

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 323

Subject - *Financial Management and Accountability Act 1997*
Financial Management and Accountability Amendment Regulations 2010 (No. 6)

The *Financial Management and Accountability Act 1997* (FMA Act) provides a framework of rules for the proper management of public money and public property by Chief Executives and officials of FMA Act agencies.

Subsection 65(1) of the FMA Act provides that the Governor-General may make regulations prescribing matters required or permitted by the FMA Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the FMA Act.

The Regulations update the *Financial Management and Accountability Regulations 1997* (the Principal Regulations) to improve their operation.

The Regulations make a number of changes, including:

- prescribing paid parental leave as an amount that FMA Act agencies may retain under the FMA Act;
- adding the Australian National Preventive Health Agency to the list of prescribed Agencies in Schedule 1 to the Principal Regulations; and
- making other minor amendments to the Principal Regulations.

Further details on the Regulations are set out in the Attachment.

The FMA Act specifies no conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Most of the provisions in the Regulations commence on 1 January 2011. However, the amendment to the note in regulation 9 in item 1 of Schedule 2 commences when Schedule 8 to the *Financial Framework Legislation Amendment Act 2010* is proclaimed.

Authority: Subsection 65(1) of the
Financial Management and Accountability Act 1997

Details of the *Financial Management and Accountability Amendment Regulations 2010 (No. 6)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Financial Management and Accountability Amendment Regulations 2010 (No. 6)*, as made under section 65 of the *Financial Management and Accountability Act 1997* (FMA Act).

Regulation 2 – Commencement

This regulation provides for regulations 1 to 3 and Schedule 1 to commence on 1 January 2011 and regulation 4 and Schedule 2 to commence on commencement of Schedule 8 to the *Financial Framework Legislation Amendment Act 2010*.

Regulation 3 – Amendment of the *Financial Management and Accountability Regulations 1997*

This regulation provides that the *Financial Management and Accountability Regulations 1997* (the Principal Regulations) are amended as set out in Schedule 1.

Regulation 4 – Amendment of the *Financial Management and Accountability Regulations 1997*

This regulation provides that the Principal Regulations are amended as set out in Schedule 2.

Regulation 5 – Transitional issues

This regulation preserves the operation of previous determinations made under the authority of the Principal Regulations before the Regulations commence.

Schedule 1 – Amendments commencing on 1 January 2011

Item [1] – regulation 3, after definition of *grant*

Regulation 3 (Definitions) of the Principal Regulations is amended by inserting a new definition, “specified cash”, to mean cash in its physical form which is obtained on credit or from a cash float provided by a person other than the Agency that receives the specified cash. The new definition is added for the purpose of the clarifications to regulations 15 by Item [4] and 17 by Item [6].

Items [2] and [3] – paragraphs 11(1)(a) and 11(1)(c)

Regulation 11 (Entering into loan guarantees) of the Principal Regulations is amended by adding the word “loan” before references to “guarantee” in paragraphs 11(1)(a) and (c) to that ensure consistent language is used in regulation 11.

Item [4] – regulations 15 and 16

Regulations 15 (Relevant Agency receipts) and 16 (Limits on Agency receipts) of the Principal Regulations is replaced with a new regulation 15.

Subsection 31(1) of the FMA Act permits certain prescribed amounts, which are received by an Agency (such as receipts from the sale of goods, or from the provision of services) to be added to the Agency's annual departmental appropriation. These prescribed amounts may then be spent by the Agency without the further authorisation of Parliament.

New regulation 15 broadens one type of prescribed amount to enable agencies to retain amounts received for paid parental leave (item 7 of the table in subregulation 15(2)), but otherwise does not substantially change the scope or character of former regulations 15 and 16. New regulation 15 clarifies and simplifies the types of prescribed amounts by consolidating former regulations 15 and 16 into a single regulation.

