



## **Express law** *fast track information for clients*

2 July 2010

### **Changes to the Financial Management and Accountability Regulations 1997**

**Regulations amending the *Financial Management and Accountability Regulations 1997* (FMA Regulations), which alter the process of approving expenditure of public money and delegating powers under the Regulations, have commenced.**

The Financial Management and Accountability Amendment Regulations 2010 (No 3) (Amendment Regulations) commenced on 1 July 2010.

These Regulations make a number of changes to the FMA Regulations, primarily in relation to the process for entering into arrangements under which public money may be payable, the reg 10 process, and the delegation powers under the Regulations. They also contain transitional arrangements and make a number of minor changes to improve readability of the FMA Regulations.

#### ***Key developments***

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##### **The spending approval process**

The Amendment Regulations make a number of changes to the process for officials entering into arrangements under which public money may become payable, including:

- reordering regs 9–14 to follow a more logical order
- providing greater clarification on which arrangements need to follow this process
- no longer requiring reg 10 agreement to be sought before reg 9 approval can be given.

##### **Reg 10**

The Amendment Regulations also revise reg 10, by excluding 'remote and not material' contingent liabilities from the requirement for reg 10 agreement.

##### **Delegations**

The Amendment Regulations also simplify delegations and permit the Finance Minister and Chief Executives to delegate their power of delegation under the Regulations.

## ***Spending approval process***

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### **Regulation ordering**

Formerly, the process for approving expenditure of public money was dealt with by regs 9–14 of the FMA Regulations. The amendments rearrange the order of these regulations to provide a more logical flow for the requirements and improve readability.

The new regulations deal with the process for entering into arrangements in the following order:

- the overarching requirements on officials entering into arrangements (new reg 8, former reg 13)
- the process for approval of a spending proposal (reg 9)
- the process for seeking agreement where there is no available appropriation for the proposal (reg 10)
- exclusions and inclusions from the reg 10 requirement (new reg 10A and new reg 11, former reg 14)
- the requirements for recording approvals (reg 12).

### **Order of reg 9 and reg 10 process**

Previously, reg 13 required the steps before entering into an arrangement to be undertaken in a particular order; that is, reg 10 authorisation had to be sought, if necessary, before an approver could approve the spending proposal under reg 9.

New reg 8 will still require that both of these steps be undertaken before the arrangement is entered into. However, it no longer requires that the reg 10 process occur before the reg 9 process. Approvers will now be able to approve proposals under reg 9, even if agreement has not yet been obtained under reg 10. This may assist agencies with practical difficulties that may have arisen from the former ordering requirement.

Agencies may still wish to require that these steps be done in a particular order, but this will be a decision for the Chief Executive of the particular agency and can be reflected in the Chief Executive's Instructions or directions to delegates.

### **Definition of 'arrangement'**

The new reg 8 refers only to entering into an 'arrangement', to simplify the wording of that provision. 'Arrangements' will still cover contracts, agreements or arrangements under which public money is, or may become, payable. However, certain arrangements are now expressly excluded from the definition, namely:

- engagement of employees
- appointment of statutory office holders
- acquisition of particular property or services under a general arrangement with the supplier of that property or those services, for the purposes of providing a statutory or employment entitlement
- entering into an international agreement governed by international law.

## ***Changes to reg 10***

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The major change to reg 10 is to deal with remote, non-material contingent liabilities. The existence of such a contingent liability in an arrangement (for example, an indemnity in a standard venue hire contract) would previously have triggered the operation of reg 10 and required the agency to seek reg 10 authorisation, despite the fact that the liability was very unlikely to occur, and would not be material if it did.

New reg 10A ensures that a contingent liability will not trigger a reg 10 agreement requirement if the person entering into the arrangement is satisfied that:

- the contingency event is 'remote' (that is, there is a less than five per cent probability that it will occur) and
- if the event did occur, the most probable expenditure it would involve would 'not be material' (that is, less than \$5 million, or some other amount specified by the Finance Minister in a legislative instrument).

The Finance Minister may make materiality determinations for an individual agency or a group of agencies through a legislative instrument (on a case-by-case basis). Accordingly, the Department of Finance and Deregulation (Finance) has requested that it be contacted if agencies wish to discuss the possibility of a different materiality threshold for the agency.

An additional minor change to reg 10 involves replacing the process of 'authorisation' with one of 'agreement'.

## ***Delegations provisions***

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### **Sub-delegation**

Regulation 26 now provides for Chief Executives to 'sub-delegate' their powers under the FMA Regulations. That is, Chief Executives will now be able to delegate to an official in their agency their own power of delegation. This can be explained through an example. A Chief Financial Officer (CFO) who has been delegated with the power to approve spending proposals under reg 9 could delegate the reg 9 power to other officials. However, the CFO could not further delegate to those officials the power for the officials to delegate reg 9 powers to other officials.

This change is intended to provide agencies with greater flexibility and efficiency in the way in which they distribute powers throughout the agency.

There is no obligation for a Chief Executive to sub-delegate his or her powers. The power of sub-delegation also only relates to powers conferred on Chief Executives under the FMA Regulations; it does not permit sub-delegation of powers conferred on them by the *Financial Management and Accountability Act 1997*.

The new regulation also expressly clarifies that the express delegation provision does not by implication limit any other power of the Chief Executive to authorise a person to act on his or her behalf, or any other power of an official to authorise a person to act on behalf of the official.

Equivalent changes have also been made to the Finance Minister's delegation powers under reg 24, but only in relation to regs 9 and 10.

## Simplification

The Amendment Regulations make a number of minor adjustments to the delegations provisions, including the following:

- the Treasurer's delegation power has been moved from reg 15A to reg 22, which contains the Treasurer's only power in the FMA Regulations
- the specific delegation powers for the Finance and Treasury Chief Executives have been removed, as these are provided for in the general Chief Executive delegation power in reg 26.

## *Implementing the amendments*

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The Amendment Regulations contain transitional provisions until 1 July 2011, which gives you time to update your agency's internal systems and associated procedures.

AGS advised on many aspects of the Amendment Regulations and is well positioned to advise you on the application of the new FMA Regulations in your agency. We would be happy to assist you with review of your documents and procedures to ensure consistency with the new requirements.

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