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Implementing the Uhrig review: becoming an FMA agency

One potential outcome of the Uhrig review is that authorities under the *Commonwealth Authorities and Companies Act 1997* (CAC authorities) may become agencies under the *Financial Management and Accountability Act 1997* (FMA agencies).[1] The assessment of Australian Government agencies against the Uhrig templates and principles is to be completed by March 2006.

The focus of this briefing is on key issues relating to becoming or creating an FMA agency, and the changes that flow from being an FMA agency rather than a CAC authority.

When a CAC authority is to become an FMA agency, the process can seem quite daunting. This briefing looks at critical issues that will need to be addressed early including:

— preparing for transition (governance, preparing staff, due diligence)

— transition to Public Service Act employment

— transition to the FMA Act regime.

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Preparing for transition

Cooperation between organisation and portfolio department

Fundamental to achieving a smooth and seamless transfer is close cooperation between the authority and its portfolio department. Both have an equal stake in the successful outcome of the transition process and neither the authority nor the department can carry out its role without the help of the other. The CAC authority has all the knowledge of the organisation and its myriad different arrangements. The department needs to understand these so that decisions can be made about how to deal with various issues that arise out of those arrangements. One way that this cooperation can be achieved is to set up a small group (the transition committee), comprising both departmental and authority personnel, who will drive the process and ensure that all issues that need to be addressed are addressed.

Governance during the transitional period

Governance arrangements during the transition period need to be established. The following are some examples of governance issues that will need to be addressed. There may be others that will need consideration depending on the particular authority's circumstances and operations.

This issue

Role of the board

During the transition period the board will, of course, continue to manage the authority and ensure that it carries out its functions properly in accordance with the enabling and other applicable legislation which applies to the authority. However, there will be a number of matters that may need to be done differently.

The board will now be managing the authority knowing that it is about to be abolished and replaced with an FMA agency. In this situation its role will become a caretaker role. The board will need to fulfil this role in close consultation with the department, bearing in mind that the authority will soon cease to exist in its current form.

One of the first things the transition committee needs to do is to draw up protocols for communication and decision-making during the transition period. For example, these protocols could:

— set out matters where the authority could continue to make decisions in the usual way

— indicate matters likely to require approval of the department (or minister), such as:
  – arrangements which involve any significant spending
  – arrangements which will last longer than say six months
  – further appointments of permanent staff.

There may also need to be new delegations by the board to the staff of the authority to take account of the new arrangements.

The board will need to fulfil a caretaker role in close consultation with the department, bearing in mind that the authority will soon cease to exist in its current form.

Meetings between the board and the minister

It might also be desirable for the minister during this time to meet with and brief the board more frequently than he or she otherwise would. This will ensure that at the highest level there is no misunderstanding. It may also be desirable for the board to be briefed by the authority more frequently than may otherwise be the case.

Close liaison with other departments

In order for there to be a smooth transition, the transition committee needs at an early stage to consider which departments need to be consulted. For example, the Department of Finance and Administration is responsible for both the CAC Act, which sets out the governance and accountability arrangements for statutory authorities, and the FMA Act, to which the CAC authority will be moving.

Assistance and advice should be sought from Finance at an early stage. If the statutory authority has any debt or tax issues then Treasury should be consulted.

Preparing the staff for the new environment

There are two important aspects to this:

— setting up processes for ensuring staff are kept up-to-date with what is happening

— training staff on the new governance environment.

Keeping staff informed

Fundamental to a successful transition is ensuring that employees know what is happening and are kept informed. It is natural that there will be some uncertainty at this time, and it is vital to have processes in place to

ensure that staff anxiety is kept to a minimum. Again, there needs to be a specific plan drawn up for this. This could include, for example:

— a weekly newsletter to staff providing updates on the process

— a dedicated web site where information is published

— meetings where employees can ask questions

— a way for staff to ask questions anonymously (e.g. via a question box, with answers posted on the web site).

Training on new environment

All public sector bodies, whether they are CAC authorities or agencies under the FMA Act and/or the *Public Service Act 1999*, have well defined governance frameworks which require adherence to the highest standards of accountability and transparency.

