



fact sheet

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Legal issues to consider with program design

This fact sheet gives Commonwealth agencies a guide to the common legal issues relevant to setting up programs.

Similar issues can also arise when an existing program is being adjusted – that is, where you are changing the scope (expanding or contracting), value (increase or decrease) or duration (extension or early termination).

The fact sheet highlights the key areas to work through and is not comprehensive. AGS recommends that agencies take specific legal advice when setting up a new or changing an existing program.

Assessing the legal issues relevant to the program

Once the policy objectives have been determined, there could be a number of legal issues relevant to achieving the policy outcomes. Here are some important questions to ask yourself about the program.

Legal framework and appropriation

- Is the program within constitutional powers and restrictions?
- Does the program involve spending money?
 - Has advice been sought from AGS on the constitutional risk of the proposed expenditure and on whether legislation is required to authorise the expenditure?
 - If legislative authority is required is there existing legislation that will provide the necessary authority? If not, consider whether a new Act will be needed for the program, or contact the Department of Finance to discuss whether the program could be included in Schedule 1AB of the *Financial Framework (Supplementary Powers) Regulations 1997* (FFSP Regulations)?
 - What are the timetable implications of obtaining the necessary legislative authority?
 - What existing appropriations will the money come from or will new appropriations be necessary?
 - Are any conditions or requirements attached to those appropriations?
 - What internal requirements apply to approvals of expenditure? Who holds the delegation to authorise the expenditure?
- What (if any) restrictions does/will enabling legislation impose on the program?
- Are any amendments required to State or Territory legislation?

Where an existing program is being changed, you should revisit the assessment of these questions undertaken before the program commenced and consider whether the proposed changes alter that assessment. You should also review any relevant appropriations or approvals and consider whether they need to be amended or updated, particularly if there will be a change in the overall 'value' of the program.

Delivery mechanisms

If the program involves delivery of goods or services to the public, how will this be implemented? For example, will the program be carried out:

- by the Commonwealth through its employees
- by outsourcing to contractors
- by using reimbursement arrangements or tax breaks?

Safeguarding money paid by the Commonwealth

Are any measures necessary to safeguard money paid by the Commonwealth under the program? Should you consider:

- milestone payments
- reporting
- security for performance, such as guarantees, mortgages or other securities over land or personal property?

Where changes to an existing program are being proposed, consider whether the existing arrangements will continue to be appropriate or whether these will need to be changed.

See AGS Legal briefing No 96, Personal Property Securities Act and AGS Commercial notes No 33, *Securities: ensuring payment of debts to the Commonwealth*.

Intergovernmental arrangements

- Will there be binding or non-binding arrangements?
- Is the federal financial relations framework applicable?

What legislation is relevant to the program?

Consider what legislation and policies might be relevant to the program:

- generally applicable Commonwealth legislation and policies
(see AGS Fact sheet No 8, *Commonwealth legislation that may apply to Australian Government funding recipients*)
- the laws of a State, Territory or other country where relevant to the success of the program.

Engaging contractors

- Will the program involve contractors providing goods or services to the Commonwealth or on behalf of the Commonwealth?
- Is procurement in accordance with Commonwealth Procurement Rules, including any requirements for an open tender?
- What other Commonwealth policies may be applicable to both the tender conditions and the contract?
- What legal relationship do you intend to create with contractors?
- Is the scope of what they are engaged to provide clear and unambiguous?
- Do any minimum standards apply? For example:
 - If building is involved, will only registered builders be considered?
 - If goods are to be supplied, will they only be accepted if they meet certain standards?
- What are the risks and how are they to be allocated between the parties (including indemnities/ liability caps)?

- Is there sufficient time to run any required procurement process and select the contractor(s)?
- Is there adequate documentation of arrangements, including arrangements for contract management (which will include, in some cases, a risk management plan)?

Changes to an existing program will often require amendments to existing arrangements with contractors. You should carefully review any existing contracts and consider whether changes will be required and, if so, how they will be implemented. You will also need to ensure ongoing compliance with relevant policy requirements.

