



DELEGATIONS

> > > >



## Previous titles

1. Values in the Australian Public Service  
(currently available in the *Values and Conduct* series)
2. Managing Breaches of the APS Code of Conduct  
(currently available in the *Working with the Act* series)
3. Counselling for Better Work Performance  
(currently available in the *Working Together* series)
4. Guidelines on Workplace Diversity  
(currently available in the *Working Together* series)
5. Maintaining a Harassment-free Workplace  
(currently available in the *Working Together* series)
6. Senior Executive Service  
(currently available in the *Working with the Act* series)
7. Recruitment of Indigenous Australians in the Australian Public Service (currently available in the *Working Together* series)
8. Outsourcing: Human Resource Management Issues



## DELEGATIONS

---



© Commonwealth of Australia 2002

ISBN 0 642 54355 0

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without permission from AusInfo. Requests and enquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 84, Canberra ACT 2601.

# F O R E W O R D

---

This booklet is part of a series of guides issued by the Australian Public Service Commission (the Commission), following the passage of the *Public Service Act 1999*.

Since the passage of the Act, the Commission has published seven guides in the three series: *Working with the Act*, *Working Together*, and *Values and Conduct*.

All Commission guides and advices are now published in this new series, which began with number 8 on outsourcing.

Earlier guides will be listed in sequence and given a number inside the front cover of all new booklets and, as they are reprinted or revised, will be renumbered into the new series as nos. 1–7.

Under the Public Service Act, responsibility for employment decisions has generally been devolved to Agency Heads, giving them greater flexibility to manage their own workplaces, within the framework of the Act and subordinate legislation.

The management of delegations is crucial to the legitimacy of many decisions and actions undertaken within the public service environment. This booklet provides Agency Heads, and agency staff more generally, with information about delegations under the legislative framework for public sector employment introduced in December 1999 including the Public Service Act.

This booklet has been prepared in consultation with the Department of Employment and Workplace Relations (DEWR). It replaces the earlier Commission Advices: *Advice No 2: Delegations (10 November 1999)*; *Advice No 35 Delegations: Further information (2 December 1999)*; and *Advice No 37: Authorisation and delegation of powers and functions of the Public Service Minister (16 March 2000)*.



Andrew Podger  
Public Service Commissioner  
June 2002



# C O N T E N T S



FOREWORD . . . . .	iii
INTRODUCTION . . . . .	vii
<b>1. LEGISLATIVE FRAMEWORK AND OTHER KEY CONSIDERATIONS . . . . .</b>	<b>1</b>
1.1 Legislative framework . . . . .	1
1.2 Terminology . . . . .	2
1.3 Administrative law principles that govern the exercise of delegations . . . . .	2
1.4 Acts Interpretation Act . . . . .	3
1.5 Validity of an instrument of delegation . . . . .	4
1.6 Managing risk . . . . .	5
1.7 Restrictions on the delegation and exercise of powers and functions under the PS Act and subordinate legislation . . . . .	6
<b>2. AUTHORISATION AND DELEGATION OF POWERS AND FUNCTIONS . . . . .</b>	<b>7</b>
2.1 The Prime Minister . . . . .	7
2.2 The Public Service Commissioner . . . . .	8
2.3 The Merit Protection Commissioner . . . . .	8
2.4 Agency Heads . . . . .	8
Delegation of Agency Head powers and functions under the PS Act . . . . .	9
Delegation of Agency Head powers and functions under the Public Service Regulations 1999 . . . . .	9
Delegations of Agency Head powers and functions under the Public Service Commissioner's Directions 1999 . . . . .	9
Delegations of Agency Head powers and functions under the Public Service Classification Rules 2000 . . . . .	9
Delegation of Agency Head powers and functions under the Maternity Leave and Long Service Leave Acts . . . . .	10
Delegation and authorisation of powers and functions under certified agreements, AWAs and awards and section 24 determinations . . . . .	10
Authorisation to enter AWAs on behalf of an Agency Head . . . . .	11

3. DELEGATIONS AND SUBDELEGATIONS TO  
AN OUTSIDER BY AN AGENCY HEAD . . . . . 13

3.1 Applications to the Public Service Commissioner for consent for an Agency  
Head to delegate and subdelegate powers and functions to an outsider . . . . . 13

APPENDIX 1: AGENCY HEAD RESPONSIBILITIES . . . . . 15



# I N T R O D U C T I O N

---



This booklet provides information about the delegation of powers and functions within the APS environment. It focuses primarily on the delegation of Agency Head powers and functions under the *Public Service Act 1999* (PS Act), the Public Service Regulations 1999 (the Regulations), the Public Service Commissioner's Directions 1999 (the Directions) and the Public Service Classification Rules 1999 (the Classification Rules). For the purpose of this booklet the Regulations, the Directions and the Classification Rules are collectively referred to as subordinate legislation. While the booklet is primarily concerned with delegations under the PS Act and subordinate legislation, it also includes some material on delegations under the *Long Service Leave (Commonwealth Employees) Act 1976* (the Long Service Leave Act), the *Maternity Leave (Commonwealth Employees) Act 1973* (the Maternity Leave Act), certified agreements, Australian Workplace Agreements (AWAs) and awards.

The PS Act confers powers and functions on the Prime Minister, the Public Service Minister, Agency Ministers, the Public Service Commissioner, the Merit Protection Commissioner and Agency Heads. Similarly, powers and functions are conferred through subordinate legislation.

---

The booklet identifies powers and functions that may be considered for delegation under the PS Act and subordinate legislation. It does not seek to identify the powers and functions that should or should not be delegated or to canvass the merits of delegating any particular power or function.

---

The PS Act and subordinate legislation allow for the person upon whom the powers and functions have been conferred to delegate them to another person. The Act and subordinate legislation do not require an Agency Head to delegate any powers or functions

or impose any limits on the powers or functions to be delegated or on the class of potential delegates, other than in relation to outsiders (see Chapter 3).

