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# Commonwealth grants: an overview of legal issues

**Many Commonwealth entities undertake a range of grant activities. This briefing discusses some of the legal and policy issues that may be relevant.**

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## What is a grant?

Grants can take a variety of forms. For example, a grant may be a one-off or ad hoc arrangement or it may form part of a broader grant opportunity and/or competitive assessment process. The focus of this briefing is on arrangements that fall within the scope of the Commonwealth Grants Rules and Guidelines (CGRGs). The Commonwealth enters into a range of other transactions involving the provision of 'funding' that are not covered by the CGRGs. These are beyond the scope of this publication.

The CGRGs, issued under s 105C of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), establish the overarching Commonwealth grants policy framework and set out the expectations for all non-corporate Commonwealth entities (and third parties undertaking grant administration on their behalf) in relation to grants administration.

Paragraph 2.3 of the CGRGs defines a 'grant' as an arrangement for the provision of financial assistance by or on behalf of the Commonwealth:

(a) under which relevant money[1] or other CRF money[2] is to be paid to a grantee other than the Commonwealth[3]

(b) which is intended to help address one or more of the Australian Government's policy outcomes while assisting the grantee to achieve its objectives.

**In this issue**



1 'Relevant money' is defined in s 8 of the PGPA Act.

2 'Other CRF money' is defined in s 105 of the PGPA Act.

3 'Notional' payments and receipts by non-corporate Commonwealth entities (within the meaning of s 76 of the PGPA Act) are not grants – see para 2.5 of the CGRGs.

The CGRGs also specify which arrangements are not 'grants' for the purposes of the CGRGs.[4] For example, para 2.6 says that procurements of goods or services by an entity for its own use, investments and loans,[5] payments to States under s 96 of the Constitution, payments to States and Territories that are made under the *Federal Financial Relations Act 2009* (FFR Act), gifts of public property, act of grace payments approved under s 65 of the PGPA Act, tax concessions and offsets, and a range of other payments and programs are taken not to be grants.

What constitutes a 'grant' is also discussed in more detail in the Department of Finance Resource Management Guide No 411: *Grants, procurements and other financial arrangements* (https://www.finance.gov.au/resource-management/grants/additional-guidance/) (RMG No 411). RMG No 411 states that the nature of a financial arrangement should be determined by considering the substantive purpose and the characteristics of the arrangement.

## Is the arrangement a grant or a procurement or something else?

One of the first issues that many Commonwealth entities need to consider is whether a spending proposal is a grant or a procurement or something else.

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Under the CGRGs, before officials apply the CGRGs they must establish and document whether a proposed activity is a grant (para 4.2). In some cases, the distinction between a grant and a procurement may not be immediately obvious. In those cases, to determine and document the true nature of the transaction, the Commonwealth entity must look at the substantive purpose for which the funds are to be provided, the characteristics of the arrangement and the source of those funds.

Where services are being provided, it is often relevant to consider who will be the beneficiary of the services (for example, the Commonwealth or a part of the community). As a rule of thumb, if the arrangement is primarily to conduct an activity that will assist the grantee to achieve its purpose or objectives and also promote Commonwealth policy objectives, without providing some direct return to the Commonwealth (other than, say, the provision of reports), it is more likely to be a grant than a procurement.

By contrast, if the arrangement is primarily one where a Commonwealth entity is paying for the provision of goods or services for its own use (including where the goods or services are being provided to a third party), the arrangement is more likely to be a procurement.

In some cases, Commonwealth entities have some discretion as to how they achieve their policy objectives, and similar objectives may potentially be achieved through either a procurement or a grant. Entities should give early and careful consideration to which approach they propose to take, because the policies, procedures and documentation requirements that apply will differ.

RMG No 411 includes a list of considerations to assist Commonwealth entities to determine whether a proposed payment is a grant. Entities should consult with the Department of Finance if it is unclear how a financial arrangement should be characterised. Legal advice may also assist in determining which approach will best meet an entity's objectives. This could be particularly appropriate if the arrangements are relatively novel or complex.

## Payments to States

Section 96 of the Constitution provides that the Commonwealth Parliament 'may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'. This means that the Parliament can legislate to provide financial assistance to States (and

4 See para 2.6 of the CGRGs.

5 Although the CGRGs contemplate that some concessional loans may be a 'grant' for the purposes of the CGRGs.

Territories under s 122 of the Constitution) and can attach conditions to the provision of that financial assistance. Section 96 payments to States, and payments to the States and Territories under the FFR Act, are not 'grants' under the CGRGs.

Instead, payments to a State or Territory made under the FFR Act (including National Specific Purpose Payments and National Partnership Payments) are subject to the Federal Financial Relations framework (FFR framework). The FFR framework implements the Intergovernmental Agreement on Federal Financial Relations that took effect on 1 January 2009. In accordance with the FFR framework, these payments to States and Territories must be made under the terms of a National Agreement, National Partnership Agreement, Project Agreement or Implementation Plan (as applicable).

Commonwealth entities must consider whether a proposed payment arrangement with a State or Territory is subject to the FFR framework or is a 'Commonwealth Own-Purpose Expense' (COPE). A COPE is not subject to the FFR framework but may in some cases be a 'grant' to which the CGRGs apply. When considering this issue, an entity should take into account the guidance contained in the Department of Finance Resource Management Guide No 419*: Classification of payments to other levels of government for specific purposes and Commonwealth own-purpose expenses*.[6] (https://www.finance.gov.au/sites/default/files/rmg-419-classification_of_payments_to_other_levels_gov_for_spp_and_cope.pdf) The entity should also consult the Department of Finance to ensure that its proposed characterisation of the payment arrangement is the right one.