However, employees in CAC authorities work within a different governance framework from those in FMA agencies, and staff transferring to an FMA agency will need to understand the governance framework for the handling and spending of public money. Further, the employment regime for CAC employees who are not already under the Public Service Act, but are employed under other arrangements, is also different.

Under the Public Service Act, the governance framework for public servants is codified in the APS Values, and the conduct expected of public servants is set out in the Code of Conduct, which also provides for sanctions on APS employees who breach that Code.

There will also be a number of other requirements, such as the Legal Services Directions, that the new agency will be subject to.

Training for staff on this new environment would make the transition for them very much easier, assisting the new agency to carry on its functions in a seamless way.

Once the employees of the authority become public servants they will be employed under the Public Service Act and many of their activities will be governed by the FMA Act.

Due diligence preparation for transition

The third item which should be on any transition group's agenda is due diligence. Due diligence is a shorthand way of saying that there needs to be a detailed examination of the business of the authority, including its functions, its assets and liabilities, and its contractual and other arrangements, with a view to identifying any issues that may need to be addressed during the transition process.

Why due diligence?

Many CAC authorities that become FMA agencies will do so pursuant to legislation. Why is it important to identify issues and arrangements when the legislation can simply provide for all assets and liabilities to be moved to the Commonwealth, which will become the successor in law to the authority? There are several reasons:

— to ensure that all functions are suitable for transfer to the FMA agency

— to ensure there are no arrangements which are unsuitable simply to be transferred by legislation

— to ensure that there are no arrangements which cannot be simply transferred by legislation

— to identify any peculiarities which will need to be dealt with specifically in the legislation.

Experience shows that an agency cannot make decisions about these matters unless it has a thorough understanding of all aspects of the business of the authority.

How to set about due diligence

It is often useful to draw up a due diligence check list. This should include all areas of the authority's activities which need to be investigated. The authority will then need to examine in detail all of its arrangements in relation to each of these areas. This would involve detailed discussions with the authority employee who is responsible for each specific aspect, as well as looking at the statutory or contractual arrangements that relate to that aspect of the business.

The aim is to ascertain any issues – an important part of a thorough due diligence process is to have an issues list on which each issue, or potential issue, is set out as soon as it is identified. Someone then needs to be tasked to consider that issue further, in order to determine whether it can be resolved before transfer, whether it needs specific provisions in the legislation to resolve it, or if it cannot be easily resolved, how to manage it.

Examination of functions

The functions of the authority need to be considered carefully, so a decision can be made as to whether all the functions are suitable to be performed by the new FMA agency, or whether there are any that might be more appropriately moved to a similar CAC authority that is remaining under the CAC Act (or indeed to another department or agency).

If there is to be any change in functions, or any removal of some functions to another body, then there will be the issue of which of the staff and assets/liabilities, contracts and records should follow those functions. They will then have to be excluded from any transfer in the legislation to the new FMA agency. Two recent examples are:

— The abolition of ATSIC, where some functions and assets were transferred to the Commonwealth and some to other CAC authorities such as the Indigenous Land Corporation or Indigenous Business Australia.

— The repeal of the *National Occupational Health and Safety Commission Act 1985* and the transfer of the Commission's assets, liabilities and most of its functions to the Commonwealth. However, one of its functions, that of declaring national standards and codes of practice, has been conferred by new legislation (the *Australian Workplace Safety Standards Act 2005*) on an advisory body called the Australian Safety and Compensation Council, established by the executive power of the Commonwealth.

An important part of a thorough due diligence process is to have an issues list on which each issue, or potential issue, is set out as soon as it is identified.

Examples of some areas where there may be issues

The due diligence process may uncover a variety of issues which will need to be addressed. For example:

— There may be matters that might not be able to be transferred by legislation. For example, contracts governed by overseas laws, or that may need to be varied (e.g. contracts that may not be consistent with FMA requirements in relation to handling public money).

— There may be contracts which have provisions for the contract to terminate at the election of the other party if there is a change of ownership. Obvious examples of this are contracts for borrowings or long-term property/leasing contracts.

— Does the authority have any subsidiary companies? If so, what is the intention in relation to these companies.? Will they simply transfer to the Commonwealth? Will their assets and functions be transferred back to the authority and the company wound up before transition?

— If an authority is an income tax payer, are there any outstanding matters to work through with the ATO?

