



## *Express law* fast track information for clients

26 June 2007

### **New FMA Regulation 10 delegation and guidance from 1 July 2007**

The Department of Finance and Administration has issued new guidance on the application of Regulation 10 of the *Financial Management and Accountability Regulations 1997* (FMA Reg 10) in the form of [Finance Circular No. 2007/01](#). The circular replaces Finance Circular No. 2004/10 and incorporates changes resulting from a [new FMA delegation](#) that will take effect on 1 July.

The circular provides information about how to determine whether an FMA Reg 10 authorisation is required and, if so, whether authorisation can be given under the new delegation. FMA Reg 10 authorisations will now be able to be provided under the delegation in a wider range of situations.

#### ***Is an FMA Reg 10 authorisation required?***

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FMA Reg 10 authorisation is required for any spending proposal that is not fully supported by an available appropriation. The circular provides information about how to work out when an appropriation is available. In particular, the circular notes that authorisation will be required in the following cases:

- for multi-year spending under an annual administered appropriation
- for uncapped, demand-driven contracts, agreements or arrangements unless supported by a special appropriation
- for uncapped contingent liabilities unless supported by a special appropriation that covers the maximum amount that could or would become payable
- unless supported by an appropriation, where a contract includes a liability cap which limits a supplier's liability
  - to a third party so that the Commonwealth is liable to the third party for the excess
  - for damage the supplier has suffered itself so that the Commonwealth is liable to the supplier for any excess (for example, where the Commonwealth indemnifies the supplier for liability it suffers above the cap) or
  - to meet costs that the Commonwealth may seek to recover from the supplier where a third party has sued the Commonwealth for damage resulting from the supplier's action or inaction.

## ***Timing for obtaining FMA Reg 10 authorisation***

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The circular reminds agencies that authorisation must be obtained prior to Reg 9 approval. It suggests that agencies consider whether authorisation should be obtained, for example, before issuing tender documents or media releases or entering into heads of agreement where it is clear that such authorisation will be required.

## ***The delegation***

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There are three ways to obtain FMA Reg 10 authorisation, if authorisation is required: under the delegation; under agency specific determinations; or directly from the Finance Minister. If authorisation is required from the Finance Minister, it is important to seek authorisation early in the process. The guidance includes a specific form to use in conjunction with a submission to the Finance Minister.

Under the delegation, FMA Reg 10 authorisation can be given by a delegate in six situations. Each situation is subject to specific conditions and considerations, including, in some cases, a requirement to obtain the approval of the portfolio minister. Those six situations are as follows:

- departmental spending proposals up to 16 years
- administered spending proposals up to 10 years
- spending proposals including contingent liabilities. (The circular provides that, when calculating the duration of an expenditure proposal that involves a contingent liability, agencies should use the period during which an event leading to a contingent liability crystallising could occur but need not include any subsequent period during which a person might make a claim arising from that event.)
- departmental spending proposals relating to vehicle lease or vehicle purchase arrangements under the Fleet Management Agreement
- spending proposals in accordance with a specific decision of Cabinet, the National Security Committee of Cabinet or the Prime Minister
- spending proposals in accordance with a determination of the Finance Minister.

Note that the circular makes it clear that no commitments can be made beyond the limits of any relevant policy approvals.

An update of AGS's *Legal Briefing* 79, '[Indemnities in Commonwealth Contracting](#)', to take account of this new guidance, the new delegation and [Finance Circular 2006/03 on limited liability in ICT contracts](#) will be distributed shortly. If you did not receive this email directly from AGS and wish to receive the updated *Legal Briefing* and other AGS publications, please email [ags@ags.gov.au](mailto:ags@ags.gov.au)

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