

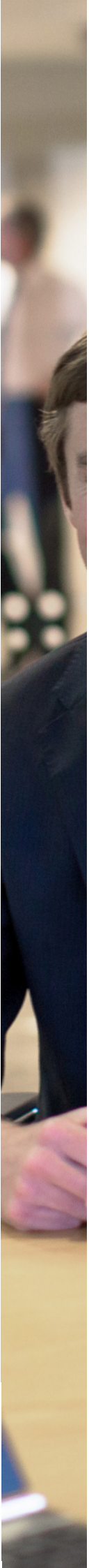
3 November 2026

Legal briefing

Effective performance management in the Australian public service

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Creating and maintaining a strong performance culture is crucial to ensuring the integrity of the Australian Public Service (APS) and public trust and confidence in the APS. The Australian Public Service Commission (APSC) fosters a strong APS performance culture by requiring that APS agencies as a minimum implement the elements of the APS Performance Frameworks. One element of the Frameworks is the effective management of unsatisfactory performance.

This briefing outlines:

- **the challenge of effective performance management and how the APS is meeting the challenge**
- **the legal framework for effective performance management**
- **the SES Performance Leadership Framework and the non-SES Performance Framework**
- **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 exposure**
- **effective performance management policies and practices and steps that can be taken to minimise legal risks.**

The challenge of effective performance management

The contemporary approach of the APS is to ensure effective performance management generally. This builds on previous responses to the identified challenges.[1] This includes responses to the former tendency of APS agencies to treat performance management as being primarily concerned with the management of underperformance and responses to identified failures in the management of poor performance.

Challenges and impediments

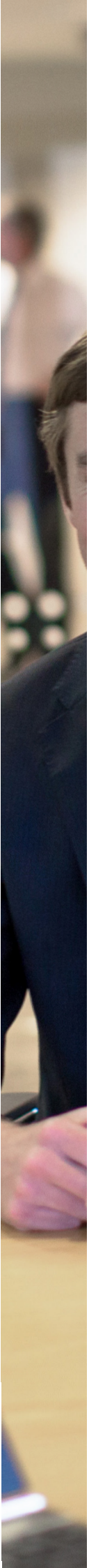
In 2001 a high-level APS report identified the management of poor performance as a particular concern and stated that an inability to manage poor performance undermines the credibility of performance management systems. The report identified as inhibiting factors the lack of preparedness by managers to take on the issue of poor performance and the cumbersome underperformance procedures then commonly prescribed by industrial instruments.[2] Later reviews

[1] The concern with effective performance management is longstanding - see, for example: the report of the Management Advisory Committee 2001, *Performance management in the Australian Public Service: a strategic framework*, APSC; APSC 2009, *Sharpening the focus: managing performance in the APS*; APSC 2009, *Contemporary government challenges: delivering performance and accountability*; 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). The APSC 2014, *State of the Service report 2013–14*, Chapter 9, 'Delivering performance and accountability' includes a summary of reform work at that stage. In 2014–15 the APSC introduced the Core Skills program and the Performance Management Diagnostic.

[2] Management Advisory Committee 2001, *Performance management in the Australian Public Service: a strategic framework*, APSC, section 2.2.5, p 28. The report included the following staff quote: '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.'

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 Secretaries Board.

In the past APS agencies commonly had industrial instruments with detailed and prescriptive procedures for the management of underperformance.



identified such problems as persisting.[3] Surveys of staff perceptions reflected the difficulties in addressing these problems.[4]

The APSC in 2014 recognised that management of underperformance was a serious challenge for the APS that required close and constant attention by APS managers.[5]

A report of the Australian National Audit Office (ANAO) in 2016–17 concluded that underperformance was generally not effectively dealt with in APS performance management processes and that there was significant room for improvement in the management of underperformance.[6] For example, the ANAO report noted research that indicated that the proportion of staff being formally rated as less than effective significantly underestimated the actual proportion of staff performing below expectations.[7] The report considered that the main barriers to more effectively managing underperformance related to inadequacies in the management culture, support to managers and manager capability.[8]

The report of the Independent Review of the APS in 2019 (led by David Thodey AO) concluded that APS performance management was not sufficiently valued and resourced. The Review considered that the APS agencies needed to focus on a range of performance benchmarks, not just delivery, and that managers needed to dedicate a significant amount of time and effort to developing people.[9]

What should not happen

Previously identified deficiencies in the implementation of performance management frameworks in

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[3] The Advisory Group on Reform of Australian Government Administration 2009, *Reform of Australian Government administration: building the world's best public service* (October), p 44 identified underperformance procedures as a barrier to efficiency, together with a lack of appropriate training and management skills.

Research work by the APSC in 2013 established that performance management was often viewed in the APS as a compliance exercise or shorthand for managing underperformance and that this often resulted 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'.

[4] Before 2020 the annual APS employee census consistently showed low staff satisfaction with performance management in the APS. For example, Australian Public Service Commission, *State of the Service report 2018–19*, pp 18–19 stated that less than half of 2019 APS employee census respondents (48%) agreed that their overall experience of performance management in their agency had been useful for their development, unchanged from 2018. More than one third (37%) of respondents disagreed that their agency dealt with underperformance effectively. The 2 most commonly cited reasons for concerns about management of underperformance were managers' reluctance to have difficult conversations and their lack of confidence in addressing underperformance.
Previous survey results have similar effects. The *State of the Service report 2016–17*, p 29 stated that the results of the 2017 APS employee census confirm that satisfaction with and confidence in approaches to performance management is low across the APS. It stated at p 31 that, overall, 41% of respondents do not believe their agency deals with underperformance effectively. The *State of the Service report 2013–14* stated at p 154 that only 20% of surveyed employees considered that their agency dealt with underperformance effectively. The *State of the Service report 2008–09* at p 100 stated that only 25% of employees considered that their agency dealt with underperformance effectively.
Since 2020 the annual APS employee census does not directly ask employees about their perceptions of the general effectiveness of management of underperformance in their agency. Consistent with the contemporary approach of the APS to performance management, census questions are now concerned with the individual's experience of all aspects of performance management in their agency.
The 2026 APS bargaining staff survey of more than 39,000 APS employees across 107 agencies, representing nearly 30% of the APS, asked employees about their experience of their employment conditions. Responses indicated that 28% of employees were least satisfied with performance management (noting that employees could nominate more than one employment condition). However, responses also indicated that very few employees considered that performance management employment conditions mattered most (around 5%). See APS bargaining updates: APS staff survey results | Australian Public Service Commission.

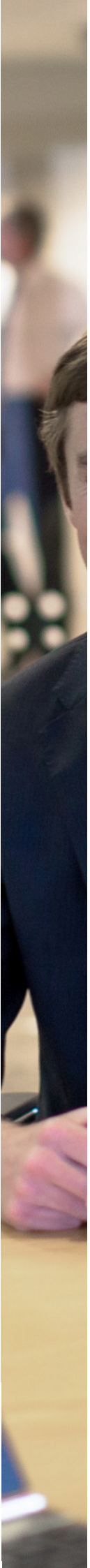
[5] See the Explanatory Statement on the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014* made on 12 December 2014 (and issued by the authority of the Australian Public Service Commissioner).

[6] See Auditor-General, ANAO Report No. 52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* at p 7, [1.5]–[1.6], based on an audit of 8 APS agencies.

[7] Ibid at p 33, [2.10] refers to the views of Professor Deborah Blackman, University of NSW, based on her research for the APSC's Strengthening the Performance Framework project. Professor Blackman conducted 25 focus groups and 90 interviews of APS employees and managers for the project work undertaken in collaboration with the APSC. An overview of the results were published in D West and D Blackman, 'Performance management in the public sector', *Australian Journal of Public Administration*, Vol 74, no. 1, 2015, pp 73–81.

