS is a mechanism for:

- aligning employees with organisational requirements
- clearly articulating and managing expectations
- clearly establishing role and goal clarity
- identifying the support required to enable goal attainment
- discussing future career aspirations

¹² The importance of leadership in effective performance management has long been recognised. For example, in its 2001 report *Performance management in the Australian Public Service – A strategic framework*, the Management Advisory Committee identified management of poor performance as a key challenge. It concluded that leaders need to give the management of underperformance high priority and ensure that results are achieved: see Management Advisory Committee 2001, *Performance management in the Australian Public Service – A strategic framework*, APSC, Executive Summary, p 11; also, section 2.2.3 on 'Management buy in'.

¹³ APSC 2014, *State of the Service report 2013–14*, p 149. As noted later in this briefing, research work by the APSC has established that the achievement of high performance is affected more by the implementation of a performance system than by the system design itself.

¹⁴ APSC 2014, *State of the Service report 2013–14*, p 155.

¹⁵ See APSC 2013, *Strengthening the performance framework: Towards a high performing Australian Public Service* (May) at [1.0], 'Performance management as a tool for high performance'.

- identifying developmental needs
- monitoring and reviewing performance
- ensuring that standards of performance align with expectations
- recognising good performance.¹⁶

The APS has a longstanding concern with improving accountability and performance.¹⁷ In recent years considerable work has been done to improve individual and organisational accountability and performance arrangements within the APS.¹⁸ The APSC's Strengthening the Performance Framework strategic project has identified steps that are needed to improve implementation of APS performance management systems to achieve a high performing APS.¹⁹ New Chapter 4 of the Commissioner's Directions, which will commence on 1 July 2015, is a significant step in the broader agenda for reform of performance management across the APS.²⁰

'...it is important to effectively manage underperformance to prevent its drain on resources and productivity.'

The management of underperformance is only one aspect of an effective performance management framework, but it is important to effectively manage underperformance to prevent its drain on resources and productivity.²¹ New Chapter 4 of the Commissioner's Directions, which will commence on 1 July 2015, deals with all important elements of performance management and includes some provisions specifically concerned with dealing with unsatisfactory performance.²²

Impediments to effective management of poor performance

The former Management Advisory Committee identified a number of problems in achieving effective management of poor performance.²³ It is worth setting out in full the section of the Management Advisory Committee's report about managing underperformance.²⁴

- 16 APSC 2013, *Strengthening the performance framework: Towards a high performing Australian Public Service* (May) at [2.1.1], 'Role of performance management'. See also new Chapter 4 of the Commissioner's Directions, set out in the annexure to this briefing, which will commence on 1 July 2015.
- 17 See, for example, the report of the Management Advisory Committee 2001, *Performance management in the Australian Public Service – A strategic framework*, APSC; APSC 2006, *Sharpening the focus – Managing performance in the APS*; and APSC 2009, *Contemporary Government challenges: Delivering performance and accountability*.
- 18 See, for example, the summary of this work in APSC 2014, *State of the Service report 2013–14*, Chapter 9, 'Delivering performance and accountability'.
- 19 See APSC 2013, *Strengthening the performance framework: Towards a high performing Australian Public Service* (May); and APSC 2014, *Strengthening the performance framework: Towards a high performing Australian Public Service – Diagnostic implementation* (July). Other key steps include the introduction of the Core Skills program and the Performance Management Diagnostic: on the Core Skills program, see: <http://www.apsc.gov.au/learn/training-calendar/core-skills>.
- 20 See the Explanatory Statement on the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014*.
- 21 See APSC 2014, *State of the Service report 2013–14*, p 154.
- 22 Clauses 4.1A(1)(g) and (h), 4.1A(2)(f) and 4.1A(3)(f) are about dealing with unsatisfactory performance.
- 23 The Management Advisory Committee was a forum of secretaries and other agency heads established under s 64 of the PS Act (as s 64 was before its amendment with effect from 1 July 2013). Its function was to advise the Australian Government on matters relating to the management of the APS. Section 64 now provides for the establishment of the Secretaries Board.
- 24 Management Advisory Committee 2001, *Performance Management in the Australian Public Service: A Strategic Framework*, APSC, section 2.2.5, p 24. Although this is a 2001 report, the concerns that it canvassed remain current. For example, recent research work by the APSC has established that performance management is often viewed in the APS as a compliance exercise or shorthand for managing underperformance. This often results in a degree of cynicism and a reluctance to engage in this process among supervisors and employees alike: see APSC 2013, *Strengthening the performance framework: Towards a high performing Australian Public Service* (May) at [2.1.1], 'Role of performance management'. See also APSC 2014, *State of the Service report 2013–14*, Chapter 9, 'Delivering performance and accountability'.

There is no doubt that staff become cynical when poor performance is not dealt with. Staff surveys show this consistently. While inadequate recognition of good performance is often a cause of concern, the inability of an organisation to manage ineffectiveness and poor performance creates even stronger resentment. This cynicism does affect the credibility of performance management systems.

A number of factors can work against the effective management of poor performance. One is a lack of preparedness by managers to take the issue on.

...

Another inhibiting factor may be the procedural or process frameworks that agencies establish to handle under-performance. Processes obviously need to meet basic principles of procedural fairness. This is important from an administrative law point of view and a basis for staff trust in the system. In many cases the procedures will have been subject to negotiation as part of agency bargaining and it may have been difficult to negotiate streamlined arrangements. As a result many agency Certified Agreements have provisions beyond what is necessary and create an overly cumbersome framework.

For example:

- The period during which the employee's performance is monitored has been extended and become quite lengthy;
- The formal reporting and responding requirements are more than required (for example reporting on a weekly basis); and
- Very complex processes are put in place for arriving at a determination, once the assessment is complete and the report made to the decision-maker.

The bottom line is that management's failure to address under-performance in most workplaces, across all sectors, is one of the persistent factors that undermines the credibility of performance management systems overall. Agencies could re-visit the issue, particularly in the context of negotiating new certified agreements.

The Management Advisory Committee also included the following quotes from staff in its report:

- Managing under-performance is one of the hardest skills of a manager.
- Managers aren't prepared to confront hard issues and then issues of rights and remedies arise and ... an awareness of the legal pitfalls ... It was a weakness in managers to tolerate weak performance but with more experience managers will do it better.
- I believe that the term 'managing under-performance' is code for supervisors not being prepared to tell people that they are not performing satisfactorily, so they hide behind guidelines and booklets. It is code for saying that you cannot sack public servants, which is incorrect. It means you are not prepared to do it.²⁵

The report of the Advisory Group on Reform of Australian Government Administration identified underperformance procedures as a barrier to efficiency. The report states:

Unnecessary red tape in the form of cumbersome regulatory or administrative arrangements is another possible barrier to efficiency, absorbing resources that could otherwise be used more productively. Onerous agency-level process requirements for dealing with underperformance is an example of a particularly tricky form of red tape posing a barrier to efficiency – not only is considerable time and effort required to follow through processes, but they also discourage public service managers from actually addressing some cases of underperformance. A lack of appropriate training and management skills may be another factor.²⁶

More recent work in the APS has established that the achievement of high performance is affected more by the implementation of a performance system than by the system design itself. This work emphasises the importance of addressing performance issues in every aspect of an agency's operation. As part of this, agencies must ensure that

²⁵ Management Advisory Committee 2001, *Performance management in the Australian Public Service – A strategic framework*, APSC, section 2.2.5, p 24–25.

