

## /// Chief Minister's Department - Governance Division

### DELEGATIONS UNDER THE ACT LEGISLATIVE EMPLOYMENT FRAMEWORK

- **HR Directors/Managers**
- **Shared Services Centre**

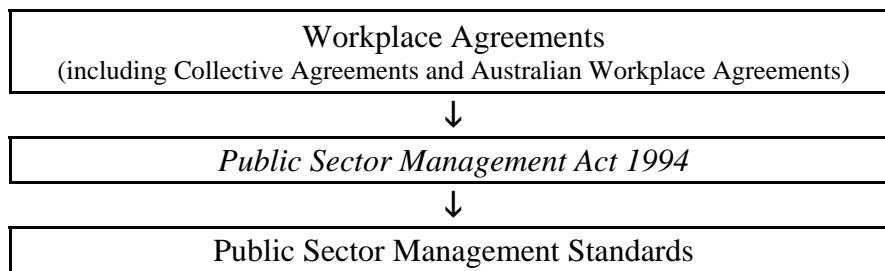
#### **Purpose**

1. This note is intended to provide agencies with *general information* on delegations associated with the ACT public service (ACTPS) legislative employment framework. It is general policy advice in relation to employment matters, it is not legal advice.
2. Importantly if a function or power is exercised in the absence of a valid instrument of delegation the resulting decision and/or action may be deemed invalid.
3. Agencies are encouraged to consider and adopt suitable governance procedures in conjunction with this Information Note – such as document custody, version control, and management steps to ensure that the exercise of a delegated power has been properly recorded and reported.
4. If you require further information or advice on legal matters associated with delegations, it is strongly recommended that you contact the ACT Government Solicitor's Office (ACTGS).

#### **ACT Public Service Legislative Employment Framework**

5. The main elements of the ACT legislative employment framework are detailed below.
  - *Public Sector Management Act 1994* (the PSM Act) and Public Sector Management Standards (the Standards); and
  - Collective Agreements:
    - the template Collective Agreement and agency specific conditions as a schedule; or
    - occupational/Departmental specific Collective Agreements.

6. The following diagram represents a simple view of the employment framework (in order of precedence):



7. The PSM Act establishes and sets out general provisions (e.g. values and principles) and primary employment issues including categories of employment, promotion, transfer, appeal and review mechanisms and discipline. The PSM Act is supported by the Standards (subordinate law). If any inconsistency arises between the PSM Act and the Standards, the Act prevails.
8. The PSM Act and Standards are subordinate to Workplace Agreements because Workplace Agreements are made under provisions of Commonwealth laws. Where there is inconsistency between a workplace agreement and the Act or Standards, the workplace agreement will override ACT laws *to the extent of any inconsistency*.

### **Application**

9. This Information Note applies to delegations made under the PSM Act, the Standards and the Template Collective Agreement (including the schedules) and is intended for use by relevant staff responsible for human resources delegations within each agency.
10. Sections of the Information Note which relate to the Template Collective Agreement will not apply to agencies covered by other agreements.

### **The Authority to Make Delegations**

11. Certain legislation allows for powers to be delegated. That is, the person upon whom an Act or collective agreement confers powers and functions may also be empowered to permit another person to exercise those powers and functions. A person with powers and functions under an Act who then permits another person to exercise them is known as the *appointer*. The person who is authorised under a delegation to exercise the delegated powers and functions is known as the *delegate*.
12. Delegations must be made in accordance with the requirements of the legislation from which the delegated power derives and the *Legislation Act 2001* (the Legislation Act).
13. Subdelegation refers to a situation where an appointer delegates his or her powers or functions to Y, and in turn Y delegates those powers or functions to Z. The Legislation Act prevents a delegate from subdelegating a power or function delegated under Territory legislation unless the power to subdelegate is specifically provided by the relevant legislation.