— Has the authority entered into any joint venture arrangements? Will these remain, and if not, how can they be unravelled?

— In relation to complex or sensitive contracts, even if there is no fetter to their legislative transfer to the Commonwealth, it may be advisable to inform the other party of the proposed changes to the authority early, and make sure that it is comfortable with the arrangements.

— There may be contracts which will no longer be necessary after transfer. It may be possible to unravel them before transition. There may be property or equipment leases that will no longer be needed after transition. If the authority is occupying premises it will no longer require, then there is a real issue unless the lease can be terminated, or another agency found to occupy the premises.

— Intellectual property and information technology issues may arise.

— Any contractual arrangements between the authority and the Commonwealth may need to be replaced by an MOU, or a letter. This can create particular issues if contracts with other parties (e.g. subcontractors) are dependent on the contract between the Commonwealth and the agency.

— Existing insurance policies may no longer be required if the agency is to come under Comcover arrangements.

If the authority is occupying premises which it will no longer require, then there is a real issue unless the lease can be terminated, or another agency found to occupy the premises.

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Notes

1 Mr John Uhrig AC was appointed in November 2002 by the Australian Government to conduct a review of the corporate governance of Commonwealth statutory authorities and office holders. The review reported to the government in June 2003. On 12 August 2004, the government released its response to the report (see <http://www.finance.gov.au/governancestructures/>.

The government accepted the recommendation that financial frameworks be based on the governance characteristics of the authority. Hence Budget-funded agencies, whose money and property should be held by the Commonwealth, typically should be subject to the *Financial Management and Accountability Act 1997*. Where it is appropriate that the authority be legally and financially separate from the Commonwealth and the authority is best governed by a board, it should be subject to the *Commonwealth Authorities and Companies Act 1997*.

Becoming an FMA agency – employment considerations

This is a brief overview of some of the key employment issues that arise when a CAC authority not previously covered by the Public Service Act becomes an FMA agency, focusing mainly on the terms and conditions of employment of the transferring employees.

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Will the authority employ under the Public Service Act?

From the point of view of employment matters, the first issue to consider when looking at a CAC authority becoming an FMA agency is whether the authority will also, as part of the transition, become a Public Service Act agency.

Being a CAC authority and being staffed under the Public Service Act are not mutually exclusive. Some 17 of 105 CAC authorities are staffed under the Public Service Act. Generally, CAC Act coverage is *not* accompanied by Public Service Act coverage, and generally FMA Act coverage *is* accompanied by Public Service Act coverage. While this is the norm, it is not inevitable.

There are likely to be very few employment issues arising out of the transition to the FMA Act of a CAC authority that already employs its staff under the Public Service Act. We do not discuss that situation further in this briefing.

Does the authority currently employ staff on its own account?

The next issue to consider is whether the CAC authority that is in transition currently employs its own staff.

For this to be the case, the authority must have its own legal personality, separate from the Commonwealth. This will usually be the case in relation to non-FMA authorities, but there are plenty of exceptions in the CAC Act world.

This briefing looks at the situation of CAC authorities that have their own legal personality and employ their staff on their own account.

The authority in transition will usually be a statutory authority (though not always).

The authority in transition will usually be a statutory authority (though not always). If it is, it will usually have a statutory power to engage employees. If it has that power, it will almost certainly have a statutory power to determine terms and conditions of employment of employees. The relevant provision will also typically include, or be followed by, a power to engage consultants.

To give an example, let's look at the Health Insurance Commission, that ceased to exist on 1 October 2005. Subsection 9(1) of the *Health Insurance Commission Act 1973* (HIC Act) established the HIC as a body corporate, as follows.

(1) The Commission –

(a) is a body corporate with perpetual succession;

(b) shall have a common seal;

(c) may acquire, hold and dispose of real and personal property; and

(d) may sue or be sued in its corporate name.

Note: The *Commonwealth Authorities and Companies Act 1997* applies to the Commission. That Act deals with matters relating to Commonwealth authorities, including reporting and accountability and conduct of officers.

Subsections 28(1) and 28(2) of the HIC Act provided for standard arrangements in relation to the engagement of staff of the HIC and the setting of their terms and conditions, as follows.

(1) Subject to this section, the Commission may engage such staff as it thinks necessary for the purposes of this Act.