²⁶ See Advisory Group on Reform of Australian Government Administration 2009, *Reform of Australian Government administration: Building the world's best public service* (October), p 44.

individuals have the necessary capabilities and skills to engage in effective performance management.²⁷

APS managers' concerns about the complexity of formal underperformance procedures should not prevent them from managing poor performance effectively. Concerns about procedures should not be used as an excuse for failing to effectively manage underperformance. Agencies can ensure that managers have the necessary skills and support.

What should not happen

Instances of deficiencies in the implementation of performance management frameworks in APS agencies include the following:

- failure to allocate adequate resources and time, noting that both managers and employees need to have the necessary skills and time to engage in effective performance management
- lack of timely feedback on employee performance
- the failure to clearly communicate goals
- the absence of clear and measurable goals
- failure to adequately identify and develop appropriate skills and capabilities in employees to meet organisational capability needs
- failure to effectively identify and recognise talent and high-level performance
 - gearing performance management systems to focus on management of underperformance
 - failure to implement underperformance procedures in a timely manner.²⁸

'A concern that is commonly expressed in the APS is that managers do not take adequate action in response to genuine performance concerns.'

Performance management should not be a compliance exercise. It should not be actively engaged only to manage underperformance.²⁹

A concern that is commonly expressed in the APS is that managers do not take adequate action in response to genuine performance concerns.

If sound management policies and practices are in place, APS agencies should not experience undesirable cases of the following kinds:

- An alleged chronic underperformer for many years has been rated satisfactory or better because no supervisor has been prepared to be honest with the employee, so there is no documentation to support the generally held view that the employee is a poor performer and all the documentation supports the conclusion that the employee is a satisfactory performer.
- After a year of poor performance and no feedback, an employee is surprised to be rated as unsatisfactory.
- A longstanding employee who has been doing the same job with the same performance standards for many years, and who has been previously rated as satisfactory or better, is rated unsatisfactory by a new supervisor, even though there has been no change in the work or performance requirements for the employee's duties.

²⁷ See APSC 2013, *Strengthening the performance framework: Towards a high performing Australian Public Service* (May); and APSC 2014, *Strengthening the performance framework: Towards a high performing Australian Public Service – Diagnostic implementation* (July).

²⁸ See APSC 2014, *State of the Service report 2013–14*, pp 149 and 154.

²⁹ See APSC 2013, *Strengthening the performance framework: Towards a high performing Australian Public Service* (May) at [2.1.1], 'Role of performance management'.

- A poor performer is rated as satisfactory or better because of extenuating personal circumstances.³⁰

Where agency heads, supervisors and employees comply with the requirements in new Chapter 4 of the Commissioner's Directions (set out in the annexure to this briefing), which will commence on 1 July 2015, deficiencies of the kind outlined above should not occur.

Effective management of performance

Effective management of performance, including poor performance, is primarily a matter of using good management practices rather than focusing on process or legal issues.

An effective manager will use techniques such as good supervision, coaching and mentoring. Some policies and practices for effective performance management are listed at the end of this briefing.

New Chapter 4 of the Commissioner's Directions, which will commence on 1 July 2015, in effect require agency heads, supervisors and other employees to implement good management practices.

Where good supervision and other administrative actions do not succeed, the manager may need to have recourse to available legal powers.

Legal powers to deal with underperformance

The PS Act is the primary source of legal power to deal with underperformance in APS agencies. It is the only source discussed in detail in this briefing.

The following can also be a source of power or can impact on the exercise of powers under the PS Act:

- industrial instruments under the *Fair Work Act 2009* (the FW Act)³¹
- terms and conditions of employment that are enforceable in contract.

Range of powers under Public Service Act

Under the PS Act, the following actions are potentially available to deal with performance problems:

- directions about the employee's performance of duties
- action for possible breach of the APS Code of Conduct, potentially resulting in imposition of sanctions for breach of the Code of Conduct
- reassignment of duties
- reduction in classification on the ground of non-performance or unsatisfactory performance of duties
- termination of employment on the ground of non-performance or unsatisfactory performance of duties.

³⁰ Ratings should reflect actual performance, even where there are extenuating reasons for poor performance such as health or other personal circumstances. Where there are extenuating reasons for poor performance, this will be relevant to the formulation of the appropriate management response.

³¹ In *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109 at [43], the Full Court of the Federal Court left open the issue whether the source of power to terminate the employment of an APS employee on the ground of unsatisfactory performance of duties was the ABS Certified Agreement or s 29 of the PS Act, as it was not necessary to determine the issue in that case. The issue was not considered at first instance in *Khiani v Australian Bureau of Statistics* (2010) 199 IR 281; [2010] FCA 1059.

Directions

Where an employee wilfully refuses to satisfactorily perform their duties, the employee can be given written directions about performance of work and a warning about the consequences of a breach of the directions. Often this measure will be enough to correct the employee's behaviour.

If the directions are breached then consideration could be given to taking further corrective management action or to commencing a formal process to determine whether or not there has been a breach of the Code of Conduct (s 13(5) of the PS Act).

Code of Conduct

APS employees are subject to the following potentially relevant conduct requirements:

- An APS employee must act with care and diligence in connection with APS employment (s 13(2) of the PS Act).
- An APS employee, when acting in connection with APS employment, must comply with the PS Act, the *Public Service Regulations 1999* (PS Regulations) and Commissioner's Directions (s 13(4) of the PS Act).
- An APS employee must comply with any lawful and reasonable direction (s 13(5) of the PS Act).
- An APS employee must at all times behave in a way that upholds the APS Values and APS Employment Principles (s 13(11) of the PS Act). The APS Values and APS Employment Principles that are relevant to performance management are discussed above.

Code of Conduct or underperformance process?

Action for possible breach of the Code of Conduct is potentially available where an APS employee fails to:

- be answerable for individual performance through performance management systems, as required by the Commissioner's Directions and PS Act³²
- comply with the requirements in new Chapter 4 of the Commissioner's Directions (set out in the annexure to this briefing), which will commence on 1 July 2015
- perform duties with care and diligence
- comply with a lawful and reasonable direction about performance of duties
- uphold the APS Values or the APS Employment Principles.

