



fact sheet

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Tips for new corporate Commonwealth entities

This fact sheet provides a summary of key legal issues that may arise for newly established corporate Commonwealth entities.

ASSESSING THE LEGAL ISSUES RELEVANT TO THE ENTITY

When the Commonwealth establishes a new corporate Commonwealth entity, it commonly starts by developing enabling legislation. As the legislation is being developed, and once it has been passed, there are many legal and other issues that the entity or the portfolio department will need to consider. Some common considerations during the establishment phase are listed below.

Legal framework for corporate Commonwealth entities

A statutory entity that is a body corporate able to hold money on its own account will usually be subject to the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) so far as it applies to corporate Commonwealth entities.¹

The legal framework applicable to the entity will set the scope of powers and obligations of the entity. The legal framework is usually found in a combination of the PGPA Act, the Public Governance, Performance and Accountability Rule, the legislation establishing the entity and other more generally applicable legislation.

Corporate structure

The entity's enabling legislation will detail the entity's structure. In analysing the enabling legislation, the following issues should be considered:

- Is there a governing board? If there is a board, what is the power and authority of the board?
- Is there a chief executive? If there is a chief executive, what is the power and authority of the chief executive?
- What is the nature of the relationship between the chief executive, the board and the responsible minister?
- What is the process for appointing the statutory body or office holder(s)?
- What are the powers of the relevant statutory bodies or office holder(s)?
- Are there specific requirements for the statutory body or office holder(s)?

Functions and powers of the entity

The entity's functions and powers are likely to be set out in its enabling legislation. It is critical to understand the extent of these functions and powers. In analysing these, consider the following:

- Are the functions and powers of the entity sufficiently wide to facilitate the entity's proposed activities?
- Does the entity contract in its own name?

¹ A body established as a Commonwealth company will be subject to some parts of the PGPA Act but will also be registered under the *Corporations Act 2001* (Cth). The issues discussed in this fact sheet relate primarily to corporate Commonwealth entities as defined in the PGPA Act and will not necessarily be applicable to Commonwealth companies.

- Does the entity's enabling legislation (or any other legislation or policy) impose restrictions on the entity's activities? For example, do certain decisions need the approval of the minister?
- Does the entity perform regulatory functions? If so, what are the entity's regulatory powers? The entity will need to consider its systems and processes for exercising regulatory functions, including investigations and enforcement activities, to ensure that they are legally robust.
- What is the relationship between the entity and the Commonwealth generally? For example, are there any contexts where the entity would be collecting a tax or an excise on behalf of the Commonwealth?

Delegations and authorisations

- To devolve functions and powers within the entity, delegations or authorisations will usually be required. Consideration should be given to who can give delegations or authorisations and who should be given a delegation or authorisation.
- Internal processes and procedures are needed to identify and manage delegations and authorisations – for example, a central delegations register, clear role and position descriptions, and ongoing review and maintenance of delegations/authorisations.

See AGS Fact Sheet No 11: *Delegations and authorisations for corporate Commonwealth entities*.

Duties of accountable authorities

Under the PGPA Act, the accountable authority of a corporate Commonwealth entity has a number of duties, including the duty to govern the entity in a way that promotes the efficient, effective, economical and ethical use of public resources, and the duty to establish and maintain systems relating to risk and control. The entity should consider how to ensure these duties are best complied with.

Duties of all officials

All officials (ie board members, CEOs and employees) of corporate Commonwealth entities are subject to a series of duties under the PGPA Act, including a duty of care and diligence, a duty to act honestly, in good faith and for a proper purpose, duties in relation to the use of position and information, and duties to disclose conflicts of interest. The entity will need to put in place processes to ensure that officials are able to comply with these duties and to ensure that breaches of duties are discovered and dealt with.

Planning and performance

The PGPA Act requires all Commonwealth entities to prepare a corporate plan, which covers any subsidiaries of the entity, and to prepare budget estimates. Commonwealth entities are also required to measure and assess their own performance and prepare annual performance statements. The entity should consider how it will meet these obligations.

Accountability and reporting

A common thread that ties Commonwealth entities together is the requirement of accountability. The entity may be accountable in a number of different ways. For example, it may be required to report to the responsible minister, the portfolio department, or the Parliament, and to produce reports for the public. The Auditor-General and the Ombudsman may have a role in relation to the entity and freedom of information and other accountability laws may apply to the entity.

To deal with the interests of these various interest holders, the entity should consider what reporting processes will be required, taking account of applicable requirements under the PGPA Act, the enabling legislation and other applicable requirements.

The PGPA Act imposes requirements on corporate Commonwealth entities in relation to financial reporting and auditing, including the auditing of the financial statements of any subsidiaries.

Spending, receiving and otherwise dealing with money

The obligations of the entity and its personnel in relation to spending, receiving and otherwise dealing with money will be found in the PGPA Act and Rule, and provisions of the entity's enabling legislation will also be important. Particular consideration should be given to:

- powers to contract and hold property (contained in the entity's enabling legislation)
- banking and investment (PGPA Act s 54 and 59 and any relevant rules)
- approvals for expenditure and payments (which might be contained in enabling legislation, or in delegations and authorisations)
- borrowing – the PGPA Act provides that corporate Commonwealth entities cannot borrow unless this is authorised by an Act (typically the entity's enabling legislation), the Finance Minister or the rules. Borrowing using credit card facilities is authorised by section 21A of the PGPA Rule.