(2) The terms and conditions of employment (other than in respect of matters provided for by this Act) of persons engaged as staff under subsection (1) shall be as determined by the Commission.

Provisions like this are replicated in the establishing statutes of many statutory authorities.

We can see from these provisions that the HIC had a separate legal personality from the Commonwealth – because it was established as a body corporate – and that the HIC body corporate had the power to employ its own staff.

Every person who is employed under the Public Service Act is an employee of the Commonwealth.

The Commonwealth is the employer of employees under the Public Service Act

Public Service Act employment is employment by the Commonwealth. An agency head under the Public Service Act engages employees *on behalf of* the Commonwealth (s 22). Every person who is employed under the Public Service Act is an employee of the Commonwealth. (This is why it is not strictly correct to say 'I am employed by the Department of Finance and Administration.' Strictly, if you are from Finance, you are employed *by* the Commonwealth, *in* the Department of Finance and Administration.)

Why is the question of whether the CAC authority employs its own staff a critical one? Why does it matter who is the employer of APS employees?

The short answer to this question is because of the transmission of business provisions in the *Workplace Relations Act 1996*, and the effect those provisions will typically have when a CAC authority begins to employ under the Public Service Act. Those provisions are likely to come into play when there is a change of employer.

The transmission of business provisions can apply where there is a change of employer

Where a transition to Public Service Act employment involves a change of employer, the transmission of business provisions in the Workplace Relations Act will usually apply. And those provisions can operate to bring across the employees' current conditions, as set out in awards, certified agreements and AWAs.

Transmission of business provisions can operate to bring across the employees' current conditions, as set out in awards, certified agreements and AWAs.

There is some complex case law on when the transmission of business provisions under the WR Act apply. We do not consider that case law here. While the application of the transmission of business provisions should not be assumed, it will generally be the case that those provisions will operate when a CAC authority employing staff on its own account becomes an agency employing staff under the Public Service Act.

What is the effect of the transmission of business provisions?

To answer this question, we need to backtrack a little, to consider the range of instruments that will typically operate in a CAC authority to regulate the terms and conditions of employment of its staff.

Instruments that determine terms and conditions

Most CAC authorities that employ outside the Public Service Act will have the terms and conditions of their staff determined under a rich amalgam of different instruments.

The constituting legislation itself

Some terms and conditions may be determined directly in the authority's constituting legislation, although this will be fairly rare.

Determinations made under the constituting legislation

Some terms and conditions of employment may be set by CEO or Board determinations made under a power in the constituting legislation to determine terms and conditions of employees, like subsection 28(2) of the Health Insurance Commission Act, quoted above.

Certified agreements

Most of the terms and conditions of employment for most of the employees will be determined under a certified agreement (CA), if one is in place. In many cases a certified agreement will be in place, but not all CAC authorities have a certified agreement.

AWAs

Terms and conditions for some (typically senior) staff may be set under Australian workplace agreements (AWAs). Some CAC authorities may have all of their staff working on AWAs; some may have no staff on AWAs.

Awards

Conditions of employment may be underpinned by an award; but the award will typically have no operation in the CAC authority (apart from acting as the benchmark for the application of the no disadvantage test when CAs and AWAs are being made). This is because any awards will usually have been explicitly or generally *excluded* by the terms of the authority's certified agreement (and because AWAs entirely exclude awards).

Common law contracts of employment

Subject to any of the instruments referred to above, there may be common law contracts of employment operating between the authority and its employees.

Having set out this background, we need to consider what will happen to the conditions of employment of the current staff if they are moved to employment under the Public Service Act.

Operation of transmission of business provisions

When the transmission of business provisions apply, they generally operate to make the industrial instruments under the Workplace Relations Act apply to the new employer, at least in respect of the employees who are transferred, and arguably, more broadly than that.

There is a provision in the Workplace Relations Act which makes an award that applies to an employer transmit, so that it binds the successor of the employer (see section 149). There is a provision which makes a certified agreement transmit, so that it applies to the successor of the employer (see section 170MB). And there is a provision which makes an AWA transmit so that it binds the successor of the employer (see section 170VS). In the cases under discussion the Commonwealth will generally be the successor in employment to the CAC authority, for the purposes of the Workplace Relations Act.