Clause 4.2 of the Commissioner's Directions provides that where the conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code of Conduct then, before making a decision to initiate any inquiry under procedures established under s 15(3), the agency head must have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner.³³

Subject to any standards and guidance issued by the Commissioner, we make the following comments. Performance problems are generally better dealt with as performance issues rather than as a possible breach of the Code of Conduct for a failure to perform duties with care and diligence. Code of Conduct action for a failure to perform duties with care and diligence may be appropriate where the employee is wilfully refusing to satisfactorily perform duties, where there is a deliberate or

32 A failure to comply with the Commissioner's Directions is a failure to comply with s 42(2) of the PS Act and a breach of s 13(4) of the PS Act. Clause 1.5(g) of the Commissioner's Directions requires that an employee is answerable for individual performance through performance management systems.

33 As at March 2015 the Australian Public Service Commissioner had not issued any relevant standards and guidance.

flagrant failure to act with care and diligence or where the employee has had repeated underperformance problems that appear to be within the employee's control and that have previously been dealt with as underperformance.³⁴ In each of these situations, further performance management action would also be an option.

A Full Bench of the Fair Work Commission has held that the termination of an APS employee's employment on the ground of non-performance of duties (as provided for in s 29(3)(c) of the PS Act) was valid in circumstances where the employee had refused to attend work as directed and where Code of Conduct action could potentially have been taken for failure to comply with a direction.³⁵ The Full Bench held that a misconduct process was not necessary in such a case.

Similarly, a misconduct process is not necessarily required where the primary concern is unsatisfactory performance of duties (which is also a ground for termination of employment provided for in s 29(3)(c) of the PS Act). This is so, even though Code of Conduct action could also potentially be taken, for example, for breach of directions about performance of duties or on other grounds such as failure to perform duties with care and diligence.

Reassignment of duties

An agency head has a general discretion to determine from time to time the duties of an APS employee and the place or places at which the duties are to be performed (s 25 of the PS Act).³⁶

Reassignment of duties may be considered more appropriate than commencement of underperformance action in cases where the reason for a performance problem is that:

- there is a personality conflict between the employee and a supervisor
or
- the employee's work-related qualities, including relevant personal qualities, are not a good fit with their job.

'Reassignment of duties may be considered more appropriate than commencement of underperformance action...'

Reduction in classification or termination of employment

An agency head has power to reduce the classification of an APS employee without the employee's consent and to terminate the employment of an APS employee on grounds that include:

- non-performance of duties
- unsatisfactory performance of duties
or
- inability to perform duties because of physical or mental incapacity (the incapacity ground).³⁷

34 In *Rothfield v Australian Bureau of Statistics* Print PR927240; [2003] AIRC 97 (3 February 2003), the Australian Industrial Relations Commission upheld a decision by an APS agency to terminate employment on the ground of misconduct related to an underperformance process. In contrast, in *Uitdenbogerd v Australian Taxation Office* [2009] AIRC 39 (13 January 2009), the Australian Industrial Relations Commission upheld a termination of employment on the ground of unsatisfactory performance of duties having regard to the employee's poor performance and his inappropriate conduct in the formal performance management process.

35 *Dunkerley v Commonwealth of Australia* [2013] FWCFB 2390 (29 April 2013).

36 Clause 2.24 of the Commissioner's Directions sets out minimum requirements for decisions on assignment of duties at or below classification. Decisions are required to be based on an assessment of the employee's work-related qualities and the work-related qualities genuinely required to perform the relevant duties. Decisions are also required to take into account efficient and effective organisational performance.

37 See s 23(4) of the PS Act on reduction in classification and s 29(3) of the PS Act on termination of employment. The grounds of termination set out in s 29(3) are the only grounds for termination of an ongoing APS employee. A non-ongoing APS employee can have their employment terminated on the grounds set out in s 29(3), but the grounds of termination are not confined to the grounds set out in s 29(3).

Reduction in classification or termination for non-performance

The non-performance ground is available where an employee does not perform the relevant duties at all: for example, where the employee is absent from work without the employer's authorisation.³⁸ The ground of termination of employment for non-performance of duties is available according to its terms (that is, for non-attendance) and does not require that it be established that the employee has repudiated the contract of employment by abandoning their employment.³⁹

Reduction in classification or termination for unsatisfactory performance

APS agencies can clearly rely on the unsatisfactory performance ground where the employee is able to perform duties and is performing duties but where the employee's performance of duties is unsatisfactory. Agencies should be cautious about relying on the unsatisfactory performance ground in other situations.

Impact of illness or disability

Agencies need to exercise caution in cases where an employee has a medical condition that contributes to performance problems. In particular, agencies need to be careful to ensure that their actions are not harsh, unjust or unreasonable and that they do not breach anti-discrimination protections.⁴⁰

Agencies should carefully assess the medical evidence and get their own evidence where appropriate.⁴¹ Agencies can rely on the non-performance and unsatisfactory performance grounds where the employee has a medical condition but is fit for duties.⁴² Agencies can potentially rely on the unsatisfactory performance ground where they have reasonably accommodated the employee's medical condition and performance remains unsatisfactory.⁴³

Where an employee has an inability to perform duties because of illness, the agency should assess whether the incapacity ground may be available and should rely on this ground where available rather than on the non-performance or unsatisfactory performance grounds.

Reduction in classification or termination for incapacity

General requirement

The incapacity ground is available where:

- the employee is unable to perform duties
- the inability is because of physical or mental incapacity.

38 For example, in *Tozer v Centrelink* [2008] AIRC 195 (19 May 2008), a termination of employment for non-performance of duties was upheld where the employee was absent from work without authority for 9 days after having a request for leave refused. In *Dunkerley v Commonwealth of Australia* [2013] FWCFB 2390 (29 April 2013), a Full Bench of the Fair Work Commission upheld a termination of employment for non-performance of duties in a case where the employee was absent from work without authority and refused to attend work despite being directed to do so.

39 *Dunkerley v Commonwealth of Australia* [2013] FWCFB 2390 (29 April 2013).

40 There are anti-discrimination protections in the FW Act and the *Disability Discrimination Act 1992*.

41 Agencies can require an employee to undergo a fitness for duty assessment in accordance with reg 3.2 of the PS Regulations.

42 In *Hamden v Commonwealth of Australia* [2010] FCA 924 the Federal Court on appeal held that, in the circumstances of that case, a termination of employment on the ground of non-performance of duties following unauthorised absence from work did not involve unlawful disability discrimination. Although the employee was suffering medical conditions, the employer had an expert medical assessment that the employee was fit for duties.

43 See *De Sousa v Department of Education, Employment and Workplace Relations* [2013] FWC 10155 (23 December 2013) for an example of a case where the Fair Work Commission held that a termination of employment on the unsatisfactory performance ground was not harsh, unjust or unreasonable even though the employee was suffering a medical condition that had some impact on their capacity to perform modified duties.

Additional requirement in the case of potential termination of employment of employees who are CSS, PSS or PSSap members

In a case where an employee who is a CSS, PSS or PSSap member faces potential termination of employment on the incapacity ground, there is an additional requirement for employees who are a certain age: the relevant superannuation authority must have issued a certificate to the effect that the member is entitled to invalidity retirement benefits under the relevant superannuation scheme. This is a precondition for termination of employment under the PS Act on the incapacity ground.⁴⁴

What is ‘unsatisfactory performance of duties’?

