



fact sheet

for property managers

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Public Governance, Performance and Accountability Act issues in Commonwealth property transactions

This fact sheet provides tips on managing common Commonwealth property transactions consistently with *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule) requirements for **non-corporate Commonwealth entities**. It contains information for those officials who develop, agree to, approve or consider entering into arrangements, including contracts, agreements and leases, under which relevant money is, or may become, payable.

Duties of accountable authorities which relate to property transactions

All accountable authorities of non-corporate Commonwealth entities are subject to general duties under the PGPA Act in relation to the governance of their entity and should ensure that officials in their entity act in such a way that these are complied with. The general duties include the duty to govern the entity in a way that promotes the:

- efficient, effective, economical and ethical use and management of 'public resources' (which includes 'relevant money' and 'relevant property') (s 15(1)(a))
- achievement of the purposes and the financial sustainability of the entity (s 15(1)(b) and (c)).

Other accountable authority duties that might be relevant to property transactions include the duty to:

- establish and maintain systems relating to risk and control (s 16)
- notify the responsible Minister of significant decisions or issues (s 19).

To comply with these duties, accountable authorities will need to establish internal processes and rules that will apply to property transactions and should be considered by officials when making decisions relating to those transactions (often these will be in the form of accountable authority instructions or directions attached to delegations). When making decisions in relation to the governance of the entity, the accountable authority must take into account the effect of the decisions on public resources generally.

Duties of officials which relate to property transactions

Every official of a Commonwealth entity is subject to a number of duties set out in the PGPA Act. These duties are:

- a duty of care and diligence (s 25)
- a duty to act honestly, in good faith and for a proper purpose (s 26)

- a duty not to improperly use the official's position, or information obtained because of their position, to:
 - gain or seek to gain a benefit for the official or someone else
 - cause or seek to cause a detriment to anyone (s 27 and s 28)
- a duty to disclose material personal interests that relate to the affairs of the entity (s 29).

Officials must comply with these duties in the context of a property transaction.

Power to enter the arrangement

The power to enter into property transactions is often derived from s 23(1) of the PGPA Act, which confers power on the accountable authority of each non-corporate Commonwealth entity to enter into arrangements relating to the affairs of their entity. This power can be delegated to officials. In all cases, delegates are required to exercise powers and functions subject to any directions set out in the delegation from the accountable authority, as well as any relevant accountable authority instructions.

In some circumstances, if the property transaction is for the purpose of a particular program or legislation, rather than the affairs of the non-corporate Commonwealth entity, the power to enter the arrangement might be found elsewhere.

Approving commitments of relevant money

Section 23(3) of the PGPA Act empowers the accountable authority of a non-corporate Commonwealth entity to approve a commitment of relevant money for which the accountable authority is responsible. This will include making a decision to enter an arrangement (such as a lease or contract of sale) under which relevant money will be payable by the non-corporate Commonwealth entity. Accountable authorities ordinarily delegate this power to officials in their entity. Whether separate approval of a commitment of relevant money will be required before an arrangement is entered into under s 23(1) will depend on the specific processes within each entity. In some entities there is a 2-step approval process, where an arrangement cannot be entered into under s 23(1) until approval for the commitment of relevant money has been given by a delegate under s 23(3).

Each non-corporate Commonwealth entity will have its own processes and rules relating to the approval of commitments of relevant money, which are likely to be contained in accountable authority instructions or directions attached to delegations or authorisations to commit relevant money.

Where an accountable authority or official approves the commitment of relevant money, that person must record the approval in writing as soon as practicable after giving the approval (s 18, PGPA Rule).

Commonwealth Procurement Rules

The Commonwealth Procurement Rules (CPRs) apply to the procurement of leases, licences and other property interests, as well as construction and office fit-out projects. The CPRs set out the requirement to use open, pre-qualified or limited tender methods to procure for non-corporate Commonwealth entities. All procurements which meet financial thresholds (\$7.5 million for construction, \$80,000 for other procurements, GST inclusive) must be conducted in accordance with both divisions of the CPRs which may mean that an open tender must be conducted for some procurements.

However, 'procurement including leasing of land, existing buildings or other immovable property or any associated rights' is exempted from the Division 2 requirements (which includes the requirement for an open tender process). Accordingly, leases may be sourced by limited tender or even directly entered into without a tender process. Officials are nevertheless still required to comply with the Division 1 requirements, which include achieving value for money and using public resources properly. Fit-outs and other building work are not exempted from the Division 2 requirements. Consideration is to be given to the requirements of the PGPA Act and Rules and reasons for entering the arrangement should be documented.