Agency Heads and delegates need to be careful how they exercise their power of delegation under the PS Act and subordinate legislation, particularly when seeking to identify persons to exercise powers and functions under other portfolio legislation, because any defect in such delegation can effect the validity of the actions taken by those persons under other legislation.

---

If an agency is uncertain about any delegation issue it should obtain separate legal advice on the matter. Legal advices obtained on the PS Act by Financial Management and Accountability Act (FMA) agencies should, under the Legal Services Directions, be copied to the Public Service Commissioner. Commonwealth Authorities and Companies (CAC) Act agencies are also encouraged to copy any legal advices obtained by them in relation to the PS Act.

---

# 1 . T H E   L E G I S L A T I V E F R A M E W O R K A N D   O T H E R   K E Y   C O N S I D E R A T I O N S

This chapter introduces the reader to the legislative framework that provides for the delegation of powers and functions, particularly under the PS Act. It also refers to:

- the administrative law principles that govern the exercise of delegations
- the proper management of risk in managing the delegation process
- the validity of an instrument of delegation
- the restrictions on the delegation and exercise of powers and functions under the PS Act and subordinate legislation.

## 1 . 1   L E G I S L A T I V E   F R A M E W O R K

The provisions of the PS Act and subordinate legislation that enable the delegation of powers and functions are:

- Section 78 of the PS Act
- Regulation 9.3
- Clause 7.1A of the Directions
- Clause 7.1 of the Directions
- Classification Rule 13.

In addition, the Maternity Leave Act and the Long Service Leave Act vest directly in Agency Heads various discretionary powers in relation to maternity leave and long service leave (see 2.4). Under both Acts, the exercise of these powers and functions may be delegated.

In addition to these formal powers of delegation, which result from an explicit power of delegation and involve formal instruments of delegation, the Courts recognise an implied power to authorise the exercise of certain powers—often referred to as the ‘Carltona Principle’<sup>1</sup>. Under this principle, a person in whom a

---

1 The ‘Carltona Principle’ takes its name from the case most often relied on as authority for the proposition that a person may authorise another to exercise a power for and on his or her behalf—‘*Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560’, which has been expressly endorsed by Courts in Australia.

statutory power is vested may, in some exceptional circumstances, be able to rely on an implied power to authorise an official to exercise the statutory power for and on his/her behalf. In these circumstances, the act of the authorised person is, at law, the act of the person in whom the power is vested by law. This is fundamentally different to the act of a delegate, which, at law, is the delegate's act and not the act of the delegator. It is not the purpose of this booklet to address issues related to this implied power to authorise the exercise of certain powers.

## 1.2 TERMINOLOGY

The main terms used in the PS Act (section 7 of the PS Act - Interpretation) in relation to delegations are:

- **Agency Head** means:
  - (a) the Secretary of a Department; or
  - (b) the Head of an Executive Agency; or
  - (c) the Head of a Statutory Agency.
- **Agency Minister** means:
  - (a) in relation to a Department—the Minister who administers the Department; or
  - (b) in relation to an Executive Agency—the Minister who administers the Agency; or
  - (c) in relation to a Statutory Agency—the Minister who administers the provision of the Act that provides for the appointment of the Head of the Agency.
- **Commissioner** means the Public Service Commissioner appointed under the PS Act.
- **Merit Protection Commissioner** means the Merit Protection Commissioner appointed under the PS Act.
- **Public Service Minister** means the Minister who administers the PS Act.

An **outsider** for the purposes of section 78(8) of the PS Act, regulation 9.3(9), clause 7.1 (7) of the Directions and Classification Rule 13(7) means a person other than:

- (a) an APS employee; or
- (b) a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

## 1.3 ADMINISTRATIVE LAW PRINCIPLES THAT GOVERN THE EXERCISE OF DELEGATIONS

The delegation of powers and functions and the exercise of delegated powers and functions are subject to a number of principles of administrative law, including those contained in the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). The ADJR Act provides that a person who is aggrieved by a decision may apply for review of the decision on one or more of a number of specified grounds. These grounds, which provide a useful checklist for delegates, are, in summary:

- The person who makes the decision must have jurisdiction, i.e. a valid delegation or authorisation to make the decision.
- The decision must be authorised by the enactment under which it is made (e.g. the PS Act).
- The procedures that are required by law to be observed in the making of the decision must be observed.
- The decision must not be an improper exercise of the power conferred by the enactment—examples of this would be that:
  - an irrelevant consideration was taken into account;
  - the power was exercised for a purpose other than that for which it was conferred;
  - the discretionary power was exercised at the direction of another;
  - the discretionary power was exercised in accordance with a rule or policy without regard to the merits of the case; or
  - there was no evidence or other material to justify the decision.
- The decision must not be induced or affected by fraud.
- There must be evidence or other material to justify the making of the decision.
- The decision must not involve an error of law, whether or not the error appears on the record of the decision.
- The decision must be made in accordance with the rules of natural justice.
- The decision must not otherwise be contrary to law.

#### 1.4 ACTS INTERPRETATION ACT

The *Acts Interpretation Act 1901* (the AI Act) contains provisions that are relevant to delegations, the effect of delegation and the exercise of certain powers and functions by a delegate.

The AI Act makes it clear that, unless a contrary intention appears in the relevant legislation, an express power of delegation does not have to be exercised in favour of a nominated individual (section 34AA). It may be exercised by reference to a person or persons from time to time holding, occupying or performing the duties of a specified position even if the position doesn't come into existence until after the delegation is given.

The AI Act sets out a number of general principles related to the exercise of an express power of delegation. Section 34AB provides:

Where an Act confers power on a person or body (the Authority) to delegate a power or function:

- (a) the delegation may be made either generally or as otherwise provided by the instrument of delegation;

- (b) the powers that may be delegated do not include that power to delegate;
- (c) a function or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the authority;
- (d) a delegation by the authority does not prevent the performance or exercise of a function or power by the authority; and
- (e) if the authority is not a person, section 34A applies as if it were.

