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Audit Report No.15 2004–05
Performance Audit

Financial Management of Special Appropriations

Australian National Audit Office

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of Australia 2004

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Canberra ACT
23 November 2004

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *Financial Management of Special Appropriations*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Oliver Winder', is positioned above the printed name.

Oliver Winder
Acting Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations / Glossary

AAO	Administrative Arrangements Order
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
ACS	Australian Customs Service
AEC	Australian Electoral Commission
AEST	Australian Eastern Standard Time
Application of Laws Act	<i>Commonwealth Places (Application of Laws) Act 1970</i>
AGD	Attorney-General's Department
AGO	Australian Greenhouse Office
AGS	Australian Government Solicitor
AIR	Australian Industrial Registry
AJF	Australia-Japan Foundation
ANAO	Australian National Audit Office
AOFM	Australian Office of Financial Management
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIC Act	<i>Aboriginal and Torres Strait Islander Commission Act 1989</i>
ATSIS	Aboriginal and Torres Strait Islander Services
Audit Act	<i>Audit Act 1901</i>
AusAID	Australian Agency for International Development
Bankruptcy Act	<i>Bankruptcy Act 1966</i>
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CAMM	Cash and Appropriation Management Module
'Clear read' principle	The relationship between reporting documents covering any one financial year.
the Compact	<i>Compact of 1965</i>

Compensation Act	<i>Compensation (Japanese Internment) Act 2001</i>
CSIRO	Commonwealth Scientific and Industrial Research Organisation
CRF	Consolidated Revenue Fund
DAFF	Department of Agriculture, Fisheries and Forestry
DCITA	Department of Communications, Information Technology and the Arts
Defence	Department of Defence
DEH	Department of Environment and Heritage
DEST	Department of Education, Science and Training
DEWR	Department of Employment and Workplace Relations
DFAT	Department of Foreign Affairs and Trade
DHA	Department of Health and Ageing
DHR	Department of the House of Representatives
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DITR	Department of Industry, Tourism and Resources
DoS	Department of the Senate
DoTRS	Department of Transport and Regional Services
DVA	Department of Veterans' Affairs
FaCS	Department of Family and Community Services
Finance	Department of Finance and Administration
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMLA Act	<i>Financial Management Legislation Amendment Act 1999</i>
FMOs	Finance Minister's Orders—financial reporting requirements made by the Finance Minister under Section 63 of the FMA Act and Section 48 of the CAC Act
Gas Pipelines Act	<i>Gas Pipelines Access (Commonwealth) Act 1998</i>
GBE	Government Business Enterprise
GBRMPA	Great Barrier Reef Marine Park Authority

GGG	General Government Sector
HIC	Health Insurance Commission
ILC	Indigenous Land Corporation
ITSA	Insolvency and Trustee Service Australia
Land Fund Special Account	Aboriginal and Torres Strait Islander Land Fund Special Account
Mirror Taxes Act	<i>Commonwealth Places (Mirror Taxes) Act 1998</i>
NDA	<i>National Distribution Account</i>
OLD	Office of Legislative Drafting
OOSGG	Office of the Official Secretary to the Governor-General
OPA	Official Public Account
OPC	Office of Parliamentary Counsel
ORER	Office of the Renewable Energy Regulator
PAES	Portfolio Additional Estimates Statements
PBS	Portfolio Budget Statements
PM&C	Department of the Prime Minister and Cabinet
the Regulations	<i>Veterans' Entitlements (Compensation-Japanese Internment) Regulations 2001</i>
Reserve Bank	Reserve Bank of Australia
SAAP	Supported Accommodation Assistance Program
SCALEplus	On-line database of Commonwealth laws maintained by the Attorney-General's Department
States Grants Act	<i>States Grants Act 1927</i>
Supplementary Measures Act No.1	<i>Appropriation (Supplementary Measures) Act (No.1) 1999</i>
Supplementary Measures Act No.2	<i>Appropriation (Supplementary Measures) Act (No.2) 1999</i>
Treasury	Department of the Treasury
VEA	<i>Veterans' Entitlements Act 1986</i>

Summary and Recommendations

Summary

Introduction

1. The Australian Constitution provides for a Consolidated Revenue Fund (CRF), formed from all revenues and moneys raised or received by the Government. Payments from the CRF are required to be authorised by an appropriation, made by law.
2. Special Appropriations are made in Acts that deal with particular purposes of spending. In 2002–03, more than \$223 billion was spent from the CRF under the authority of Special Appropriations. This represented more than 80 per cent of all appropriation drawings for the year.
3. The Department of Finance and Administration (Finance) is responsible for developing and maintaining the financial framework for the Commonwealth public sector. For their part, individual Commonwealth entities are responsible for managing particular Special Appropriations. This management responsibility includes: adherence to the requirements of the financial framework and relevant laws; maintaining proper accounts and records on each Special Appropriation; financial reporting on the use of Special Appropriations; and, as appropriate, performance information in annual reports.

Audit objectives and key findings

4. The audit objectives were to:
 - identify all Special Appropriations and ascertain which entities are responsible for their financial management and reporting; and
 - assess entities' financial management and reporting of Special Appropriations against the Commonwealth's financial management and reporting frameworks.

Special Appropriation stocktake

5. In terms of the first audit objective, the Australian National Audit Office (ANAO) identified that, during 2002–03, there were 414 Special Appropriations in existence. Each of those appropriations provides a right to spend money from the CRF subject to meeting legislative criteria. In some cases the appropriation is not limited in amount. It is therefore important that there is defined responsibility and accountability for such appropriations and that access to the CRF is withdrawn when it is no longer needed. ANAO concluded that this has not been the case, as follows:

- A large number of Special Appropriations that entities no longer require remain in existence. In the main, entities do not seek to have unnecessary Special Appropriation clauses repealed.
- In some instances, entities have obtained more than one appropriation for the same purposes.
- No entity has accepted responsibility for some Special Appropriations. Conversely, there were also instances where more than one entity claimed to be administering the same payments from the same Special Appropriation. A variation was identified which involved shared responsibility, but in circumstances where accountability arrangements often lacked clarity.

Financial management and disclosure

6. Appropriation management is not a recent feature of Commonwealth financial management. Since Federation, agencies have been required to: spend strictly within appropriation limits; ensure that amounts are only spent within the purposes of appropriation; maintain accounts and records; control obligations in relation to current and future years' appropriations; and properly report appropriations.

7. With effect from 1 July 1999, important amendments were made to the *Financial Management and Accountability Act 1997* (FMA Act). Under the arrangements in place up to 30 June 1999, Finance operated a central bank account, payment system and appropriation ledger on behalf of all agencies. As part of the July 1999 changes, two key appropriation management responsibilities were devolved from Finance to agencies, namely:

- legislative controls over who may lawfully draw upon appropriations; and
- maintenance of accounts and records concerning the use of individual appropriations.

8. In this context, in relation to the second audit objective, ANAO concluded that widespread shortcomings have existed in the management and disclosure of Special Appropriations. This included the following findings:

- A number of entities had yet to amend their instructions, procedures and/or delegations to reflect their increased responsibilities although, at the time of this performance audit, some five years had elapsed since the FMA Act changes commenced operation. Subsequent to the ANAO raising this issue with the entities concerned, a significant number have now taken steps to rectify the deficiencies identified.

- Drawings have been made from the CRF by five entities in reliance on incorrect appropriation authorities. These drawings involved payments of more than \$393 million between 1998–99 and 2002–03. In each instance, a valid alternative appropriation was available. This finding highlights the need for proper appropriation controls to be in place at the time the payments are made.
- Errors were also identified in the reporting and disclosure of Special Appropriation spending. In one instance, an entity disclosed in 2001–02 and 2002–03 a total of \$7.2 billion in spending against proposed legislation that had not been passed by the Parliament.
- Two entities have spent money that was not approved by the Parliament. The instances identified by ANAO involved aggregate funds estimated at some \$23 million being improperly drawn over the period examined by ANAO. Of this amount, \$6.96 million is estimated to involve breaches of Section 83 of the Constitution. ANAO has been advised that the entities involved are working with Finance to correct the errors and repay the amounts involved.¹
- In the five-year period covered by the audit, 21 entities made, but did not disclose as Special Appropriation drawings from the CRF, payments totalling at least \$13.1 billion from 11 Special Appropriations. In addition, a further entity did not disclose \$26.6 billion in payments from one Special Appropriation, although this non-disclosure was based upon legal advice and the treatment was explicitly described in the 2002–03 financial statements. The treatment was subsequently changed following further legal advice.
- More than half of all existing Special Appropriations were not appropriately disclosed by the responsible entities in their annual financial statements. While in many instances the non-disclosed Special Appropriations had not been used, the disclosure of unused Special Appropriations should be made to the Parliament and other stakeholders for accountability purposes.