Subregulation 15(2) prescribes ten types of amounts in relation to departmental activities which may be retained by an Agency for the purpose of section 31 of the FMA Act:

1. *An amount that offsets costs in relation to an activity of the Agency that receives it* – This item cover all of the types of cost offsets formerly listed in paragraph 15(1)(b) and subregulation 15(3). The details in former subregulation 15(3) are not reproduced in new regulation 15, as it is not necessary to confine the range of offsets. Guidance on the nature of these offsets is supplied separately to Agencies by the Department of Finance and Deregulation.
2. *An amount that is a sponsorship, subsidy, gift, bequest or a similar contribution* – This item covers the amounts covered by former paragraphs 15(2)(a), (5)(a) and (b), with one change. The new type of amount does not include “grants”. A grant is defined in regulation 3A as public money paid to a recipient other than the Commonwealth. As a result, FMA Act agencies do not receive “grants” within the technical definition of the FMA Regulations. Former paragraphs 15(5)(a) and (b) prescribe amounts received by an Agency in relation to a program that supports employees engaged in national security or defence activities or in relation to an employment subsidy scheme. These amounts are subsidies or similar contributions are reproduced separately in the new regulation 15.
3. *An amount that relates to a trust or similar arrangement* – This item provides agencies with a mechanism to deal with monies which have the characteristics of a trust. This is not a new type of amount but rather, for clarity an amount that has been carved out of former subregulation 15(2)(a). Separately specifying this type of amount clarifies that an Agency may increase its most recent departmental item to reflect the amount that must be retained where the amount relates to a trust or similar arrangement.
4. *An amount that is a monetary incentive or rebate in relation to a procurement arrangement* – This item reproduces former paragraphs 15(2)(d) and (5)(c) to cover amounts that are monetary incentives or rebates in relation to a procurement arrangement. Former paragraph 15(5)(c) prescribed amounts received by an Agency in relation to a rebate of fuel tax, if the fuel tax was paid under a departmental item.

A fuel tax rebate is a rebate in relation to a procurement arrangement, so is not reproduced separately in the new regulation 15.

5. *An amount that is an insurance recovery* – This item reproduces former paragraph 15(2)(e).
6. *An amount that is in satisfaction of a claim for damages or other compensation* – This item reproduces former paragraph 15(2)(f).
7. *An amount that relates to an employee's leave (including paid parental leave)* – This item reproduces and broadens former paragraph 15(3)(b), to enable Agencies to retain amounts in relation to employee leave, including the Australian Government's new Paid Parental Leave Scheme, which commences on 1 January 2011. Former regulation 15(3)(b) only prescribed amounts received by an Agency in relation to the transfer of annual and long serve leave entitlements, to the extent those amounts offset costs. The new broader type of amount relating to an employee's leave is no longer explicitly confined to cost offsets, but enables an Agency to retain the complete amount received, in recognition that this amount would affect Agency's expenses in relation to employee leave.
8. *An amount which is specified cash* – This item provides agencies with a mechanism to increase their appropriation, when they receive certain money on credit (specified cash). A new definition of "specified cash" has been added to regulation 3 by Item [1] of the Regulations. The nature of specified cash is different to other public money in that it may need to be held in cash form, rather than being promptly banked in accordance with section 10 of the FMA Act and regulation 17. Item [5] adds a note to regulation 17 to acknowledge these operational requirements by prompting agencies to issue their own Chief Executive's Instructions on the handling of specified cash.
9. *An amount that relates to the sale of minor assets of the Agency that receives the amount* – This item reproduces former paragraph 15(1)(d). The amount that an Agency may retain is capped by subregulation 15(7).
10. *Amounts received in relation to an application to the Agency under the Freedom of Information Act 1982* – This item reproduces former paragraph 15(2)(c) to enable Agencies to collect fees for a Freedom of Information (FOI) requests or applications for internal review from before 1 November 2010. Changes to the *Freedom of Information (Charges) Regulations 1982* on 1 November 2010 no longer permit application fees for FOI requests or applications for internal review. If an Agency is permitted to charge for an FOI request, the agency may already retain the charges insofar as the amounts offset associated costs under item 1 of the table in subregulation 15(2). The amount in Item 10 is therefore limited in scope and may be removed from the table in subregulation 15(2) in the future, when Agencies have finished dealing with FOI applications submitted before 1 November 2010.

Subregulation 15(3) preserves three other types of amounts which are not confined to departmental activities that Agencies may retain under subsection 31 of the FMA Act:

1. *An amount that relates to GST* – This item covers former paragraph 15(2)(g), however, this item clarifies the expression "receipts in relation to GST". This will ensure that any GST collected by agencies can be retained and relied on for any notional payments to be made to the Australian Taxation Office.