[8] Ibid at pp 45–47; [2.28]–[2.29] and Table 2.10; see also the key learnings at pp 11–13; Boxes 1–8. Table 2.10 identifies and explains a range of specific barriers within the categories of management culture, support to managers and manager capability. The Report addresses these barriers in summary form in the key learnings in Boxes 1–8.

[9] *Our public service, our future. Independent review of the Australian Public Service,* Department of the Prime Minister and Cabinet, 2019, at pp 207-209. Much of the report of the review is relevant to performance issues: see especially the section on *Building capability, measuring progress* at pp 69-76 and chapter 6 on *Invest in people to strengthen capability*, including the section on *Performance management* at pp 207-209.



APS agencies included 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.[10]

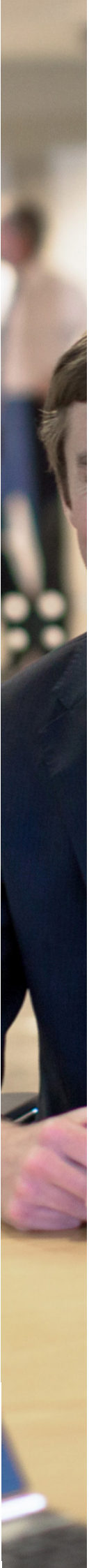
If sound management policies and practices are in place, APS agencies should not experience undesirable cases of the following kinds:

- Shortly after completion of a 6-month probation period an employee is identified as a poor performer.[11]
- A poor performer is rated as satisfactory or better because of extenuating personal circumstances.[12]
- An agency tasks a supervisor to deal with a recognised underperformer without ensuring that the supervisor has the necessary time and skills and access to HR or other expert support.
- 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. There is no documentation to support the generally held view that the employee is a poor performer. 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.
- A supervisor justifies a refusal to engage in any performance management beyond minimal completion of the required annual documentation because of concerns about the

[10] See APSC 2014, *State of the Service report 2013–14*, pp 149 and 154. ANAO Report No. 52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* identified a range of deficiencies in performance management: see pp 45–47; [2.28]–[2.29], Table 2.10 and pp 11–13; Boxes 1–8.

[11] A probationer who is a poor performer or who behaves poorly should generally be considered as not suitable for ongoing employment. An employee who fails to meet a condition of engagement relating to probation (notified in accordance with s 22(6) of the PS Act) should generally have their employment terminated before expiration of the probation period: see s 29(3)(f) of the PS Act. ANAO Report No. 52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* at [2.22]–[2.25] noted inadequacies in agencies' management of probationers. *Buerckner v Australian Taxation Office* 1505/00 C Print T4239; [2000] AIRC 660 (8 December 2000); *Mr R v Agency* (2010) 197 IR 241; [2010] FWA 3446; and *Randall v Australian Taxation Office* (2010) 198 IR 114; [2010] FWAFB 5626 are examples of cases concerning underperformance in the context of probation conditions.

[12] 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.



complexity of the agency's formal underperformance procedures.

- An agency does not actively engage in performance management and deals with underperformers by rewarding them with offers of redundancies. Offers are not made to staff who perform satisfactorily and who are otherwise in circumstances similar to the underperformers.
- Senior executives maintain that there is an unwritten rule that SES employees should not be subject to underperformance processes and should be managed by transfers and incentives to retire.[13]

Importance of effective performance management

The APS has long recognised that performance management is critical to support the development and maintenance of a high-performing APS and that it affects every aspect of an agency's operation, from the performance of individual employees through to the implementation of organisational outcomes that Government expects.[14]

Performance management within the APS should be a mechanism for:

- aligning employees with organisational requirements
- clearly articulating and managing expectations
- clearly establishing roles and goals
- identifying the support required to enable goal attainment
- discussing future career aspirations
- identifying developmental needs
- monitoring and reviewing performance
- ensuring that standards of performance align with expectations
- recognising good performance.[15]

Performance management should not be a compliance exercise and should not be actively engaged only to manage underperformance.[16] Effective management of poor performance is important to prevent its drain on resources, productivity and morale but it is only one aspect of an effective performance management framework.[17]

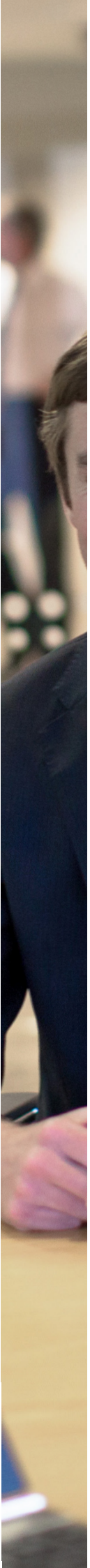
[13] Auditor-General, ANAO Report No. 52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* at [6] noted that some agencies have used redundancies or incentives to retire as alternatives to underperformance procedures and concluded that, while these may be cost-effective approaches in situations of excess staffing or in particularly complex cases, they should not be used to replace or undermine ongoing, robust underperformance management procedures.

[14] 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'. This built on research work in the APS in 2013 that 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 emphasised the importance of addressing performance issues in every aspect of an agency's operation and of ensuring that individuals have the necessary capabilities and skills to engage in effective performance management. See also APSC 2014, *Strengthening the performance framework: towards a high performing Australian Public Service – diagnostic implementation* (July).

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

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

[17] See APSC 2014, *State of the Service report 2013–14*, p 154. See also ANAO Report No.52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* at p 7, [1.1].



Meeting the challenge of effective performance management

Changes in 2019 to Australian Public Service Commissioner's Directions

The 2019 Independent Review of the APS recommended that the APS standardise and systematise performance management to drive a culture of high achievement (Recommendation 22). The Government's response to the Review agreed with this recommendation and said the following:[18]

> The APS Commissioner amended the Australian Public Service Commissioner's Directions 2016 in July 2019 to set clear expectations about performance management (including SES performance management) across the APS. The Directions clarify the obligations of agency heads, supervisors and APS employees in achieving, promoting and fostering a high-performance culture. The Secretaries Board will build on this to embed a high-performance culture in the APS. Work already underway to increase the interoperability of APS HR systems will support effective performance management processes and enable the APS to have a system-wide understanding of current performance levels.

APS Performance Frameworks

The 2019 changes to the Commissioner's Directions about performance management were supported by the APSC guide *Performance Management in the Australian Public Service* (2019) which aimed to assist APS agencies to develop performance management practices that sustain a high-performance culture across the APS.

The Performance Frameworks[19] issued by the APSC in 2023 and 2025 further build on the Commissioner's Directions. Significantly, APS performance management is now concerned with behaviours as well as outcomes. Under the Frameworks, behaviour (how outcomes are delivered) is considered core to effective performance and is seen as an enabler of a high-performance culture that supports continuous improvement, growth and development.[20]

Legal framework for performance management

Objects of the Public Service Act

The main objects of the *Public Service Act 1999* (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)
- provide a legal framework for the effective and fair employment, management and leadership of APS employees (s 3(b) of the PS Act).

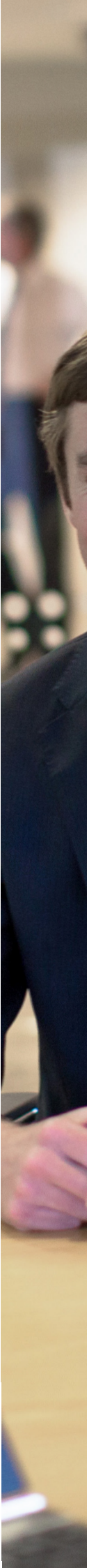
Consistent with these objects:

- 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.