# Commonwealth legal framework for grants

## PGPA Act and rules apply to grants

The PGPA Act provides a framework for the proper use and management of public resources. The term 'public resources' includes 'relevant money' (money standing to the credit of any bank account of, or otherwise held by, the Commonwealth or a corporate Commonwealth entity), 'relevant property' (property, other than relevant money, that the Commonwealth or a corporate Commonwealth entity owns or holds)[7] and appropriations.

Under the PGPA Act, the 'accountable authority' of a Commonwealth entity must govern their entity in a way that promotes the 'proper' (efficient, effective, economical and ethical) use and management of public resources for which they are responsible (s 15(1)(a)). They may give 'Accountable Authority Instructions' (AAIs) to officials of the Commonwealth entity (s 20A),[8] which may include additional instructions regarding the entity's grants administration processes.

## Authority to enter into grant arrangements

In planning for a new grant opportunity or other grant activity, or reviewing an existing grant opportunity or grant activity, Commonwealth entities must consider their power to enter into a grant arrangement, particularly in light of the High Court's decisions in *Williams v Commonwealth*[9] (*Williams No 1*) and *Williams v Commonwealth (No 2)*[10] (*Williams No 2*). These cases indicate that most grants require specific legislative authority in addition to an appropriation.[11]

This means that, when planning a grant activity, one of the first issues that an entity should consider is whether it will require legislative authority in addition to an appropriation to support

6 See also Federal Finances Circular 2015/03: *Processes for drafting, negotiating, finalising and varying agreements under the Federal Financial Relations Framework, and related estimates and payments processes*.

7 Or any other thing prescribed by the rules. There are currently no rules made for this purpose.

8 An accountable authority can also give instructions to an official of another Commonwealth entity on the specific matters listed in s 20A(2) of the PGPA Act.

9 (2012) 248 CLR 156.

10 (2014) 252 CLR 416.

11 This is also discussed in the Department of Finance Resource Management Guide No 400: *Commitment of relevant money*.

the grant activity. If it does, it should then consider whether any existing legislative authority can be relied on.

The CGRGs provide that, before entering into an arrangement for the proposed commitment of relevant money, there must be legal authority to support the arrangement (para 3.6). This authority will generally be derived from legislation.

*'...before entering into an arrangement for the proposed commitment of relevant money, there must be legal authority to support the arrangement...'*

Most grants are authorised by either specific legislation or by s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act), which was enacted following the decision in *Williams No 1*. In summary, s 32B provides that if:

- the Commonwealth does not otherwise have power to make, vary or administer:
  - an arrangement under which relevant money or other CRF money is or may become payable by the Commonwealth or
  - a grant of financial assistance (to a State or Territory, or to another person) and
- the arrangement or grant is covered by the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations) (because it is specified in the regulations, is included in a class of arrangements or grants specified in the regulations, or is for a program specified in the regulations)

then the Commonwealth has power to make, vary or administer that arrangement or grant. This power is exercisable on behalf of the Commonwealth by a minister or an accountable authority of a non-corporate Commonwealth entity (or a delegate).

Various items specified in Sch 1AA and Sch 1AB to the FF(SP) Regulations, together with s 32B of the FF(SP) Act, provide legislative authority for grant activities.

Under s 23(1) of the PGPA Act, the accountable authority of a non-corporate Commonwealth entity has a separate power to enter into, vary and administer arrangements relating to the affairs of their entity. This power supports the entry of arrangements for the ordinary activities of government (for example, procuring goods or services for the purposes of running an entity, and paying contractors). However, s 23(1) would not normally support the entry of grant arrangements that will assist grantees to achieve their objectives – this is not usually part of the ordinary activities of government.

If a proposed grant opportunity or activity is not already supported by specific legislation or by s 32B of the FF(SP) Act, specific legislation will usually need to be developed or the FF(SP) Regulations will need to be amended to include reference to the relevant grant activity or program. Amendments to the FF(SP) Regulations need to be developed in consultation with the Department of Finance, which is responsible for the FF(SP) Regulations.

## Approving commitments of relevant money

As noted above, under s 15 of the PGPA Act, an accountable authority must govern their entity in a way that promotes the proper use of public resources. This duty applies to the expenditure of relevant money.

Under s 20A of the PGPA Act an accountable authority can issue AAIs setting out the things that officials must do before they approve a commitment of relevant money or enter into an arrangement to spend relevant money. Officials will need to comply with any relevant AAIs, or any other written requirements that their accountable authority specifies, before they approve a commitment of relevant money (see s 18(2) of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule)). Also, any official (including an accountable

authority) who is responsible for approving the commitment of relevant money must record the approval in writing as soon as practicable after giving it (see s 18(1) of the PGPA Rule).

Section 71 of the PGPA Act imposes separate requirements on a minister who is approving a proposed expenditure of relevant money. A minister must not approve a proposed expenditure unless they are satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money. They must also record the terms of their approval in writing as soon as practicable after giving it.

*'A minister must not approve a proposed expenditure unless they are satisfied...that the expenditure would be a proper use of relevant money.'*

Further guidance is provided in the Department of Finance Resource Management Guide No 400: *Commitment of relevant money (*https://www.finance.gov.au/resource-management/accountability/commitment/).

Also, under s 21 of the PGPA Act the accountable authority of a non-corporate Commonwealth entity must govern their entity in a way that is not inconsistent with the policies of the Australian Government. This includes taking steps to ensure that their entity complies with any government policies that relate to grants. Examples of policies that may be relevant to grant activities include:

- Australian Industry Participation Plans for Commonwealth Government Grants (grants over $20 million or grant opportunities that provide grants of over $20 million)
- Code for the Tendering and Performance of Building Work 2016
- Australian Government Building and Construction WHS Accreditation Scheme.

## Commonwealth Grant Rules and Guidelines

The CGRGs are a legislative instrument issued by the Finance Minister under s 105C of the PGPA Act. Therefore, they form part of the 'finance law' for the purposes of the PGPA Act. Under s 16 of the PGPA Act, an accountable authority of a Commonwealth entity has a duty to implement measures to ensure its officials comply with the 'finance law'.