Of particular note, section 34A of the AI Act provides that delegates must exercise the delegated power by applying his or her own discretion. It also has the effect that the delegator cannot direct the delegate in the exercise of the delegator's discretion or make the exercise of the power conditional on certain events or actions. This general rule is subject to legislation which specifically provides that a delegate is subject to the directions or conditions imposed by the delegator—this is the case with the PS Act and the subordinate legislation.

It is not the purpose of this booklet to explore these provisions. Further legal advice should be sought as agencies identify issues.

## 1.5 VALIDITY OF AN INSTRUMENT OF DELEGATION

A delegation instrument should be carefully drafted to ensure that it clearly identifies:

- the delegate
- the section of the legislation that permits the delegation
- the power or function being delegated.

Agency Heads may choose how they specify the person or persons to whom their powers or functions are to be delegated.

The options are to:

- (a) name the relevant employee or employees to whom the powers or functions are delegated; or
- (b) specify that the power or function is delegated to the person or persons nominated from time to time to occupy a specified position created under section 77 of the PS Act; or
- (c) specify that the power or function is delegated to the person or persons performing from time to time the duties specified in the instrument.<sup>2</sup>

Where either of the two latter options is adopted, a delegation will not cease to operate where there is a change in the person occupying a position or performing the specified duties.

---

<sup>2</sup> Care should be taken in defining the duties in the instrument so that the delegate can be distinguished, if necessary, from non-delegates performing similar duties.

Agencies are advised to revise regularly all delegations to APS employees (under the PS Act and other legislation), to ensure that they identify properly the persons to whom the powers and functions have been delegated, the section of the legislation that permits the delegation and the powers and functions being delegated.

Where legislation confers on a person holding a specified office the power to delegate a power vested in them as the holder of that office, the courts have held that a change in the person holding that office will not result in an instrument of delegation executed by the former occupant of that office ceasing to have effect. Accordingly, instruments of delegation made by the Commissioner, the Merit Protection Commissioner or an Agency Head will continue in effect where there is a change in the occupant of the particular office until they are otherwise changed or revoked.

## 1.6 MANAGING RISK

Managing risk is an important part of managing the delegation process within an agency.

In order to make decisions about whether to delegate a power or function and to whom a power or function should be delegated, it is necessary to make an assessment of any foreseeable risks associated with the exercise of the power or function by the delegate.

Foreseeable risks will vary depending on the power or function that is being considered for delegation. Possible risks may include poor performance and undesirable or unintended outcomes, negative findings from political scrutiny, adverse audit reports, litigation, adverse media exposure, increased resources devoted to reviews of actions, exposure to fraud, a failure to uphold the APS Values or a breach of the Code of Conduct.

Agencies should consider strategies to minimise the risk associated with the delegation of a power or function. Strategies to minimise risk may include ensuring that:

- delegations are within the scope permitted by the legislative framework
- instruments of delegation are drafted in accordance with an established agency-wide standard
- both the delegator and delegate are familiar with their responsibilities
- delegates possess the necessary skills and attributes to exercise the delegated powers and functions
- effective performance management and accountability mechanisms are in place
- appropriate internal audit, review and monitoring is undertaken
- delegates receive relevant training
- all delegations are regularly reviewed for appropriateness and accuracy.

After assessing the risks involved, an Agency Head or delegate may decide to avoid the risk associated with the delegation of a power or function by choosing not to delegate it. The Agency Head may also choose to give directions to a delegate that restrict the exercise of the delegated power or function, as set out in paragraph 1.7 below.

## 1.7 RESTRICTIONS ON THE DELEGATION AND THE EXERCISE OF POWERS AND FUNCTIONS UNDER THE PS ACT AND SUBORDINATE LEGISLATION

The restrictions outlined in this section are based on the requirements of the PS Act and subordinate legislation.<sup>3</sup>

Under section 78 of the PS Act, regulation 9.3, clause 7.1 of the Directions and Classification Rule 13, an Agency Head may decide to delegate a power or function to one or more persons (the first delegate). Under these provisions the first delegate may then delegate that power or function to another APS employee (the second delegate), as appropriate. The second delegate cannot further delegate that power or function.

The consent of the Commissioner must be obtained if an Agency Head wishes to delegate, or a delegate wishes to further delegate, a power or function to an outsider (see Chapter 3).

Under section 78 of the PS Act, regulation 9.3, clause 7.1 of the Directions and Classification Rule 13, an Agency Head may give directions to a delegate (the first delegate) in relation to a delegated power or function. A first delegate must comply with a direction by the Agency Head in relation to a delegated power or function and, where a further delegation is made, the first delegate must give a corresponding direction to the second delegate. While an Agency Head may give directions to the first delegate, legal advice indicates that this power does not include the power to direct the first delegate that they cannot further delegate the power or function to a second delegate.

The Senate Standing Committee on the Scrutiny of Bills has expressed concerns about delegations where the powers or functions that may be delegated are broad in scope and variety. While these concerns do not place restrictions on the delegation of powers and functions under the PS Act and subordinate legislation, Agency Heads are encouraged to consider these concerns in exercising their powers of delegation.

---

3 The Long Service Leave and the Maternity Leave Acts have some application outside the APS. While these Acts have a similar power to subdelegate and to direct delegates, they do not limit the power to delegate to non-APS persons in the same way as the PS Act and subordinate legislation do. These Acts are therefore not covered by this part.



## 2 . A U T H O R I S A T I O N AND DELEGATION OF POWERS AND FUNCTIONS

---

This chapter outlines the legal basis for the authorisation and delegation of powers and functions by the Prime Minister, the Commissioner, the Merit Protection Commissioner and Agency Heads.