Overall audit conclusion

9. The sound governance, management and reporting of appropriations requires certainty, clarity and consistency in the application of the Commonwealth's financial management framework. The audit findings indicate that the manner in which the financial framework has been interpreted and implemented has not been consistent with those

¹ See paragraphs 4.73 to 4.75.

characteristics. While many of the issues are quite technical, in a legal sense there are important considerations of appropriate accountability, including transparency, in relation to the Parliament. Overall, ANAO considers that there have been significant shortcomings in the financial management of various Special Appropriations.

10. Given the fundamental importance of appropriations to Parliamentary control over expenditure, changes need to be made to secure proper appropriation management in the Commonwealth. In particular, there has been inadequate attention by a number of entities to their responsibility to ensure that a correct, valid appropriation to support a particular payment has been identified before spending funds from the CRF, and to accurately disclose their use of Special Appropriations.

11. Achieving the necessary improvements to the management of Special Appropriations will require greater understanding of, and increased care and attention to, legislative requirements and appropriation management practices. In that respect, there is evidence that, in response to ANAO's audit activities, entities have increased their focus on those obligations. In addition, during the course of this audit, Finance issued guidance to Chief Financial Officers² and provided four Circulars to FMA Act agencies relating to particular aspects of appropriation management by agencies subject to the FMA Act.³

12. The provision of additional guidance on appropriation management and disclosure, as required, would assist entities to manage and report appropriations in a better and more consistent manner across the Commonwealth. Further work is also required in other areas of appropriation management to provide sufficient assurance about the use of Special Appropriations, including improvements to entity internal controls. To these ends, this report makes six recommendations.

Entity responses

13. Entities that responded to the draft report agreed to all recommendations. Detailed agency responses are included at Appendix 1. In addition, Finance provided the following summary comment on the report:

Finance notes that the work undertaken by the ANAO in preparing the report has been significant and considers that it will serve to focus agencies' attention on appropriation management.

² *Special Appropriation Disclosure*, Accounting Policy Branch, 20 May 2004.

³ Namely: Finance Circular No.2004/06, *Appropriations and the Consolidated Revenue Fund*, 10 June 2004; Finance Circular No.2004/07, *Drawing Rights: Payments and Debiting Appropriations*, 2 July 2004; Finance Circular No.2004/08, *Appropriation for Repayments under Section 28 of the FMA Act*, 11 August 2004; and Finance Circular No.2004/09, *Net appropriation agreements (Section 31 Agreements)*, 11 August 2004.

Finance agrees the recommendations and is taking action to assist agencies to comply more fully with the requirements.

Finance will be proposing clarifications to the disclosure requirements for Special Appropriations set out in the Finance Minister's Orders in order to more effectively explain for the benefit of agencies several of the issues raised in the report.

Finance has provided agencies with a range of guidance on the issue of appropriation management over the past year and has more recently issued Finance Circulars on specific issues raised in the audit. These include:

- Guidance material (Explanatory Notes) contained in the Finance Minister's Orders (Preparation of Financial Statements);
- Estimates Memorandum 2003/27, *Refresher on Appropriation Framework – Rules: The Commonwealth's Appropriation Framework and Rules*;
- Finance Circular 2004/06, *Appropriations and the Consolidated Revenue Fund*;
- Finance Circular 2004/07, *Drawing Rights: Payments and Debiting Appropriations*;
- Finance Circular 2004/08, *Appropriation for repayments under Section 28 of the FMA Act*;
- Finance Circular 2004/09, *Net appropriation agreements (Section 31 agreements)*;
- Finance Circular 2004/16, *Appropriation management: responsibilities of agencies*; and
- Finance Circular 2004/17, *Appropriations for payment to CAC bodies*.

This work provides a strong platform for agencies enhancing their management and disclosure of appropriations.

Recommendations

Set out below are ANAO's recommendations and agencies' abbreviated responses. More detailed responses are shown in the body of the report immediately after each recommendation.

Recommendation No.1
Para 2.14

ANAO *recommends* that relevant entities consult with the Department of Finance and Administration on the need to liaise with the Senate Appropriations and Staffing Committee about which Annual Appropriation Bill should be used where it is proposed to move funding for particular payments from Special Appropriations to Annual Appropriations.

All responding agencies agreed.

Recommendation No.2
Para 3.26

ANAO *recommends* that Portfolio Departments review their processes for providing information to the Department of the Prime Minister and Cabinet for the purpose of updating, consolidating or amending the Administrative Arrangements Order, in order to confirm that the information provided is accurate and includes all relevant legislation administered by their Ministers.

All responding agencies agreed.

Recommendation No.3
Para 3.52

ANAO *recommends* that accountability for Special Appropriations be improved by the Department of Finance and Administration reviewing financial reporting requirements and related guidance to provide entities with greater clarity about:

- (a) the disclosure requirements for Special Appropriations that have not been used in a given financial year and/or have been exhausted;
- (b) the disclosure obligations that apply where entities access Special Appropriations that are the administrative responsibility of another entity; and

- (c) the approach to be taken to achieving a clear read between budgeted and actual use of Special Appropriations.

All responding agencies agreed.

**Recommendation
No.4
Para 4.18**

ANAO *recommends* that the Department of Finance and Administration promulgate advice on the management and disclosure of Special Appropriations used by, or paid to, entities subject to the *Commonwealth Authorities and Companies Act 1997*. This should include advice on the particular roles and responsibilities of Finance, Portfolio Departments and the CAC Act entities.

All responding agencies agreed.

**Recommendation
No.5
Para 4.41**

ANAO *recommends* that:

- (a) the Department of Finance and Administration examine options for promoting greater consistency across Commonwealth entities in the management of Special Appropriations; and
- (b) where more than one entity draws on a Special Appropriation, relevant entities agree on appropriate arrangements to effectively coordinate the administration and disclosure of its use.

All responding agencies agreed.

**Recommendation
No.6
Para 4.55**

ANAO *recommends* that, to meet their accountability obligations in respect of Section 83 of the Constitution, entities that draw amounts from the Consolidated Revenue Fund establish and maintain accounts and records that accurately link expenditure with a specific valid appropriation.

All responding agencies agreed.

Audit Findings and Conclusions

1. Introduction

This chapter outlines the background to the audit; summarises the Commonwealth's appropriations framework; and explains the audit approach taken.

Background

1.1 The Australian Constitution⁴ states that all revenues or money raised or received by the Executive Government shall form one Consolidated Revenue Fund (CRF). An appropriation is an authorisation by Parliament to spend from the CRF for a particular purpose.⁵ Laws authorising money to be drawn from the CRF are either annual or Special Appropriations, as follows:

- Annual Appropriations are generally made in six Acts each year. Of these six Acts, three are prepared at the time of each Federal Budget and a further three are prepared, as necessary, at Additional Estimates.
- Special Appropriations are provided in Acts of Parliament that deal with particular purposes of spending. Some Special Appropriations state an amount that is appropriated for a particular purpose, sometimes referred to as being 'limited by amount'. Others do not state an amount, but the appropriation is instead determined by legislative criteria or conditions. These types of Special Appropriations can be referred to as 'unlimited by amount', and are also referred to as 'standing appropriations', in that they endure over time.

1.2 Special Appropriations are a feature of most Westminster-based appropriation frameworks and generally relate to payments that need to be made on an ongoing basis independently of the Government's annual budget priorities.⁶ The Department of Finance and Administration (Finance) advised agencies that Special Appropriations, rather than Annual Appropriations, would generally be appropriate where there is a need or desire (on the part of the Government) to:

- fund a legal entitlement to a benefit which is to be provided to those who satisfy criteria set out in law (for instance, age pensions);
- give effect to inter-governmental funding agreements or arrangements;

⁴ Section 81.

⁵ Department of Finance and Administration, Estimates Memorandum 2003/27, *Refresher on Appropriation Framework — Rules: The Commonwealth's Appropriation Framework and Rules*, 28 August 2003, p. 1.

⁶ Report of the Victorian Auditor-General, *Parliamentary control and management of appropriations*, April 2003, p. 11.