The CGRGs establish the overarching Commonwealth grants policy framework and set out the expectations for all non-corporate Commonwealth entities (and third parties undertaking grant administration on behalf of the Commonwealth) in relation to grant administration. The CGRGs are divided into 2 parts:

- Part 1 of the CGRGs contains mandatory decision-making and reporting requirements that apply to grants administration performed by ministers, accountable authorities, officials and third parties who undertake grants administration on behalf of the Commonwealth.
- Part 2 of the CGRGs sets out 7 key principles for better practice grants administration. There is scope for entities to determine the most appropriate way to implement these key principles for each of their grant activities.

The CGRGs state that the objective of grants administration is to promote proper use and management of public resources through collaboration with the non-government sector to achieve government policy outcomes. The CGRGs emphasise working together with the non-government sector to develop and deliver government policy outcomes and not overburdening grant applicants and grantees with the grants administration process.

The CGRGs do not apply to corporate Commonwealth entities except where they undertake grant administration on behalf of the Commonwealth. However, corporate Commonwealth entities may voluntarily adopt these requirements.

In the CGRGs, 'grants administration' covers all processes that a Commonwealth entity undertakes to achieve government policy outcomes through grants. The term includes

planning and design; selection and decision-making; and making, managing, reporting and evaluating grants (para 2.8). Non-corporate Commonwealth entities need to ensure that they comply with the CGRGs throughout all relevant processes involved in making a grant.

## Mandatory grant administration process requirements

**Requirements for accountable authorities and officials**

The CGRGs (specifically, paras 4.2–4.9) require officials who undertake grants administration to:

- establish and document whether a proposed activity is a grant
- comply with all legislation and policy requirements relevant to grants administration
- develop grant opportunity guidelines for all new grant opportunities and activities; and revised guidelines where significant changes have been made to an existing grant opportunity or activity[12]
- have regard to the 7 key principles for grants administration
- ensure that the grant opportunity guidelines and related guidance material are consistent with the CGRGs
- advise the relevant minister on the relevant requirements of the PGPA Act, PGPA Rule and CGRGs if the minister is considering a proposed expenditure of relevant money for a grant
- provide written advice to the relevant minister where the minister exercises the role of grant approver (see para 4.6 of the CGRGs). The advice must explicitly state that the spending proposal involves a 'grant', set out the merits of a specific grant or group of grants and specify the extent to which the grant applications fully, partially or do not meet the selection criteria (additional information is required for 'first in, first served' grant opportunities)
- when they approve the proposed commitment of relevant money for a grant, record in writing the basis for the approval of a grant relative to the grant opportunity guidelines and the key consideration of achieving value with relevant money
- when determining acquittal and reporting requirements, have regard to information collected by Australian Government regulators (including the Australian Securities and Investment Commission (ASIC), the Office of the Registrar of Indigenous Corporations (ORIC) and the Australian Charities and Not-for-profit Commission (ACNC)) and available to officials.

Where a third party administers grants on behalf of a non-corporate Commonwealth entity, the relevant accountable authority must ensure that the arrangement is in writing, requires the third party to apply the CGRGs and promotes the proper use and management of other CRF money (para 4.8).

**Requirements for ministers**

The CGRGs (specifically, paras 4.10–4.12) require that:

- a minister must not approve proposed expenditure under s 71 of the PGPA Act before officials have given the minister written advice, which meets the requirements of the CGRGs, on the merits of the proposed grant
- a minister must record, in writing, the basis for the approval of a grant relative to the grant opportunity guidelines and the key consideration of achieving value with relevant money

12 Grant opportunity guidelines are required for all grant opportunities and grant activities, including one-off or ad-hoc grants. The format and complexity of the guidelines should be proportionate to the grant activity – the grant opportunity guidelines for a grant program will usually be more detailed and fulsome than those required for a one-off or ad-hoc grant activity. Officials involved in the development or revision of grant opportunity guidelines are required to complete a risk assessment of the grant program and its associated guidelines in consultation with the Department of Finance and Department of the Prime Minister and Cabinet.

- where a minister approves a grant within their own electorate, the minister must write to the Finance Minister advising of the details (para 4.11 of the CGRGs), except where:
  - the minister is a senator or
  - the grant is part of a group of grants awarded across a geographic region based on a formula
- where a minister approves a grant that the relevant official has recommended be rejected, the minister must report to the Finance Minister by 31 March each year setting out a brief statement of reasons (the basis of the approval) for approving the grant in the preceding calendar year. If the approval is for a grant within the minister's own electorate (House of Representatives members only) then the minister must also include this information when writing to the Finance Minister (para 4.11 of the CGRGs).

*'...where a minister approves a grant within their own electorate, the minister must write to the Finance Minister advising of the details'*

**Reporting**

The CGRGs include web-based reporting requirements (see paras 5.2–5.8). In particular, under the CGRGs (together with the Department of Finance Resource Management Guide No. 421: *Publishing and reporting grants and GrantConnect* (RMG No 421)), non-corporate Commonwealth entities must publish all grant opportunities and related guidelines (other than for one-off or ad hoc grants or where the Finance Minister has granted an exemption for specific policy reasons), and any alterations and addenda to them, on GrantConnect[13] – the Australian Government's whole-of-government grant information system.

Also, non-corporate Commonwealth entities must publish information on GrantConnect about each of their individual grants (including whether the relevant grant agreement contains confidentiality provisions) no later than 21 calendar days after that grant agreement takes effect.[14] The date of effect will depend on the arrangement itself – for example, it may be a specified commencement date or it may relate to a specified event.

If an official determines that public reporting of grants in accordance with the CGRGs is contrary to the *Privacy Act 1988*, other statutory requirements or the specific terms of a grant agreement, the official:

- must publish as much information as is legally possible
- must document the reasons for not reporting fully
- should take all reasonable steps to ensure that future grant agreements contain provisions that do not prevent the disclosure of the required information.