Unsatisfactory performance

The term ‘underperformance’ is not used in the PS Act. The term used in the PS Act is ‘unsatisfactory performance of duties’.

The PS Act does not define ‘unsatisfactory performance of duties’.⁴⁵ In accordance with its ordinary meaning, ‘unsatisfactory performance’ would extend to any situation where an employee does not have the capacity or ability to satisfactorily perform duties.⁴⁶

Duties that are not satisfactorily performed

When making decisions about reduction in classification or termination of employment on the ground of unsatisfactory performance of duties, the decision-maker must have regard to any duties assigned to the employee in accordance with s 25 of the PS Act.⁴⁷ Agencies generally use performance plans and other performance measures to assess an employee’s performance. Performance plans and other performance measures should be consistent with the duties assigned under s 25.⁴⁸

Objective test

The test for unsatisfactory performance of duties is an objective test. An employee can be performing unsatisfactorily even though the employee is doing their best in all the circumstances.

A Full Bench of the Australian Industrial Relations Commission in *Crozier v Palazzo Corporation Pty Ltd* considered an application for unfair dismissal under the *Workplace Relations Act 1996* (WR Act).⁴⁹ One issue under the WR Act was whether there was a valid reason for termination of employment related to the employee’s capacity. The Full Bench held that:

- a key requirement of the employee’s position was to generate new business
- this requirement of the position was reasonable

44 See s 54C of the *Superannuation Act 1976* for CSS; s 13 of the *Superannuation Act 1990* for PSS; and s 43 of the *Superannuation Act 2005* for PSSap. The requirement applies to CSS members who have not reached their maximum retiring age and PSS and PSSap members under the age of 60.

45 The *Macquarie dictionary* online defines unsatisfactory as meaning ‘not satisfactory; not satisfying specified desires or requirements; inadequate’.

46 *Crozier, in the matter of an application for Writs of Certiorari and Mandamus against the AIRC* [2001] FCA 1031. As noted above, the incapacity ground should be relied on where available, rather than the non-performance or unsatisfactory performance grounds.

47 Section 25 provides that an agency head may from time to time determine the duties of an APS employee in the agency.

48 From 1 July 2015 new Chapter 4 of the Commissioner’s Directions will include the following definition: ‘*performance agreement*, for an APS employee, means a documentary record (including any additions to, or variations of, that record) that sets out the performance expectations in relation to the duties that have been assigned to the employee’. That definition requires that performance agreements must be related to any duties assigned under s 25.

49 *Crozier v Palazzo Corporation Pty Ltd* Print S5897 (11 May 2000); (2000) 98 IR 137.

- the employee had failed to meet the key requirement despite his best endeavours
- there was a valid reason for termination of employment related to the employee's capacity.⁵⁰

The Full Court of the Federal Court, on judicial review of the decision of the Full Bench, rejected the argument that, if an employee worked to their full capacity and was the best worker that he or she could be, the employer could have no valid reason related to the capacity of the employee to terminate the employee's employment.⁵¹ The Full Court held that:

- the word 'capacity', as used in the relevant provision of the WR Act, meant the employee's ability to do the work that they are employed to do
- a reason will be *related to the capacity* of the employee where the reason is associated or connected with the ability of the employee to do their job
- there can be a valid reason for the termination of an employee's employment where they simply do not have the capacity or ability to do the job.

Standard of proof

The standard of proof in determining whether there has been unsatisfactory performance of duties is the ordinary civil standard of the balance of probabilities. The more serious the possible consequences of a finding of unsatisfactory performance of duties, the higher the level of satisfaction required by the decision-maker.⁵² In determining whether there has been unsatisfactory performance of duties such as to warrant reduction in classification or termination of employment, a high level of satisfaction is required.

Procedures for dealing with unsatisfactory performance

Source of procedures

The PS Act itself does not set out procedures for making decisions about reduction in classification or termination of employment on the ground of unsatisfactory performance of duties.

The previous general practice of APS agencies has been to include underperformance procedures for non-SES employees in enterprise agreements made under the FW Act.

Agencies commonly also have associated administrative or policy documents that set out underperformance procedures.

The following discussion focuses on procedures that apply to non-SES employees.⁵³

Employees covered by underperformance procedures

APS underperformance procedures set out in industrial instruments such as enterprise agreements have generally been developed for application to ongoing employees. It is generally desirable that these underperformance procedures not apply to probationers or non-ongoing employees.

⁵⁰ *Crozier v Palazzo Corporation Pty Ltd* Print S5897 (11 May 2000); (2000) 98 IR 137 at [41]–[63].

⁵¹ *Crozier, in the matter of an application for Writs of Certiorari and Mandamus against the AIRC* [2001] FCA 1031.

⁵² *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁵³ The current policy and practice is for terms and conditions of employment of an SES employee to be set out in a determination under s 24 of the PS Act.

If underperformance procedures set out in industrial instruments are to not apply to probationers or non-ongoing employees, the industrial instruments should make this clear.⁵⁴

Traps to avoid

Caution should be exercised in commencing action under agency underperformance processes where:

- action for breach of the Code of Conduct is more appropriate having regard to the nature of the particular conduct of concern
- or
- there is a health issue that should be dealt with by way of management of a medical problem.

Agencies should be careful not to adopt provisions in any procedures in industrial instruments or in policy documents that are unnecessarily prescriptive or that inappropriately constrain the agency. For example, it would not be appropriate to have provisions that preclude all Code of Conduct action against an employee merely because there is a formal underperformance process in place. Also, it would not be appropriate to have provisions that could preclude the agency from pursuing, or continuing to pursue, a formal underperformance process merely because the employee has suffered, or is suffering, some degree of illness.

Potential consequences of failure to adhere to procedures in industrial instrument

APS agencies should adhere to procedures in an industrial instrument such as an enterprise agreement. If agencies fail to do this, they may face the following consequences:

- dispute resolution in accordance with the dispute resolution provisions in an enterprise agreement⁵⁵
- civil penalty remedies against the employer for any contravention by the employer of a term of an enterprise agreement⁵⁶
- the Fair Work Commission finding unfair dismissal on the ground that the termination of employment was harsh, unjust or unreasonable⁵⁷
- any decision to reduce the classification of an employee being a breach of the PS Act and being ineffective by virtue of s 23(5) of the PS Act
- any decision to terminate the employment of a non-ongoing employee being a breach of the PS Act by virtue of s 42(2) and cl 7.2 of the Commissioner's Directions and potentially being ineffective.

'APS agencies should adhere to procedures in an industrial instrument such as an enterprise agreement.'