### 2.1 THE PRIME MINISTER

The Prime Minister exercises powers and functions under the PS Act in three capacities:

- (a) as Prime Minister
- (b) as Public Service Minister (being the Minister who administers the PS Act)
- (c) as Agency Minister (being the Minister who administers the provision of the PS Act that provides for the appointment of the Commissioner and the Merit Protection Commissioner).

Section 78 of the PS Act, together with section 18C of the AI Act, enables the Prime Minister to delegate, or authorise other Ministers to perform on his or her behalf, the powers and functions he or she has in each of these capacities.

Of particular interest to agencies, the Prime Minister, as Public Service Minister, may delegate his or her powers under section 23 and section 73 of the PS Act. At the time of publishing he has delegated to:

- (a) the person for the time being holding, or performing the duties of, the Secretary of the Department of Employment and Workplace Relations, the power of the Public Service Minister under section 23(1) of the PS Act to make rules about classifications of APS employees;
- (b) Agency Heads, the powers of the Public Service Minister under section 73(1) of the PS Act to authorise the making of payments to persons if it is considered appropriate to do so because of special circumstances that relate to, or arise out of:

- the payee's employment by the Commonwealth; or
  - another person's employment by the Commonwealth; and
- (c) Agency Heads, the power under section 73(2) of the PS Act to authorise the making of any of the following payments:
- one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation)
  - periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation).<sup>4</sup>

## 2.2 THE PUBLIC SERVICE COMMISSIONER

While the Commissioner may delegate the powers or functions conferred on him or her by the PS Act, the Regulations, and the Directions, at this stage there has been no delegation of these powers to Agency Heads.

## 2.3 THE MERIT PROTECTION COMMISSIONER

Similarly, while the Merit Protection Commissioner may delegate the powers or functions conferred on him or her by the PS Act and the Regulations, at this stage, there has been no delegation of these powers to Agency Heads.

## 2.4 AGENCY HEADS

Powers and functions conferred on Agency Heads by the PS Act and subordinate legislation are listed at Appendix 1. Agency Heads may also have a number of implied powers under the PS Act and subordinate legislation which have not been identified in the Appendix. This Appendix does not attempt to canvass the merits of delegating any particular power or function.

An agency should obtain separate legal advice on the matter if there is any uncertainty about a delegation issue.

The Legal Services Directions issued by the Attorney-General require that, unless there are special circumstances, FMA agencies are required to consult the Commission before obtaining legal advice, from any source, on the interpretation of the PS Act. In addition FMA agencies are also required to provide the Commission with a copy of the request for advice and the advice obtained. In certain circumstances, such as where privacy considerations are an issue, the Directions permit that the provision of the substance of the advice will suffice.

While Legal Services Directions do not apply to CAC Act agencies, these agencies are encouraged to assist in the same way in relation to requests for advice on the PS Act.

---

<sup>4</sup> If the need arises, Agencies should check the currency of these delegations by initially contacting the Commission Helpline on (02) 6272 3609.

## Delegation of Agency Head powers and functions under the PS Act

Under section 78(7) of the PS Act, an Agency Head may, in writing, delegate to another person any of the Agency Head's powers or functions under the PS Act (other than the power to delegate).

Under section 78(8) of the PS Act, an Agency Head cannot delegate powers or functions to an outsider without the prior written consent of the Commissioner.

The Commission has obtained legal advice to the effect that the requirement for the Commissioner's prior written consent also extends to the subdelegation of Agency Head powers and functions to an outsider under section 78(9) of the PS Act.

Information about the process of seeking the Commissioner's consent to the delegation of powers and functions to an outsider is detailed in Chapter 3.

## Delegation of Agency Head powers and functions under the Public Service Regulations 1999

The Regulations confer powers and functions on an Agency Head. Regulation 9.3 provides for the delegation of those powers and functions.

Under regulation 9.3(3), an Agency Head may, in writing, delegate to a person any of the Agency Head's powers or functions under the Regulations, other than the power to delegate. Under regulation 9.3(4), however, an Agency Head cannot delegate the powers and functions to an outsider without the prior written consent of the Commissioner (see Chapter 3).

## Delegation of Agency Head powers and functions under the Public Service Commissioner's Directions 1999

The Directions confer powers and functions on an Agency Head. Clause 7.1 of the Directions provides for the delegation of those powers and functions.

Under clause 7.1(1) of the Directions, an Agency Head may, in writing, delegate to a person any of the Agency Head's powers or functions under the Directions, other than the power to delegate. Under clause 7.1(2) of the Directions, however, an Agency Head cannot delegate powers and functions to an outsider without prior written consent of the Commissioner (see Chapter 3).

## Delegation of Agency Head powers and functions under the Public Service Classification Rules 2000

The Classification Rules confer powers and functions on an Agency Head. Classification Rule 13 provides for the delegation of those powers and functions.

Under Classification Rule 13(1) an Agency Head may, in writing, delegate to a person any of the Agency Head's powers or functions under the Classification Rules, other than the power

to delegate. Under Classification Rule 13(2), however, an Agency Head cannot delegate powers and functions to an outsider without prior written consent of the Commissioner (see Chapter 3).

### **Delegation of Agency Head powers and functions under the Maternity Leave and Long Service Leave Acts**

The Maternity Leave Act and the Long Service Leave Act directly vest in an Agency Head (and a Chief Executive Officer of a non-APS agency) various discretionary powers and functions in relation to maternity leave and long service leave. These discretionary powers and functions may be delegated.

As is the case with delegations under the PS Act, a delegation instrument should be carefully drafted to ensure that it clearly identifies the delegate, the section of the legislation that permits delegation and the power or function being delegated.

An Agency Head can choose how he or she specifies the person or persons to whom his or her powers or functions are to be delegated under the Acts. The options are to:

- (a) name the relevant employee or employees to whom the powers or functions are delegated; or
- (b) specify the person or persons nominated from time to time to occupy a position created under section 77 of the PS Act; or
- (c) specify the person or persons performing specified duties from time to time.

