



Express law

fast track information for clients

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Important changes to FMA Regulations on proposals and approvals to spend public money

Significant changes to the *Financial Management and Accountability Regulations (FMA Regulations)* came into effect on 1 July 2009.

The main changes are as follows:

- **New definition of 'spending proposal'**: a definition of 'spending proposal' was inserted into reg 3 (and related changes were made to references to 'spending proposal' in regs 9, 11, 12 and 13)
- **Officials now 'must act in accordance with CPGs'**: new reg 7(4) (replacing old reg 8) changes requirements for officials involved in procurement of property or services
- **New wording affecting approvers of spending proposals**: the wording of reg 9 was simplified and made more consistent with s 44 of the FMA Act
- **New requirement for recording approvals**: an amendment relating to the recording of approvals in relation to grants was made to reg 12
- **Modified operation of regulations for certain agencies**: a provision was made to ensure that certain regulations do not apply to the operational money of intelligence and security agencies and prescribed law enforcement agencies.

Changes to the FMA Regulations concerning new arrangements for grants and the [Commonwealth Grants Guidelines](#), which also came into effect on 1 July, were discussed in the AGS *Express Law* of 3 July 2009.

New definition of 'spending proposal': reg 3

The concept of a 'proposal to spend public money' or a 'spending proposal' has been used throughout the life of the FMA Regulations, without ever being defined. The new definition goes some way to resolving confusion about the concept. The new definition is as follows:

spending proposal means a proposal that could lead to the creation of a contract, agreement or arrangement under which public money is payable or may become payable (including public money that is payable or may become payable in circumstances in which payment would be a notional payment for the purposes of section 6 of the Act).

The definition makes clear that a spending proposal is distinct from and separate to the contract, agreement or arrangement under which public money is or may become payable. It also makes clear that the approval of a spending proposal does not necessarily result in an

agreement under which public money is or may become payable. Finally, it removes any doubt that a spending proposal is required for arrangements between agencies involving notional payments (which might not amount to legally binding contracts).

The inclusion of a definition of 'spending proposal' has also allowed for the simplification of the wording of regs 9, 11, 12 and 13.

Officials must act in accordance with Commonwealth Procurement Guidelines: reg 7(4)

An official performing duties in relation to the procurement of property or services must act in accordance with the Commonwealth Procurement Guidelines (CPGs) (new reg 7(4)). Old reg 8 (which has been repealed) provided that officials must 'have regard to' the CPGs and allowed for a record to be made in those circumstances where an official took action which was not consistent with the CPGs. The CPGs themselves describe actions which are mandatory and those which are not mandatory but are 'sound practice'.

New wording affecting approvers of spending proposals: reg 9

Regulation 9 previous provided as follows:

9 Approval of spending proposals—principles

(1) An approver must not approve a proposal to spend public money (including a notional payment within the meaning of section 6 of the Act) unless the approver is satisfied, after making such inquiries as are reasonable, that the proposed expenditure:

- (a) is in accordance with the policies of the Commonwealth; and
- (b) will make efficient and effective use of the public money; and
- (c) if the proposal is one to spend special public money, is consistent with the terms under which the money is held by the Commonwealth.

(2) Subregulation (1) does not apply to a proposal by an intelligence or security agency, or a prescribed law enforcement agency, to spend operational money within the meaning of section 5 of the Act as modified in accordance with Schedule 2.

New reg 9 is considerably simplified:

9 Approval of spending proposals—principles

An approver must not approve a spending proposal unless the approver is satisfied, after reasonable inquiries, that giving effect to the spending proposal would be a proper use of Commonwealth resources (within the meaning given by subsection 44 (3) of the Act).

Note When this regulation commenced, subsection 44 (3) of the Act defined proper use to mean efficient, effective and ethical use that is not inconsistent with the policies of the Commonwealth.