[18] Department of the Prime Minister and Cabinet, 13 December 2019, *Delivering for Australians. A world-class Australian Public Service: The Government's APS reform agenda*.

[19] See the SES Performance Leadership Framework first published by the APSC on 28 August 2023 (updated in 2025) and the non-SES Performance Framework published by the APSC on 11 December 2025.

[20] See the APSC's descriptions of the SES and non-SES Frameworks at SES performance | Australian Public Service Commission and Performance Management in the Australian Public Service | Australian Public Service Commission. The SES Framework is stated to have commenced on 1 October 2023 and the non-SES Framework on 1 January 2026.



Legislative changes in 2013, 2014 and 2024

Legislative changes were made in 2013 and 2014 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 and the related *Australian Public Service Commissioner's Directions 2013* effective 1 July 2013 (discussed below)[21]
- the *Public Governance, Performance and Accountability Act 2013*, effective 1 July 2014.[22]

As part of the Government's APS reform agenda, the APS Values were amended effective 11 December 2024 to include the new Value of Stewardship.[23]

APS Values and APS Employment Principles

Under the APS Values the APS is committed to service, is ethical and is accountable.[24] 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.[25]

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).

Commissioner's Directions

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 current directions are set out in the *Australian Public Service Commissioner's Directions 2022* (Commissioner's Directions).

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

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[21] The *Australian Public Service Commissioner's Directions 2013* (effective 1 July 2013, now repealed and replaced) expanded on the new APS Values and Employment Principles inserted in the PS Act in 2013.

[22] 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.

[23] House of Representatives, Public Service Amendment Bill 2023, second reading speech, 14 June 2023, 4280. The APSC *State of the Service report 2024-25*, 66 states: [The Stewardship Value] articulates the important role all APS employees play in ensuring that the APS serves the Australian Government, the Parliament, and the Australian community, and supports the public interest, now and into the future. The APSC has issued practical guidance about the Stewardship Value: https://www.apsc.gov.au/aps-values/scope-and-application-values/stewardship-guidance (17 October 2024).

[24] The APS Values are set out in s 10(1) 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

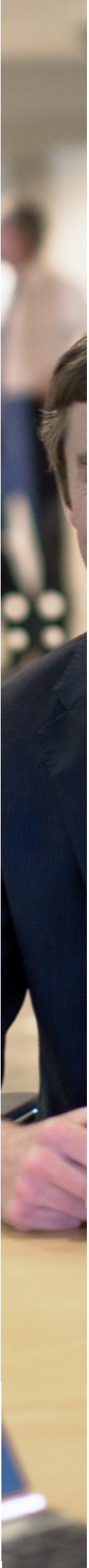
(4) The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

[25] 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

Part 2 of the Commissioner's Directions sets out standards and outcomes that are required of agency heads and APS employees in upholding each APS Value.[26] When complying with these requirements, regard must be had to the individual's duties and responsibilities.[27]

Section 13 of the Commissioner's Directions sets out the standards and outcomes that are required of each individual in upholding the APS Value in s 10(1), 'Committed to service'. These requirements include:

- promoting continuous improvement and managing change effectively[28]
- pursuing and supporting training and development to improve capability.[29]

Requirements in upholding the other APS Values include:

- acting in a way that is right and proper, as well as technically and legally correct or preferable[30]
- reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way[31]
- having proper regard to Agency goals and responsibilities and the way in which the individual's work contributes to the achievement of those goals and responsibilities[32]
- supporting and contributing to a workplace culture that sustains core knowledge, expertise, and standards of professionalism to deliver intended results with integrity[33]
- being answerable for individual performance.[34]

Commissioner's Directions on performance management and culture

The APS Employment Principle in s 10A(1)(d) of the PS Act is that the APS requires effective performance from each employee. Part 5, Division 2 of the Commissioner's Directions sets out the Commissioner's directions on this Employment Principle under the heading 'Performance management and culture'.[35] These directions are copied in the **annexure** to this briefing. They set out the obligations of agency heads, supervisors and APS employees for developing and sustaining a high-performance culture across the APS.

Purpose of Directions on performance management and culture

Introduction in 2015

When first introduced in 2015 the provisions now included in Part 5, Division 2 were seen as a

[26] Sections of the Commissioner's Directions particularly relevant to performance are those referred to in the following footnotes but see also ss 14(c), 16(e), 16(f), 17(d) and 17(e).

[27] See ss 13–17A of the Commissioner's Directions.

[28] See s 13(g) of the Commissioner's Directions about upholding the APS Value in s 10(1) of the PS Act, 'Committed to service'.

[29] See s 13(i) about upholding the APS Value in s 10(1), 'Committed to service'.

[30] See s 14(e) about upholding the APS Value in s 10(2), 'Ethical'.

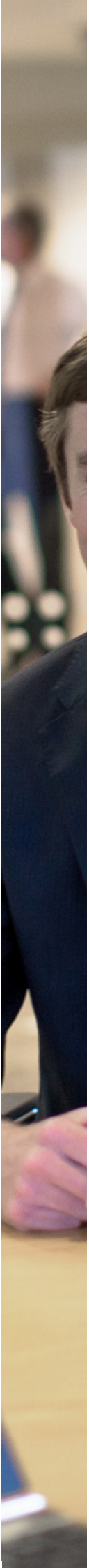
[31] See s 14(f) about upholding the APS Value in s 10(2), 'Ethical'.

[32] See s 17A(b) about upholding the APS Value in s 10(2), 'Stewardship'.

[33] See s 17A(c) about upholding the APS Value in s 10(2), 'Stewardship'.

[34] See s 16(g) about upholding the APS Value in s 10(4), 'Accountable'. Previous versions of the direction were confined to being answerable for individual performance *through performance management systems*.

[35] Part 5, Division 2 in its current form replicates Part 4, Division 2 of the *Australian Public Service Commissioner's Directions 2016* as inserted from 25 July 2019 by the *Australian Public Service Commissioner's Amendment (2019 Measures No. 1) Direction 2019*. Part 4, Division 2 reinstated provisions as they were from 1 July 2015 to 30 November 2016.



significant step in the broader agenda for reform of performance management across the APS.[36] Their stated purpose was 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.[37]

The Explanatory Statement set out the following reasons for these directions:

> 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.

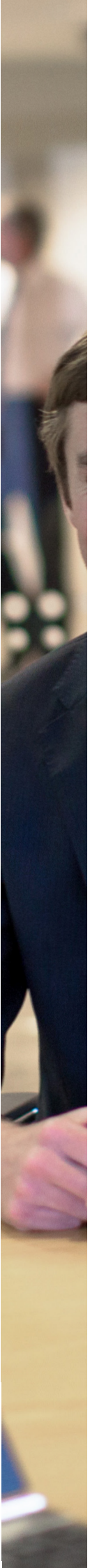
Reintroduction in 2019

The directions as introduced in 2015 were not in force from 1 December 2016 to 24 July 2019. The stated purpose of their reinstatement in 2019 was to:

- achieve optimal performance management across the APS through extending the responsibility for achieving effective performance to supervisors and employees and requiring agencies to proactively engage in performance management practices

[36] See the Explanatory Statement on the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014.* The Explanatory Statement said that strengthening the legal framework for performance management was a critical success factor for improvement in this area. The APSC's Strengthening the Performance Framework strategic project identified steps needed to improve implementation of APS performance management systems to achieve a high performing APS: 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 in 2014–15 included the introduction of the Core Skills program and the Performance Management Diagnostic.

[37] See the Explanatory Statement on the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014.*



- clarify the obligations of agency heads, supervisors and APS employees in achieving, promoting and fostering a high-performance culture
- emphasise that effective performance is a shared responsibility.[38]

The reinstatement of the provisions was also consistent with the Government's agreement to the recommendation of the 2019 Independent Review of the APS that the APS standardise and systematise performance management to drive a culture of high achievement.