Where either of the two latter options is adopted, a delegation will not cease to operate where there is a change in the person occupying a position or performing specified duties.

Agency Heads may also wish to consider whether a delegate should be directed to exercise the relevant power or function in a particular way. There is scope for such a direction to be given to a delegate under section 11 of the Maternity Leave Act and section 9(4) of the Long Service Leave Act.

### **Delegation and authorisation of powers and functions under certified agreements, AWAs and awards and section 24 determinations**

The delegation power in section 78 of the PS Act relates only to the delegation of powers and functions under the PS Act.

If it is desired to delegate powers and functions relating to matters set out in awards, certified agreements, AWAs and section 24 determinations, it is, therefore, necessary to rely on an appropriate head of power in the relevant instrument.

The APS Award does not include a power to make delegations but rather relies on the use of authorisations. Clause 3, Definitions, states that an " 'Agency Head' is as defined in the Act, or (except where the context otherwise requires) is a person authorised to exercise the relevant

powers of an Agency Head for the purpose concerned". To the extent that the APS Award is relevant, agencies need to decide whether it is sufficient to rely on implicit authorisations (e.g. arising out of people's roles and internal management guidelines) or, if it is considered that there might be some risk of a challenge to a decision and it would be preferable to put in place explicit authorisations.

Agencies need to consider these issues when drafting their certified agreements, AWAs or determinations under section 24 of the PS Act. Specifically, they need to consider to whom they wish to give power and for what purposes, and whether they wish to put in place a system of formal delegations or rely on implicit or express authorisations.

The appropriate approach will vary from one situation to another taking account of such factors as:

- the work involved in maintaining detailed formal delegations
- whether particular decisions are likely to be challenged on legal grounds, noting that disputes about certified agreements or AWAs will usually be handled through industrial rather than legal mechanisms.

Possible approaches may involve:

- including an express delegation power in the certified agreement, AWA or section 24 determination
- defining the Agency Head to include persons authorised by the Agency Head
- vesting the discretion in all people in a certain job description or at a certain level.

### **Authorisation to enter AWAs on behalf of an Agency Head**

Under section 170WK of the *Workplace Relations Act 1996*, an Agency Head has the power to enter into AWAs with persons in the agency who are engaged under the PS Act.

If an Agency Head wishes to empower one or more senior managers to sign AWAs on his or her behalf, it is suggested that he or she should execute a formal instrument of authorisation which confers that power.

Note that, unlike delegations, authorisations cease to have effect when the person who gives the authorisation ceases to hold the power. It is important to make new authorisations in such circumstances.



## 3 . D E L E G A T I O N S AND SUBDELEGATIONS TO AN OUTSIDER BY AN AGENCY HEAD

---

This chapter outlines the requirements to be met and information to be provided in seeking the Commissioner's consent to the delegation or subdelegation of a power or function to an outsider.

### 3.1 APPLICATIONS TO THE PUBLIC SERVICE COMMISSIONER FOR CONSENT FOR AN AGENCY HEAD TO DELEGATE AND SUBDELEGATE POWERS AND FUNCTIONS TO AN OUTSIDER<sup>5</sup>

As noted earlier, the prior written consent of the Commissioner is required before a power or function is delegated to an outsider (see 1.7). Applications for such consent are considered by the Commissioner on a case-by-case basis.

Agencies seeking approval to delegate powers and functions to outsiders should provide as much information as possible when seeking the Commissioner's consent. The following details should be provided:

- the nature of the relationship of the outsider with the agency, (e.g. consultant, participant in exchange program, or person employed under other legislation)
- the legislation or authority under which the person is engaged
- the duties to be performed
- the period for which the consent is required
- whether supervision of APS employees is included in the duties
- whether the arrangement (contract) requires the proposed delegate to have appropriate regard to the APS Values, Code of Conduct and other relevant APS policy

---

<sup>5</sup> The Long Service Leave and the Maternity Leave Acts include a similar power to subdelegate and to direct delegates, but those Acts do not limit the power of delegation to non-APS persons as does the PS Act because these Acts also have some application outside the APS.

- the qualifications and experience of the outsider
- whether the outsider has received a redundancy benefit from an agency or a non-APS Commonwealth employer within the last 12 months and when the benefit was received
- any additional information to explain the need for the proposed delegation to an outsider.

Agencies should note that consent to a subdelegation to an outsider will be authorised only in exceptional circumstances.

---

#### FURTHER ADVICE

For more advice on the general principles relating to delegations and authorisation see Attorney-General's Department, Legal Practice Briefing Number 24 of 24 April 1996.

Enquiries about the information contained in this booklet should be directed to the Commission's Helpline on (02) 6272 3609.

---



# A P P E N D I X 1

## AGENCY HEAD RESPONSIBILITIES

---

### AGENCY HEAD POWERS AND FUNCTIONS UNDER THE PUBLIC SERVICE ACT 1999

This list comprises powers or functions that may be considered for delegation under Section 78 of the PS Act. It is a matter for Agency Heads to decide what powers and functions are delegated to staff within their Agency.

SECTION	POWER OR FUNCTION
section 15	An Agency Head may impose sanctions for breaches of the Code of Conduct.  An Agency Head must establish procedures for determining breaches of the Code of Conduct.  An Agency Head must take steps to ensure that the agency's employees are aware of the procedures.
section 18	An Agency Head must establish a workplace diversity program.
section 22	An Agency Head may engage persons as APS employees.
section 24	An Agency Head may determine remuneration and other terms and conditions of employment.
section 25	An Agency Head may from time to time determine the duties of an APS employee in the Agency, and the place or places at which the duties are to be performed.
section 26	An Agency Head may enter into an agreement in writing with an APS employee for the employee to move to the Agency Head's Agency from another Agency.