- demonstrate the independence of an office from Parliament and the Executive by providing for automatic payment of the remuneration of holders of statutory offices (such as judges);
- demonstrate Australia's ability to meet its financial obligations independently of parliamentary approval of funds (as, for instance, in the repayment of loans);
- provide urgent payment where alternative arrangements are unsuitable or inappropriate (for instance, for relief from natural disasters); or
- provide funding for unique circumstances which would be difficult to accommodate in Annual Appropriation bills.⁷

1.3 Special Appropriations are not subject to the Parliament's annual budgetary control.⁸ However, they are subject to Parliament's examination (for instance, in Estimates Committees). Finance advised ANAO in September 2004 that, while the Parliament necessarily focuses on annual estimates, as detailed in the appropriation bills, as part of the Budget Process, it is open to the Parliament to scrutinise estimated expenditure from Special Appropriations. These estimates are detailed in relevant agencies' Portfolio Budget Statements (PBS).

1.4 Special Appropriations fund the majority of Commonwealth General Government Sector (GGS) expenditure. In 2002–03, Commonwealth agencies and authorities drew from the CRF a total of more than \$223 billion for payment under the authority of Special Appropriations. ANAO estimates that these drawings represented more than 80 per cent of total Commonwealth appropriation expenditure in that year. Among other things, the 414 Special Appropriations authorise funding for significant social welfare benefit payments, taxation refunds and debt servicing costs. Special Appropriations also provide a guarantee for loans, underwrite contingencies, and fund payments for compensation and financial assistance.

Appropriations framework

1.5 There are two main provisions in the Constitution relating to appropriations. These are Sections 81 and 83. They provide as follows:

All revenue or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth, in the manner

⁷ Estimates Memorandum 2003/27, op. cit., pp. 2–3.

⁸ *ibid.*, p. 2.

and subject to the charges and liabilities imposed by this Constitution. (Section 81)

No money shall be drawn from the Treasury of the Commonwealth⁹ except under appropriation made by law. (Section 83)

1.6 The Section 83 requirement derives from principles established at the time of passage of the Bill of Rights in Britain in 1688. Taken together, the requirements of Section 81, Section 83 and Section 97 (governing accounting and audit) create a regime for Parliament to exercise control over and require accountability for the Executive Government's spending.

Roles and responsibilities

1.7 Finance is responsible for developing and maintaining the financial framework for the Commonwealth public sector.¹⁰ As of September 2004, the financial framework covered 85 agencies subject to the FMA Act and 107 entities subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act).¹¹

1.8 Under the previous *Audit Act 1901* (Audit Act), Finance had a central role in maintaining a detailed and prescriptive financial framework, including the provision of central accounting and payment systems. This latter role included the centralised reporting of estimated and actual appropriations expenditure. In September 2004, Finance advised ANAO that, in a few cases, appropriation management was the responsibility of other agencies under the Audit Act, as was the case with social welfare benefit payments.

1.9 With the repeal of the Audit Act, and the commencement on 1 January 1998 of the FMA Act and related Acts, there was an important change in Finance's appropriation management role. Under the revised financial framework, individual agencies became responsible for the control and management of their own finances, including the management of appropriations.

1.10 In February and September 2004, Finance explained to ANAO its role in respect of Special Appropriations from a whole of government perspective, as follows:

[Finance's] primary role occurs in Budget Group, which analyses the estimates that are prepared by agencies during the Budget and Additional Estimates processes; these amounts indicate what agencies expect to be spent against

⁹ In this context, the Treasury of the Commonwealth refers to the CRF.

¹⁰ *Portfolio Budget Statements 2003–04: Finance and Administration Portfolio*, Budget Related Paper No. 1.9, p. 35.

¹¹ Figures advised by Finance.

each Special Appropriation. These estimates, which are entered by agencies with other data into the Accrual Information Management System (AIMS), are subsequently input into the Cash and Appropriation Management Module (CAMM)¹² by officers from [Finance's] Financial Management Group. Finance's secondary role is to provide the mechanism for agencies to draw down these funds into their bank accounts on an 'as needed' basis.

When agencies request variations to the approved limits outside of these estimates updates, they are required to seek approval from the relevant area of Budget Group. Once approved, the Agency Advice Unit forwards agreed requests to Financial Management Group for updating of the amounts in CAMM.

Additionally, Finance examines, consults with agencies and approves variations to approved draw-down limits but these are only estimate approvals and the legal right for the agency to spend the money originates in the legislation. The estimate approval process is separate from the controls that agencies put in place to ensure the spending of money is supported by appropriations.

1.11 For their part, individual entities are responsible for managing and disclosing the use of Special Appropriations in accordance with the financial framework and applicable laws. This includes a requirement to keep accounts and records in a way that, inter alia, ensures moneys are only expended for the purpose for which they are appropriated, and the limit on any appropriation is not exceeded.¹³ Entities are also required to disclose the appropriations for which they are responsible, and the payments made against those appropriations, in their annual financial statements.

Audit approach

1.12 The subject of this audit is the financial management of all Commonwealth Special Appropriations in the period 1998–99 to 2002–03, with the exception of those relating to Special Accounts and those administered by Government Business Enterprises (GBE). The management of Special Accounts and the related appropriations was examined in a recent ANAO performance audit.¹⁴ Unless requested by the Finance Minister, the responsible Minister or

¹² Finance advised ANAO that: 'CAMM is designed to meet Finance's responsibilities in relation to the administration of the annual Appropriation Acts and special appropriations. It is not, however, intended to be a control mechanism for the spending of money supported by appropriations, as such administration is the responsibility of agencies.'

¹³ Refer to Section 48 of the FMA Act and Financial Management and Accountability Order 2.3.

¹⁴ ANAO Audit Report No.24 2003–2004, *Agency Management of Special Accounts*, Canberra, 30 January 2004.

the Joint Committee of Public Accounts and Audit, ANAO cannot conduct a performance audit of a GBE.¹⁵

1.13 The audit objectives were to:

- identify all Special Appropriations and ascertain which entities are responsible for their financial management and reporting; and
- assess entities' financial management and reporting of Special Appropriations against the Commonwealth's financial management and reporting frameworks.

1.14 The audit commenced in December 2003 with a survey aimed at identifying all Special Appropriations. ANAO provided 57 entities with a listing of all Special Appropriations (except those relating to Special Accounts) that audit research¹⁶ had indicated were the responsibility of that entity. Entities were asked to respond, confirming the survey's accuracy and completeness, or advising of any corrections to the audit data.

1.15 Based on survey responses and further audit analysis, ANAO began following-up with entities in February 2004, to request financial data for each Special Appropriation managed by them, and to raise issues that required further clarification. At this stage, ANAO also provided each entity with an audit assessment of the current status of each Special Appropriation and whether the entity had met its obligation to account for the appropriation in its financial reports.

1.16 In addition to the audit survey and related desk audit activity, ANAO examined in detail five agencies' financial management of selected Special Appropriations. Management practices were examined in the Department of the Treasury (Treasury), the Department of Family and Community Services (FaCS), the Department of Veterans' Affairs (DVA), the Department of Education, Science and Training (DEST), and the Department of Health and Ageing (DHA).

1.17 On 8 July 2004, ANAO provided a Discussion Paper, or relevant extracts thereof, to the 44 entities that had a role in administering Special Appropriations during 2002–03. Entities were asked to provide any written comments on the Discussion Paper by 29 July 2004. Most respondents provided comments by that date, or soon thereafter. However, a delay was experienced in receiving comments from a few agencies, including Finance, with comments provided by Finance on 9 September 2004. In November 2004, Finance advised ANAO that the delay in it responding to the Discussion Paper

¹⁵ Section 16(2) of the *Auditor-General Act 1997*.

¹⁶ The research included a comprehensive examination of Commonwealth legislation, entity financial statements and Budget Papers.

had resulted from the need to consult with a range of agencies in relation to the complex technical issues raised, in order to fully respond to the issues raised by the ANAO.

1.18 A proposed report was circulated to agencies for comment on 29 September 2004.

1.19 The audit was conducted in accordance with ANAO auditing standards at an estimated cost to the ANAO of \$460 000.

2. Governance Framework

This chapter discusses the governance framework for the management of Special Appropriations as established by the Constitution, including the structure and operation of the Consolidated Revenue Fund and the role of the Parliament in the creation and administration of Special Appropriations.