If an official determines that the publication of grant information in accordance with the CGRGs could adversely affect the achievement of government policy outcomes, the responsible minister may seek an exemption from the Finance Minister. The responsible minister must write to the Finance Minister detailing the case for exemption from these web-based reporting requirements.

The Department of Finance Resource Management Guide No 412: *Australian Government grants – briefing, reporting, evaluating and election commitments* (https://www.finance.gov.au/sites/default/files/resource-management-guide-no-412.pdf) (RMG No 412) and RMG No 421 provide further information for accountable authorities and officials on briefing and reporting requirements relating to grants.

13 See Australian Government, GrantConnect.

14 If information about an individual grant was published on a Commonwealth entity's website before 30 April 2017, when publication on GrantConnect was mandated, then that information is to be retained on that website for at least 2 financial years.

## Key principles for good grant administration

Part 2 of the CGRGs establishes 7 key principles for sound grants administration. Accountable authorities and officials must put in place practices and procedures to ensure that the conduct of grants administration is consistent with these principles.

### Robust planning and design

Officials should work together with stakeholders to plan, design and undertake grant opportunities and activities. Accountable authorities have a duty to establish and maintain systems relating to risk and control.[15] A key element of planning and designing a grant activity is to identify and engage with risk.

*'Officials should work together with stakeholders to plan, design and undertake grant opportunities and activities.'*

### Collaboration and partnership

Accountable authorities have a duty to encourage officials to cooperate with others to achieve common objectives.[16] Officials should work collaboratively with, and seek input from, potential grant applicants and other stakeholders and seek to minimise red tape and duplication.

### Proportionality

When imposing requirements on others, accountable authorities of Commonwealth entities must take into account the risks associated with the use or management of public resources and the effect of the requirements imposed.[17] The proportionality principle requires officials to strike an appropriate balance between the complexity, risks, outcomes, and transparency requirements of a grant opportunity or activity.

### An outcomes orientation

Accountable authorities have a duty to govern Commonwealth entities in a way that, amongst other things, promotes the achievement of the purposes of the entity.[18] Grant opportunities should focus on outcomes and outputs for beneficiaries while seeking the most efficient and effective use of inputs.

### Achieving value with relevant money

Accountable authorities have a duty to govern Commonwealth entities in a way that, amongst other things, promotes the proper use and management of public resources and the financial sustainability of the relevant Commonwealth entity.[19] In assessing whether a grant activity will provide value for money, the entity must carefully compare the costs and benefits, options and risks associated with a grant activity.

### Governance and accountability

Grant opportunities and activities should be underpinned by solid governance structures and clear accountability for all parties involved in grants administration. Officials should:

- clearly define the roles and responsibilities of all parties involved in grants administration
- ensure that any grants governance framework is underpinned by the mandatory requirements in Part 1 of the CGRGs
- develop policies, procedures and documentation necessary for the effective and efficient governance and accountability of grant activities

15 PGPA Act, s 16.

16 PGPA Act, s 17.

17 PGPA Act, s 18.

18 PGPA Act, s 15.

19 PGPA Act, s 15.

- maintain accurate records on the grants administration process
- ensure grant agreements are well drafted and fit for purpose
- ensure grant agreements are supported by ongoing communication, active grants management and performance monitoring requirements that are proportional to the risks involved.

**Probity and transparency**

Probity and transparency are achieved by ensuring that:

- decisions relating to grant opportunities are impartial, appropriately documented, publicly defensible and lawful
- entities comply with the mandatory public reporting requirements set out in Part 1 of the CGRGs
- grants administration incorporates appropriate safeguards against fraud, unlawful activities and other inappropriate conduct (by both officials and grantees).

Accountable authorities should also:

- establish appropriate internal control mechanisms for grants administration
- guard against fraudulent use of grant payments
- put in place appropriate mechanisms for identifying and managing potential conflicts of interest for both officials and grantees.

# Legal issues when establishing grant opportunities

## Compliance with Commonwealth Grant Rules and Guidelines and PGPA Act requirements

Most of the requirements contained in the CGRGs relate to establishing a grant. In this section we discuss general issues that Commonwealth entities should consider in establishing grant opportunities and selecting grantees. For information on specific legal issues that may need to be worked through when setting up a new grant opportunity, see AGS Fact Sheet No 10: *Legal issues to consider with program design* (https://www.ags.gov.au/publications/fact-sheets/fact_sheet_no_10.pdf) (November 2014).

## Identifying potential risks

The CGRGs emphasise that risk management should begin at the planning and design phase. Risks can arise because of the design or requirements of the grant opportunity, the nature of the grantee or the specific activities that the grantee performs. During the planning phase, Commonwealth entities should take the time to identify all the legal risks that might arise from a grant opportunity or activity and how those risks might be managed. This will ensure they are in a better position to manage the implementation of the grant opportunity or activity.

For example, the Commonwealth entity might consider the likelihood of the following risks of the specific grant activity:

- personal injury
- property damage
- environmental damage or contamination
- breach of intellectual property rights
- working with vulnerable people
- fraud.

Other non-legal risks, such as financial and reputational risks, should also be assessed. The CGRGs list a range of risks that should be considered.

Officials should also ensure that they comply with any relevant internal processes and instructions (including any relevant AAIs given under s 20A of the PGPA Act).

## Selecting grantees

A Commonwealth entity's principal consideration when selecting grantees should be to use public resources in a way that is efficient, effective, economical and ethical. In particular, in accordance with the CGRGs, Commonwealth entities should aim to achieve value with relevant money.