SECTION	POWER OR FUNCTION
section 27	An Agency Head may notify the Commissioner in writing that an employee is excess to the requirements of the Agency.
section 29	An Agency Head may terminate the employment of an APS employee.
section 31	An Agency Head may give notice to an APS employee in relation to additional non-Commonwealth remuneration.
section 37	An Agency Head may give a notice to an SES employee concerning the payment of a specified amount if the employee retires.
section 44	An Agency Head must provide the Commissioner with whatever information is required for the purposes of the Commissioner's report on the state of the Service.
section 63	After the end of each financial year, the Secretary of a Department must give a report to the Agency Minister, for presentation to Parliament, on the Department's activities during the year.
section 70	After the end of each financial year, the Head of an Executive Agency must give a report to the Agency Minister, for presentation to Parliament, on the Agency's activities during the year.
section 74	An Agency Head may engage persons overseas.
section 77	An Agency Head may create positions and nominate APS employees to occupy such positions.

## AGENCY HEAD POWERS AND FUNCTIONS UNDER THE PUBLIC SERVICE REGULATIONS 1999

This list comprises powers or functions that may be considered for delegation under regulation 9.3. It is a matter for Agency Heads to decide what powers and functions are delegated to staff within their Agency.

SECTION	POWER OR FUNCTION
regulation 2.1	An Agency Head may give an APS employee express authority to disclose information about public business or anything of which the employee has official knowledge.
regulation 2.4	An Agency Head must establish procedures for dealing with whistleblowers' reports.
regulation 3.1 and 3.2	An Agency Head may direct an APS employee to attend a medical examination in some circumstances and to give the Agency Head a medical report of the examination.
regulation 3.3	An Agency Head may approve a scheme for persons engaged for a specified term, or for the duration of a specified task, in the Agency to gain skills and experience for the purpose of assisting them to participate in the workforce.
regulation 3.5	An Agency Head may engage a person for a specified term or for the duration of a specified task in accordance with section 22 of the PS Act. This regulation limits the circumstances for engagements of this type. Decisions by Agency Heads under this regulation include making a judgement about whether increases in the workload of the Agency are likely to be temporary (see regulation 3.5(2)) and whether the duration of tasks can be estimated. (See regulation (3.5(3))
regulations 3.6 and 3.7	An Agency Head may certify that the extension of specified terms of engagement for certain non-SES employees is in the public interest.
regulation 3.8	The gaining and losing Agency Heads may agree with an ongoing employee to a different date of effect for promotion. Note this power appears in (2), (4), (5), (5B), and (5C).
regulation 3.9	The gaining and losing Agency Heads and employee may agree to a different date of effect of a voluntary move between Agencies that is not a promotion.
regulation 3.10	In certain circumstances an Agency Head may suspend an APS employee employed in the Agency from duties.

SECTION	POWER OR FUNCTION
regulation 4.2	An Agency Head may request the establishment of an Independent Selection Advisory Committee
regulation 4.3	An Agency Head must nominate a person to an Independent Selection Advisory Committee when requested to do so.
regulation 5.11	An Agency Head must nominate an APS employee to a Promotion Review Committee when requested to do so.
regulation 5.17	An Agency Head must provide to a Promotion Review Committee information and/or documents relevant to a review in the way, and at or within the time, stated in the written notice of request.
regulation 5.25	An Agency Head, with the Merit Protection Commissioner's agreement, may refer an application for review of a reviewable action to the Merit Protection Commissioner. An Agency Head must tell the employee of this decision in writing.
regulation 5.26	The person who would have conducted the review must tell the employee in writing, certain things in relation to a notice that action is not reviewable.
regulation 5.27	An Agency Head must review the action and attempt to resolve the employee's concerns about the action.  The Agency Head may: <ul style="list-style-type: none"> <li>(a) confirm the action; or</li> <li>(b) vary the action; or</li> <li>(c) set the action aside and substitute a new action.</li> </ul> The Agency Head must tell the employee in writing of: <ul style="list-style-type: none"> <li>(a) any decision made on the application; and</li> <li>(b) the reasons for the decision; and</li> <li>(c) any action to be taken as result of the review; and</li> <li>(d) the applicant's right to apply to the Merit Protection Commissioner under regulation 5.29 for secondary review of the action.</li> </ul>
regulation 5.30	An Agency Head must give the application and documents relating to the primary review of action to the Merit Protection Commissioner within 14 days after receiving an application for a secondary review. The Agency Head must also give the affected employee a copy of the documentation that is passed to the Merit Protection Commissioner.

SECTION	POWER OR FUNCTION
regulation 5.32	<p>An Agency Head must as soon as possible consider and make decisions about recommendations received from the Merit Protection Commissioner regarding review of actions.</p> <p>The Agency Head must write to the employee and the Merit Protection Commissioner, informing them of his/her decision and the reasons for it.</p>
regulation 5.35	<p>An Agency Head must provide information or documents relevant to a review to a person or Committee carrying out a review in the way, and at or within the time, stated in the written notice of request.</p>
regulation 6.3	<p>Under regulation 6.3 (4) (b) an APS employee's Agency Head may give consent in relation to disclosure of information.</p>
regulation 7.6	<p>Under regulation 7.6 (4) (b) an APS employee's Agency Head may give consent in relation to disclosure of information.</p>
regulation 8.1	<p>In relation to Administrative arrangements and re-organisations, there is a requirement for Agency Heads to consult with certain APS employees either before or after the move, prior to varying certain conditions of employment.</p>
regulation 8.2	<p>In relation to Administrative arrangements and re-organisations, there is a requirement for Agency Heads to consult with certain non-APS employees before or after engagement, before varying remuneration and certain conditions of employment.</p>
regulation 9.2	<p>In specified circumstances an Agency Head may disclose personal information that is in their possession or under their control.</p>

## AGENCY HEAD POWERS AND FUNCTIONS UNDER THE PUBLIC SERVICE COMMISSIONER'S DIRECTIONS 1999

This list comprises powers or functions that may be considered for delegation under Clause 7.1 of the Directions. It is a matter for Agency Heads to decide what powers and functions are delegated to staff within their Agency.