Funding

- Does the program involve funding or other financial support such as grants, loans or guarantees?
- Consider the constitutional and legislative issues mentioned above.
- Are the Commonwealth Grant Rules applicable?
- Is there a need to establish a mechanism for determining who will receive the funding?
Consider requirements for:
 - developing and approving program guidelines
 - ensuring probity
 - evaluation methodology
 - managing conflicts of interest.
- What other policies applicable to grants may be relevant?
- What types of entities are likely to apply for the grant? How will they be structured? Will they also have private funding? Is it necessary to put in place arrangements with other funding providers to regulate timing of contributions, securities, priorities and other issues?
- Have the arrangements been documented and are contract management arrangements in place?

Changes to existing programs can have a significant impact on recipients of grants or other financial support and this can raise complex operational and contract management issues. You should consider any existing grants or other financial support agreements to determine what changes may be required and how these changes will be managed.

Accrediting contractors to do things for other parties

- Does the program establish clear criteria for accreditation?
- Will this be a new regime, or will the program require accreditation under existing regimes?
- How will parties be invited to apply for accreditation?
- How will checking or verifying accreditation be carried out? Will you need to have a process for review and revocation?
- What liability might arise from the accreditation process?

Establishing new bodies

- If consideration is being given to establishing a new body, what is the constitutional power for doing so and/or are there any existing legislative requirements?
- Have other relevant agencies – for example, the Department of Finance – been consulted about the proposal to form a body?
- If the body involves a number of shareholders, what arrangements are needed between them for funding, strategy, decision-making, risk allocation and termination/exit?

Employing people

- If people are to be employed by the agency, will the usual APS employment arrangements apply?
- If people are to be employed by someone else, what are the employment arrangements, risks and liabilities?

Guides, fact sheets and other materials

- Is all material created and/or issued accurate and not misleading?
- How will statements about future government actions relating to the program be developed and vetted?
- Have appropriate disclaimers been included in materials and have areas where the material may not be complete been flagged?
- What copyright and other intellectual property issues apply?
- Has the risk of defamation been addressed?

You should also have processes in place to ensure that this material remains up to date during the life of the program and that any changes are made in a timely manner.

Establishing websites

- If the program involves establishing a website, does the content raise similar issues to those surrounding guides and fact sheets discussed above?
- If the internet is to be the principal means by which communications with the public, contractors and others will be maintained, consider what other issues might arise. For example:
 - how will changes to policy be communicated after implementation?
 - how will historical information be dealt with? If the website is designed to be interactive, do Web 2.0 issues arise?
 - are there adequate processes for archiving website information?

Managing information

- What records management requirements, including Archives Act requirements, are relevant to the program?
- What information access issues may arise? These may include, for example:
 - requests for information under the Freedom of Information Act
 - potential compulsory disclosure in court or tribunal proceedings.
- What privacy issues arise where the Commonwealth or its contractors receive information from the public and are privacy statements required?
- How should records be managed at the end of any contracts?

Audit and compliance mechanisms

- Does the program require the establishment of audit and compliance mechanisms?
- Are audit and compliance mechanisms clearly stated up-front so that contractors can price them in and they can be provided for in contracts?

Assessing legal risks arising from the program

It is also important to ask whether all legal risks that might arise from the program have been identified and how those legal risks will be managed. Changes to existing programs can also raise these risks or can have an impact on the initial assessment of these risks, particularly where you will be looking to take action to terminate existing contracts.

- Have the following risks been considered:
 - personal injury
 - property damage
 - defamation
 - breach of legislation
 - breach of intellectual property rights
 - breach of contract?
- Have other risks, including non-legal risks such as financial and reputational risks, been assessed?
- Have these risks been reassessed in light of any proposed changes to the program? Do the proposed changes raise any new risks?

More information please contact

For further information about legal considerations for setting up programs, please contact one of AGS's specialist legal advisers:

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