The Role of Parliament

2.1 The Australian Constitution creates a framework within which the Executive Government receives and may spend money. Together, Sections 81 and 83 of the Constitution require that there must be an appropriation, made by law, for the purposes of the Commonwealth before money can be drawn from the CRF.

2.2 Under Section 1 of the Constitution, the power to make laws is vested in the Parliament. The Parliament comprises three components, namely: the Governor-General (as Head of State and representative of the Queen); the House of Representatives; and the Senate. The agreement of each to a proposed law is required to make it a law of the Commonwealth. Section 53 of the Constitution provides that the two Houses of the Parliament have equal powers in relation to all proposed laws, except in relation to proposed laws to impose taxation or laws involving appropriations.

Laws imposing taxation

2.3 Section 55 of the Constitution states that taxation laws shall deal only with the imposition of taxation. Among other things, this means that a law imposing taxation cannot include an appropriation. In this respect, ANAO raised with the Australian Taxation Office (ATO) three apparent instances of Special Appropriations having been included in taxation Acts.¹⁷ ATO advised ANAO that amounts had been drawn against only one¹⁸ of these three Special Appropriations in the five-year audit period to 2002–03. That Special Appropriation was repealed in June 2003. ATO also obtained legal advice from the Australian Government Solicitor (AGS) on the Constitutional validity of these Special Appropriations. The advice concluded that:

None of [*these Acts*] impose taxation. Rather, they set out provisions concerning liability (or ‘assessment’) to taxation. Separate Acts impose the

¹⁷ These were: Section 78A(6) of the *Excise Act 1901* (Excise Act), for payments of Diesel Fuel Rebate, which was repealed on 27 June 2003; Section 221ZXE of the *Income Tax Assessment Act 1936*, for refunds of certain farm management deposits; and Section 16M(7) of the *Pay-Roll Tax Assessment Act 1941*, for the payment of rebates on payroll tax.

¹⁸ Section 78A(6) of the Excise Act.

relevant taxes. ... I note that each of the imposition Acts contains a provision which says that the relevant assessment Act is 'incorporated' and to be 'read as one' with the imposition Act (see Section 2 of the *Excise Tariff Act 1921*, Section 4 of the *Income Tax Act 1986* and Section 2 of the *Pay-Roll Tax Act 1941*). However, the High Court has effectively held that incorporation provisions like these operate only to incorporate into an imposition Act provisions of an assessment Act which deal with the imposition of taxation ... It follows that the incorporation provisions in the imposition Acts do not incorporate into those Acts any of the standing appropriation provisions referred to above.

2.4 This conclusion drew substantially on the view of Justice Dawson in *Northern Suburbs General Cemetery Reserve Trust v. The Commonwealth of Australia* (1993),¹⁹ as follows:

The precise effect of incorporating an assessment Act with a taxing Act appears not to have been the subject of actual decision, but it has generally been accepted that the result is that, if the incorporation means that the taxing Act deals with matters other than the imposition of taxation, then the incorporation is ineffectual by reason of s.55 (save to the extent that the assessment Act deals with the imposition of taxation), leaving the assessment Act otherwise to remain in existence and to operate separately.²⁰ This mechanism is a convenient means of avoiding the difficulty which might otherwise arise should the legislature misconceive where the line is to be drawn between a law dealing with the imposition of taxation and a law simply dealing with taxation.

2.5 In the absence of a definitive ruling to the contrary, the two remaining Special Appropriations in taxation laws are valid and available to be drawn down. However, it would seem desirable that any new proposals for the inclusion of Special Appropriations in taxation Bills to be presented for Parliament's consideration, should be given careful scrutiny.

The Compact of 1965

2.6 The framers of the Constitution considered three separate classes of appropriation, as follows:

- fixed charges on permanent appropriations, or Special Appropriations;
- appropriations for the costs and expenses of maintaining the Government's ordinary annual services. These are currently incorporated in Annual Appropriation Acts No.1, No.3 and No.5; and

¹⁹ 176 CLR 555 FC 93/005.

²⁰ See *Federal Commissioner of Taxation v. Munro* (1926) 38 CLR , per Isaacs J. at p 185; *Cadbury-Fry-Pascall Pty. Ltd. v. Federal Commissioner of Taxation* (1944) 70 CLR 362, per Latham C.J. at p. 373; *Moore v. The Commonwealth* (1951) 82 CLR 547, per Latham C.J. at p 565; *State Chamber of Commerce and Industry v. The Commonwealth (The Second Fringe Benefits Tax Case)* (1987) 163 CLR 329, at p. 341).

- appropriations for 'extraordinary charges': that is, expenditure on other than the Government's ordinary annual services. They correspond to the items in Annual Appropriation Acts No.2, No.4 and No.6.²¹

2.7 Section 53 of the Constitution provides that the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. In order to settle the question of which matters fit into the term 'ordinary annual services of the Government', the Senate and the then Government made an agreement, known as the *Compact of 1965* (the Compact).²² The Compact (as altered in 1999 for the introduction of accrual budgeting) determines the allocation of items between the Annual Appropriation Acts.²³ The Compact requires that:

- Annual Appropriation Acts No.2, No.4 and No.6 include, among other things, activities for which appropriations have not been made in the past, all non-operating appropriations, and grants to the States authorised by Section 96 of the Constitution; and
- Annual Appropriation Acts No.1, No.3 and No.5 include the costs and expenses of maintaining the Government's ordinary annual services.

2.8 In circumstances where it is proposed to move funding for particular payments from Special Appropriations to Annual Appropriations, the terms of the Compact are relevant to determining which Appropriation Bill should be used, as well as the nature of disclosure that should be made in the Bill as to the nature of the proposed payments. An example of such a move was identified by ANAO in relation to payments made to multilateral aid organisations by the Australian Agency for International Development (AusAID). The relevant term of the Compact which applied at the time of the move from Special Appropriations to Appropriation Bill No.1 (incorporating the amendment to the Compact on 17 February 1977) was that 'appropriations for expenditure on ... new policies not previously authorised by special legislation are not appropriations for the ordinary annual services of the Government...'.²⁴

2.9 Various Acts were passed by the Parliament to approve Australian membership of multilateral aid institutions. These Acts incorporate (in a Schedule) the Articles of Membership between the member nations. In each case, the legislation also included a Special Appropriation to pay an initial

²¹ Quick, J., and Garran, R.R., *The Annotated Constitution of the Commonwealth of Australia*, Angus and Robertson, 1901, pp. 669–670.

²² The Compact is not legislation, and issues relating to it may only be conclusively determined by the Parliament.

²³ *Agency Resourcing 2004–05*, Budget Paper No.4, p. 2.

²⁴ *Odgers' Australian Senate Practice*, Tenth Edition, Chapter 13.7.

membership subscription, and a Special Appropriation for an original funding contribution.²⁵

2.10 From time to time, the various institutions seek additional funds from their members.²⁶ For many years, each replenishment contribution in which Australia participated was funded through a Special Appropriation included in separate legislation put before the Parliament, which the Parliament could have chosen to accept or reject.²⁷ However, more recently, in order to remove the need for additional legislation for each contribution, Governments decided to move funding for future replenishment contributions from Special Appropriations to Annual Appropriations.²⁸

2.11 As noted earlier at paragraph 2.7, under the arrangements for Annual Appropriations agreed under the Compact, new policy measures are usually included in Annual Appropriation Bill No.2, which the Senate has the power to amend, with later year payments then moving to Bill No.1. However, funding for new replenishment obligations entered into since the Government decisions to move to Annual Appropriations has been obtained through Annual Appropriation Act No.1, as ordinary annual services of Government, which the Senate does not have the power to amend. The only payments that have been funded through Appropriation Act No.2 have been payments outstanding under replenishment agreements already in existence at the time of the introduction of accrual budgeting for the Commonwealth Budget in 1999–2000. In that case, Finance issued advice that funding to extinguish the existing administered liabilities would be appropriated in Act No.2 as a capital item.

2.12 In that context, ANAO raised with AusAID the possibility that the use of Annual Appropriation Act No.1 for all payments in respect of new

²⁵ The initial subscriptions provided members, including Australia, with certain voting rights. The Articles of Agreement provide that members may choose, but are not obliged, to participate in replenishments of funding to that organisation. Participating in replenishments enables donor countries to maintain their relative voting power in the institution.

²⁶ Payments to the multilateral aid institutions under each new replenishment in which Australia elects to participate generally involve a substantial commitment of funds over a number of years. For example, one of the recent commitments to the International Development Association involves payments totalling \$275 million over a six-year period.