The provisions in the Workplace Relations Act that make awards and certified agreements transmit allow for their operation to be varied by the Australian Industrial Relations Commission.

When the transmission provisions apply, they generally operate to make the industrial instruments under the Workplace Relations Act apply to the new employer.

A complex picture can develop on transmission

The simplest case will be where an authority is merely changing status and is not going to become part of an existing agency, and is not combining with another (existing) agency (or several such agencies) to form a new agency.

In this simple case, there will typically be a certified agreement and perhaps AWAs operating in the authority, and an award that is in the background, but not operating. Because the authority is simply changing status, there will be no industrial instruments to worry about at the receiving end of the transfer, apart from the *Australian Public Service Award 1998* (the APS Award).

A somewhat more complicated case will be where the authority is to become part of the portfolio department. Here the issue will usually be the relationship between the certified agreements of the authority and the department.

The most complex cases can be very complex indeed, involving multiple overlapping certified agreements and awards, and sometimes state awards and state transmission of business arrangements.

But even in the simple situation, significant issues may arise.

One problem that can arise is that while the award that applied to the authority when it was under the CAC Act will usually have been excluded by the authority's certified agreement, that certified agreement may not operate to exclude the operation of the APS Award. The potential situation, then, is that the transmitted certified agreement and the APS Award will operate in tandem, with the agreement prevailing over the award to the extent of any inconsistency. This will not be a problem if the certified agreement is expressed to be comprehensive; but it will depend on the wording of the certified agreement.

The classification structure of the authority when it made its own employment arrangements may not match the classification structure of the APS.

Beyond the transmission of business issues, there may be issues about the classification structure the new agency is to have. The classification structure of the authority when it made its own employment arrangements may not match the classification structure of the APS. The structure will have to be changed to fit the Public Service Act model, even though it is a model with significant flexibility. In this situation some translation work will have to be done.

Another possibility is that the engagement and tenure arrangements in the authority may not match those under the Public Service Act. For example, an authority may not employ employees on an ongoing basis, but may engage all of its employees on term contracts, say for a maximum of five years. This does not fit the model of tenure under the Public Service Act and it is not possible to change that model. It is not possible to engage employees (other than Senior Executive Service employees) for a five-year term under the Public Service Act. A decision will usually have to be taken as to whether these staff are to be given ongoing employment.

WorkChoices

The government is proposing to change the transmission of business arrangements under the Workplace Relations Act. Under the WorkChoices proposals, awards, certified agreements and AWAs would not transmit where *no* employees take up employment with the new employer. And where transmission does occur, the transmitted instruments will only operate for a maximum of twelve months.

In practice these changes are not likely to have a great deal of impact on CAC authorities moving to the Public Service Act.

How are the employees to be moved to the new Public Service Act agency?

Particularly where there is a change of employer, the question will arise, how are the employees to be moved to the new agency? When the new employment is Public Service Act employment, there are at least two possible answers to this question.

The first is that the staff will be moved by the Public Service Commissioner, who among other things has the power to terminate the employment of an employee in a Commonwealth authority, and to engage that employee in the APS. So, generally speaking, the move can be effected administratively by the Public Service Commissioner, under section 72 of the Public Service Act. This action does not depend on any consent of the affected employees.

The second option for moving people is by legislation. Generally when an authority is being moved into FMA Act coverage, there will be a need for amendment to the authority's enabling legislation (if it has enabling legislation) and provisions can be included in the amending Act that move the staff to the new agency. However, this path is generally not necessary because of the considerable flexibility of the Public Service Commissioner's power in the Public Service Act to move staff.

Where the Public Service Commissioner moves the employees

Where the Public Service Commissioner moves the authority's employees into the public service under section 72 of the Public Service Act, there is a facility in the Public Service Regulations which enables the agency head of the new Public Service Act agency to effectively preserve remuneration and conditions of employment of the transferred employees. A determination made under regulation 8.2 of the Public Service Regulations preserving conditions of employment ceases to apply to an employee as soon as they become covered by a new award, certified agreement or AWA.

The move can be effected administratively by the Public Service Commissioner, under section 72 of the Public Service Act. This action does not depend on any consent of the affected employees.

Other issues

Here is a short list of some of the other employment issues that will need to be looked at if an authority is moving into Public Service Act coverage.