DIRECTION	POWER OR FUNCTION
Clause 2.2 (1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS is apolitical, performing its functions in an impartial and professional manner.</i>
Clause 2.3 (1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS is a public service in which employment decisions are based on merit.</i>
Clause 2.4 (1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves.</i>
Clause 2.5 (1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS has the highest ethical standards.</i> (That part which requires an Agency Head to model and promote the highest standards of ethical behaviour cannot be delegated).
Clause 2.7(1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs.</i>
Clause 2.8(1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public.</i>
Clause 2.9(1)(d)	An Agency Head must put in place measures to ensure that there are systems in the Agency that give APS employees appropriate opportunities to develop and demonstrate leadership qualities.
Clause 2.10(1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace.</i>

DIRECTION	POWER OR FUNCTION
Clause 2.11 (1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS provides a fair, flexible, safe and rewarding workplace.</i>
Clause 2.12 (1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS focuses on achieving results and managing performance.</i> (That part of 2.12(1) that refers to an Agency Head's responsibility to have regard to any statutory accountability and reporting obligations cannot be delegated)
Clause 2.13(1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS promotes equity in employment/</i>
Clause 2.14(1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment.</i>
Clause 2.15(1)(d)	An Agency Head must: (d) put in place measures to ensure that: (i) the Agency is staffed on a basis that sustains core knowledge, expertise, and standards of professionalism and behaviour; and (ii) legislative and Agency requirements in relation to the use of the different categories of APS employment are upheld.
Clause 2.16 (1)	An Agency Head must put in place measures for the purposes of upholding and promoting the following APS Value: <i>The APS provides a fair system of review of decisions taken in respect of APS employees.</i>
Clause 3.2(1)	An Agency Head must put in place measures to (a) help prevent all forms of discrimination (b) recognise the positive advantages of, and help make best use of, the diversity available in the workplace and the Australian community.
Clause 3.2(2)	An Agency Head must assist employees to balance their work, family and other caring responsibilities effectively by encouraging the development of mutually beneficial work practices in the Agency.
Clause 3.4	An Agency Head must provide to the Commissioner a copy of the workplace diversity program or any revision of it.

DIRECTION	POWER OR FUNCTION
Clause 3.5(1)	An Agency Head must develop performance indicators for, and evaluate and report annually on the effectiveness and outcomes of the workplace diversity program.
Clause 3.5(2)	An Agency Head must give required information to the Commissioner in relation to the workplace diversity program.
Clause 3.6	An Agency Head must review the Agency's workplace diversity program at least once every four years.
Clause 4.2(1)	An Agency Head must put in place measures to ensure that if: <ul style="list-style-type: none"> <li>(a) a person is to be engaged as an ongoing APS employee at a training classification, or an APS Group 1 classification; or</li> <li>(b) an ongoing APS employee (other than an employee whose current classification is a training classification) is to be assigned duties at a training classification— <p style="margin-left: 40px;">the opportunity to apply for the relevant employment, or similar employment in the Agency, was open to all eligible members of the community, whether or not they were APS employees.</p> </li> </ul>
Clause 4.2(2)	An Agency Head must put in place measures to ensure that, subject to considerations of cost and operational efficiency, if a person is to be engaged as an ongoing APS employee (other than at a training classification, or an APS Group 1 classification), the opportunity to apply for the relevant employment, or similar employment in the Agency, was open to all eligible members of the community, whether or not they were APS employees.
Clause 4.2(4)	An Agency Head may make a decision not to provide an opportunity mentioned in subclause (2) to all eligible members of the community subject to conditions outlined in this subclause.
Clause 4.3(1)	An Agency Head must put in place measures to ensure that, if a person is to be engaged as an APS employee for a specified term of more than 12 months, or for the duration of a specified task that is reasonably estimated to take more than 12 months, the opportunity to apply for the relevant employment, or similar employment in the Agency, was open to all eligible members of the community, whether or not they were APS employees.
Clause 4.4A(1)	An Agency Head must put in place measures for the purposes of the Direction in relation to the engagement of certain persons who have received a redundancy benefit.



DIRECTION	POWER OR FUNCTION
Clause 4.4A(2)(b)	An Agency Head may decide that the engagement of a person who has received a redundancy benefit in the last 12 months, on a non-ongoing basis as prescribed in the Direction, is essential for the Agency's operations, having regard to the nature of the duties to be performed and the skills, experience or qualifications of the person.
Clause 4.4A(2)(c)	An Agency Head must consult with the Commissioner in relation to the engagement of persons who have received a redundancy benefit.
Clause 4.4A3(b)	An Agency Head may decide that the engagement of a person who has received a redundancy benefit in the last 12 months, on a non-ongoing basis as prescribed in the Direction, is essential for the Agency's operations, having regard to the nature of the duties to be performed and the skills, experience or qualifications of the person.
Clause 4.4B(1)	An Agency Head must put in place measures for the purposes of the Direction in relation to the engagement of certain persons as overseas employees under section 74 of the Act who have received a redundancy benefit.
Clause 4.4B(2)(b)	An Agency Head may decide that the engagement of a person who has received a redundancy benefit in the last 12 months as overseas employees under section 74 of the Act is essential for the Agency's operations, having regard to the nature of the duties to be performed and the skills, experience or qualifications of the person.
Clause 4.4B(2)(c)	An Agency Head must consult with the Commissioner in relation to the engagement of persons who have received a redundancy benefit.
Clause 4.5	An Agency Head must put in place measures for the purposes of the Direction in relation to the extension of engagement of an APS employee engaged for a specified term.
Clause 4.6A	An Agency Head must put in place measures to ensure that, subject to considerations of costs and operational efficiency, if an ongoing APS employee is to be promoted in the Agency, the opportunity to apply for the relevant employment, or similar employment in the Agency, was open to all eligible members of the community, whether or not they were APS employees.
Clause 4.6A(3)	An Agency Head may make a decision not to provide the opportunity to apply for a promotion to all eligible members of the community because of considerations of cost or operational efficiency.