14. Section 36 of the PSM Act provides for chief executives and the Commissioner for Public Administration (the Commissioner) to delegate all or any of their powers under the PSM Act or any other law, or subdelegate any of the powers that have been delegated to him or her.
15. Chief executives and the Commissioner may only delegate their powers to a public sector officer. For the purposes of section 36, a public sector officer means:
  - an officer or employee;
  - a statutory office holder; or
  - a person exercising a function on behalf of the Territory *other than an officer, employee or a statutory office holder* (probably as a separate process).
16. Clause 6 of the Template Collective Agreement 2007-2010 authorises a chief executive to delegate any powers and function that the chief executive has under the Agreement.
17. Certain provisions in the Template Collective Agreement override powers in the PSM Act or Standards in respect of staff covered by the Agreement. However, it is important to remember that the delegation in the PSM Act or Standard may need to be retained and regularly updated for use in respect of staff not covered by the Agreement, for example ACTPS Executives.
18. Under section 236 of the Legislation Act, unless expressly allowed by the legislation that permits the granting of the delegation, the power to delegate must not be delegated. Neither the PSM Act or the Template Collective Agreement permit the delegation of the power to delegate.

### **Making Delegations - Legislative Requirements and Best Practice**

19. Under section 232 of the Legislation Act, a delegation must be made, or evidenced, in writing and signed by the appointer.
20. In accordance with section 234 of the Legislation Act an instrument of delegation may:
  - state that the delegation only comes into effect if certain circumstances exist, for example, a delegation only applies if the appointer is on leave; or
  - state that all of a function, or only part of a function, is delegated.
21. Section 233 of the Legislation Act provides that a delegation can be made by naming a person, or nominating the occupant of a position, to be the delegate. Nevertheless, it is considered best practice to delegate using position numbers and/or office titles, e.g. Commissioner for Public Administration. This means that the delegation power is unaffected by a change of occupant in the position. Additionally, under section 235 of the Legislation Act a delegation may be made to multiple people (usually through the use of 'groupings').
22. A delegation instrument is a legal instrument. Template delegation instruments, approved by the ACTGS, are attached to this Information Note:
  - Attachment A applies to delegations under an Act; and
  - Attachment B applies to delegations under agency collective agreements.

Agencies may choose not to adopt these delegation templates when preparing delegations, in which case agencies should seek advice from the ACTGS.

23. While it is not a legal requirement to have each page of the delegation signed, it is advisable to do so.
24. It is important to note that when a function is delegated:
  - the appointer retains the use of the power (section 240 of the Legislation Act);
  - the appointer retains an obligation to ensure that the function is properly exercised (section 238 of the Legislation Act); and
  - anything done by or in relation to the delegate in the exercise of the delegation is taken to have been done by or in relation to the appointer (section 239 of the Legislation Act).
25. It is important to note that when exercising a delegated power:
  - a delegate acts independently and makes a decision in his or her own right, not on behalf of the appointer (this means that decisions made by the delegate under the delegated power should be signed and dated by the delegate making them);
  - one delegate cannot override a decision made by another delegate on the same matter - common sense suggests that discussion and reason should prevail in cases where there is conflict or dispute on the exercise of a delegation;
  - where there is confusion or dispute about the exercise of a delegation, the Chief Executive or the Commissioner, depending on who the appointer is, should be consulted.
26. Both the appointer and the delegate should be aware of their responsibilities in the exercise of delegated powers. The issues identified on paragraphs 24 and 25 should be considered when making delegations.

### **Reviewing Delegations**

27. It is best practice to regularly review agency delegations. Events which should lead to a review of delegations include, but are not limited to:
  - a change of government;
  - new administrative arrangements;
  - organisational restructure;
  - a change of responsible Minister; or
  - a change of appointer.
28. If new positions are created, it is important that they receive all necessary delegations.
29. Regularly reviewing agency delegations also provides an opportunity to ensure that former delegations have been revoked. The best practice templates, at [Attachment A](#) and [Attachment B](#), revoke all previous delegations before making the new delegations.
30. While a change of appointer or defects or irregularities in an instrument of delegation may not mean a delegation is invalid (see section 242-243 of the Legislation Act), other changes may invalidate a delegation or leave it open to challenge.