The APSC's media release of 24 July 2019 stated as follows:

> The Australian Public Service Commissioner, Peter Woolcott AO, has today released amendments to the Australian Public Service Commissioner's Directions 2016. The amendments place a stronger focus on the obligations of agency heads, supervisors and APS employees for developing and sustaining a high-performance culture across the APS.
>
> Mr Woolcott said the Australian Public Service Commissioner's Directions describe how the Australian Public Service should incorporate and uphold the APS values, conduct recruitment activities and undertake performance management.
>
> "Performance management is about best practices that allow the APS to manage talent and retain high-performing employees. It involves managers dedicating time to develop and mentor staff and teams. It's not just for managing under performance.
>
> "These amendments make clear that the responsibilities for performance management are no longer limited to agency heads but extend to all supervisors and all employees.
>
> "The amendments are about achieving optimal performance across all agencies. They also hold all APS employees accountable for upholding the APS employment principle that requires effective performance from every employee.
>
> "There is a strong focus on constructive engagement, building capability, promptly managing unsatisfactory performance and seeking opportunities to innovate.
>
> "The intent of the amendments is to strike a balance between a principles-based framework, and setting clear expectations about those elements of a strong performance framework that agencies need to incorporate," Mr Woolcott said.
>
> The amendments to the directions have the support of all Secretaries.

Repealed Commissioner's Directions with agency based approach

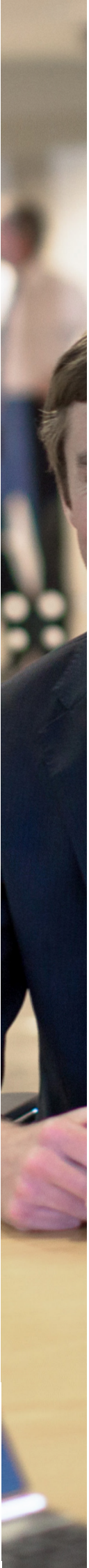
The now repealed Commissioner's Directions, as originally in force (from 1 December 1999 to 30 June 2015) and in force from 1 December 2016 to 24 July 2019, adopted the approach of imposing obligations on agency heads about the performance management policies and processes required to be implemented in each agency. This emphasised an agency based approach to performance management.

The stated reasons for reverting to the agency based approach in December 2016 were to:[39]

- reflect recent reviews into public administration including the Independent Review of

[38] Australian Public Service Commission Circular 2019/3 *Amendments to the Australian Public Service Commissioner's Directions 2016*. The Circular notes that the amendments had the support of Secretaries and were agreed at the meeting of the Secretaries Board on 3 April 2019.

[39] See the overview in the Explanatory Statement for the *Australian Public Service Commissioner's Directions 2016* issued by the authority of the Australian Public Service Commissioner. See also APSC Circular 2016/1: *Commencement of the Australian Public Service Commissioner's Directions 2016*.



Whole-of-Government Internal Regulation (Belcher Red Tape review) and the Unlocking potential – APS workforce management contestability review (McPhee review)[40]

- streamline and simplify content, with the removal of content better provided in guidance material[41]
- provide additional flexibility for agency heads so they have greater discretion to determine the performance management framework appropriate to their agency
- reduce red tape by streamlining processes.

These now repealed directions imposed obligations only on the agency head. If an agency head wished to impose obligations on supervisors and employees this had to be done under the performance management arrangements implemented at the agency level, for example by way of binding agency policies or agency head directions.[42] This agency based approach gave rise to potential for differences across APS agencies and potential complexities about the obligations of employees and supervisors and the enforcement of those obligations. In contrast the current approach is for the APS to standardise and systematise performance management.[43]

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 (s 14(c) of the Commissioner's Directions).

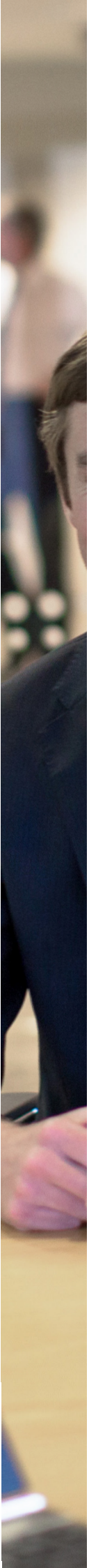
Leadership and good supervision are important to the successful implementation of effective

[40] The report of the Advisory Group on Reform of Australian Government Administration 2009, *Reform of Australian Government administration: building the world's best public service* (October) identified underperformance procedures as a barrier to efficiency. The report stated at p 44: '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.'

[41] ANAO Report No. 52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* recognised the desirability of streamlining procedures to remove repetition and prescription and excess requirements: see for example the conclusions at p 8, [7].

[42] The making of policies or processes by an agency head does not necessarily impose obligations on an employee. For example, in *Tucker v State of Victoria* [2019] VSC 420 the Victorian Supreme Court held that a statutory duty on an agency head to establish employment processes to ensure statutory employment principles does not itself give rise to a requirement for an employee to comply with the processes.

[43] See, for example, the APS Performance Frameworks discussed in this briefing.



performance management.[44]

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 discussed, the Commissioner's Directions on the Employment Principle of effective performance impose obligations on agency heads and supervisors (as well as APS employees).

APS Performance Frameworks

The SES Performance Leadership Framework (APSC 2023)[45] and the non-SES Performance Framework (APSC 2025)[46] build on the obligations set out in the Commissioner's Directions on performance management (discussed above). The Frameworks also align with the Government's current APS reform agenda of strengthening APS integrity and capability.[47]

APS agencies are required as a minimum to implement the elements of the APS Performance Frameworks.

Significantly, APS performance management is now concerned with behaviours as well as outcomes. Under the Frameworks, behaviour (how outcomes are delivered) is considered core to effective performance and is seen as an enabler of a high-performance culture that supports continuous improvement, growth and development.[48]

One element of the Frameworks is management of poor performance. Under the Frameworks, if an employee's performance is considered unsatisfactory at any time, the employee's supervisor must take steps to manage it appropriately, sensitively and promptly in accordance with the agency's unsatisfactory performance policy and procedures, with the aim of restoring 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. The Commissioner's Directions on performance management and culture (set out in the annexure) and the APS Performance Frameworks in effect require agency heads, supervisors and other employees to implement good management practices. Some policies and practices for effective performance management are listed at the end of this briefing. 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 unsatisfactory performance

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

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[44] 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 12; also, section 2.2.3 on 'Management buy in'.

The importance of leadership was recognised in ANAO Report No. 52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service*, p 9. The Report considered that the main barriers to more effectively managing underperformance related to inadequacies in the management culture, support to managers and manager capability.

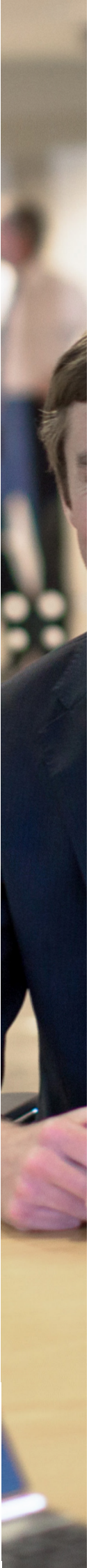
The APSC 2014, *State of the Service report 2013–14*, pp 149 and 155 stated that effective management of employee performance is a core responsibility of all supervisors and that all APS managers are required to accept responsibility for managing performance to ensure that it receives close and constant attention. 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: see APSC 2013, *Strengthening the performance framework: towards a high performing Australian Public Service* APSC (May); and APSC 2014, *Strengthening the performance framework: towards a high performing Australian Public Service – diagnostic implementation* (July).

