



fact sheet

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Tips for new Commonwealth authorities

This fact sheet provides a summary of key legal issues that may arise for newly established Commonwealth authorities.

ASSESSING THE LEGAL ISSUES RELEVANT TO THE AUTHORITY

When the Commonwealth establishes a new authority, it commonly starts by developing enabling legislation. As the legislation is being developed, and once it has been passed, there are many legal and other issues that the authority or the portfolio department will need to consider. Some common considerations during the establishment phase are listed below.

Commonwealth authorities and companies framework

A statutory authority that is a body corporate able to hold money on its own account will usually be subject to the *Commonwealth Authorities and Companies Act 1997* (Cth) (CAC Act).¹

The legal framework applicable to the authority will set the scope of powers and obligations of the authority. The legal framework is usually found in a combination of the CAC Act, the *Commonwealth Authorities and Companies Regulations 1997*, the *Commonwealth Authorities and Companies (Report of Operations) Orders 2008*, the legislation establishing the authority and other more generally applicable legislation.

Corporate structure

The authority's enabling legislation will detail the authority's structure. In analysing the enabling legislation, the following issues should be considered:

- Is there a governing board? If there is a board, what is the power and authority of the board?
- Is there a chief executive? If there is a chief executive, what is the power and authority of the chief executive?
- What is the nature of the relationship between the chief executive, the board and the responsible minister?
- What is the process for appointing the statutory body or office holder(s)?
- What are the powers of the relevant statutory bodies or office holder(s)?
- Are there specific requirements for the statutory body or office holder(s)?

Functions and powers of the authority

The authority's functions and powers are likely to be set out in its enabling legislation. It is critical to understand the extent of these functions and powers. In analysing these, consider the following:

- Are the functions and powers of the authority sufficiently wide to facilitate the authority's proposed activities?

¹ Note that a body established as a Commonwealth company will be subject to some parts of the CAC Act but will also be registered under the *Corporations Act 2001* (Cth). The issues discussed in this Fact Sheet relate primarily to authorities subject to the CAC Act and will not necessarily be applicable to Commonwealth companies.

- Does the authority contract in its own name?
- Does the authority's enabling legislation (or any other legislation or policy) impose restrictions on the authority's activities? For example, do certain decisions need the approval of the minister?
- Does the authority perform regulatory functions? If so, what are the authority's regulatory powers? The authority will need to consider its systems and processes for exercising regulatory functions, including investigations and enforcement activities, to ensure that they are legally robust.
- What is the relationship between the authority and the Commonwealth generally? For example, are there any contexts where the authority would be handling public money, or would be collecting a tax or an excise on behalf of the Commonwealth?

Delegations and authorisations

- To devolve functions and powers within the authority, delegations or authorisations will usually be required. Consideration should be given to who can give delegations or authorisations and who should be given a delegation or authorisation.
- Internal processes and procedures are needed to identify and manage delegations and authorisations – for example, a central delegations register, clear role and position descriptions and ongoing review and maintenance of delegations/authorisations.

See AGS Fact Sheet No 11: *Delegations and authorisations for CAC bodies*.

Accountability and reporting

A common thread that ties Commonwealth authorities together is the requirement of accountability. The authority may be accountable in a number of different ways. For example, it may be required to report to the responsible minister, the portfolio department, or the Parliament, and to produce reports for the public. The Auditor-General and the Ombudsman may have a role in relation to the authority and FOI and other accountability laws may apply to the authority.

To deal with the interests of these various interest holders, the authority should consider what reporting processes will be required, taking account of applicable requirements under the CAC Act, the enabling legislation and other applicable requirements (eg Finance Circular 2008/05: *Compliance reporting – CAC Act bodies*).

Spending, receiving and otherwise dealing with money

What are the obligations of the authority and its personnel in relation to spending, receiving and otherwise dealing with money? Particular consideration should be given to:

- bank accounts, investment and accounting requirements (eg CAC Act, Div 3)
- approvals for expenditure and payments (eg enabling legislation, delegations and authorisations)
- audit of financial statements, including for subsidiaries (eg CAC Act, s 12); noting that a Commonwealth authority must ensure that none of its subsidiaries does anything that the authority does not itself have power to do (s 29 CAC Act)
- budget estimates (eg CAC Act, s 14)
- use of credit cards (eg CAC Act, s 28A).