54 If underperformance procedures in industrial instruments do not make it clear that they do not apply to probationers or other specified classes of employees then the procedures may well apply to all employees in the agency who are covered by the instrument, including probationers and non-ongoing employees. In *Wilson v Australian Taxation Office* PR910942; [2001] AIRC 1176 (9 November 2001); and PR913265; [2002] AIRC 69 (17 January 2002); (2002) 112 IR 24, a Full Bench of the Australian Industrial Relations Commission held that underperformance procedures in a certified agreement under the *Workplace Relations Act 1996* applied to a probationer, in particular because the certified agreement did not make it clear that the underperformance procedures did not apply to performance concerns about a probationer.

55 This can include proceedings in the Fair Work Commission: see Pt 6-2 of the FW Act.

56 Section 50 and Pt 4-1 of the FW Act. Available remedies that can be granted by a court include payment of a penalty, reinstatement and/or payment of compensation. The FW Act also provides for protection of workplace rights. For example, s 340 precludes discrimination against, victimisation of or other adverse treatment of an employee because of the employee's workplace rights, including rights under an industrial instrument.

57 Part 3-2 of the FW Act. A failure to comply with legally binding procedural requirements does not automatically establish that a termination of employment was harsh, unjust or unreasonable for the purposes of the unfair dismissal provisions: *Crozier, in the matter of an application for Writs of Certiorari and Mandamus against the Australian Industrial Relations Commission* [2001] FCA 1031 per Gray, Branson and Kenny JJ at [15].

Recommended approach – adhere to procedures in industrial instrument

The potential consequences of a failure to adhere to procedures in an industrial instrument can vary depending on the type of employee and the outcome of an underperformance process. As discussed in detail below, there are differing legal requirements about adherence to procedures for decisions to reduce the classification of an employee, terminate the employment of a non-ongoing employee and terminate the employment of an ongoing employee. There is no apparent logic to these differences. However, the practical implications are tolerably clear.

Having regard to the requirements of s 23(5) of the PS Act, we recommend that, where there is potential for an underperformance process to lead to a decision to reduce the classification of an employee, the agency should strictly adhere to procedures in an industrial instrument. As any underperformance process can potentially lead to a decision to reduce the classification of an employee (or another decision), it is desirable in all cases to seek to ensure strict adherence to underperformance procedures in an industrial instrument. However, as discussed below, depending on the type of employee and the outcome of an underperformance process, there are different degrees of legal risk associated with any failure to adhere to the procedures.

Where provisions of Public Service Act and Commissioner’s Directions require adherence to procedures in industrial instrument

Reduction in classification

Section 23(5) of the PS Act provides that:

If a relevant industrial instrument, determination under this Act or written contract of employment contains procedures to be followed when reducing the classification, then a reduction is of no effect unless those procedures are followed.⁵⁸

Section 23(5) gives to an industrial instrument such as an enterprise agreement a legal effect that is additional to the legal effect that it has under the FW Act. Section 23(5) makes it clear that procedures in the industrial instruments referred to in the provision must be followed and that, if those procedures are not followed, the decision to reduce the classification of an employee is of no effect.

Agencies should note that underperformance procedures in industrial instruments generally apply to both decisions to reduce classification and decisions to terminate employment. Agencies should strictly adhere to those procedures so as to ensure the validity of any decision to reduce classification.

Termination of employment of non-ongoing employees

The PS Act provides that the Commissioner’s Directions may set out procedures relating to the termination of the employment of an APS employee.⁵⁹ Clause 7.2 of the Commissioner’s Directions sets out procedures that apply to the termination of the

58 Section 23(6) of the PS Act defines an ‘industrial instrument’ to mean:

- (a) a modern award; or
- (b) an enterprise agreement; or
- (c) a workplace determination; or
- (d) a WR Act transitional instrument; or
- (e) a transitional APCS.

Section 23(6) of the PS Act includes definitions of ‘transitional APCS’ and ‘workplace determination’. Section 7 of the PS Act includes definitions of ‘modern award’, ‘enterprise agreement’ and ‘WR Act transitional instrument’. A ‘WR Act transitional instrument’ is defined by s 7 of the PS Act to mean an award, a workplace agreement, a pre-reform certified agreement, an AWA or a pre-reform AWA within the meaning of those terms in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

59 See s 11A(1)(f) of the PS Act.

employment of a non-ongoing APS employee. Clause 7.2 provides that, subject to certain exceptions, if an 'employment arrangement' sets out procedures that apply to the termination of the employment of the non-ongoing APS employee, the procedures apply to the termination of the employment.

An 'employment arrangement' as referred to in cl 7.2 of the Commissioner's Directions includes certain industrial instruments under the FW Act such as an enterprise agreement. An 'employment arrangement' also includes a determination of employment conditions under s 24(1) or (3) of the PS Act or a written contract of employment.⁶⁰

Agencies should follow procedures that apply to the termination of the employment of a non-ongoing APS employee in accordance with cl 7.2, as agency heads and APS employees are required by the PS Act to comply with the Commissioner's Directions (s 42(2) of the PS Act).

Unlike s 23(5) of the PS Act, the legislation does not specify the consequences of a failure to adhere to relevant procedures that apply to the termination of the employment of a non-ongoing APS employee in accordance with cl 7.2 of the Commissioner's Directions. It is therefore a matter of statutory construction, having regard to the intention of Parliament, as to whether the departure from a procedure applicable in accordance with cl 7.2 will mean that the decision to terminate the employment of a non-ongoing employee is invalid and of no effect.⁶¹

Although there are good arguments to the contrary, it is prudent for APS agencies to assume that a decision to terminate employment will be liable to be found invalid by a court in judicial review proceedings if there has been any non-trivial failure to comply with the procedures applicable in accordance with cl 7.2.

Where provisions of Public Service Act and Regulations do not require adherence to procedures in industrial instrument

Termination of employment of ongoing employees

Section 29 of the PS Act deals with the power to terminate employment and sets out the only grounds for termination of employment of ongoing APS employees. Section 29 contains no provision equivalent to s 23(5) of the PS Act or cl 7.2 of the Commissioner's Directions. There is no requirement in the PS Act or PS Regulations that procedures set out in an industrial instrument (or any other document) must be followed when terminating the employment of ongoing employees.

In the absence of a requirement in the PS Act, there are good arguments that a failure to adhere to the procedures should not render a decision to terminate employment invalid. This is because there is no indication of a statutory intention that a departure from the procedures is intended to result in invalidity.⁶²

⁶⁰ The term 'employment arrangement' as referred to in cl 7.2 is defined by the Dictionary to the Commissioner's Directions.

⁶¹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Compare *Bromet v Oddie* [2003] FCAFC 213. Compare *Lohse v Arthur* (No 3) (2009) 180 FCR 334 at [53(b)], where the Court on judicial review held that a failure to comply with mandatory procedures applicable to a Code of Conduct process resulted in a sanction decision being invalid for jurisdictional error.