[45] SES Performance Leadership Framework first published by the APSC on 28 August 2023 (updated in 2025) and commenced on 1 October 2023.

[46] non-SES Performance Framework published by the APSC on 11 December 2025 and commenced on 1 January 2026.

[47] The reform agenda includes integrity, model employer and capability priorities: that the APS 'embodies integrity in everything it does', 'is a model employer' and is 'an APS that has the capability to do its job well': House of Representatives, Public Service Amendment Bill 2023, second reading speech, 14 June 2023, 4280.

[48] See the APSC's descriptions of the SES and non-SES Frameworks at SES performance | Australian Public Service Commission and Performance Management in the Australian Public Service | Australian Public Service Commission.



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* (FW Act)[49]
- terms and conditions of employment that are enforceable in contract.

Range of powers under the 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.

Employer directions

Where an employee wilfully refuses to satisfactorily perform their duties, the employee can be given written directions about their 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

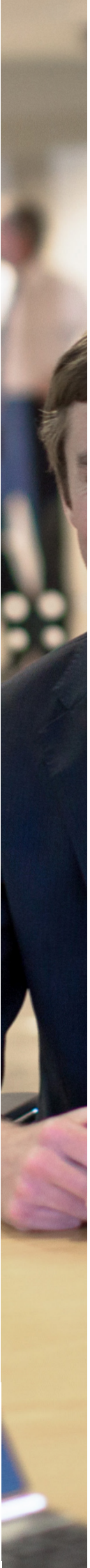
APS employees are subject to the following potentially relevant conduct requirements:

- 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 2023* (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 and its management are discussed above.

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

[49] In *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109 at [43], a 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.

In practice it is desirable to ensure delegation of any potentially relevant power.



- perform duties with care and diligence[50]
- comply with a lawful and reasonable direction about performance of duties[51]
- uphold the APS Values or the APS Employment Principles[52]
- comply with the Commissioner's Directions relevant to performance, including the requirements that they participate constructively in the agency's performance management processes and engage constructively to resolve any identified issues relating to their unsatisfactory performance.[53]

Sanctions for an established breach of the Code of Conduct include reassignment of duties, demotion or termination of employment.[54]

Code of Conduct or performance management process?

Commissioner's Directions require regard to any relevant standards and guidance

Section 52 of the Commissioner's Directions provides that, where the conduct of an APS employee raises concerns about both effective performance and possible breaches of the Code, the agency head must have regard to any relevant standards and guidance from the Australian Public Service Commissioner before deciding whether to initiate any inquiry under s 15(3) procedures (to determine whether there has been a breach of the Code and, if so, what sanction, if any, should be imposed).

Commissioner's standards and guidance about Code or performance management process

The Commissioner's standards and guidance require that before a decision-maker decides to initiate any inquiry under s 15(3) procedures they must first consider whether it is more appropriate to deal with the concern by way of performance management actions or other management actions having regard to Chapter 4 of the APSC guide on *Handling misconduct* (28 January 2021).[55]

Briefly, Chapter 4 of the APSC guide indicates that agencies should take a targeted, proportionate, and restorative approach to behaviour that does not meet expectations, having regard to its nature and seriousness in context. Depending on the circumstances, the focus of restoration might be on the reputation of the agency or APS, workplace relationships and morale, or employee productivity and capability. For example, conduct that is the result of an honest and reasonable mistake, accident, or a lack of capability can generally be addressed through process improvements or management action such as training, performance management, or counselling. On the other hand, behaviour by an employee that is within their control - for example, a wilful refusal to follow lawful and reasonable directions, or a blatant disregard for expected behavioural standards - may be better dealt with through misconduct action. It may be appropriate to take both misconduct and other management action, for example, to mend workplace relationships or address systemic issues.[56]

Subject to taking into account the Commissioner's standards and guidance, we suggest that other

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[50] See s 13(2) of the PS Act.

[51] See s 13(5). Lawful and reasonable directions can include those imposed by an agency head implementing the performance management policies and processes required by s 49 of the Commissioner's Directions.

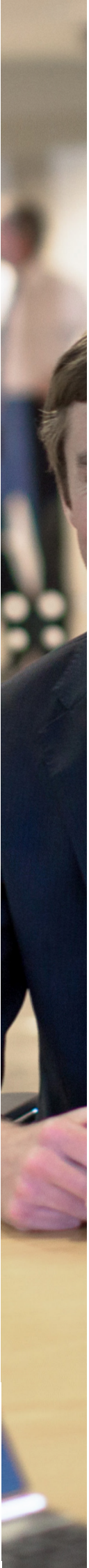
[52] See s 13(11). The APS Employment Principle in s 10A(1)(d) provides that the APS requires effective performance from each employee.

[53] See ss 51(c) and (f). 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. Any supervisor or employee who breaches any of their obligations under the Commissioner's Directions can potentially be liable to action by their agency for possible breach of the APS Code of Conduct. It will commonly be preferable for performance issues to be addressed other than by way of disciplinary action. However, the potential for Code action signals the importance of good performance management behaviours and can have a salutary effect.

[54] See s 15 of the PS Act.

[55] The standards and guidance are set out in Chapter 4 of the Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (28 January 2021): see para 4.12.

[56] See Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (28 January 2021), Chapter 4, paras 4.2, 4.9, 4.11 and 4.14.



examples where Code of Conduct action may be appropriate include where: the employee is wilfully refusing to satisfactorily perform duties; there is a deliberate or flagrant failure to act with care and diligence; or the employee has had repeated performance problems that appear to be within the employee's control and that have previously been addressed by management action.[57]

Code process not required in preference to performance management

A Full Bench of the Fair Work Commission in an unfair dismissal case 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.[58] 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, even though Code of Conduct action could potentially be taken (e.g. for failure to perform duties with care and diligence).

Agencies should ensure that any performance management action is not improperly taken for disciplinary purposes. Any Code of Conduct action must be taken in accordance with agency Code procedures (as required by s 15 of the PS Act).

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).

Reassignment of duties (or other management action) may be considered more appropriate than formal performance management action in cases where, for example, 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 and relevant personal qualities are not a good fit with their job.

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

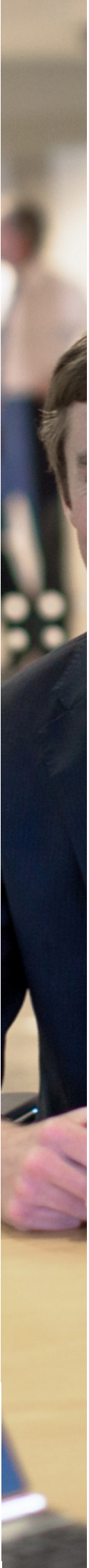
- inability to perform duties because of physical or mental incapacity (the incapacity ground).[59]

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[57] 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.

[58] *Dunkerley v Commonwealth of Australia* [2013] FWCFB 2390.