2. *An amount that is debited from a Special Account in accordance with the purposes of the Special Account* – This item reproduces former paragraph 15(2)(b).
3. *An amount that relates to the operation of a scheme determined in writing by the Minister for this item* – This item reproduces former paragraph 15(5)(e) to continue to enable the Minister to prescribe other schemes under which an agency may receive amounts. Paragraph 15(8) provides that any determinations made under this item will be legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Subregulations 15(4) to (7) qualify the amounts prescribed in subregulations 15(2) and (3) that Agencies may receive:

- Subregulation 15(4) reproduces former subregulation 16(1) to provide that an amount that is a tax, levy, fine or penalty is not an amount prescribed for section 31(1) of the FMA Act.
- Subregulation 15(5) establishes a new qualification to clarify that an amount debited from an administered item appropriated for an Agency is not an amount prescribed for section 31(1) of the FMA Act. This is to prevent an Agency from using section 31 to shift amounts from administered appropriations to departmental appropriations. Administered item are defined in subregulation 15(9) to mean an administered item in an Appropriation Act.
- Subregulation 15(6) reproduces former subregulation 15(4) to provide that Agencies may not retain an amount for an item in the tables in subregulations 15(2) or (3) if the Agencies have received an appropriation in relation to the amount received by the Agency.
- Subregulation 15(7) reproduces former paragraph 15(7)(a) to permit the retention of income from the sale of minor departmental assets, up to 5 per-cent of the cumulative departmental appropriation of an Agency for the financial year. A minor departmental asset is defined in subregulation 15(9) to be an asset for which the original purchase price was \$10 million or less.

Subregulation 15(8) provides that any scheme determined in writing by the Minister under item 3 of subregulation 15(3) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

In simplifying and clarifying new regulation 15 the following amounts in former regulations 15 and 16 are no longer specifically prescribed:

- *Amounts received in relation to the carrying on of business activities by the Agency that receives the amount* (former paragraph 15(1)(e) and subregulation 15(6)(b)) – matters relevant as to whether an Agency is carrying on a business are covered in detail by the Australian Government's policy on competitive neutrality. For receipts relating to such activities, agencies are permitted to retain these amounts in so far as the amounts offset costs under item 1 of the table in subregulation 15(2).
- *Refunds of Fringe Benefits Tax* (former 15(5)(d)) – these amounts are refunds or repayments which Agencies may collect under section 30 of the Act.
- Former subregulations 16(2) and (3) relate to competitive neutrality policy and cost recover policy respectively. Section 44 of the FMA Act requires Agencies to

comply with Commonwealth policies. For receipts relating to the performance of these policies, agencies are permitted to retain the amounts in so far as the amounts offset costs (item 1 of the table in subregulation 15(2)).

Item [5] – subregulation 17(2), after note 2

A note is added to subregulation 17(2) (Prompt banking of received money) of the Principal Regulations to inform readers that the Chief Executive may establish a later day for banking certain money such as specified cash. Further, the note advises that one way a Chief Executive may establish a later banking day is in Chief Executive's Instructions.

Item [6] – regulation 19

Regulation 19 (Withdrawals for official accounts and internal transfers between accounts) of the Principal Regulations is amended to clarify the nature of the matters dealt with in this regulation. This item reassigns former subregulation 19(3) to a new regulation 19A, because the matters dealt with under former subregulation 19(3) differ from subregulations 19(1) and 19(2). Subregulations 19(1) and 19(2) refer to the transfer of money where no appropriation is relied upon to support the transfer, whereas a transaction under former subregulation 19(3) necessitates an appropriation. Note, however, the objective and effect of new regulations 19 and 19A remain unchanged.

Item [7] – schedule 1, after item 116

Section 5 of the FMA Act provides that for the purposes of the FMA Act, a prescribed Agency means a body, organisation or group of persons prescribed by the regulations for the purposes of that definition. Agencies are prescribed in Schedule 1 to the Principal Regulations.

This item amends Schedule 1 to the Principal Regulations to prescribe the Australian National Preventive Health Agency (ANPHA) under the FMA Act. ANPHA will be established on 1 January 2011 by the *Australian National Preventive Health Agency Act 2010*, as a new Statutory Agency under the *Public Service Act 1999*.

Schedule 2 – Amendment commencing on commencement of Schedule 8 to the *Financial Framework Legislation Amendment Act 2010*

Item [1] – regulation 9, note 1

Note 1 of regulation 9 (Approval of spending measures) of the Principal Regulations is amended by adding the word “economical” to the note to reflect changes to the definition of “proper use” in subsection 44(3) of the FMA Act as amended by the *Financial Framework Legislation Amendment Act 2010*.