



# fact sheet

## for property managers

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### Financial Management and Accountability Act issues in Commonwealth property transactions

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This fact sheet provides Australian Government agencies with some useful tips on managing common *Financial Management and Accountability Act 1997* (FMA Act) and *Financial Management and Accountability Regulations 1997* (FMA Regulations) issues in property transactions. It contains information for those officials who develop, agree to, approve or consider entering into arrangements, including contracts or agreements, under which public money is or may become payable.

#### Approving spending proposals under Regulation 9

Commonwealth agencies should be aware of the requirements of the FMA Act and Regulations when entering into or managing property transactions. Under FMA Regulation 8 a person must not enter into an arrangement, unless a spending proposal has been approved under FMA Regulation 9 and, if required, written agreement has been given under FMA Regulation 10.

- An arrangement includes a contract or agreement under which public money is, or may become, payable, including a notional payment within the meaning of section 6 of the Act (but excluding specific arrangements listed in the definition of ‘arrangement’ in FMA Regulation 3, such as arrangements for hiring staff).

FMA Regulation 9 approval is required for all spending proposals. This is separate from the process of entering into the arrangement itself. Regulation 9 provides that an approver must not approve a spending proposal unless they are satisfied, after making reasonable inquiries, that it would be a proper use of Commonwealth resources within the meaning given by section 44(3) of the FMA Act (that it is an ‘efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth’).

- The policies with which approvers need to comply under FMA Regulation 9 will vary depending on the nature of the spending proposal. Approvers should make reasonable enquiries to ensure they comply with relevant policies, and should take particular care to comply with general financial policies of the Commonwealth and any relevant new policies introduced by government. Policies of the Commonwealth for the purposes of FMA Regulation 9 include the *Implementation Guidelines for the National Code of Practice for the Construction Industry*, the Fair Work Principles, Australian Industry Participation and the *Energy Efficiency in Government Operations* policy (which includes certain ‘green lease’ requirements).<sup>1</sup>

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<sup>1</sup> Other policies that may apply for the purpose of FMA Regulation 9 can be found in the Department of Finance and Deregulation table 1, ‘Procurement Connected Policies’ available at <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/policy-framework/procurement-policies/principles.html>.

FMA Regulation 10 agreement is required where there is an insufficient appropriation of money, under the provisions of an existing law or a proposed law that is before Parliament, to meet the expenditure that might be payable under the arrangement. Where Regulation 10 agreement is required, it does not have to be given before the proposal is approved under Regulation 9 but it must be given before the 'arrangement' itself is actually entered into. FMA Regulation 10A provides an exception to the requirement to obtain FMA Regulation 10 agreement for some contingent liabilities. For more information see Finance Circular 2011/01: Commitments to spend public money available at <http://www.finance.gov.au/publications/finance-circulars/2011/01.html>.

### **Commonwealth Procurement Rules**

The Commonwealth Procurement Rules (CPRs) apply to the procurement of goods and services including the procurement of leases. Procurements which meet certain financial thresholds (\$9m for construction, \$80,000 for other procurements, GST inclusive) must be conducted in accordance with the additional rules for procurements at or above the relevant threshold in Division 2 of the CPRs, which may mean that an open tender is required. These additional rules do not apply to 'leasing or procurement of real property or accommodation' but the other provisions of the CPRs do apply.

### **'Outsiders' handling public money**

Property management sometimes involves 'outsiders' handling public money, which can have implications for agencies in relation to the requirements under the FMA Act and Regulations. Public money includes rent payable to the Commonwealth agency even if held by an intermediary such as a property management firm. It also includes amounts payable by the agency for maintenance etc, including where that amount is paid by the agency via an intermediary.

For the purposes of the FMA Act, an 'outsider' means any person other than a Minister or agency official as defined in section 12 of the FMA Act. This would include the employees of a contractor, for example or employees of a property management firm.