Finance Minister lease endorsement

Non-corporate Commonwealth entities need to notify the Department of Finance of proposals to approach the market for leases with a whole-of-life cost exceeding \$2 million (excluding fit-out costs). Usually, a cost-benefit analysis will need to be prepared and assessed by Finance. For non-Defence entities, formal endorsement of the Finance Minister will be required where the whole-of-life cost exceeds \$30 million. For more information, see Resource Management Guide 504 (https://www.finance.gov.au/sites/default/files/rmg-504-commonwealth-property-management-framework-lease-endorsement-process-for-non-corporate-commonwealth-entities16_o.pdf).

Indemnities

The Finance Minister has power to grant an indemnity on behalf of the Commonwealth under s 60 of the PGPA Act. This power has been delegated by the Finance Minister to the accountable authority of each non-corporate Commonwealth entity and usually has been further delegated within each entity, with particular directions attached (see the *PGPA (Finance Minister to Accountable Authorities of Non-Corporate Commonwealth Entities) Delegation 2014* (PGPA Act Delegation)). Each delegate must consider risk and the likelihood of a contingent liability arising, and the significance of expenditure related to such an event.

An indemnity can generally only be granted if the delegate considers the likelihood of its being enlivened is remote (less than 5% chance) and the most probable expenditure under it is not significant (less than \$30 million). However, an indemnity can also be granted if the Finance Minister has approved the grant of the indemnity in writing, or the indemnity has been explicitly agreed in a decision of Cabinet, the National Security Committee of Cabinet (or its successor), or the Prime Minister. In some circumstances, Comcover may need to be consulted to discuss risk and the terms and conditions provided for in the Comcover Statement of Cover.

For more information, see Resource Management Guide 414 (<https://www.finance.gov.au/sites/default/files/rmg-414-indemnities.pdf?v=1>) and the PGPA Act Delegation (https://www.finance.gov.au/sites/default/files/FM_Delegation_%20to_AA_Amendment_%202018.pdf).

Reporting procurement on Austender

Non-corporate Commonwealth entities must report all contracts and amendments to contracts on Austender within 42 days of entering into, or varying, a contract where it exceeds \$10,000 including GST. This will include most leases, licences and office fit-out projects. Details to be included in the Austender reports include the name the supplier, the value of the agreement, and start and end dates.

'Other CRF money' and property transactions

Section 29 of the PGPA Rule contains rules about the handling of 'other CRF money'. This is money that forms part of the Consolidated Revenue Fund (CRF), other than either 'relevant money' or money that is specifically prescribed by the rules not to be other CRF money.

If a property transaction involves money being held by a third party as a legal agent of a non-corporate Commonwealth entity, then the third party will likely be handling other CRF money. For example, property management arrangements often involve other CRF money, such as rent payable to or by a non-corporate Commonwealth entity or 'pass through' funds for maintenance and upkeep being held by an intermediary such as a property management firm. If a contractor or property management firm will be handling other CRF money, the entity's agreement with the contractor or firm will need to comply with the requirements of s 29(2) of the PGPA Rule.

This means that the agreement must:

- promote the proper use and management of the other CRF money
- be in writing
- require that the other CRF money be deposited in a bank as soon as practicable

- require the other party to the arrangement keeps proper records and that those records can be inspected
- require that any interest earned on the other CRF money be remitted to the Commonwealth
- require that the agreement specify the timing and frequency of remittance of other CRF money to the Commonwealth, or payment to another person or organisation.

Other relevant requirements

A range of other requirements and policies might apply to a proposed property transaction. For example:

- the need for authorisation by an approved delegate of an 'acquisition' or 'disposal' of an interest in land under the *Lands Acquisition Act 1989* (Cth)
- the *Energy Efficiency in Government Operations* policy (which includes certain 'green lease' requirements)
- the need for referral to and approval of a proposed 'public work' by the Standing Committee on Public Works under the *Public Works Committee Act 1969* (Cth)
- the *Code for Tendering and Performance of Building Work 2016* made under the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth)
- Australian Industry Participation requirements (where projects have Australian Government funding of \$20 million or more, and major projects with capital expenditure exceeding \$500 million).

More information

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

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