The CGRGs state that competitive, merit-based selection processes, based upon clearly defined selection criteria, should be used to select grantees. This will be the case unless a minister, accountable authority or delegate has specifically agreed otherwise. Where a Commonwealth entity uses a competitive process in providing a grant, an appropriate and proportionate process should be chosen to select the grantees. The process should take into account the scale and risk profile of the proposed grant opportunity, the likely number and type of grant applicants and the objectives and desired outcomes of the grant opportunity.

Where a competitive, merit-based selection process is not used, officials should document the reasons for this. It may be appropriate to conduct a targeted and restricted selection process for a specific grant opportunity – for instance, where the proposed grant activity is extremely specialised or needs to be conducted in a remote geographic region.

Commonwealth entities should ensure that they follow appropriate probity principles (for example, by complying with grant opportunity guidelines and following the evaluation criteria, which should be determined before applications are received) to lessen the risk of an unsuccessful applicant making a claim based on the way the Commonwealth entity conducted the process.

## Grant opportunity guidelines

It is a mandatory requirement under the CGRGs for non-corporate Commonwealth entities to develop grant opportunity guidelines for all new grant opportunities and to revise those guidelines where significant changes have been made. These guidelines must be publicly available on GrantConnect unless:

- there is a specific policy reason for not doing so (and the Finance Minister has granted an exemption) or
- the grant is provided on an ad hoc or one-off basis.

The content of grant opportunity guidelines will vary depending on the scale, scope and nature of the grant opportunity. In most cases, the guidelines should state the purpose and scope of the grant opportunity, any mandatory requirements for the grant opportunity and the criteria against which the Commonwealth entity will assess all grant applications.

Commonwealth entities should carefully consider what, if any, requirements will be mandatory for a grant program and should keep in mind that extensive mandatory requirements may unintentionally exclude otherwise suitable applicants from the selection process.

## Grantees' capacity to enter into grant agreements

It is preferable to enter into a grant agreement with specific legal entity, such as an individual, an incorporated entity or a government entity. There are risks involved where a Commonwealth entity enters into a grant agreement with an unincorporated body or

a group of organisations (for example, a consortium). One of the risks of entering into a grant agreement with an unincorporated association or unincorporated joint venture is uncertainty as to which entity is 'bound' by the agreement and the extent to which different parties involved in the arrangement are responsible for the overall performance of the grant agreement.

If a Commonwealth entity receives a grant application from an unincorporated association, it could consider requiring the association to incorporate (for example, under the relevant State or Territory associations incorporation act or, if applicable, the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islanders) Act 2006)* as a precondition to entering into a grant agreement.

Where the applicant is an unincorporated group of entities, the Commonwealth may need to consider strategies such as entering into the grant agreement with the lead member of the group (who is therefore responsible for overall performance). The other members of the group would then act as the lead member's subcontractors. It may also be prudent for the Commonwealth to require the lead member to provide satisfactory evidence of the relationship between each member of the group and their individual legal commitments to the grant activity.

Sometimes a proposed grantee will be a trust. This can raise issues such as the capacity and scope of the trustee's powers to enter into the grant agreement. Where a grantee is a trust, it may be appropriate to obtain specific legal advice.

### Grantee and grant activity risks

Sometimes problems will arise with a grantee's ability to see the grant activity through to completion. Commonwealth entities can seek to minimise the risk of failed grant activities by asking the following types of questions:

- Is the proposed activity too ambitious? Is the grant applicant financially viable, taking into account the scope of the proposed activity?
- Is the requested grant amount sufficient to complete the activity? If not, is there satisfactory evidence of funding from other sources to enable the activity to be completed? Are these other sources of funding 'locked in'?
- Will the grant applicant be relying on a large number of participants cooperating with the grant applicant? If so, have these participants made legal commitments to perform the activity?
- What experience does the applicant have in performing the proposed activity?

As a general rule, Commonwealth entities should avoid paying any grant funds to a grantee before the grantee has signed the grant agreement.

## Legal issues when managing a grant agreement

### The grant agreement

In this briefing we use the term 'grant agreement' to describe the document that records the terms and conditions on which the grant is provided.

The grant agreement sets out the relationship between the Commonwealth entity and the grantee. Unless legislation sets out the terms on which the grant can or must be provided, Commonwealth entities generally have a discretion as to the form of the grant agreement.

The CGRGs state that grant agreements should be well designed, well drafted and fit for purpose. The Department of Finance has issued a range of templates that can be used. These are available in Finance's website: https://www.finance.gov.au/resource-management/grants/.

The CGRG key principles relating to proportionality, outcomes, collaboration and partnership, governance and accountability have particular relevance when determining what provisions to include in the grant agreement. Many Commonwealth entities seek to impose a range of enforceable conditions for grants. Accordingly, grant agreements are often expressed to be contracts or deeds, with the intention that all of the obligations will be enforceable.

Ultimately, the rights and obligations of the Commonwealth and a grantee, and the extent to which those rights and obligations are enforceable, will primarily depend on the terms of the grant agreement itself. This means that it is important for Commonwealth entities to consider what rights and obligations they require when developing the grant agreement for a particular grant opportunity or activity.

## Identity of the grantee may influence the terms and conditions

Decisions about what form of grant agreement will be used and what terms and conditions might be appropriate will be influenced by various factors, including the identity of the grantee, the types of obligations the Commonwealth entity is seeking to impose on the grantee and the remedies that the entity wishes to have in the event of non-compliance.

*'...grant agreements are often expressed to be contracts or deeds, with the intention that all of the obligations will be enforceable.'*

## Large grant opportunities

Where a grant opportunity funds a large number of similar lower-value activities, it may be most efficient for the Commonwealth entity to use a standard form grant agreement, reflecting a consistent legal, risk and policy positions across all grantees. Commonwealth standard form agreements take a consistent and familiar position on contractual issues. They can therefore reduce the grantee's administrative and compliance costs. Similarly, the use of a standard agreement will also assist with the Commonwealth's management and administration of the opportunity.