²⁷ Australia's participation in a replenishment becomes effective when the relevant institution receives an Instrument of Commitment, executed by the relevant Minister, for subscriptions and contributions of a specified portion of the total replenishment agreed to by the full membership. Those subscriptions and contributions are settled through payment of cash and deposit of non-negotiable, non-interest bearing promissory notes. These notes are encashed (that is, paid) as provided by the schedule in the relevant replenishment resolution.

²⁸ This applied from 1989–90, in respect of contributions to the International Fund for Agricultural Development, and from 1996–97, for contributions to the Asian Development Fund and the International Development Association. As a consequence of the shift to Annual Appropriations, the \$350 million limited Special Appropriation relating to the sixth replenishment of the Asian Development Fund has an outstanding undrawn balance of \$338.3 million.

replenishment agreements entered into since the change from Special Appropriations may have breached the Compact of 1965. In July 2004, ANAO advised AusAID that, while the Compact was not justiciable, AGS would, as the Government's provider of Constitutional advice, be in a position to advise whether any similar matters had previously been considered or whether fresh consideration was warranted. In response, AusAID initially obtained legal advice from AGS in July 2004 on historical multilateral aid payments, and subsequent advice by way of clarification in August 2004. On that basis, AusAID advised ANAO that, in its view, there has been no breach of the Compact by using either Act No.1 or Act No.2 appropriations for multilateral payments. In August 2004, after considering AusAID's legal advice, ANAO sought the opinion of the Clerk of the Senate, who commented as follows:

The question [as to whether these payments could be made from appropriations for the ordinary annual services of the government] has not been considered by the Senate Appropriations and Staffing Committee or by the Senate itself, and therefore payments out of the appropriations for the ordinary annual services have not been accepted by the Senate.

It is also necessary to emphasise that the question is not justiciable, and therefore it is not a question on which a legal opinion may appropriately be sought, or on which a purported legal opinion carries any particular weight.

The question is whether, under the terms of the agreement as to the meaning of ordinary annual services between the Senate and the government, the payments may appropriately be made from appropriations for the ordinary annual services. There are two possible answers to this question:

- The payments are not for ordinary annual services, because they are not payments for continuing government activities, in that each payment to an organisation ("replenishment") represents a distinct policy decision to provide further support to the organisation.
- While the initial payments to each organisation in effect represented a new policy decision to support the organisation, and therefore could not have been made out of appropriations for the ordinary annual services, the subsequent payments represent a continuing government activity of supporting the organisations and therefore could be made out of such appropriations.

Both propositions are arguable, but I incline to the second, and to conclude that the subsequent payments do represent a continuing activity of government and therefore ordinary annual services which may be funded out of appropriations for that purpose.

I think it would be an essential part of that conclusion that, when the payments were shifted from special appropriations to annual appropriations, the first payments on that basis should not have been made from appropriations for the ordinary annual services, but subsequent payments could appropriately be so made.

As has been indicated, this question has not been considered by the Appropriations and Staffing Committee or the Senate. I shall refer the question to the committee, with our correspondence and my tentative conclusion, and seek an expression of a concluded view.

2.13 ANAO understands that this reference will most likely be considered by the new Parliament.

Recommendation No.1

2.14 ANAO *recommends* that relevant entities consult with the Department of Finance and Administration on the need to liaise with the Senate Appropriations and Staffing Committee about which Annual Appropriation Bill should be used where it is proposed to move funding for particular payments from Special Appropriations to Annual Appropriations.

Agency responses

2.15 AEC, AGD, AJF, AOFM, ASIC, ATO, AusAID, Centrelink, Comcare, CSIRO, DAFF, DCITA, Defence, DEST, DFAT, DHA, DITR, DoS, DoTRS, DVA, FaCS, Finance, HIC, PM&C and Treasury agreed.

2.16 In agreeing to this recommendation, Finance stated that it will continue to provide assistance to agencies where it is proposed that funding for particular payments move from Special Appropriations to Annual Appropriations.

Composition of the CRF

2.17 The Constitutional concepts of the CRF and appropriations safeguard the Parliament's ultimate control over public expenditure. However, an appropriation is not required to expend funds that are not a part of the CRF. Accordingly, from a financial framework perspective, it is important for the composition of the CRF to be well understood by all agencies dealing with the CRF.

2.18 In recent years, Finance has undertaken significant work to develop a sound basis for understanding the composition of the CRF. Based on legal advice received, Finance has reached a number of conclusions in relation to the nature and composition of the CRF, including as follows:

- The CRF is 'self-executing'. That is, all revenues or moneys received by the Commonwealth automatically form part of the CRF, whether or not the Commonwealth has credited those moneys to a fund or account which is designated as part of the CRF.²⁹

²⁹ Refer to Finance Circular No.2004/06, op. cit. p. 1.

- The CRF includes money borrowed by the Commonwealth and ‘trust money’, as well as money in the nature of revenue. As a result, an appropriation is required to spend all such money, including that held on trust.³⁰
- The wide range of circumstances in which Commonwealth money is raised or received makes it impracticable to identify the precise balance of the CRF at any particular time.

2.19 In 2002–03, Finance introduced reporting in the Consolidated Financial Statements of the end of financial year balance of the CRF (but not the related transactions). Finance reported that, as at 30 June 2003, the derived balance of the CRF was \$1.461 billion.³¹

Investments under Section 39 of the FMA Act

2.20 Section 39 of the FMA Act provides the authority for the investment of public money by the Finance Minister and the Treasurer (for debt management purposes only). A Special Appropriation authorising the drawing of money from the CRF for the purposes of Section 39 investments is provided by sub-Section 39(9) of the Act. The Finance Minister has delegated his investment power to a number of Chief Executives in respect of various Special Accounts.³² In addition, the Treasurer has delegated to the Australian Office of Financial Management (AOFM) his power to invest amounts for debt management purposes.

2.21 Each investment made under Section 39 of the FMA Act involves a separate use of the sub-section 39(9) Special Appropriation. This was confirmed in legal advice provided to Finance in July 2003. Notwithstanding this, ANAO found that there has been widespread non-disclosure of the use, and non-use, of the Section 39 Special Appropriation (see Table 2.1). In total, over the period examined by this performance audit, eleven entities did not report their use of the Section 39 Special Appropriation, involving drawings of more than \$36.8 billion.

³⁰ *ibid.*, p. 2.

³¹ Consolidated Financial Statements 2002–03, p. 160.

³² At the time of this audit, ANAO was also undertaking a cross-portfolio performance audit of investment of public funds. The scope of the audit includes a number of FMA Act agencies with a Section 39 delegation.

Table 2.1**Entities that did not disclose use of the FMA Act Section 39 Special Appropriation in the Notes to their Financial Statements^A**

Entity	Payments	ANAO comment
Aboriginal and Torres Strait Islander Commission (ATSIC)	\$4 888 million, 1998–99 to 2002–03	Subsumed elsewhere in financial statement cash flow disclosures
Australian Office of Financial Management (AOFM), Department of the Treasury (Treasury)	\$14 414 million, 1998–99 to 2002–03, in respect of bond repurchases	AOFM (and previously Treasury) reported bond repurchases aggregated under Special Appropriations provided by three other Acts
	\$12 200 million, ^B 1998–99 to 2002–03, in respect of term deposits	From 1 July 1999 to 30 June 2003, the AOFM reported term deposit balances and associated interest earnings but, based on legal advice, did not report on use of the special appropriation that was available under FMA Act Section 39 (see paragraphs 2.23 and 2.24)
Australia-Japan Foundation (AJF)	\$3.950 million, 1998–99 to 2002–03	
Australian Customs Service (ACS)	\$2.044 million, 1998–99 to 2002–03	
Department of Agriculture, Fisheries and Forestry (DAFF)	\$4 713 million, 1998–99 to 2002–03	Partial disclosure as purchases of investments
Department of Communications, Information Technology and the Arts (DCITA)	\$149.0 million, 2001–02 to 2002–03	Reported as investment purchases
Department of Defence (Defence)	\$1.795 million, 1998–99 to 2002–03	
Department of Health and Ageing (DHA)	\$67.784 million, 1998–99 to 2002–03	

Entity	Payments	ANAO comment
Department of Industry, Tourism and Resources (DITR)	\$239.013 million, 1998–99 to 2002–03	
Department of Veterans' Affairs (DVA)	\$31.321 million, 1998–99 to 2002–03	
Department of Finance and Administration (Finance)	\$95.098 million, 2001–02 to 2002–03	
<p>Note A: ATSC, AOFM, ACS, DAFF, DCITA, DHA, DVA and Finance disclosed drawings under FMA Act Section 39 in their 2003–04 financial statements.</p> <p>Note B: Figure is net of term deposit maturities during the year that are reinvested. On a gross basis, use of the Special Appropriation amounted to \$342 914 million.</p>		

Source: ANAO analysis of agency financial data and correspondence.