Policy parameters for agreement making

The government's policy parameters for agreement making in the Australian Public Service are substantially similar to the parameters that apply to Commonwealth authorities. There are, however, some minor differences – mostly relating to mobility across the APS – and authorities need to be aware of these.

Different Commonwealth legislation may apply

A number of pieces of Commonwealth legislation apply directly to employees employed under the Public Service Act. So the statutory framework that applies in an authority may change once it is within Public Service Act coverage.

This is not likely to lead to major change, because most CAC authorities are likely to be covered by most Commonwealth employment legislation. But to give one example, the *Maternity Leave (Commonwealth Employees) Act 1973* will automatically apply once the authority is under the Public Service Act, where at present that Act does not apply to a number of Commonwealth authorities.

Coverage by the APS Values and the APS Code of Conduct

Authorities need to be aware that the conduct rules for employees will change to a greater or lesser extent once employees are employed under the Public Service Act. Section 10 of the Public Service Act sets out the APS

Values, and section 13 sets out the Code of Conduct. It may be necessary to provide staff with training in the new arrangements.

Powers of delegation

New delegations will need to be made for the exercise of powers under the Public Service Act. The Public Service Act includes very flexible powers of delegation. Authorities will need to be conscious that the employment powers in their current personnel management regime may not be perfectly mirrored in the Public Service Act.

It is prudent to tackle the employment issues as early as possible.

Conclusion

The issue of the terms and conditions of employment can be a complex one where a CAC authority moves to the FMA Act and with that move, to employment under the Public Service Act. It is prudent to tackle the employment issues as early as possible.

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Financial management under the FMA Act: handling public money, appropriations and procurement

When a body becomes a prescribed agency under the *Financial Management and Accountability Act 1997* (the FMA Act), it becomes subject to a comprehensive regulatory regime in relation to financial management. Section 44 of the FMA Act imposes on the Chief Executive of each agency responsibility for the efficient, effective and ethical management of the Commonwealth resources under the Chief Executive's control. The FMA Act, the Financial Management and Accountability Regulations and the Finance Minister's Orders then impose a range of obligations and restrictions on the way public money and public property is to be managed and used, and how that management and use is to be reported. This briefing sets out some of the important obligations which arise for FMA Agencies. [1]

The context: the Consolidated Revenue Fund and public money

What is public money?

All money which is held by the Commonwealth (including money which is held on behalf of another person), and all money which is held by another person on behalf of the Commonwealth is 'public money'. [2] This includes:

— all money which is in the bank accounts of an FMA Act entity [3]

— all petty cash held by an FMA Act entity

— all money which is held by a third party on behalf of an FMA Act entity

— as well as the money which is held by Finance in the 'Official Public Account' (OPA).

What is the Consolidated Revenue Fund?

There is no longer a 'fund' into which money is paid, which is called the Consolidated Revenue Fund (CRF). Rather, under the 'self-executing' theory of the CRF, money becomes part of the CRF when it is received by

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the Commonwealth, and remains part of the CRF until it is paid by the Commonwealth (or by someone else on behalf of the Commonwealth) to another person.

For most purposes, money which is 'public money' is part of the CRF, and vice versa. Importantly, money which is held by or on behalf of an FMA agency is part of the CRF.

Appropriations

One of the most important principles of the Westminster system of government is that money cannot be spent by the Executive Government unless Parliament has passed a law appropriating the money. This principle is enshrined in sections 81 and 83 of the Constitution. In particular, money cannot be spent from the CRF without an appropriation.

Money cannot be spent from the CRF without an appropriation.

As noted above, money held by FMA agencies forms part of the CRF. Under the devolved system of financial management, agencies are responsible for managing and reporting on their expenditure under appropriations. In particular, they are responsible for ensuring that every time public money is spent, an appropriation is available to cover the expenditure, and that the expenditure is recorded, to ensure that there is no risk of overspending the appropriation.

Every expenditure made under an appropriation must be recorded by the agency. This process is called 'debiting' the appropriation. This recording must be done on a cash, not an accruals, basis.