[59] See s 23(4) of the PS Act on reduction in classification and s 29(3) of the PS Act on termination of employment. An agency head also has power to reduce classification and to terminate employment on the ground of breach of the Code. 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:

- was absent from work without the employer's authorisation[60]
- was absent from work following a failure to engage in any meaningful way in developing a graduated return to work program and a failure to comply with a direction to perform duties where the employer was (properly) satisfied on the (conflicting) medical evidence that the employee was fit for duties[61]
- failed without justification to undertake the assigned duties on the 11 days on which the employee attended work[62]
- was unable to perform duties owing to their incarceration.[63]

The ground of termination of employment for non-performance of duties is available according to its terms (that is, for non-performance). It does not require that it be established that the employee has repudiated the contract of employment by abandoning their employment.[64]

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.[65]

Generally, an agency should terminate employment for unsatisfactory performance only where the employer can establish objectively that performance was deficient and further performance management would be unlikely to be successful, for example, where the employee's performance is unsatisfactory despite having been given every reasonable opportunity to succeed.[66]

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.[67]

Agencies should carefully assess the medical evidence and get their own evidence where

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[60] 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, 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, refused to participate in a return-to-work process even though there was no sound medical reason for such refusal, failed to return to work despite efforts by the Department to facilitate her return in such a way as to address her concerns (even though she was aware that dismissal would be the likely consequence) and refused to attend work despite being directed to do so. See also *Gadzickwa v Commonwealth of Australia (Department of Human Services)* [2028] FWCFB 7354, *Dewar v Commonwealth of Australia as represented by the Department of Climate Change, Energy, the Environment and Water* [2026] FWC 58; [2026] FWCFB 65 for cases upholding dismissals. *Compare Cully v Commonwealth of Australia (represented by the Australian National Audit Office)* [2022] FWC 495; [2022] FWCFB 91 finding a dismissal unfair where it was not reasonable to direct the employee's return to work in the office.

[61] *Tunks v Commonwealth of Australia as represented by the Department of Defence* [2015] FWC 2398. Permission to appeal refused: *Tunks v Commonwealth of Australia (acting through and represented by the Department of Defence)* [2015] FWCFB 6246.

[62] *Commonwealth of Australia (Australian Taxation Office) v Shamir* (2016) 261 IR 176; [2016] FWCFB 4185.

[63] *Maddison v Commonwealth of Australia* (acting through and represented by the Department of Defence) [2016] FWC 2371.

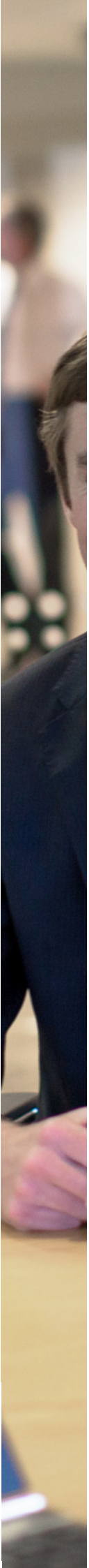
[64] *Dunkerley v Commonwealth of Australia* [2013] FWCFB 2390.

[65] See footnotes below under the heading 'Avenues of redress' for examples of cases where the FWC has upheld dismissal of APS employees for unsatisfactory performance.

[66] See *Etienne v FMG Personnel Services Pty Ltd* (2017) 274 IR 361; [2017] FWCFB 3864 at [45]-[47].

In *Gundelli v Department of Human Services* [2014] FWC 8149 the FWC found that the employee was given every opportunity to succeed and that the remedial plan and monitoring documents agreed to by the employee were not overly intrusive or ambitious in the circumstances.

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



appropriate.[68] Agencies can rely on the non-performance and unsatisfactory performance grounds where the employee has a medical condition but is fit for duties.[69] Agencies can potentially rely on the unsatisfactory performance ground where they have reasonably accommodated the employee's medical condition and performance remains unsatisfactory.[70]

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.

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.[71]

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'.[72] 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.[73]

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.[74] Agencies generally use performance plans and other performance measures to assess an employee's performance.

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

[69] 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.

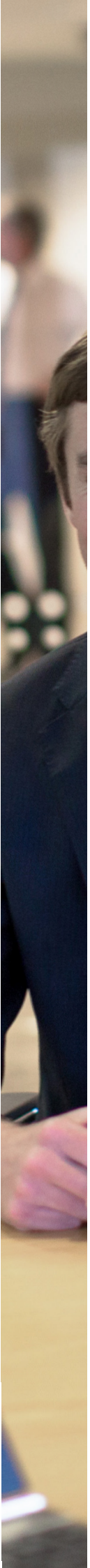
[70] See *De Sousa v Department of Education, Employment and Workplace Relations* [2013] FWC 10155 (23 December 2013) for an example of a case where the Fair Work Commission held that a termination of employment on the unsatisfactory performance ground was not harsh, unjust or unreasonable, even though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

[71] 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.

[72] The *Macquarie dictionary* online defines unsatisfactory as meaning 'not satisfactory; not satisfying specified desires or requirements; inadequate'.

[73] *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.

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



Performance plans and other performance measures should be consistent with the duties assigned under s 25.

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).[75] 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
- 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.[76]

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.[77] 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.[78] 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.

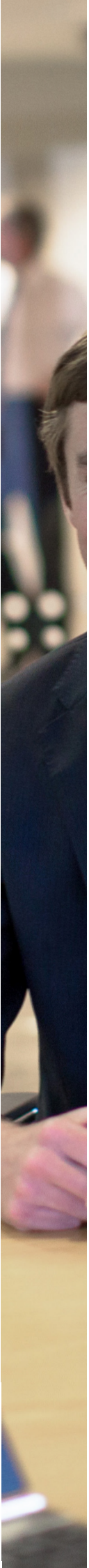
The general trend is for APS agencies to set out the details of their performance management framework, including underperformance procedures, in administrative or policy documents that

[75] *Crozier v Palazzo Corporation Pty Ltd* Print S5897 (11 May 2000); (2000) 98 IR 137. Relevant provisions of FW Act about unfair dismissal are to similar effect: s 387(a) refers to a valid reason for termination related to conduct or capacity.

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

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

[78] *Briginshaw v Briginshaw* (1938) 60 CLR 336.



do not form part of the agency's enterprise agreement made under the FW Act.[79] In the past APS agencies commonly included underperformance procedures for non-SES employees in their industrial instruments. Sometimes these procedures were fairly detailed and could be unduly onerous and restrictive.[80]

The following discussion focuses on procedures that apply to non-SES employees.[81]

Employees covered by underperformance procedures

Where underperformance procedures have been developed for application to ongoing employees, care should be taken to ensure that they do not inappropriately apply to probationers or non-ongoing employees. If underperformance procedures set out or referenced in an industrial instrument is not to apply to probationers or non-ongoing employees, the industrial instrument should make this clear.[82]

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

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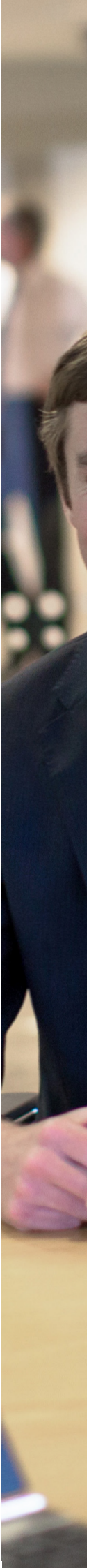
[79] Conditions concerning performance management are negotiated at the agency level; they were not included in the 'common conditions' negotiated at an APS wide level in 2023 -24: APS Bargaining Statement of Common Conditions - 5 February 2024.pdf.

[80] ANAO Report No. 52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* at p 8, [7] and Chapter 3 noted some variation between agencies in the level of prescription in enterprise agreements and the consequential lack of capacity for flexibility and streamlining of procedures.

[81] 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. See also the SES Performance Leadership Framework.

ANAO Report No.52 2016–17 Performance Audit *Managing underperformance in the Australian Public Service* at [3.24]–[3.31] highlighted the need for transparent performance management procedures for SES employees and the desirability of such procedures being more streamlined than those applicable to non-SES employees.

[82] 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.



agreement[83]

- civil penalty remedies against the employer for any contravention by the employer of a term of an enterprise agreement[84]
- the Fair Work Commission finding unfair dismissal on the ground that the termination of employment was harsh, unjust or unreasonable[85]
- 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.

Recommended approach to adherence 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 and terminate the employment of an 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 outcome of an underperformance process, there are different degrees of legal risk associated with any failure to adhere to the procedures.