2.22 The majority of the non-disclosed use of the Section 39 Special Appropriation related to the debt management activities of the Commonwealth.

2.23 Between 1998–99 and 2002–03, the financial statements of the Treasury and the AOFM did not disclose, as a use of the Section 39 Special Appropriation, investments totalling \$26.6 billion. The AOFM advised ANAO that it adopted this approach on the understanding that term deposits placed with the Reserve Bank of Australia (Reserve Bank) were still inside the CRF, thus not requiring the debiting of an appropriation. The AOFM gained legal advice to support this approach. The AOFM was also involved in discussions with Finance.

2.24 In July 2004, the AOFM advised ANAO of the circumstances leading to the non-disclosure, and its recent resolution, as follows:

Throughout 2002–03, the AOFM proactively engaged both [*Finance*] and the AGS to clarify procedural, accounting and legal issues surrounding its term deposit investments. Consistently throughout this time the AOFM was advised that its term deposit investments with the Reserve Bank of Australia (Reserve Bank) were held within the CRF and consequently the Section 39(9) appropriation authority was not used.

Late in the 2002–03 financial year (19th of May 2003) the AGS issued new advice that changed its previous position. This was in response to a further request made by the AOFM to the AGS to review its previous legal advice. In the advice the AGS went only so far as saying that it was ‘open’ to treat the money applied to term deposit investments as having left the CRF if the understanding of the parties (namely the Reserve Bank and the AOFM) was that the Commonwealth did not intend to treat the term deposits as being on call. It did not indicate that it was necessary to treat the transactions in this way or that it would be an error not to do so.

On the 22nd of May 2003 the AOFM sought assistance from [*Finance*] to put in place new operational processes to align with this latest legal advice. In September 2003 [*Finance*] responded to the AOFM request. It was subsequently agreed that a new treatment would be applied for term deposits – whereby funds would be treated as flows out of the CRF – taking effect from 1 July 2003.

Given that the AOFM had received no legal advice that the course previously followed was inappropriate and that no response had been received from [*Finance*], the accounting treatment and associated disclosures made by the AOFM in its [2002–03] financial statements (signed on 22 August 2003) were reasonable given the status of this issue at the time of signing. Moreover, the AOFM explicitly stated (in a footnote to Note 20 [*of the financial statements*]) that the term deposit investments were accounted for on the basis that funds placed on term deposit did not leave the CRF.

2.25 In November 2004, Finance commented to ANAO that the new operational policies that the AOFM was seeking to implement through Finance's IT system were a separate issue to the way the AOFM reported these investments.

2.26 With effect from 1 July 2003, both the AOFM and Finance have treated the AOFM term deposit investments with the Reserve Bank as having left the CRF. Consistent with this approach, the AOFM disclosed these investments in its 2003–04 financial statements as involving a drawing on the Special Appropriation provided by Section 39 of the FMA Act.³³

Surplus revenue

2.27 Under Section 94 of the Constitution, the Parliament may provide, on such basis as it deems fair, that the Commonwealth distribute surplus revenue of the Commonwealth to the States.³⁴

2.28 Finance is responsible for calculating the Commonwealth's financial position for the purposes of Section 94 of the Constitution. In June 2004, Finance advised ANAO that this calculation involves adding the AOFM's term deposit investments held with the Reserve Bank to the balance of the CRF in order to calculate total revenue caught by Section 94.³⁵ To arrive at the

³³ To avoid unwarranted procedures and distortions of CRF receipts and payments in the case of investments that are 'rolled-over', the drafting of Section 39 intended that the reinvestment of moneys that have been invested on deposit for a fixed period are to be deemed not to be a realisation and purchase of an investment requiring the moneys to be accounted for as a receipt and payment in accordance with Section 39 unless:

- the reinvestment places those moneys and accrued interest on deposit with a different financial institution; or
- the Commonwealth actually receives a payment from the previous investment before the second payment is made.

In the case of the AOFM's investment roll-overs, funds are physically returned before being reinvested.

³⁴ Section 94 provides that, 'After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.' Until uniform customs duties were imposed on 8 October 1901, surplus revenue was paid monthly to the States under Section 89(iii) of the Constitution. From that time until the expiry of the five year period on 9 October 1906, surplus revenue was paid monthly to the States under Section 93(ii) of the Constitution. Subsequently, surplus revenue was paid monthly to the States under Section 94 of the Constitution until 31 December 1910, on which date Section 87 of the Constitution (the "Braddon Clause") ceased to have effect. Immediately following, the *Surplus Revenue Act 1910* came into effect, Section 6 of which provided for the distribution of surplus revenue to the States in accordance with the provisions of Section 94 of the Constitution. While drawings are recorded under the *Surplus Revenue Act 1910*, which also provided other payments to States, no drawings are recorded under Section 6 from 1911 until 1927, when Section 6 was repealed in favour of a similar provision at Section 5 of the *States Grants Act 1927*. While payments totalling £7 734 990 are recorded under *States Grants Act 1927* for 1926–27, this did not include any payment of surplus revenue under Section 5. From that date, no further drawings appear to have been reported under the *States Grants Act 1927*.

³⁵ In September 2004, Finance advised ANAO that: 'The AOFM's term deposits have been included in the calculation since the beginning of accrual appropriations in 1999–00.'

Commonwealth's surplus or deficit revenue position, Finance subtracts from this amount the following:

- undrawn appropriations for specified amounts;
- the amounts specified in the Annual Appropriation Budget Bills;
- Standing Appropriations for debt repayment that are quantifiable and certain with respect to the due date for payment; and
- the balance of all Special Accounts.

2.29 In October 2004, Finance advised ANAO that: 'As far as can reasonably be determined, no surplus revenue of the Commonwealth has existed for distribution since 1908–09.'

2.30 ANAO noted that the calculation of any surplus revenue has not been publicly disclosed by Finance. In that respect, Finance advised ANAO in September 2004 that:

Finance sees no benefit in disclosing the Section 94 calculation. While we accept it is important that the calculation be done annually, as it has been, there is no requirement under Section 94 for the calculation to be disclosed, nor has there been any demand for its disclosure. Finance notes that the [*Finance Minister's Orders*] require the Treasury to report on payments under the special appropriation available under the *States Grants Act 1927* and considers that this is an appropriate level of transparency consistent with the level of transparency for many other payments.

2.31 Finance subsequently provided ANAO with details of Finance's October 2004 calculations of surplus revenue for the financial years 1999–2000 to 2002–03 inclusive, indicating that no surplus revenue was available for distribution to States in those years.

2.32 The *States Grants Act 1927* (States Grants Act), administered by Treasury, gives effect to Section 94 of the Constitution. However, in the five-year period to 2002–03 examined by ANAO, Treasury did not publicly report on its administration of the States Grants Act. Treasury's 2003–04 financial statements include a note disclosing a list of Special Appropriations for which it is responsible, including the States Grants Act, that were not used in 2003–04 or 2002–03.

Implications of a self-executing CRF

2.33 As mentioned, the CRF established under Section 81 of the Constitution is considered to be 'self-executing'. That is, moneys raised or received by the Commonwealth automatically form part of the CRF. This is the case, even where the money is received by entities that are legally separate from the

Commonwealth.³⁶ However, ANAO identified two circumstances in which the self-executing nature of the CRF has not been effectively addressed by entities in their administration of Special Appropriations. These were:

- where revenue is collected by States and Territories on behalf of the Commonwealth, before being returned to the States and Territories via a Special Appropriation; and
- where entities need to refund taxes, levies and/or charges.