Other applicable legislation

Whilst the authority's enabling legislation will often be the primary source of its functions and powers, other Commonwealth legislation and policies that regulate Commonwealth activities are likely to affect the authority. For example, some Commonwealth legislation that applies to many CAC Act authorities includes:

- *Occupational Health and Safety Act 1991*
- *Archives Act 1983*

- Legal Services Directions 2005 (as made under the *Judiciary Act 1903*)
- *Competition and Consumer Act 2010* (especially if there is a profit-making function, through which the authority 'carries on a business').

The authority may also need to determine to what extent State and Territory legislation is applicable to its activities, such as laws relating to contracts or landlord and tenancy laws.

Employment framework

Some common employment considerations for CAC Act authorities include:

- Do the *Public Service Act 1999*, APS Values and Code of Conduct apply to employees?
- If the Public Service Act does not apply, how are employees engaged?
- Will the authority require an enterprise agreement?
- What other employment or HR policies will the authority require – for example, misconduct procedures, Code of Conduct?
- What legislation will regulate employee entitlements such as maternity leave, long service leave, redundancy, recognition of entitlements and superannuation?
- If employees are transferring from State and Territory agencies, consider transmission of business issues.
- Consider the terms and conditions of appointment of statutory office holders and whether the *Remuneration Tribunal Act 1973* is applicable.

Property and leasing issues

The authority will often require office accommodation and will need to purchase, lease or sub-lease. The authority may also need to fit out its accommodation and enter into other facilities management arrangements (cleaning, security etc).

- In the first place, consideration will always need to be given to whether the authority is empowered to enter into such arrangements.
- The next step will be to consider other requirements or approvals that may be required. For instance, when acquiring or disposing of an interest in land (including a lease), approval under the *Lands Acquisition Act 1989* (Cth) (LAA) may be required.
- If this approval is required, check who holds the delegation to provide this approval (see AGS Fact Sheet No 3: *Lands Acquisition Act 1989* for further information on LAA approvals).

Other requirements that may apply to purchasing, leasing, sub-leasing or fitting out property that should be considered include:

- Commonwealth Procurement Guidelines (for those CAC Act authorities subject to the CPGs, as applied and modified through Directions made under the CAC Act)
- National Code of Practice for the Building and Construction Industry and OHS Accreditation Scheme
- Public Works Committee requirements
- *Environment Protection and Biodiversity Conservation Act 1999* (see AGS Legal Briefing 82: *Commonwealth environment and heritage law*)
- the internal policies and procedures of the authority
- the extent to which the authority is required to comply with State laws.

This list is not comprehensive – see the Department of Finance and Deregulation, Table 1, 'Procurement Connected Policies' for more details of some policies that may be relevant.

Technology and intellectual property requirements

A range of technology and intellectual property (IP) issues should be considered in the context of establishing new authorities. As always, the scope of the authority's powers will inform whether specific activities can be undertaken.

Technology

As part of the establishment process, the authority will probably need to enter into arrangements for a variety of internet and other ICT products. These arrangements may include purchasing, building, leasing or outsourcing relevant goods or services required to set up key internet and ICT facilities and systems. The authority will need to plan and manage the procurement and implementation of such facilities and systems. Some specific requirements may include:

- establishing a general website – consider issues associated with website terms and conditions, web interface and website text, notifications and acceptances, including whether the authority will use the '.gov.au' domain
- where there is a requirement for a more specialised website, considering issues such as who owns data used to create the website and whether the information from the website can be reproduced or manipulated by other parties (eg media)
- establishing an intranet usage policy
- establishing an emailing system – consider issues associated with email disclaimers
- making arrangements for establishing data and reporting systems (design, develop, support, hosting and maintaining regional or national data collection)
- implementing document management system software.

In addition, there may be whole-of-government arrangements in place that the authority can use for particular goods or services. A full list of panels and arrangements can be found at <http://www.finance.gov.au/procurement/wog-procurement/index.html>.

Intellectual property

The effective management of IP will be important to authorities that generate significant amounts of IP. Some of the issues that need to be considered are:

- developing IP and copyright policies
- developing appropriate IP licensing arrangements
- establishing and maintaining an IP register
- dealing with any IP that is being transferred from another party, such a State or Territory agency
- managing any potential conflicts with the IP (or trade related features) of pre-existing entities, including trade marks, domain names and business names.

More information

AGS has assisted a number of newly-established CAC Act authorities. If you require further legal advice about the issues set out above or you would like assistance or training with the initial establishment phase of a new Commonwealth authority, please contact:

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