Where provisions of the Public Service Act require adherence to procedures in an 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.[86]

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.

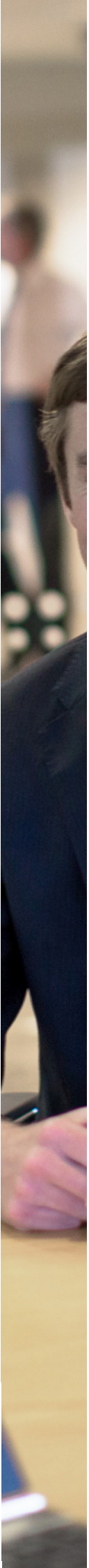
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[83] This can include proceedings in the Fair Work Commission: see Pt 6-2 of the FW Act. In *Veldekis v Commonwealth of Australia as represented by the Australian Taxation Office* [2023] FWC 798 the FWC dealt with a dispute about the interpretation and application of provisions in an EA about the handling of performance related concerns.

[84] 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.

[85] 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]. See *Nemcic v Australian Electoral Commission* [2018] FWC 5645 (7 September 2018) for an example of a termination of employment that was found to not be unfair, having regard to the nature and seriousness of the conduct in issue, despite a number of material procedural defects in investigation and decision-making processes.

[86] 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.*



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.

Where provisions of the Public Service Act and Regulations do not require adherence to procedures in an industrial instrument – termination of employment

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

In the absence of any statutory requirements, there are good arguments that a failure to adhere to any such 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 should result in invalidity.[87]

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 Act[88] and not by way of judicial review remedies or other remedies under the general law.[89] 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 s 24(1) or (3) determination), a decision under s 29 of the PS Act to terminate employment might be found invalid by a court in judicial review proceedings. The possible invalidity arises from 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.

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[87] It is a matter of statutory construction, having regard to the intention of Parliament, as to whether the departure from a procedure will mean that the decision to terminate employment is invalid and of no effect: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Compare *Panagopoulos v Secretary, Department of Veteran Affairs* (1995) 60 FCR 524 where the Court on judicial review held that a failure to comply with mandatory procedures under an industrial instrument, to which the power of termination under the then *Public Service Act 1922* was subject, rendered a decision to terminate employment invalid for jurisdictional error. 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. Compare also *Bromet v Oddie* [2003] FCAFC 213.

In *Khiani v Australian Bureau of Statistics* (2010) 199 IR 281; [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.

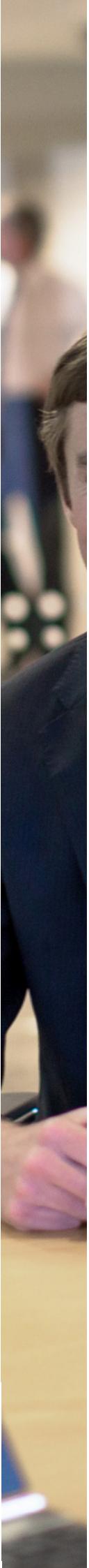
[88] Under the FW Act, the Federal Court of Australia and Federal Circuit and Family Court of Australia have broad powers to grant injunctions to prevent, stop or remedy the effects of a contravention of the FW Act and therefore to enforce compliance with industrial instruments such as modern awards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

[89] 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 Magistrates 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; see also *O'Halloran v Wood* (2003) 75 ALD 446; [2003] FCA 854.



Procedures in an administrative or policy document

Procedures binding under an industrial instrument

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

Procedures not binding under an industrial instrument

Where an agency's underperformance procedures in a policy document are not legally enforceable under any industrial instrument, they can still 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 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 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.[90] 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.[91] The courts will imply such agreement if it can be objectively implied from all the circumstances that 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.

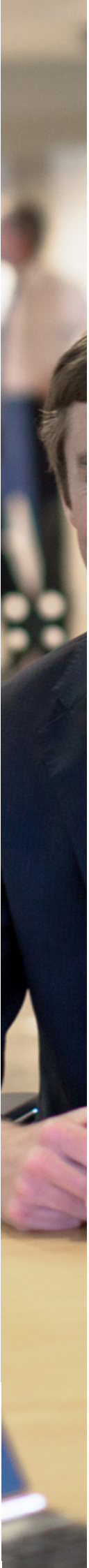
Terms and conditions of employment that form the contract of employment between the employer and an employee give rise to potential remedies in contract law. If the employer breaches a contractual term or condition of employment, it is potentially subject to an action for damages.

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[90] 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* (2008) 176 IR 183; [2008] FCA 1512; compare *O'Halloran v Wood* (2003) 75 ALD 446; [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.

[91] *Goldman Sachs JBWere 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) 231 FCR 403, a 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.



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 law[92]
- 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)
- 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 compensation[93]
- 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 compensation[94]
- remedies under the FW Act for breach of workplace protections, including the following actions by the employer:[95]
  - 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 employment[96]

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[92] The Federal Court of Australia and Federal Circuit and Family Court of Australia 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* [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* (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.

[93] 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); *De Sousa v Department of Education, Employment and Workplace Relations* [2013] FWC 10155 (23 December 2013); *Gundelli v Department of Human Services* [2014] FWC 8149; *Belachew v Commonwealth of Australia as represented by the Australian Bureau of Statistics* [2016] FWC 2532] – permission to appeal refused: [2016] FWCFB 4777; *Knight v Commonwealth of Australia (Australian Criminal Intelligence Commission)* [2017] FWC 2488 – permission to appeal refused: [2017] FWCFB 3896; *Pritchard v Commonwealth of Australia as represented by Services Australia* [2025] FWC 2002; *Leismann v Services Australia* [2026] FWC 2689.

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. In *McLean v Reserve Bank of Australia* [2024] FWC 2269 the FWC held a dismissal for unsatisfactory performance unfair because of the failure of the show cause letter to particularise ongoing deficiencies in performance.

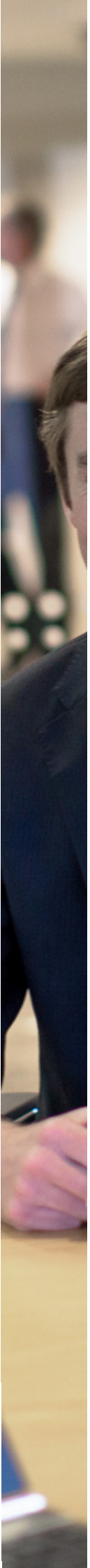
Buerckner v Australian Taxation Office 1505/00 C Print T4239; [2000] AIRC 660 (8 December 2000); *R v Agency* [2010] FWA 3446; and *Randall v Australian Taxation Office* [2010] FWAFB 5626 are examples of cases concerning underperformance in the context of probation conditions.

In *Keillor v Comcare* [2022] AATA 228 it was held in the context of a workers compensation matter that the commencement of a performance management process was unreasonable and that the process was conducted in an unreasonable manner.

[94] 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.

[95] In *Zabortseva v Commonwealth of Australia as represented by the Australian Public Service Commission* [2025] FCA 1585 the Federal Court held that the giving of certain directions in the context of performance management were not 'adverse action' in breach of workplace protections as they did not involve real and substantial prejudicial alteration of the employee's position.

[96] 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) 199 IR 281; [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.



