



fact sheet

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Corporate Commonwealth entities – authorisations and delegations

This fact sheet provides a summary of key principles in relation to authorisations and delegations for corporate Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).¹

The legal framework in which corporate Commonwealth entities operate

Corporate Commonwealth entities are legally separate from the Commonwealth. By definition, a corporate Commonwealth entity is a body corporate.

The legal framework under which corporate Commonwealth entities operate will typically be found in:

- the entity's enabling legislation
- the PGPA Act and Rule
- other more generally applicable legislation.

This fact sheet looks at some issues that corporate Commonwealth entities need to consider to ensure that the internal arrangements for the exercise of functions and powers are consistent with the legal framework in which the entities operate.

Governance

Authorisations and delegations are a fundamental part of good governance. They play an important role in ensuring that the entity is acting in accordance with the legal framework that applies to it.

The basic governance structure of corporate Commonwealth entities differs between entities. Sometimes, under the enabling legislation, the body corporate that is the entity comprises various identified officeholders – for example, the chair, the deputy chair and between 5 and 7 other members. In those cases, that group of persons performs the functions and exercises the powers of the entity directly, because that group is the entity.

Sometimes, the entity is established as a body corporate and a board or council is also established by the enabling legislation to have ultimate control over the operations of the entity. In those cases, there is often a statutory provision that states that all things done by the board or council, in the name of the entity, shall be deemed to be done by the entity.

Occasionally, although not usually, instead of a board or council, the enabling legislation vests ultimate control over the operations of the entity in a chief executive officer (CEO) or director. More commonly, the CEO or director is prescribed under the enabling legislation as the officer responsible, under the board or council, for the day-to-day management of the entity.

One thing that is common to corporate Commonwealth entities is that, irrespective of what body or individual has ultimate responsibility for an entity's operations, that body or individual cannot do everything. Accordingly, it is necessary to identify ways in which other persons can exercise the

¹ Note that different considerations will apply for *Corporations Act 2001* (Cth) companies.

entity's functions and powers. Specifically, an entity needs to put in place arrangements to devolve decision-making power from the ultimate repository of that power to the relevant officers or employees within the entity.

Is it always necessary to devolve decision-making power expressly?

Statutory entities can only have those functions and powers that are vested in them by legislation. The functions and powers of the entity are primarily derived from its enabling legislation.

It is sometimes possible to argue that an officeholder has implied authority to exercise certain functions or powers on behalf of the entity by virtue of the position that they hold. For example, the CEO of an entity who is identified in the enabling legislation as having day-to-day responsibility for the entity under the board or council would ordinarily have implied authority to enter into most contracts on behalf of the entity. It is generally better, however, for officers and employees of the entity to be expressly authorised by a body that undoubtedly has power to exercise the relevant function or power of the entity – that is, the body corporate itself or the board or council.

Powers and functions of corporate Commonwealth entities

There are 3 mechanisms that allow statutory functions or powers of the entity to be devolved:

- delegation pursuant to an express statutory power of delegation
- authorisation pursuant to an express statutory power to authorise
- authorisation pursuant to an implied power to authorise.

Delegation

Is there a power to delegate?

- A delegation is made in accordance with an express statutory procedure. If there is a power to delegate, it will usually be found in the same legislation as the power being delegated – that is, typically, in the enabling legislation of the entity.
- The legislation may specify how the power to delegate may be exercised (for example, by instrument in writing or by a resolution of the board).
- The legislation may limit the persons to whom the power may be delegated (for example, to a board member or a particular class of officer or employee of the entity).

What happens if a power is delegated?

- The person delegated with powers must exercise those powers within the scope of the delegation.
- Typically, it is not possible for a delegate to 'sub-delegate'. If a corporate Commonwealth entity wishes to put in place a system under which the delegate devolves the power to another person, AGS recommends that they seek legal advice to determine whether this is legally defensible.

Express statutory authorisation

The enabling legislation of a corporate Commonwealth entity may explicitly provide that a person or persons in whom functions or powers are vested may also authorise another person to exercise those functions or powers. Usually under such legislation the authorised person then acts in their own right rather than on behalf of the authorising person. Whether there is such a power to authorise, and the scope of any functions and powers that can be exercised under the authorisation, will depend on the express provisions in the enabling legislation.

Implied powers to authorise

There may also be times where an implied power to authorise may be exercised. This will be the case, for example, where the enabling legislation does not confer any express power of delegation or authorisation in relation to general management activities. In these circumstances, the general management powers of the entity, the board or council, including the conventional power to do

anything necessary or convenient for the operations of the entity, will extend to putting in place a regime authorising officers and employees to perform specified functions and powers. When a person is authorised under an implied power to authorise, they act for the person who authorised them.

If the enabling legislation deals expressly with how functions and powers may be devolved, to avoid uncertainty, it is generally preferable to rely on those provisions, whether of delegation or authorisation, rather than on an implied power. The presence of an express power of delegation or authorisation in itself can raise some doubt as to whether an implied power is available.

More information

If you require further legal advice about issues in relation to the PGPA Act and its application to corporate Commonwealth entities, please contact:

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