'Proper use'

New reg 9 replaces the tests to be applied by an approver, contained in old reg 9(1)(a)-(c), with the simpler test that 'giving effect to the spending proposal would be a proper use of Commonwealth resources'. A 'proper use' is an efficient, effective and ethical use that is not inconsistent with the policies of the Commonwealth. This alteration makes clear that an approver must give consideration to whether proposed expenditure is 'ethical'. It also slightly alters the requirement previously contained in reg 9(1)(b); now the approver must be satisfied that the proposed expenditure is 'not inconsistent' with the policies of the Commonwealth,

whereas previously, the approver had to be satisfied that the proposed expenditure was 'in accordance with' the policies of the Commonwealth.

Use of 'Commonwealth resources'

Previously the focus was on the efficient and effective use of public money. Now, the approver must be satisfied that the proposal will involve a proper use of Commonwealth resources

While the notion of 'Commonwealth resources' clearly includes public money, the expression 'Commonwealth resources' is broader than just public money. This suggests that, in approving a spending proposal, an approver may need to consider whether any other Commonwealth resources that may be used will be used 'properly'.

Expenditure of 'special public money'

New reg 9 has removed the express requirement that the approver be satisfied that a proposed expenditure of 'special public money' be consistent with the terms on which the money is held by the Commonwealth. 'Special public money' is public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth (including, for example, money held by the Commonwealth on trust for another person). Acting inconsistently with the terms on which special public money is held would not be a 'proper' use of that money, meaning that the concept expressed in old reg 9(1)(c) is now superfluous.

Exemption of certain agencies from reg 9

The removal of reg 9(2) does not change the exemption of intelligence and security agencies from reg 9. This is now dealt with in new reg 28A (see below).

Delegations

The Explanatory Statement for the amendments to reg 9 gives some indication to agencies about the way they may wish to organise their delegations in relation to the functions of, on the one hand, entering into contracts, agreements or arrangements, and, on the other hand, approving spending proposals. It states:

... the framework allows for agencies to adopt the useful distinction of delegating the capacity to enter contracts, agreements and arrangements under section 44 of the FMA Act, while delegating the step required beforehand, of approving spending proposals, under FMA Regulation 9.

New requirement for recording approvals: reg 12

Regulation 12 has always operated to require an approver to record the terms of the approval in a document as soon as practicable after giving the approval where the approval is not given in writing at the time the approval is given.

Regulation 12 has now been amended to include an additional requirement in relation to proposals relating to grants. New reg 12 (2) states that, if a spending proposal relates to a grant, the approver must record 'the basis on which the approver is satisfied that the spending proposal complies with reg 9'.

Modified operation of regulations in relation to intelligence, security and law enforcement agencies: reg 28A

New reg 28A provides for modified operation of the regulations in relation to intelligence and security agencies and prescribed law enforcement agencies (i.e., the Australian Federal Police and the Australian Crime Commission). Where so-called 'operational money' is concerned, regulations requiring compliance with the Commonwealth Procurement Guidelines, the Commonwealth Grants Guidelines and the Commonwealth Fraud Control Guidelines do not apply. Nor does reg 9 apply in relation to a spending proposal to spend operational money.

Other changes

Less significant changes to the FMA Regulations include:

- moving various provisions of the FMA Orders to the Regulations (including new reg 5A and Part 11)
- imposing an obligation on officials to act in accordance with the Fraud Control Guidelines (reg 16A(3)) rather than merely to 'have regard to' those Guidelines.

Upcoming AGS seminars on grants and the Commonwealth financial framework

Changes to Commonwealth financial framework

AGS will hold a seminar in Melbourne on Wednesday, 5 August 2009 examining the changes to the Commonwealth financial framework. For further information please contact [Natalie Makras](#) (T 03 9242 1448).

Grants: the current state of play

AGS will hold a series of Government Law Group seminars addressing recent developments in the provision and management of grants and funding by Commonwealth departments and agencies, with an emphasis on the new Commonwealth Grant Guidelines and the federal financial relations framework now in place. Seminars will be held in most capital cities, with the first to be held in Canberra on 26 August 2009. Clients wanting to know more about these seminars should contact [Olive Bassett-Macleod](#) (T 02 6253 7247).

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