Appropriations for the return to States and Territories of revenue collected on behalf of the Commonwealth

2.34 The majority of revenue or money raised, or received, by the Commonwealth is reflected in the Official Public Account (a group of bank accounts maintained by Finance) and individual entities' official bank accounts. However, there are some amounts that form part of the CRF that are not dealt with through official bank accounts. This is the case in relation to three Acts that validate certain State and Territory taxes, fees and charges that would otherwise be Constitutionally invalid. These are:

- the *Commonwealth Places (Mirror Taxes) Act 1998* (Mirror Taxes Act), allocated to Treasury.³⁷ In relation to this Act, Finance was advised as follows by AGS in May 2003:

Under the Mirror Taxes Act, State authorities collect various taxes that have been levied by the Commonwealth in relation to Commonwealth places. This legislation merely picks up and applies as Commonwealth law State taxes that had been declared invalid by the High Court in 1997 because they impermissibly intruded into the Commonwealth's exclusive Constitutional power with respect to places owned by the Commonwealth.

- the *Commonwealth Places (Application of Laws) Act 1970* (Application of Laws Act), allocated to the Attorney-General's Department (AGD). Similar in its provisions to the Mirror Taxes Act, since 17 April 1998, this Act has applied only to those State laws not scheduled under the Mirror Taxes Act; and

³⁶ *Submission to the Inquiry by the Joint Committee of Public Accounts and Audit into the draft Financial Framework Legislation Amendment Bill*, Department of Finance and Administration, 4 March 2003, p. 2.

³⁷ The Governor-General put into effect the revenue and appropriation provisions of the Mirror Taxes Act by making an agreement under Section 6 of the Act with the Governor of Victoria on 13 December 2000, by similar agreements with the Governors of New South Wales, Queensland, South Australia and Tasmania made on 14 February 2002, and by an agreement made with the Governor of Western Australia on 22 August 2002.

- the *Gas Pipelines Access (Commonwealth) Act 1998* (Gas Pipelines Act), allocated to the Department of Industry, Tourism and Resources (DITR). This is the lead legislation for the national scheme for third party access to natural gas pipelines. In certain circumstances, the Act provides for payments to be collected by the States and Territories on behalf of the Commonwealth, which are then returned to the relevant State or Territory by the Commonwealth.

2.35 The revenue collected by the States and Territories in each case automatically forms part of the CRF, reflecting its self-executing nature. Each Act provides, therefore, a Special Appropriation permitting this revenue to then be paid from the CRF back to the collecting State or Territory.³⁸ However, none of the relevant departments disclosed the use, if any, made of these Special Appropriations in the audit period of 1998–99 to 2002–03. In this respect, ANAO was advised as follows:

- In July 2004, DITR advised that the Special Appropriation in the Gas Pipelines Act was presently dormant, as no determinations had yet been made activating the relevant provisions of the Act.³⁹ DITR also obtained confirmation from each State and Territory that no financial transactions have been made by a State or Territory under the Gas Pipelines Act.
- In August 2004, AGD advised that it does not, and is not ever likely to, receive monies or make drawings against the Special Appropriation provided by the Application of Laws Act. AGD further advised that there are likely to be a number of agencies that apply this Act in a wide range of locations in Australia and that AGD has no information, and has never collected information, on which agencies may receive monies into the CRF and/or make drawings against the Special Appropriation. AGD raised concerns about the potential inefficiencies and duplication of administrative effort that would arise, together with the need for additional resources, should AGD be held responsible for reporting revenues and expenditures against this Act. The Department suggested that it might be more appropriate for the Act to be made the

³⁸ A similar Special Appropriation exists in respect of payments of refunds to certain taxpayers, provided for by the *Commonwealth Places Windfall Tax (Collection) Act 1998*, allocated to the ATO. On 30 July 2004, ATO advised ANAO that it would only draw on the Special Appropriation provided in that Act where a State Government could not make a payment. ATO advised that this circumstance has not yet arisen and consequently the ATO has not yet drawn on this appropriation.

³⁹ Should determinations be made under Section 11 of the Gas Pipelines Act and the Special Appropriation be activated, the Commonwealth is explicitly required to show in its accounts the full amount of the payments that are notionally made to each State or the Northern Territory. While Section 11(4) of the Gas Pipelines Act permits payments from the States and the corresponding Special Appropriation draw down to be set-off against one another, it also requires that the Commonwealth must show, for accounting purposes, the full amount of each payment made under the Act.

responsibility of a central agency, such as Finance. On this point, Finance advised ANAO in November 2004 that matters dealt with by a Department of State, including the legislation it administers, are set out in the Administrative Arrangements Order (AAO).

- In July 2004, Treasury advised that it does not report transactions under the Mirror Taxes Act in its financial statements, although they are reported in the Final Budget Outcome. Between 2000–01 and 2003–04, revenue totalling \$1.1 billion was reported in the respective Final Budget Outcome documents as being collected under this Act and then paid to the States and Territories. Treasury advised ANAO in July 2004 that it was ‘...considering options on how or whether to report these transactions in the financial statements.’ Following examination of the relevant accounting standards and requirements, the ANAO agreed with Treasury’s proposed approach to the reporting of these transactions and the Department’s 2003–04 financial statements included a note disclosing the total mirror tax collection in that year and the previous year.

Refunds

2.36 The self-executing nature of the CRF means that levies and other taxes, charges, loans and trust moneys form part of the CRF automatically upon receipt.⁴⁰ Accordingly, entities require a valid appropriation in order to make refunds, where required, of any such taxes, levies and charges. However, ANAO identified twelve entities that had been making refunds of taxes, levies or charges without disclosing those refunds as a use of the relevant Special Appropriation as required by the *Financial Management and Accountability (Financial Statement) Orders*. The refunds made by those entities amounted to more than \$1.25 billion over the audit period (see Table 2.2). In many instances, the refunds were netted off against the total revenue collected and reported by the relevant entity, rather than being recognised as constituting both a receipt to the CRF, and a subsequent Special Appropriation drawing on the CRF.

⁴⁰ Finance Circular 2004/06, op. cit., p. 1.

Table 2.2

Refunds made from the CRF but not disclosed as use of a Special Appropriation in the Notes to the Financial Statements^A

Entity	Appropriation Used	Payments	ANAO comment
Attorney-General's Department (AGD)	FMA Act S.28	\$4.014 million, 1998–99 to 2002–03	
Australian Customs Service (ACS)	FMA Act S.28	\$1 198 million, 1998–99 to 2002–03	Various amounts received under the <i>Customs Act 1901</i>
Australian Securities and Investments Commission (ASIC)	FMA Act S.28	\$187 159, 2000–01 to 2002–03	Refund of companies' unclaimed monies
Australian Taxation Office (ATO)	FMA Act S.28	\$19.525 million in 2002–03. ATO unable to quantify payments in earlier years	Includes refunds of indirect taxes to consular officials and refunds of Electronic Funds Transfer payments made to the ATO in error
Department of Agriculture, Fisheries and Forestry (DAFF)	FMA Act S.28	\$8.823 million, 1999–00 to 2002–03 (1998–99 figures not available)	Refund of levies collected under eight Acts
Department of Foreign Affairs and Trade (DFAT)	FMA Act S.28	\$880 846, 1998–99 to 2002–03	Refund of passport and consular fees
Department of Transport and Regional Services (DoTRS)	FMA Act S.28	\$16.215 million, 2000–01 to 2002–03	Does not include certain amounts refunded by airlines under the <i>Air Passenger Ticket Levy (Collection) Act 2001</i> , prior to remittance, which DoTRS advised ANAO are difficult to quantify
Great Barrier Reef Marine Park Authority (GBRMPA)	<i>Great Barrier Reef Marine Park Act 1975</i> , S.39K	\$45 276, 2001–02 to 2002–03	Refund of Environmental Management Charges (see also paragraph 4.13 and associated footnote)
Insolvency and Trustee Service Australia (ITSA)	FMA Act, S.28	\$647 912, 2001–02 to 2002–03	

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Entity	Appropriation Used	Payments	ANAO comment
Office of the Renewable Energy Regulator (ORER)	<i>Renewable Energy (Electricity) Act 2000</i> , S.157	\$406 182 in 2002–03	Administered expense relating to refunds disclosed without attribution
Department of the Treasury (Treasury) Australian Prudential Regulation Authority (APRA)	FMA Act S.28 (APRA function as from May 2001)	\$282 000, 1998–99 to 2000–01 \$1.637 million, 2000–01 to 2001–02	Refund of overpaid financial institutions' levies. Special Appropriation disclosed in 2002–03
Note A: AGD ACS, ASIC, ATO, DAFF, DFAT, DoTRS, GBRMPA, ITSA and Treasury disclosed drawings under FMA Act Section 28(2) in their 2003–04 financial statements.			

Source: ANAO analysis of agency financial data and correspondence.