## High-value or complex grants

By contrast, grant opportunities for significant, high-value, complex and/or one-off grant opportunities are more likely to require a more tailored grant agreement that adequately reflects the requirements of that grant activity. Typically, some of the key issues in these types of grant agreements will include:

- which entity will enter into the grant agreement and receive the grant and how the relationship with other contributors is to be managed and coordinated
- the timing of and conditions for each milestone payment
- the process for reviewing progress and/or varying the activity, particularly where the activity involves new research or the development of a prototype
- the implications of failure to meet milestones or grantee insolvency, including any rights or responsibilities of other contributors
- intellectual property issues, particularly where the grant activity involves research or the conduct of a trial
- sources of other funding and the relationship between these providers – a separate agreement that regulates priority and other obligations between the various providers of funding may be required.

Increasingly, Commonwealth entities also seek to fund grant activities that involve consortia, including State government agencies, local government bodies and industry groups. In these cases, relevant issues include:

- how the grant agreement should be structured
- the level of control and responsibility that the lead proponent is willing to take for the grant activity
- the extent to which individual consortium members should also be required to comply with terms equivalent to those in the grant agreement
- the extent to which individual consortium members should be required to report on their use of the grant funds and repay any funds that are not spent in accordance with the Commonwealth's grant requirements.

## Common clauses in grant agreements

Regardless of the type of grant, the following issues need to be considered when developing the grant agreement:

- the arrangements for monitoring the grantee's use of the grant and mechanisms for repayment where the grant has not been applied for the agreed purposes
- which party is to bear any taxes that may apply to the grant transaction, whether any GST issues arise and how any GST issues should be dealt with (see also GSTR 2012/2 and GSTR 2006/9). Section 9-17 of the *A New Tax System (Goods and Services Tax) Act 1999* may also apply if the grant agreement involves payments being made by one government-related entity to another as defined in that Act.
- whether funding is also provided to the grantee by another government entity or a third party for the same or similar purpose
- if the grant is payable on the achievement of milestones, the consequences of a grantee failing to achieve the milestone by the required date and whether there should be scope to vary the milestone date
- allocation of intellectual property rights[20]
- how risk is to be apportioned between the Commonwealth and the grantee – for example, whether the grantee must provide an indemnity for loss the Commonwealth may suffer because of the grant activity
- whether confidentiality provisions are required to protect disclosure of part of the grant agreement or information generated in the performance of the grant activity, noting these must be reported in accordance with para 5.5 of the CGRGs and RMG No 412.

## Mechanisms to safeguard relevant money

The extent of safeguard measures required will depend on the amount of the grant, the risk that it may not be used for the purposes for which it has been provided, and the broader policy considerations associated with the grant activity. These measures are discussed in more detail below.

*'It is common to structure the grant so that it is paid to the grantee in instalments.'*

### Management of grant funds

It is common to structure the grant so that it is paid to the grantee in instalments. This could involve an initial payment (for example, to assist the grantee with any initial or 'start-up' costs) and subsequent payments where the grantee has satisfactorily completed milestones. Each milestone might include a requirement for the grantee to provide a progress report to the Commonwealth entity. The final grant instalment could be paid on the grantee's satisfactory completion of the grant activity and after the grantee has provided a satisfactory final report.

20 The CGRGs provide that Commonwealth entities should generally not assert ownership in intellectual property rights resulting from the grant activity and should instead request a broad licence of that material for Commonwealth purposes.

This payment structure reduces the amount of the grant that the grantee holds at any one time and therefore can reduce the risk of grant funds being misspent. It can also help to ensure the grantee provides the reports that are required to assist the Commonwealth entity to meet its accountability and reporting requirements. Where the risks are greater (for example, because the grantee is a newly established entity), the grant can be structured to provide for more frequent payments of smaller amounts, together with more regular reports, at the beginning of the grant activity so that any problems in delivery of the activity and management of the grant can be identified early.

**Security for the performance of grant obligations**

One way to manage the relationship between the parties and to safeguard grant funds is for the Commonwealth entity to obtain security from the grantee for the performance of the grantee's obligations. For example, in more complex, sensitive or high-cost matters, it may be prudent to ask the grantee to give the Commonwealth entity security over property that the grantee owns (such as mortgage or charge over property acquired with the grant) to ensure that the grantee meets its obligations under the grant agreement.

An advantage of the Commonwealth entity having security is that it gives the entity the ability to exercise power of sale if the grantee defaults. This improves the Commonwealth entity's chances of recovering amounts that are owed under the grant agreement. A registered security also helps the Commonwealth entity to obtain priority over unsecured creditors and subsequent secured creditors and may prevent unauthorised dealings with the secured property.

It is important to consider the nature of the property that is proposed as security. Different legal requirements apply depending on whether security is taken over real property (land) or personal property (that could be physical property such as machinery, vehicles, or intangible property such as intellectual property rights). For example, there may be requirements concerning the format of the documentation that creates the security interest or specific requirements relating to registration. It is important that these requirements are met, otherwise there is a risk that the security may not be enforceable.

Whether it is appropriate for the Commonwealth entity to seek security will depend on the ability and willingness of the grantee to grant security to the entity, the value of the security available, the purpose of the grant, the ability or desire of the entity to exercise the rights provided by the security and any applicable policy considerations. When the Commonwealth entity is considering whether to include the provision of security as a condition of the grant, it should confirm the legal capacity of the grantee to provide the security and whether the property to be secured is sufficiently valuable for the purposes of securing the performance of the grantee's obligations.

Commonwealth entities may wish to establish internal policies on when they will seek to take security to support obligations of grantees under grant agreements. When a Commonwealth entity takes security, it becomes a secured creditor. This puts it in a stronger position in the event of insolvency. However, to make security interests effective, the entity will need to have procedures in place that ensure that security interests are registered where necessary. In some cases, the entity will need to enter into arrangements with other secured creditors, such as commercial financiers, that establish the rights, priorities and obligations of the Commonwealth as against other secured creditors of the grantee.