Drawing rights

One way in which the FMA Act ensures that there is no risk of expenditure taking place without an appropriation is by requiring that every time public money is spent, the relevant appropriation is debited by a person holding a 'drawing right'. Moreover, the person who actually makes the payment of public money is also required to hold a 'drawing right'. [4] The Finance Minister has delegated the power to issue drawing rights to the Chief Executive of each agency. [5]

Complex issues arise when one agency makes payments from an appropriation which is controlled by another agency, and legal advice should be sought if an agency is involved in this kind of transaction. The Department of Finance and Administration should also be consulted.

Can an agency 'keep' money that it earns?

One issue that arises because of the requirement that money in the CRF cannot be spent without an appropriation, is that when an agency 'earns' money (from the sale of small assets, or from cost recovery activities), it cannot be spent by the agency without a further appropriation.

It is crucial that any agency which relies heavily on income from its activities to meet its own expenses enters into a section 31 agreement as soon as possible.

The common way of dealing with this problem is for the minister responsible for the agency to enter into a 'net appropriation agreement' or 'section 31 agreement' [6] with the delegate of the Finance Minister. The effect of such an agreement is that amounts received by the agency are added to the annual departmental appropriation to the agency, meaning that the amounts can then be spent without a further appropriation.

It is crucial that any agency which relies heavily on income from its activities to meet its own expenses enters into a section 31 agreement as soon as possible. Otherwise there is a real risk that the agency will spend money without an appropriation, which can amount to a breach of section 83 of the Constitution.

Custody of public money

Under the FMA Act, public money can only be deposited by an official into an official bank account. Official bank accounts can only be opened in accordance with strict requirements imposed by the Finance Minister. In particular, official bank accounts are ordinarily required to comply with what is known as the 'core protocols' for agency banking. Under these protocols:

— all agency bank accounts (other than those which hold trust money) are swept into the Official Public Account overnight – that is, their balance is reduced to zero and then restored the following morning

— agencies do not earn interest on their bank balances

— all agencies must maintain at least a departmental payments account and a departmental receipts account.

Not all major banks are able to comply with the core protocols. It is therefore necessary to ensure that the agency is banking with a compliant bank prior to becoming an FMA agency, and that the agency's bank accounts comply with FMA Act requirements.

Public money being received or handled by outsiders

Difficult issues arise where money which is payable to or by the Commonwealth, is actually handled by persons outside the Commonwealth. This is becoming increasingly common, as agencies outsource functions such as payroll, collection of fees, the running of conferences etc.

Where an outsider is simply involved in the receipt and custody of public money, then this can be handled by an authorisation under section 12 of the FMA Act.

However, where outsiders are involved in spending or managing public money, the effect of the FMA Regulations is that the outsiders themselves become 'officials' under the FMA Act. The outsiders may not pay public money into their own bank accounts, and are subject to all the rules about the handling of public money which apply to officials inside agencies. Moreover, special arrangements may need to be made in relation to record keeping, and the management of appropriations.

Where outsiders are involved in spending or managing public money, the effect of the FMA Regulations is that the outsiders themselves become 'officials' under the FMA Act.

It is essential to seek advice in relation to these kinds of arrangements, as special contractual arrangements may be required.

Procurement

The FMA Act regulates the procurement activities of bodies that are subject to its requirements. The most significant aspects of procurement it regulates are:

— entering into contracts

— the procurement process

— contract provisions.

Entering into contracts

Under FMA regulation 13, a person must not enter into a contract unless the proposal to spend money for the contract has been approved under regulation 9 and if necessary regulation 10. Regulation 9 requires FMA agencies to ensure that expenditure is in accordance with the policies of the Commonwealth, is an effective and efficient use of public money and is consistent with the terms under which the money is held.

Regulation 10 requires the approval of the Minister for Finance (or his delegate) if there are not sufficient 'appropriations' to cover the expenditure under the contract.

The procurement process

FMA regulation 8 requires that regard be had to the *Commonwealth Procurement Guidelines* (CPGs) in any procurement. Some aspects of the CPGs are also considered to be Commonwealth policies that have to be complied with under regulation 9. The CPGs are both 'best practice guidelines' (detailing general policies that must underpin any procurement process of an FMA agency such as value for money, encouraging competition, efficient use of resources, and transparency and accountability) and a set of rules (the Mandatory Procurement Procedures – MPPs) that must be followed for 'covered' procurements.