Other applicable legislation

Whilst the entity's enabling legislation will often be the primary source of its functions and powers, other Commonwealth legislation and policies that regulate Commonwealth activities are likely to affect the entity. Commonwealth legislation that applies to many corporate Commonwealth entities includes:

- *Work Health and Safety Act 2011*
- *Archives Act 1983*
- Legal Services Directions 2005 (as made under the *Judiciary Act 1903*)
- *Competition and Consumer Act 2010* (especially if there is a profit-making function, through which the entity 'carries on a business').

The entity may also need to determine to what extent State and Territory legislation is applicable to its activities, such as laws relating to contracts or landlord and tenancy laws.

Employment framework

Some common employment considerations for corporate Commonwealth entities include:

- Do the *Public Service Act 1999*, APS Values and Code of Conduct apply to employees? Note that regardless of whether the Public Service Act applies, all employees of the entity will be subject to the duties contained in ss 25 – 29 of the PGPA Act.
- If the Public Service Act does not apply, how are employees engaged?
- Will the entity make an enterprise agreement? Does the entity's enabling legislation allow the chief executive (or equivalent) of the entity to determine terms and conditions of employment? Is there any other industrial instrument that could apply to the entity, eg a modern award?
- What other employment or HR policies will the entity require – for example, misconduct procedures or grievance procedures?
- What legislation will regulate employee entitlements, eg the National Employment Standards under the *Fair Work Act 2009* and specific legislation providing entitlements to maternity leave, long service leave, workers' compensation and superannuation for employees of most Commonwealth entities?
- If employees are transferring from another Commonwealth entity, or a State or Territory agency, consider whether there will be a transfer of business.
- Is the entity responsible for any statutory office-holders? If so consider the terms and conditions of appointment of those office-holders under the entity's enabling legislation, the *Remuneration Tribunal Act 1973* (if applicable) and any applicable determination made under the *Remuneration Tribunal Act 1973*.

Property and leasing issues

The entity will often require office accommodation and will need to purchase, lease or sub-lease. The entity may also need to fit-out its accommodation and enter into other facilities management arrangements (cleaning, security, etc).

- In the first place, consideration will always need to be given to whether the entity is empowered to enter into such arrangements.
- The next step will be to consider other requirements or approvals that may be required. For instance, when acquiring or disposing of an interest in land (including a lease), approval under the *Lands Acquisition Act 1989* (Cth) (LAA) may be required.
- If this approval is required, check who holds the delegation to provide this approval (see AGS Fact Sheet No 3: *Lands Acquisition Act 1989* for further information on LAA approvals).

Other requirements that may apply to purchasing, leasing, sub-leasing or fitting-out property that should be considered include:

- Commonwealth Procurement Rules (for those PGPA Act authorities subject to the CPRs, listed in s 30 of the PGPA Rule)
- National Code of Practice for the Building and Construction Industry and OHS Accreditation Scheme
- Public Works Committee requirements
- *Environment Protection and Biodiversity Conservation Act 1999* (see AGS Legal Briefing 82: *Commonwealth environment and heritage law*)
- the internal policies and procedures of the entity
- the extent to which the entity is required to comply with State laws.

This list is not comprehensive – see the Department of Finance, Table 1, ‘Procurement Connected Policies’ for more details of some policies that may be relevant.

Technology and intellectual property requirements

A range of technology and intellectual property (IP) issues should be considered in the context of establishing new entities. As always, the scope of the entity’s powers will inform whether specific activities can be undertaken.

Technology

As part of the establishment process, the entity will probably need to enter into arrangements for a variety of internet and other ICT products. These arrangements may include purchasing, building, leasing or outsourcing relevant goods or services required to set up key internet and ICT facilities and systems. The entity will need to plan and manage the procurement and implementation of such facilities and systems. Some specific requirements may include:

- establishing a general website – consider issues associated with website terms and conditions, web interface and website text, notifications and acceptances, including whether the entity will use the ‘.gov.au’ domain
- where there is a requirement for a more specialised website, considering issues such as who owns data used to create the website and whether the information from the website can be reproduced or manipulated by other parties (eg media)
- establishing an intranet usage policy
- establishing an emailing system – consider issues associated with email disclaimers
- making arrangements for establishing data and reporting systems (design, develop, support, hosting and maintaining regional or national data collection)
- implementing document management system software.

In addition, there may be whole-of-government arrangements in place that the entity can use for particular goods or services. A full list of panels and arrangements can be found at <http://www.finance.gov.au/procurement/wog-procurement/index.html>.

Intellectual property

The effective management of IP will be important to entities that generate significant amounts of IP. Some of the issues that need to be considered are:

- developing IP and copyright policies
- developing appropriate IP licensing arrangements
- establishing and maintaining an IP register
- dealing with any IP that is being transferred from another party, such a State or Territory agency
- managing any potential conflicts with the IP (or trade related features) of pre-existing entities, including trade marks, domain names and business names.

More information

AGS has assisted a number of newly-established corporate Commonwealth entities. If you require further legal advice about the issues set out above or you would like assistance or training with the initial establishment phase of a new Commonwealth entity, please contact:

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