⁶² In *Khiani v Australian Bureau of Statistics* [2010] FCA 1059 at [29]–[46], the Federal Court held that, where the subject employee's conduct had made it impossible for there to be compliance with the procedural requirements under an industrial instrument, this could not be relied on to establish any breach by the agency that could render decisions about the employee's performance and termination of employment invalid. An appeal was dismissed in *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109. At [20] the Full Court of the Federal Court referred to the trial judge's findings in this regard with apparent approval.

There is some judicial authority to support the view that breaches of industrial instruments such as enterprise agreements are generally enforceable only by way of remedies provided for in the FW Act⁶³ and not by way of judicial review remedies or other remedies under the general law.⁶⁴ On that basis, a court may have no jurisdiction to make any orders by way of judicial review or under the general law about the invalidity of a decision that was allegedly made in breach of procedural requirements in an industrial instrument.

However, it would be prudent for APS agencies to assume that, where there is a failure to adhere to any applicable procedures in an industrial instrument (or a section 24(1) or (3) determination), a decision to terminate employment might be liable to be found invalid by a court in judicial review proceedings for a failure to comply with the requirement in s 5(1)(b) of the *Administrative Decisions (Judicial Review) Act 1977* to observe procedures required by law.

Procedures in administrative or policy document

Procedures binding under industrial instrument

In some agencies the underperformance procedures that are set out in an administrative or policy document are either incorporated in an industrial instrument or given legal force by the industrial instrument. For example, the industrial instrument can state that an underperformance process will be carried out in accordance with the procedures set out in a specified policy document. Under such an industrial instrument, any failure to follow the procedures set out in the policy document is a breach of the industrial instrument.

Procedures not binding under industrial instrument

In some agencies the underperformance procedures set out in a policy document are not legally enforceable under any industrial instrument. But they can have legal consequences.

Administrative law requirements

Even where procedures are not legally enforceable under an industrial instrument, there is potential for the procedures set out in policy documents to give rise to procedural rights that are enforceable in accordance with the requirements of administrative law.

In some circumstances, administrative law will require that a decision about reassignment of duties, reduction in classification or termination of employment not be

63 Under the FW Act, the Federal Court and Federal Circuit Court have broad powers to grant injunctions to prevent, stop or remedy the effects of a contravention of the FW Act and therefore to enforce compliance with industrial instruments such as modern awards and enterprise agreements: ss 545, 564, 568 of the FW Act.

64 See *Wattyl Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union* (1995) 134 ALR 203 at 216 (Madgwick J); *ACTEW Corporation Ltd v Pangallo* (2002) 127 FCR 1 at [33]–[36] (Whitlam and Gyles JJ) and [56] (Allsop J); *Soliman v University of Technology, Sydney* (2008) 176 IR 183; [2008] FCA 1512 at [74]–[81] (Jagot J).

The Court in *Soliman v University of Technology* held at [81] that the weight of authority establishes that the remedies available for contravention of a certified agreement, at least for a person who is bound by but is not a party to the agreement, are those provided for by the WR Act. The Court appears to have left open whether a person who is bound by and is a party to an industrial instrument can enforce rights under the instrument by way of judicial review.

In *O'Halloran v Wood* [2004] FCA 544 at [33]–[36], the Federal Court found it unnecessary to decide, and left open, the question whether it is appropriate for the Court in judicial review proceedings concerning a decision to terminate employment to deal with matters concerning the interpretation of, or compliance with, a certified agreement.

Under the *Administrative Decisions (Judicial Review) Act 1977* the Federal Court and Federal Circuit Court have no jurisdiction to review any decision made under an industrial instrument under the FW Act: see item (a) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*; see also *O'Halloran v Wood* [2003] FCA 854.

made in a manner that departs from any of the procedures set out in a policy document unless the decision-maker has first afforded procedural fairness. In cases where it applies, procedural fairness can require that, before the decision-maker proceeds with any process that is not consistent with the procedures set out in the policy document, the decision-maker must give the affected employee notice of an intention to depart from the procedures and a reasonable opportunity to comment. The decision-maker must consider any comments of the employee.

It is generally prudent for a decision-maker to adhere to procedures set out in a policy document and to only depart from those procedures if the departure from the procedures has been done in a manner that accords with procedural fairness requirements.

Contractual requirements

In some cases, procedures set out in an industrial instrument or policy document can be contractually binding.⁶⁵ For example, there can be express or implied agreement that terms and conditions set out in an employment policy document form part of the terms and conditions of the contract of employment.⁶⁶ The courts will imply such agreement if objectively in all the circumstances there was agreement between the parties to create legally binding obligations by reference to the terms and conditions set out in the policy document. There can be no such implication if it is contrary to legislation or to the express terms of the contract.

Terms and conditions of employment that form the contract of employment between the employer and an employee give rise to potential remedies in contract law. If the employer breaches a contractual term or condition of employment, it is potentially subject to an action for damages.

Avenues of redress

An employee has a wide range of avenues to challenge decisions relating to their performance, including:

- judicial review by the Federal Court or Federal Circuit Court on the ground of failure to comply with the requirements of administrative law⁶⁷
- review of action under the PS Act and PS Regulations in cases other than termination of employment (s 33 of the PS Act; Div 5.3 of the PS Regulations)

65 Procedures set out in an industrial instrument under the FW Act are not automatically part of the terms and conditions of the contract of employment. An award is not automatically part of the terms and conditions of the contract of employment and will not be part of the contract unless expressly agreed or unless its implication by way of implied terms is necessary for the reasonable or effective operation of the contract in all the circumstances: see *Byrne and Frew v Australian Airlines Limited* (1995) 185 CLR 410. A similar approach was applied to certified agreements, which, like awards, were industrial instruments under the WR Act: see *ACTEW Corporation Ltd v Pangallo* (2002) 127 FCR 1; and *Soliman v University of Technology, Sydney* [2008] FCA 1512; compare *O'Halloran v Wood* [2003] FCA 854 and [2004] FCA 544.

See also s 202(3) of the FW Act about the effect of an 'individual flexibility arrangement', which is that this kind of arrangement does not operate as a contract.

66 *Goldman Sachs JB Were Services Pty Ltd v Nikolich* (2007) 163 FCR 62 is an example of a case where employment policies were found to constitute contractual terms and conditions of employment. In implying agreement, the Court had regard to the text of documents, the purpose and object of the arrangement and all the surrounding circumstances. In *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177, the Full Court of the Federal Court held that an employer's investigation of complaints of bullying and incompetence was in breach of contractual obligations comprised by a workplace harassment and discrimination policy.

67 The Federal Court and Federal Circuit Court have judicial review jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977*. The Federal Court also has jurisdiction under s 39B of the *Judiciary Act 1903*. See *Manikantan v Centrelink* [2008] FMCA 716 and *Kumar v Merit Protection Commissioner and Anor* [2013] FCCA 650 for examples of cases where applicants unsuccessfully attempted to pursue judicial review of various actions and decisions relating to the applicants' performance management. In *Lamond v Secretary, Department of Infrastructure and Transport and Anor* (2011) 206 IR 368; [2011] FMCA 165, the Court granted an injunction to temporarily restrain a proposed termination of employment on the ground of unsatisfactory performance of duties.