The MPPs largely evolved out of the Australia – United States Free Trade Agreement. While some CAC authorities are subject to the CPGs and in particular the MPPs, their application for FMA agencies is different and more detailed.

The most important of the MPPs are:

— the monetary threshold that triggers the application of the MPPs in most cases ($80,000) – which is much lower for FMA agencies compared to non-FMA agencies that are covered by the CPGs

— in almost every case an agency must approach the market at some stage in 'covered' procurement process – that is, an agency cannot rely on an understanding of what the market can provide

— the agency must clearly identify the information it requires of tenderers (minimum form and content requirements)

— the agency must clearly identify the legal, commercial, technical and financial capacities tenderers must have to participate in the procurement (conditions for participation)

— specifications should be performance based – essential aspects must be identified to tenderers (essential requirements)

— the agency must exclude tenders that do not comply with the minimum form and content requirements (except where there is an unintentional error of form) or the conditions for participation

— the agency must give tenderers sufficient time to lodge their tenders and must exclude tenders that are late (except where due to agency mishandling)

— unless it is not in the public interest, an agency must accept the best value for money tender that meets the form and content requirements, conditions for participation, and essential requirements.

While some CAC authorities are subject to the CPGs and in particular the MPPs, their application for FMA agencies is different and more detailed.

Contract provisions

FMA regulation 9 requires FMA agencies to have regard to relevant Commonwealth policies. These change from time to time, but are currently described in the Department of Finance and Administration's Financial Management Guidance Number 10, *Guidance on Complying with Legislation and Government Policy in Procurement*. These policies cover a range of considerations (e.g. construction, environment, security and privacy). The CPGs themselves also contain some Commonwealth policies for the purposes of Regulation 9. These can impact both on the conduct of a procurement process and on the terms of any resulting contract.

FMA regulation 10 regulates contingent liabilities (that might arise, for example, through long term contracts, or where warranties, indemnities and limitations on liability are provided for in contracts). It requires that approvals be obtained in certain circumstances either from the Minister for Finance or from a delegate. For agencies not previously regulated under the FMA regime, the requirement to take account of the need for Regulation 10 approvals may require a different approach to tendering, negotiations and contract approvals.

The Department of Finance and Administration has issued a range of publications in relation to procurement which are available from its website (www.finance.gov.au). AGS also has a range of publications in relation to Commonwealth procurement – for some recent examples see *Commercial Notes* 10, 11, 16 and 17 (www.ags.gov.au).

The requirement to take account of the need for Regulation 10 approvals may require a different approach to tendering, negotiations and contract approvals.

Notional transactions

It is important to note that transactions between agencies, although they do not involve money leaving the CRF, are treated by the FMA Act and annual appropriations Acts as if they were real transactions. This means, for example, that it is necessary to debit an appropriation when a payment is made to another agency, and that approval of the expenditure must be given.

Kathryn Graham *has particular expertise in Commonwealth financial management and provides advice on constitutional issues; assists clients in policy development, the development of drafting instructions and review of draft legislation; and advises on the interpretation and application of Commonwealth legislation.*

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Notes

1 There are a number of other obligations, and this paper should not be regarded as a comprehensive discussion of FMA Act obligations.

2 FMA Act section 5.

3 Subject to special legislative provisions which might allow an FMA agency to hold money which is not public money.

4 See section 26 of the FMA Act, which makes it an offence to make a payment of public money, or to debit an appropriation, without a valid drawing right.

5 The power to issue drawing rights is contained in section 27 of the FMA Act. Most Chief Executives have delegated the power to issue drawing rights in their own agencies.

6 So-called because it is made under the terms of section 31 of the FMA Act. A special account established under section 20 of the FMA Act can also be used to set apart money received from a particular activity for a particular use. Section 20 of the FMA Act contains a standing appropriation.

AGS contacts

AGS has a team of lawyers specialising in advising agencies on implementing the government's decision on the Uhrig recommendations. For further information on the articles in this issue or on other *Uhrig* issues, please contact our practice leaders in this area, John Scala and Robert Orr, or any of the lawyers listed below:

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The material in this briefing was first prepared for the AGS forum 'Implementing the Uhrig Review: implications of becoming an FMA agency' held in Canberra on 25 October 2005. It is anticipated that a series of follow-up seminars will be held in May–June 2006.

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