For further information on securities, see AGS Commercial Notes No 33: *Securities: Ensuring payment of debts to the Commonwealth* (http://www.ags.gov.au/publications/commercial-notes/cn33.pdf) (9 November 2009); AGS Legal Briefing No 96: *Personal Property Securities Act* (http://www.ags.gov.au/publications/legal-briefing/br96.pdf) (4 August 2012); and AGS Fact

Sheet No 20: *The Personal Property Securities Act* (http://www.ags.gov.au/publications/fact-sheets/fact_sheet_no_20.pdf) (September 2012).

See also AGS Commercial Notes No 35: *Managing government contracts through financial distress* (http://www.ags.gov.au/publications/commercial-notes/cn35.pdf) (31 May 2012).

**Performance guarantee**

Where a grant is provided to a grantee that is owned or controlled by a larger entity, it may be appropriate to require the parent company to provide a guarantee for the performance of the grantee's obligations under the grant agreement. This may be relevant for complex, risky or high-value grants and/or where the existence of the controlling entity was a factor that contributed to the decision to enter into the grant agreement. If the grantee fails to meet its obligations, the guarantor can then be required to perform those obligations, including any obligation to repay the grant. The guarantee is usually documented in a separate agreement between the guarantor and the Commonwealth entity. This is a potentially complex area that usually requires legal advice.

**Trusts**

While not common, in some situations Commonwealth entities may consider whether the creation of a trust could be an appropriate mechanism to safeguard grant funds in the event of insolvency. A number of technical legal and policy issues need to be considered and addressed in these situations. These are beyond the scope of this briefing. If a trust structure is being considered, specific legal advice (and potentially policy advice from the Department of Finance) should be sought early in the process.

## Documentation

**Reporting**

The CGRGs do not mandate any particular reporting or acquittal requirements. RMG No 412 states that officials should apply the 'report once, use often' and proportionality principles when designing grants application and reporting requirements. A Commonwealth entity should generally apply to a grant arrangement the minimum reporting requirements necessary to satisfy the entity's accountability requirements. It should not require information from grantees that the entity can obtain from Australian Government regulators, such as ASIC, ORIC and the ACNC.

**Commonwealth entity records**

Commonwealth entities should maintain records for all grant opportunities and activities. These records should include comments on the grantee's reports, performance of the grant activity and compliance with its obligations under the grant agreement. The records should also document any action that the entity takes and any variations agreed between the parties (noting, as set out below, that inadvertent, unintended variations may be made by a party's conduct).

*'Commonwealth entities may consider whether the creation of a trust could … safeguard grant funds in the event of insolvency.'*

This documentation can help Commonwealth entities to:

- manage the grant and where appropriate exercise rights under the grant agreement
- meet their reporting and accountability obligations
- retain corporate knowledge regarding the grantee, grant activity or grant agreement.

The documentation can also provide a reference point when negotiating new, or varying existing, grant arrangements.

**Variations**

Most grant agreements will include provisions dealing with variation. It is important to review the terms of a grant agreement before proceeding too far with a proposed variation, particularly where the Commonwealth entity wants to make a unilateral variation to the grant arrangement. To reduce the risk of challenge, it is essential that the process for unilateral variation that is set out in the grant agreement is followed.

*'Most grant agreements will include provisions dealing with variation.'*

Usually a Commonwealth entity and a grantee will agree to vary the grant agreement. Typically, grant agreements will state that any variation must be put in writing and signed by the parties' authorised representatives. Despite this, a grant agreement can inadvertently be varied by other means. Officials should be careful not to make statements (orally, in correspondence or in emails) to grantees or engage in behaviours that are inconsistent with the Commonwealth entity's rights in the grant agreement. These can have the effect of varying the grant agreement or otherwise preventing (or 'estopping') the Commonwealth entity from relying on the terms of the grant agreement. They can also constitute a waiver of legal rights under the grant agreement.

Officials must also ensure that any variation to the grant agreement meets the requirements of their entity's AAIs, the PGPA Act and the PGPA Rules, particularly where the variation results in a change in the overall value of the grant being provided.

## Legal issues when ending a grant agreement

Usually, a grant agreement will expire on the completion date set out in the agreement or when all of the grantee's obligations under the agreement have been completed. However, in some circumstances, it may become necessary (or desirable) for the grant agreement to be terminated early. A Commonwealth entity that is contemplating terminating a grant agreement needs to carefully consider any alternatives to, and possible consequences of, deciding to terminate the agreement, and it should seek legal advice on the proposed termination. Advice may be needed on issues such as obligations to use dispute resolution solutions before resorting to litigation. The advice may also need to consider the *Legal Services Directions 2017* (made under the *Judiciary Act 1903*).

### Is it necessary to terminate the grant agreement?

A Commonwealth entity might consider terminating a grant agreement for a range of different reasons, including because:

- the grantee has not met relevant milestones
- the grantee has not met other key requirements
- there has been a significant change in government policy regarding the relevant grant program.

If a grant agreement provides for payments to be made on the achievement of milestones and the grantee fails to meet the milestones, generally the Commonwealth is not required to make any payment attached to that milestone until and unless it is completed. In such cases, a Commonwealth entity may be prepared to give additional time for the milestone to be achieved and therefore allow the grant agreement to continue. However, it can sometimes be prudent to terminate the agreement in these circumstances, as there may be underlying issues with the grantee and its ability to undertake the activity.

## Options for termination

The Commonwealth entity's rights to terminate the grant agreement will usually be set out in the grant agreement. There may also be some common law termination rights. However, for certainty and clarity, it is preferable for termination rights to be explicitly set out in the agreement. A grant agreement may be terminated in the following ways, depending on the circumstances and the terms of the agreement:

- termination without default (sometimes known as 'termination for convenience')
- termination for default
- termination by mutual agreement.