- remedies under the FW Act for unfair dismissal on the ground that the termination of employment was harsh, unjust or unreasonable, including remedies by way of reinstatement and payment of compensation⁶⁸
- where there is breach of an industrial instrument such as an enterprise agreement, remedies under the FW Act for breach of civil penalty provisions under the FW Act, including remedies by way of payment of a penalty, reinstatement and payment of compensation⁶⁹
- remedies under the FW Act for breach of workplace protections, including the following actions by the employer:
 - adverse action against the employee because of the employee’s physical or mental disability, including (but not confined to) action by way of termination of employment⁷⁰
 - termination of employment because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the FW Regulations⁷¹
- remedies for disability discrimination under the *Australian Human Rights Commission Act 1986* and the *Disability Discrimination Act 1992* (the DD Act), subject to the inherent requirements exception and the unjustifiable hardship exception (ss 15, 21A and 21B of the DD Act):
 - in cases of termination of employment, where the employment is terminated on the ground of disability
 - in cases other than termination of employment, where there is adverse differential treatment of an employee in their employment on the ground of their disability
- damages for breach of contract, including for wrongful dismissal where the termination of employment is legally invalid: for example, for breach of procedural fairness requirements.⁷²

68 Part 3-2 of the FW Act.

The following cases are examples of cases where the Fair Work Commission (or a predecessor body) has upheld decisions by APS agencies to terminate employment on the ground of unsatisfactory performance of duties: *Singh v Australian Taxation Office* 900/98 N Print Q3695; [1998] AIRC 1011 (15 July 1998); *Ray v Department of Defence* Print PR912115; [2001] AIRC 1302 (5 December 2001); *Duma v Centrelink* Print PR914162; [2002] AIRC 141 (8 February 2002); *Ockendon v Australian Taxation Office* Print PR925954; [2003] AIRC 34 (13 January 2003); *Omar v Department of Health and Ageing* Print PR946214; [2004] AIRC 417 (30 April 2004); *Uitdenbogerd v Australian Taxation Office* [2009] AIRC 39 (13 January 2009); and *De Sousa v Department of Education, Employment and Workplace Relations* [2013] FWC 10155 (23 December 2013).

In *Rowland v National Offshore Petroleum Safety Authority* [2007] AIRC 1054 (18 December 2007), the AIRC held that the employee’s dismissal for breach of the Code of Conduct was unfair because, among other things, the AIRC considered that there was no failure by the employee to comply with her duty of care and diligence.

Buerckner v Australian Taxation Office 1505/00 C Print T4239; [2000] AIRC 660 (8 December 2000); *R v Agency* [2010] FWA 3446; and *Randall v Australian Taxation Office* [2010] FWA 5626 are examples of cases concerning underperformance in the context of probation conditions.

69 Part 4-1 of the FW Act. Civil penalty proceedings under the FW Act are available against the employer for any contravention by the employer of a term of an enterprise agreement under the FW Act: s 50 of the FW Act.

70 Section 351 of the FW Act. The protection is subject to some exceptions in the FW Act, including where the adverse action is because of the inherent requirements of the particular position concerned. ‘Adverse action’ is defined in s 342 of the FW Act. In *Khiani v Australian Bureau of Statistics* [2010] FCA 1059 and on appeal in *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109, the Federal Court held that an underperformance process and termination of employment on the ground of unsatisfactory performance of duties did not involve any breach of general protections under the FW Act. Compare *Rahman v Commonwealth of Australia as Represented by the Australian Taxation Office* [2014] FCA 1356, where the Federal Court held that Code of Conduct action did not involve any breach of general protections.

71 Section 352 of the FW Act.

72 See *Jarratt v Commissioner of Police for NSW* (2005) 224 CLR 44. Under general contract principles, if the employer breaches a term or condition of employment and the breach is serious, such that it would be regarded by the courts as a repudiation of the employment relationship, the employee can treat the employment relationship as having been terminated and can sue for damages for wrongful dismissal.

Effective performance management

Effective management of performance is essentially a matter of good management. However, sound management policies and practices along the lines set out below help to minimise legal risk exposures and are consistent with the requirements of new Chapter 4 of the Commissioner's Directions (set out in the annexure to this briefing), which will commence on 1 July 2015.⁷³

'...sound management policies and practices... help to minimise legal risk exposures...'

Effective performance management policies and practices

Sound management policies and practices include the following:

- effective recruitment to ensure that employees have good potential to perform satisfactorily
- effective probation systems to ensure that the employment of unsatisfactory performers, or those without adequate potential, is terminated within the probationary period
- a performance culture
- leadership on performance
- clearly expressed and understood work and performance requirements
- regular and frank discussion with employees about their performance
- adequate documentation of significant performance concerns
- provision of genuine duties: the employee should be given a quality and quantity of work that is consistent with their assigned duties and that enables them to perform at level
- taking all reasonable steps to assist an employee to achieve satisfactory performance
- prompt management response to any significant performance problems, including accurate identification of the cause of the performance problem and identification of the best means to address the problem: for example, whether the problem should be dealt with as a health problem, a possible breach of the Code of Conduct or a performance problem
- prompt implementation of any formal performance management or underperformance processes, as appropriate: for example, any formal performance improvement process should be implemented as soon as reasonably possible after identification of a genuine underperformance problem
- procedural requirements that are fair but not unduly complex, protracted or onerous: for example, the assessment period should not be so short as to be unfair – it needs to give enough time for improvement but should not be unduly long
- taking action to reduce classification or terminate employment only where all other reasonable avenues for helping the employee to achieve satisfactory performance have been exhausted.

⁷³ Publications of the APSC as referred to in this briefing contain very useful guidance on the management issues involved. The APSC makes learning materials on APS performance management available for download and provides training. AGS offers a training course on performance management entitled 'Tough conversations about poor performance'.

Steps to minimise legal risk

- In order to minimise exposure to legal risks, APS agencies should ensure that their procedures for making decisions in management of underperformance include the following elements:
 - employees are warned about unsatisfactory performance before any adverse decisions are made by way of reassignment of duties, reduction in classification or termination of employment and are otherwise given a fair chance to improve their performance⁷⁴
 - the decision-making process is fair: in particular, the decision-maker gives the employee notice of any proposed adverse decision and a reasonable opportunity to comment on the proposal and the employer takes into account any comments made by the employee before making any adverse decision
 - the focus is on performance and there is no unlawful discrimination.
- Agencies should not adopt any procedures, particularly legally binding procedures such as in industrial instruments, unless they are prepared to adhere to them. Simple and flexible procedures can help to minimise exposure to legal risks by reducing the risk of procedural breaches.
- Agencies should adhere to any binding procedures. Agencies should generally adhere to any procedures adopted by the agency even if they are not legally binding.
- Agencies should ensure that any decision to terminate employment is not harsh, unjust or unreasonable and is not otherwise contrary to legal requirements.