## **Management of Chief Executive Delegations**

31. Chief executives of administrative units have certain powers and functions under the PSM Act. Other chief executive officers or statutory office holders may exercise chief executive powers through deeming provisions if:
  - an Act provides that the staff of an instrumentality are employed under the PSM Act, the chief executive officer of that instrumentality shall have all the powers of a chief executive in relation to the staff as if they were a chief executive of an administrative unit (section 24 of the PSM Act); or
  - there is a direction by the Chief Minister under section 25 of the PSM Act that the statutory holder has all the powers of a chief executive of an administrative unit in relation to staff assisting them; or
  - there is a specific provision in the enabling legislation.
32. Chief executives also have certain powers and functions under the Template Collective Agreements. The agency specific schedules to collective agreements may deem that chief executive officers or statutory office holders may exercise chief executive powers under that agreement.
33. If none of the situations set out in paragraph 27 or 28 apply, delegations by the relevant portfolio chief executive are needed to support employment decisions and actions.
34. Chief executive delegations are not managed at a whole-of-government level, but rather by agencies themselves. In general, Corporate/Strategic HR areas of agencies should be able to assist with updating chief executive delegations under the legislative employment framework.
35. Copies of all delegations should be held in a central location so that they are readily accessible should evidence be required to support that a person has the delegation.

## **Management of Commissioner for Public Administration Delegations**

36. The Commissioner's delegations are centrally coordinated by the Employment Policy Group of Governance Division, Chief Minister's Department, and can be viewed at the Governance Division website [www.psm.act.gov.au](http://www.psm.act.gov.au). Updates to the Commissioner's delegations occur approximately every six months, following major changes (e.g. Administrative Arrangement Orders), or when an agency requires an urgent change. For assistance, contact the Employment Policy Group on 620 75586 or 620 50190.

## **Further Information**

37. For further information regarding delegations under the ACT legislative employment framework can contact the Senior Policy Officers, Employment Policy on 620 75586 or 620 50190.

**ATTACHMENT A**

**[NAME OF AGREEMENT]**

**DELEGATION OF POWERS AND FUNCTIONS**

Under section [X] of the [*Name of Act*] I, [Name of Appointer], revoke all previous delegations, and delegate the powers and functions listed in Column 1 of Schedule 1, to the position or group named in Column 2 of Schedule 1, subject to limitations (if any) listed in Column 3 of Schedule 1.

.....  
[Signature]  
[Name of Chief Executive]

Dated: [Day, Month, Year]

**ATTACHMENT A**

**Schedule 1**

| <b>POWER OR FUNCTION<br/>Column 1</b>              | <b>POSITION OR GROUP<br/>Column 2</b>   | <b>LIMITATIONS<br/>Column 3</b> |
|--|---|---------------------------------|
| <i>Example 1:</i><br>Section X of the ABC Act 1999 | Position Number: 12345<br><br>Local Title:<br>Manager<br>XYZ Branch<br>ABC Department | No limitation                   |
| <i>Example 2:</i><br>Section Y of the ABC Act 1999 | Group A (refer to Attachment 2)   | No limitation                   |
| <i>Example 3:</i><br>Section Z of the ABC Act 1999 | Group B (refer to Attachment 2)   | No limitation                   |
|  |   |                                 |
|  |   |                                 |
|  |   |                                 |

**ATTACHMENT B**

**[NAME OF AGREEMENT]**

**DELEGATION OF POWERS AND FUNCTIONS**

Under clause x of the [Name of Agreement] I, [Name of Chief Executive], revoke all previous delegations and authorisations, and delegate the performance of the powers and functions listed in [Column number and attached Schedule number], by the persons listed in [Column number and Schedule number], subject to limitations (if any) listed in [Column number and Schedule number].

.....  
[Signature]  
[Name of Chief Executive]

Dated: [Day, Month, Year]

**ATTACHMENT B**

**Schedule 1**

| <b>POWER OR FUNCTION<br/>Column 1</b>                           | <b>POSITION OR GROUP<br/>Column 2</b>                   | <b>LIMITATIONS<br/>Column 3</b>   |
|---|---|---|
| <i>Example 1:</i><br>Clause X of [Name of Agency Agreement]     | Local Title:<br>Manager<br>XYZ Branch<br>ABC Department | No limitation   |
| <i>Example 2:</i><br>Clauses Y and Z [Name of Agency Agreement] | Person's name<br>Title<br>Branch<br>Department          | Powers must be exercised in relation to persons of a lower classification |
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