DIRECTION	POWER OR FUNCTION
Clause 4.7	An Agency Head must put in place measures for the purposes of the temporary assignment of duties to APS employees.
Clause 5.4	An Agency Head must take reasonable steps to ensure that the person who determines whether an APS employee has breached the Code of Conduct is, and appears to be, unbiased.
Clause 6.1	An Agency Head must put in place measures: <ul style="list-style-type: none"> <li>(a) to ensure that SES employees are effectively deployed in the Agency; and</li> <li>(b) to monitor the skills required at the SES level in the Agency.</li> </ul>
Clause 6.2(2)	The Agency Head must ensure that decisions defined in Clause 6.2(1) meet the minimum requirements. Clauses 6.3 to 6.8 set out the minimum requirements.
Clause 6.4	Minimum requirements—mobility of an SES employee: <ul style="list-style-type: none"> <li>(a) in the case of an employee who is to be moved in the Agency: <ul style="list-style-type: none"> <li>(i) the Agency Head has consulted with the employee about possible options for mobility; and</li> <li>(ii) the Agency Head informs the Commissioner of the movement; and</li> </ul> </li> <li>(b) in the case of an employee who is to be moved to another Agency: <ul style="list-style-type: none"> <li>(i) the Agency Head of the Agency from which the employee is to be moved has been consulted about, and agrees to, the movement; and</li> <li>(ii) the Agency Head informs the Commissioner of the movement.</li> </ul> </li> </ul>
Clause 6.6A	Minimum requirements—assignment from specialist SES classification to corresponding non-specialist SES classification: <ul style="list-style-type: none"> <li>(1)(a) in the case of an employee who is assigned the duties as a result of a competitive selection process—the requirements in subclause 6.3(1) are met; and</li> <li>(c) in any other case: <ul style="list-style-type: none"> <li>(i) the Agency Head of the Agency in which the employee is to perform the duties is satisfied, on the basis of a formal assessment of the employee conducted by the Agency Head, that the employee has the necessary work-related qualities to perform the duties; and</li> <li>(iv) the Agency Head has informed the Commissioner of the assignment, the results of the formal assessment of the employee and the certification given.</li> </ul> </li> </ul>

DIRECTION	POWER OR FUNCTION
Clause 6.6B	<p>Minimum requirements—assignment from non-SES classification to SES classification:</p> <p>(1)(a) in the case of an employee who is assigned the duties as a result of a competitive selection process—the requirements set out in subclause 6.3(1) have been met; and</p> <p>(b) in any other case:</p> <ul style="list-style-type: none"> <li>(i) the Agency Head of the Agency in which the employee is to perform the duties is satisfied, on the basis of a formal assessment of the employee conducted by the Agency Head, that the employee has the necessary work-related qualities to perform the duties; and</li> <li>(iv) the Agency Head has informed the Commissioner of the assignment, the results of the formal assessment of the employee and the certification.</li> </ul>
Clause 6.8	<p>Minimum requirements—termination of employment</p> <p>6.8(b) the employee has been given full information about other employment in the Agency that the Agency Head, having regard to the assessment, considered could be made available to the employee.</p>
SCHEDULE 1	<p>CIRCUMSTANCES IN WHICH CHAPTER 4 (MERIT IN EMPLOYMENT) DOES NOT APPLY</p>
Clause 2(b)	<p>An Agency Head may decide that a person's previous employment should not have ended.</p>

## AGENCY HEAD POWERS AND FUNCTIONS UNDER THE PUBLIC SERVICE CLASSIFICATION RULES 2000

This list comprises powers or functions that may be considered for delegation under Rule 13 of the Public Service Classification Rules 2000. It is a matter for Agency Heads to decide what powers and functions are delegated to staff within their Agency.

RULE	POWER OR FUNCTION
Rule 6	An Agency Head must allocate an approved classification to each APS employee in the Agency, subject to Rule 7.
Rule 7(3)	The Agency Head must allocate to the employee: (a) the approved classification that was allocated to the employee immediately before moving to the Agency; or (b) another approved classification that is in the same group as the classification mentioned in paragraph (a).
Rule 9(1)	An Agency Head must allocate an approved classification to each group of duties to be performed in the Agency.
Rule 9(3)	If a training classification is allocated to a group of duties, the Agency Head must ensure that the duties include a requirement to undergo training.
Rule 9(4)	If the group of duties involves work value requirements applying to more than one classification, the Agency Head may allocate more than one classification (a broadband) to the group of duties.
Rule 10(1)	An Agency Head must issue, in writing, work level standards describing the work requirements for each classification applying to a group of duties to be performed in the Agency.
Rule 11(1)	If an APS employee who is engaged at a training classification satisfactorily finishes each training requirement for the training classification, the Agency Head must allocate to the employee a classification mentioned in column 3 of Schedule 2 that relates to the employee's training classification.

---

## A P S   V A L U E S   > >   > >

---

The Australian Public Service:

- is apolitical, performing its functions in an impartial and professional manner;
- is a public service in which employment decisions are based on merit;
- provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;
- has the highest ethical standards;
- is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
- is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;
- delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
- has leadership of the highest quality;
- establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
- provides a fair, flexible, safe and rewarding workplace;
- focuses on achieving results and managing performance;
- promotes equity in employment;
- provides a reasonable opportunity to all eligible members of the community to apply for APS employment;
- is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
- provides a fair system of review of decisions taken in respect of APS employees.

Agency Heads are bound by the Code of Conduct in the same way as APS employees and have an additional duty to promote the APS Values.