74 A termination of employment for unsatisfactory performance can be found by the Fair Work Commission to be harsh, unjust or unreasonable, among other things, if the employer did not give the employee an opportunity to respond to any reasons for dismissal related to the capacity or conduct of the employee; if there is an unreasonable refusal by the employer to allow the employee to have a support person present to assist at any discussions relating to dismissal; or if the employee was not warned about the unsatisfactory performance before the dismissal: s 387(c), (d) and (e) of the FW Act.

A warning by the employer should state the particular shortcoming that the employee needs to correct. If the employee has not been given a reasonable opportunity to address what management considers to be the employee's shortcomings, the Fair Work Commission can find the dismissal to be unfair and it can order that the employee be reinstated to their former position. See *Dafallah v Fair Work Commission* [2014] FCA 328 at [88]–[89] on the purpose and importance of giving warnings.

ANNEXURE – CHAPTER 4 OF THE AUSTRALIAN PUBLIC SERVICE COMMISSIONER’S DIRECTIONS 2013 AS IN FORCE FROM 1 JULY 2015

4.1 Purpose of Chapter 4

- (1) This Chapter sets out directions in relation to the APS Employment Principle mentioned in paragraph 10A(1)(d) of the Act (the effective performance Employment Principle).
Note: Paragraph 10A(1)(d) of the Act provides that the APS is a career based public service that requires effective performance from each employee.
- (2) Noting that there is a broad spectrum of management issues associated with managing effective performance across the APS, from encouraging high performance to managing unsatisfactory performance, the purposes of the directions are as follows:
 - (a) to strengthen the obligations of Agency Heads in relation to the effective performance Employment Principle;
 - (b) to make provision for certain obligations of supervisors and APS employees in relation to the effective performance Employment Principle;
 - (c) to encourage APS best or better practice by requiring each Agency Head to ensure that his or her Agency’s performance management policy and associated processes and practices are periodically reviewed and benchmarked against APS best practice.

4.1A Achieving effective performance

Agency Heads

- (1) For the purpose of upholding and promoting the effective performance Employment Principle, each Agency Head must ensure that:
 - (a) his or her Agency has a performance management policy and associated processes and practices that:
 - (i) demonstrably support a culture of high performance; and
 - (ii) provide for the performance of duties by APS employees in the Agency to be effectively managed; and
 - (iii) are fair, open and effective; and
 - (iv) are clearly communicated to all APS employees in the Agency; and
 - (v) are periodically reviewed and benchmarked against APS best practice; and
 - (b) his or her Agency builds the organisational capability necessary to achieve the outcomes of the Agency properly expected by the Government; and
 - (c) each APS employee in his or her Agency is given a clear statement, in a performance agreement, of the performance and behaviour expected of the employee, and an opportunity to discuss his or her duties; and
 - (d) each APS employee in his or her Agency receives feedback from supervisors about the performance of his or her duties consistent with the performance management policy, processes and practices of the Agency; and
 - (e) his or her Agency supports supervisors to enable them to effectively manage the performance of duties by APS employees under their supervision, including through appropriate training and coaching in performance management; and
 - (f) the performance management policy and associated processes and practices of his or her Agency are used to guide salary movement and any performance pay arrangements; and

- (g) the processes and practices in his or her Agency for dealing with unsatisfactory performance of duties are fair, open and effective, and that information about those processes and practices is available to supervisors and APS employees in the Agency, including information that clearly sets out:
 - (i) the responsibilities of supervisors; and
 - (ii) the possible outcomes if an APS employee's performance of duties is considered to be unsatisfactory; and
 - (iii) that, if the performance of duties by an APS employee is considered to be unsatisfactory, the employee has a responsibility to engage constructively with his or her supervisor and other affected persons (including the Agency's human resources area) in resolving the performance issues and to act on performance feedback; and
- (h) his or her Agency's processes and practices for dealing with unsatisfactory performance are applied in a timely manner if unsatisfactory performance by an APS employee has been identified.

Supervisors

- (2) For the purpose of upholding the effective performance Employment Principle, each supervisor in an Agency must, in relation to APS employees under his or her supervision:
 - (a) promote and foster high performance of duties by the employees; and
 - (b) ensure that each employee has a performance agreement that is consistent with the Agency's corporate plan and the work level standards for the employee's classification; and
 - (c) provide each employee with clear, honest, timely feedback about the employee's performance of his or her duties; and
 - (d) manage and assess the performance of duties by each employee in accordance with the performance management policy of the Agency; and
 - (e) work to improve his or her capability in effectively managing the performance of duties by the employees, including through appropriate training or coaching in performance management; and
 - (f) promptly and actively manage cases of unsatisfactory performance of duties by an employee in accordance with the Agency's performance management processes and practices, including by:
 - (i) identifying the nature of the unsatisfactory performance at the earliest opportunity; and
 - (ii) engaging with the relevant employee and other affected persons (including the Agency's human resources area and the supervisor's manager) to discuss the unsatisfactory performance, and facilitate a collective understanding about the nature of the unsatisfactory performance; and
 - (iii) maintaining appropriate records of the case.

APS employees

- (3) For the purpose of upholding the effective performance Employment Principle, each APS employee in an Agency must:
- (a) strive to perform his or her duties to the best of his or her ability, and at a level consistent with the work level standards for the employee's classification and the employee's performance agreement; and
 - (b) engage constructively with his or her supervisor in clarifying work expectations and what is needed to effectively perform his or her duties; and
 - (c) participate constructively in the Agency's performance management processes; and
 - (d) be open to receiving feedback, and act on such feedback in a timely manner; and
 - (e) seek opportunities to improve individual and team performance of duties; and
 - (f) if he or she is informed that the performance of his or her duties is unsatisfactory—engage constructively to deal with the unsatisfactory performance, including by:
 - (i) cooperating with his or her supervisor and other affected persons (including the Agency's human resources area) to resolve the issues relating to the unsatisfactory performance in a timely manner; and
 - (ii) undertaking any necessary training, or remedial or corrective measures as directed.
- (4) In this clause:
- performance agreement***, for an APS employee, means a documentary record (including any additions to, or variations of, that record) that sets out the performance expectations in relation to the duties that have been assigned to the employee.

4.2 Initiating Code of Conduct proceedings in relation to performance matters

Where the conduct of an APS employee raises concerns that relate both to effective performance and to possible breaches of the Code of Conduct, the Agency Head must, before making a decision to initiate an inquiry under procedures established by the Agency Head under subsection 15(3) of the Act, have regard to any relevant standards and guidance issued by the Commissioner.

This briefing supersedes Legal Briefing 92, *Dealing with unsatisfactory performance in the Australian Public Service* (2 December 2009).

This briefing was prepared by Paul Vermeesch of our Canberra office, who specialises in administrative law and employment law.

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