If a contractor or property management firm will be handling public money, the agency's agreement with that entity will need to be authorised under section 12 to permit persons employed by the entity to handle the money as outsiders. Otherwise, the staff dealing with public money will automatically become allocated officials of the agency and will need to comply with requirements under the FMA Act and Regulations, including banking requirements (as discussed in more detail below). In contrast, where the agreement is authorised under section 12, the outsider will only be subject to the specific requirements of the arrangement.

Written authorisation of an arrangement under section 12 by the Finance Minister (or by a delegate) must be given before the agency enters the agreement or arrangement with the outsider. The Finance Minister has delegated to all Chief Executives the capacity to give written authorisation for certain agreements under section 12, where they provide for outsiders receiving, having custody of and making payments of public money.

There are a number of conditions imposed on this delegation. These must be complied with by a delegate who wishes to authorise an agreement for the handling of public money by an outsider. These include, for example, that an agreement authorised by a delegate must be terminable by the Commonwealth at any time and can only be for a maximum period of 5 years. The delegate must be satisfied that any agreement ensures that public money remains in a bank account which is not an official account for the shortest period of time that is reasonable in all the circumstances. The agreement must specify the banking arrangements to be followed by the outsider, and specify that any interest earned by the outsider must be remitted in full to the Commonwealth.

If the agreement provides for the outsider to engage in procurement on behalf of the Commonwealth, the delegate must be satisfied that the agreement requires the outsider to comply with the CPRs to the greatest extent possible. The delegate must also be satisfied that the risks which might arise from the way in which public money is to be handled will be managed in the best interests of the Commonwealth.

If no authorisation under section 12 is obtained, any persons engaged in handling public money will be undertaking a financial task (ie management and spending of public money) and will be deemed to be 'officials' allocated to the relevant agency. This means they will need to comply with a range of requirements, including the following in the case of a property manager:

- The property manager will need access to an 'official' bank account (it cannot deposit public money into its own account, including trust accounts).
- The personnel of the property manager who are handling public money will need to comply with agency delegations and agency Chief Executive's Instructions.<sup>2</sup>
- Some of the property manager's personnel may need to be FMA Regulation 9 approvers, be issued with drawing rights or be empowered to enter into arrangements on behalf of the Commonwealth.<sup>3</sup>
- For the purposes of the agency's FMA Certificate of Compliance, the contractor's compliance with FMA requirements will need to be monitored.

Seek legal advice and discuss possible arrangements with Finance if you are contemplating this option.

For further information on section 12 authorisations see Finance Circular 2011/01: Commitments to spend public money (FMA Regulations 7 to 12) available at <http://www.finance.gov.au/publications/finance-circulars/2011/01.html>.

## Delegations

It is important to ensure that those exercising powers and functions under the FMA framework have the necessary delegations to do so.

A number of the powers and functions of the Finance Minister have been delegated to FMA Act agency Chief Executives. Chief Executives are often able to sub-delegate those powers (see further Financial Management and Accountability (Finance Minister to Chief Executives) Delegation 2010).

In addition, a number of powers and functions are conferred directly on agency Chief Executives. Many of these are also able to be delegated. Chief Executives may also now delegate their power of delegation under the FMA Regulations (see FMA Regulation 26(1)(a)).

The power to enter into contracts on behalf of the Commonwealth is important in the context of property transactions. A Chief Executive has the power to enter into arrangements, on behalf of the Commonwealth, in relation to the affairs of the Agency. Some Chief Executives have delegated this power under section 53 of the FMA Act (see note to section 44(1) of the FMA Act).

In all cases delegates are required to exercise powers and functions subject to the directions set out in the delegation from the Finance Minister or any directions in the delegation from the Chief Executive of the agency.

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<sup>2</sup> Model Chief Executive Instructions (CEIs) have been developed by the Department of Finance and Deregulation and are available at <http://www.finance.gov.au/publications/finance-circulars/2011/ceis.html>. The Model CEIs should be read in conjunction with Finance Circular 2011/05: Chief Executive's Instructions.

<sup>3</sup> Note that drawing rights should be issued to specific personnel and not to the contractor's trading entity.

## More information

If you require further information about FMA issues in property transactions, please contact one of our specialists on the Commonwealth financial framework:

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