  - termination of employment because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the FW Regulations[97]

- 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 or for wrongful dismissal where the termination of employment is legally invalid: for example, for breach of procedural fairness requirements.[98]

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.[99]

Effective performance management policies and practices

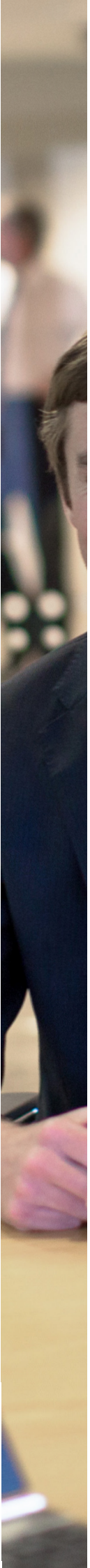
Sound management policies and practices include the following:

- 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 management matter
- prompt implementation of any formal performance management or underperformance processes, as appropriate (having taken all reasonable steps to assist an employee to

[97] Section 352 of the FW Act.

[98] 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.

[99] See also the Performance Frameworks issued by the APSC and related guidance materials and the Fair Work Ombudsman, 2025, *Managing underperformance best practice guide*: Managing underperformance best practice guide.



achieve satisfactory performance): 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.

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 performance[100]

  - 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.

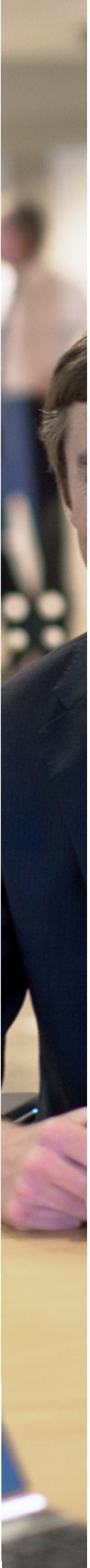
- Agencies should not adopt any procedures, particularly legally binding procedures such as in industrial instruments, unless they are prepared to adhere to them. Simple and flexible procedures can help to minimise exposure to legal risks by reducing the risk of procedural breaches.

- 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.

[100] 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, for example, *Rouse v Minit Australia Pty Limited* Print P5080 (2 September 1997). See *Dafallah v Fair Work Commission* (2014) 225 FCR 559 at [88]–[89] on the purpose and importance of giving warnings.



Annexure – Extracts of part 5, division 2 of The Australian Public Service Commissioner's Directions 2022

Division 2—Performance management and culture

49 Achieving effective performance—Agency Heads

Achieving effective performance

(1) An Agency Head upholds APS Employment Principle 10A(1) (d) by ensuring the following:

(a) the Agency has performance management policies and processes that:

(i) support a high performance culture; and

(ii) proactively identify, foster and develop APS employees to fulfil their potential; and

(iii) provide for effective performance management; and

(iv) are fair, open and effective; and

(v) are clearly communicated to APS employees;

(b) the Agency builds the organisational capability necessary to achieve the outcomes of the Agency properly expected by the Government;

(c) each APS employee in the Agency is given:

(i) a clear statement of the performance and behaviour expected of the employee; and

(ii) opportunities to discuss performance;

(d) each APS employee in the Agency receives feedback from supervisors about their performance consistent with the Agency's performance management policies and processes;

(e) the Agency requires supervisors to manage the performance of APS employees under their supervision effectively, including by engaging in career conversations;

(f) the Agency supports supervisors to manage the performance of APS employees under their supervision, including by providing appropriate training in performance management;

(g) the Agency's performance management policies and processes are used to guide salary movement.

Dealing with unsatisfactory performance

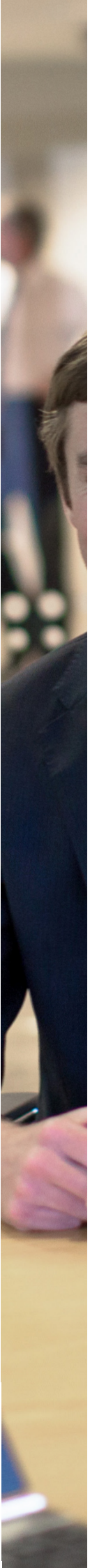
(2) An Agency Head upholds APS Employment Principle 10A(1)(d) by ensuring the following:

(a) the Agency's performance management policies and processes dealing with unsatisfactory performance are available to supervisors and APS employees in the Agency, and include information that clearly sets out:

(i) the responsibilities of supervisors; and

(ii) the possible outcomes if an APS employee's performance is considered unsatisfactory; and

(iii) that if an APS employee's performance is considered to be unsatisfactory, the employee has a responsibility to engage constructively with their supervisor and other relevant persons (including the Agency's human resources area) in resolving the performance issues and acting on performance feedback;



(b) those policies and processes are applied in a timely manner if an APS employee's performance is considered unsatisfactory.

Note: Paragraph 10A(1)(d) of the Act provides that the APS is a careerbased public service that requires effective performance from each employee.

50 Achieving effective performance—supervisors

A supervisor of an APS employee upholds APS Employment Principle 10A(1)(d) by doing the following:

(a) promoting and fostering effective performance by the APS employee;

(b) conducting, at least annually, career conversations that deal with the APS employee's performance, potential, aspirations, organisational fit and future opportunities;

(c) ensuring that the APS employee has a performance agreement that is consistent with the Agency's corporate plan and the work level standards for the APS employee's classification;

(d) ensuring that the APS employee is provided with clear, honest and timely feedback about the employee's performance;

(e) managing and assessing the APS employee's performance in accordance with the Agency's performance management policies and processes;

(f) working to improve the supervisor's capability in effectively managing the performance of APS employees, including through appropriate training;

(g) promptly and actively managing unsatisfactory performance by the APS employee in accordance with the Agency's performance management policies and processes, including by:

(i) identifying the nature of the unsatisfactory performance at the earliest opportunity; and

(ii) maintaining appropriate records; and

(iii) engaging with the APS employee and other relevant 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.

Note: Paragraph 10A(1)(d) of the Act provides that the APS is a careerbased public service that requires effective performance from each employee.

51 Achieving effective performance-APS employees

An APS employee upholds APS Employment Principle 10A(1)(d) by doing the following:

(a) striving to perform to the best of their ability, at the work level standard for the APS employee's classification and consistent with the APS employee's performance agreement;

(b) engaging constructively with their supervisor to clarify work expectations and what is required to perform effectively;

(c) participating constructively in the Agency's performance management processes, including career conversations;

(d) being open to receiving feedback and acting on feedback in a timely manner;

(e) seeking opportunities to improve individual and team performance;

(f) if informed that the APS employee's performance is unsatisfactory, engaging constructively by:

(i) cooperating with their supervisor and other relevant 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.

Note: Paragraph 10A(1)(d) of the Act provides that the APS is a careerbased public service that requires effective performance from each employee.

40 Managing performance in cases of a potential breach of the Code of Conduct

An Agency Head must have regard to any relevant standards and guidance issued by the Commissioner if:

(a) an APS employee in the Agency has engaged in conduct that:

(i) may breach the Code of Conduct; or

(ii) raises concerns relating to effective performance; and

(b) the Agency Head is considering whether to initiate an inquiry under procedures established by the Agency Head under subsection 15(3) of the Act.

Note: See also Part 7.

This briefing supersedes Legal briefing Numbers 111 (29 November 2018) and 118 (20 October 2020). It is current as at September 2026.

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Offices

Canberra 4 National Circuit, Barton ACT 2600
Sydney Level 10, 60 Martin Place, Sydney NSW 2000
Melbourne Level 34, 600 Bourke Street, Melbourne VIC 3000
Brisbane Level 33, 300 George St, Brisbane QLD 4000
Perth Level 39, Exchange Tower, 2 The Esplanade, Perth WA 6000
Adelaide Level 5, 101 Pirie Street, Adelaide SA 5000
Hobart Level 8, 188 Collins Street, Hobart TAS 7000
Darwin Level 10, TIO Centre, 24 Mitchell Street, Darwin NT 0800

www.ags.gov.au

General enquiries and subscriptions:
E production@ags.gov.au

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