### Termination without default ('for convenience')

The case of *NSW Rifle Association Inc v The Commonwealth of Australia*[21] highlights the importance of including in a Commonwealth grant agreement an express right for the Commonwealth entity to terminate the agreement at any time (for convenience) by written notice if the entity requires the flexibility to do so.

Before a Commonwealth entity terminates for convenience, it needs to consider whether it must pay compensation to the grantee under the terms of the grant agreement and, if so, the amount of compensation that might be payable.

### Termination for default

It is common for a grant agreement to provide a right to terminate for specific events of default. These commonly include the grantee's failure to perform obligations under the grant agreement (for example, failure to meet performance or reporting standards or not using the grant in accordance with the budget for the grant activity in the grant agreement) or where it is later found that the original grant application contained false information. In addition, a right to terminate may arise through the operation of the general law.

Where a breach or a default has been identified, a judgment needs to be made as to whether to exercise a right of termination. For example, if the grantee breaches the agreement in a relatively minor way, it may be appropriate to exercise a right to withhold payment until the breach is remedied rather than terminate the grant agreement. Where a Commonwealth entity decides to terminate for default, it must comply with any procedures set out in the grant agreement on the exercise of the right to terminate for default.

In some cases, it may also be necessary to consider any 'good faith' obligations that the Commonwealth entity may have – see AGS Commercial Note No 34: *The Commonwealth as a model contractor? Good faith in government contracting* (http://www.ags.gov.au/publications/commercial-notes/cn34.pdf) (21 July 2010).

### Wrongful termination

Commonwealth entities should take care when exercising either of the termination rights described above. If a Commonwealth entity wrongfully purports to terminate a grant agreement, this could amount to a repudiation of the agreement and the entity could be liable to pay a monetary amount as damages to the grantee.

### Termination by agreement

Of course, the Commonwealth entity and the grantee may simply agree to terminate the grant agreement. That would typically require consideration of the appropriateness of this course of action as well as the consequences of doing so, including for any grant payments already made and those yet to be made; and any work, materials or reports that have been, or are to be, produced by the grantee.

21 [2012] NSWSC 818.

## Recovery of unspent or misspent grant funds

### Final acquittals and reporting issues

Commonwealth entities usually require grantees to provide final reports and to retain records for an appropriate period (sometimes linked to the *Corporations Act 2001*, which requires 'financial records' to be kept for 7 years: s 286). It is also common for grant agreements to require the grantee to provide a final report to the entity within a certain period (for example, 40 business days) of the completion of the grant activity.

### Rights under the grant agreement

Where any termination right is exercised, the grant agreement will normally provide the Commonwealth entity with the power to recover grant funds that have not been:

- legally committed for expenditure (and are not therefore payable as a current liability) or
- spent in accordance with the agreement.

Where this is the case, the grant agreement may provide that these funds are recoverable as a debt due to the Commonwealth entity without the requirement for further proof. However, if the required final acquittal report is not provided or other reports have not been provided, it may be difficult to ascertain the amount that is owed. In this situation, if the grantee is refusing to provide relevant reports, Commonwealth entities may need to use dispute resolution or a court process to ascertain the amount that is owed.

### Statutory responsibilities

Under s 11 of the PGPA Rule, accountable authorities of non-corporate Commonwealth entities are responsible for pursuing the recovery of debts for which they are responsible, unless:

(a) they consider that it is not economical to do so

(b) they are satisfied that the debt is not legally recoverable or

(c) the debt has been written off as authorised by an Act.

In the absence of a specific statutory power permitting them to do so, an accountable authority generally cannot waive a debt. In these circumstances, the power to waive a debt can only be exercised by the Finance Minister (or their delegate) under s 63 of the PGPA Act.

### Can a Commonwealth entity spend recovered grant funds?

If unspent grant funds are recovered from a grantee (including following termination of a grant agreement) there may be scope for the Commonwealth entity to allocate this money to another grantee or grant activity.

A Commonwealth entity that is considering how best to deal with recovered amounts should involve its chief financial officer, who can involve the Department of Finance if necessary.

## Tips for Commonwealth entities

In summary:

- Confirm that it is appropriate to characterise an arrangement as a 'grant' and that there is legislative authority for making grant payments at the start and throughout the life of the grant activity.
- Accountable authorities and officials must consider their obligations under the PGPA Act and the CGRGs in implementing and administering grant activities.
- It is important to have a defensible basis for selecting grantees. Where an open selection process is used, it should be based on pre-determined selection criteria. A legal adviser can assist.
- Commonwealth entities need to carefully consider what rights and responsibilities they wish to include in a grant agreement, having regard to the nature of the likely grantees and grant activities. Some grant opportunities and activities will require more tailored and bespoke grant agreements than others.
- Commonwealth entities need to consider how best to achieve the proper use of grant funds – for example, where relevant, by using milestone payments and reporting arrangements.
- Care needs to be taken to avoid inadvertently amending grant agreements, particularly through verbal discussions and email exchanges with grantees.
- A decision to terminate a grant agreement needs careful consideration. Typically, it should only occur based on legal advice.
- A number of Commonwealth laws are relevant for grantees. See AGS Fact Sheet No 8: *Commonwealth legislation that may apply to Australian Government funding recipients* (http://www.ags.gov.au/publications/fact-sheets/fact_sheet_no_8.pdf) (November 2015).

**This briefing is based on a previous version prepared by Alexandra Monk, Kathryn Grimes, Dr Bridget Gilmour-Walsh and Olivia Abbott.**

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## AGS contacts

AGS has a national team of lawyers specialising in the design of grant opportunities and the drafting and negotiation of grant opportunity guidelines, grant agreements and associated documents. We also provide tailored and in-depth training to officials involved in grant administration and advice on the Commonwealth's options for managing, and exercising its rights under, specific grant programs and agreements.

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