Special Public Money

2.37 Public money means money in the custody, or under the control, of the Commonwealth or any person acting for or on behalf of the Commonwealth in respect of the custody, or control of the money, including such money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth.⁴¹ Special Public Money is defined by Section 16 of the FMA Act as 'public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth.' Money held by the Commonwealth on trust for another person is one form of Special Public Money.

2.38 As noted, Finance now operates with the view that all Special Public Money held by FMA Act entities, including money held on trust for another person, forms part of the CRF, and therefore requires an appropriation to support its expenditure.⁴² Finance's most recent (February 2004) legal advice on the CRF noted that:

...the main complication that could arise from the Commonwealth adopting the view that all special public money forms part of the CRF is that some statutory provisions regulating the receipt and custody of particular amounts may have been drafted on the assumption that those amounts stood outside the CRF and the Treasury. In those circumstances, there may not be an appropriation to support the expenditure of the relevant amount.

2.39 In June 2004, Finance wrote to Portfolio Secretaries encouraging departments to analyse any relevant legislation administered by their Ministers, in order to identify provisions that may have been drafted on the assumption that no appropriation was necessary for the expenditure of money. In the course of this audit, ANAO examined three instances where trust money was being held by Commonwealth entities, but it was unclear whether that money was within the CRF and, accordingly, whether an appropriation was required for its expenditure.

2.40 In two instances, entity legal advice concluded that the funds were held outside of the CRF. Therefore, no appropriation was required to make payments. However, the issue was sufficiently complex that, in one instance, different administrative arrangements for custody of the funds could have led to a different conclusion.

2.41 The third instance related to the Common Investment Fund, which is created by Section 20B of the *Bankruptcy Act 1966* (Bankruptcy Act) and administered by the Insolvency and Trustee Service Australia (ITSA). In July 2002, Finance was advised by AGS that the Common Investment Fund

⁴¹ Section 5 of the FMA Act.

⁴² Finance Circular 2004/06, op. cit., p. 2.

does not form part of the CRF. However, at that same time, AGS advised Finance that the Fund does contain Special Public Money, as defined under the FMA Act.

2.42 In this context, ITSA was advised by AGS in August 2003 that, in the case of certain funds held by ITSA under the Bankruptcy Act:

[ITSA] would be justified in treating trust money and other money which is special public money as not being part of the CRF ... nor would the expenditure of that money need to be covered by an appropriation.

... To the extent that an appropriation is required [*for payments from the Common Investment Fund*] sub-section 20B(7) of the Bankruptcy Act would act as an appropriation as it is an authority to spend public money for the purposes set out in that sub-section.⁴³

⁴³ Section 20B(7) states as follows: 'Any payment that the Official Trustee is authorized, required or permitted, by or under a provision of this Act, to make out of moneys standing to the credit of a bankrupt or a deceased debtor shall be made out of moneys in the Common Fund.'

3. Special Appropriation Stocktake

This chapter summarises how many Special Appropriations exist and discusses agency responsibility for their financial management and disclosure.

Introduction

3.1 According to legal advice obtained by Finance in May 2004, there are only two sources of appropriations: the Constitution; and an Act passed by both Houses of Parliament. The Constitution, enacted at Federation, included seven Special Appropriations.⁴⁴ Since that time, various Acts of Parliament have increased the number of Special Appropriations and added to the purposes for which they are used.

3.2 Special Appropriations are usually distinguished by the form of words used in their parent Act to create them. The appropriating clause signals Parliament's clear intention that the Act authorises money to be drawn from the CRF for the purpose described in the Act. AGS advised Finance in May 2004 that, in the absence of such a clear authorisation, Parliament's intention is that some other appropriation (outside the parent Act) is to pay any sum of money indicated.⁴⁵

3.3 The Solicitor-General has advised that the Constitution requires appropriations to be expressed with sufficient specificity for a court to be able to determine whether any particular expenditure is authorised by the appropriation in question. However, AGS has also advised Finance that an appropriation in an Act does not need to take a particular form. There simply needs to be a sufficiently clear indication from the Parliament that it is authorising expenditure from the CRF for a particular purpose.

⁴⁴ The seven Special Appropriations are for: the salary of the Governor-General (Chapter 1, Section 3); the salaries of Ministers of State (Chapter 2, Section 66); the payment of the Commonwealth's portion of retiring allowances due to former State public servants who were transferred to the Commonwealth (Chapter 4, Section 84); the Commonwealth compensation to States for property gained along with a State public service department (Chapter 4, Section 85(iii)); payments to States of certain revenues before and after uniform tariffs (Chapter 4, Sections 89 and 93, now defunct); and the payment of surplus revenue to the States (Chapter 4, Section 94).

⁴⁵ AGS advised Finance that: 'If the Act authorising payments is intended to effect an appropriation, it will usually contain an express standing appropriation provision to make this clear. By contrast, [*certain provisions may*] make it clear that there is no appropriation within the Act authorising payment; rather, the payer will need to look elsewhere for an appropriation mechanism. When compared with a standing appropriation, this enables Parliament to deal more specifically with the appropriation of amounts from the CRF for the purposes of the particular statute.'

3.4 The drafting of Bills for introduction into either House of the Parliament is the responsibility of the Office of Parliamentary Counsel (OPC).⁴⁶ For Bills brought forward by the Government, OPC drafts according to the instructions of the agency whose Minister is bringing the Bill before the Parliament. In doing so, OPC staff consider the constitutional and legal background against which the legislation is to be framed; analyse the policy; and determine the structure of the legislation.

3.5 In September 2004, Finance advised ANAO that it sees real benefits in Finance routinely being given an opportunity to comment on special appropriation clauses in draft Bills. In this respect, Finance further advised ANAO that, in February 2004, at Finance's initiation, OPC amended its standing instruction to require its drafters to consult Finance on any draft clauses in Bills that provide for a Special Appropriation.

Number of Special Appropriations

3.6 This audit focused on agencies' financial management of provisions in Acts that directly provide funding from the CRF (except where the law is an Annual Appropriation Act). The approach adopted for the audit was to:

- identify Special Appropriations by examining all Commonwealth legislation;
- compare the results of this analysis with entities' disclosure of appropriations for the financial years 1998–99 to 2002–03 inclusive;
- survey entities to confirm the preliminary audit analysis and resolve any discrepancies; and
- provide Finance with the preliminary results of ANAO's analysis in the event that the Department was aware of any Special Appropriations that had been overlooked.

3.7 Table 3.1 summarises the number of Special Appropriations that were in existence,⁴⁷ and payments made from each, over the five-year period covered by this performance audit. ANAO found that, during 2002–03, there were 414 Special Appropriations in existence.

⁴⁶ OPC was established under the *Parliamentary Counsel Act 1970* and drafts Bills and amendments to Bills. Its role is distinct from that of the Office of Legislative Drafting (OLD) in AGD, which is responsible for the drafting of all kinds of Commonwealth legislative instruments, including regulations, proclamations, rules of Court and laws of Australia's non-self-governing Territories.

⁴⁷ Special Appropriations continue to have effect until:

- the law containing them is repealed by the Parliament;
- provisions within that law (for instance, a 'sunset clause') end the effect of the appropriation; or
- if that law specifies that the appropriation is for a fixed time and/or a fixed dollar amount, the time has expired and/or the allowed amount has been fully drawn.

Table 3.1**Number of Special Appropriations and payments made: 1998–99 to 2002–03**

Year	Number of Special Appropriations extant	Payments made (\$b)
1998–99	375	144.4 ^A
1999–00	374	189.0
2000–01	395	206.1
2001–02	410	209.8
2002–03	414	223.2
Note A: The actual amount paid from Special Appropriations in 1998–99 was \$327.8 billion. This included amounts relating to the management of fund accounting, which was abolished from 1 July 1999. For comparative purposes, these amounts are not included in the above Table.		

Source: ANAO analysis of agency financial data and correspondence.

Multiple appropriations for the same purpose

3.8 ANAO's analysis identified instances of multiple appropriations existing for the same purpose. For example, in a number of instances, a Special Appropriation for the payment of the salary and allowances of a statutory office holder exists in two Acts. In this respect, AGD obtained the following advice from AGS:

Where there is a standing appropriation in respect of particular expenditure and Parliament later provides a further appropriation in respect of the same expenditure, for example, on an annual basis, there is an issue whether the standing appropriation has been impliedly repealed or at least suspended by the later appropriation. In such a case, it may not be correct to say that [AGD] remain 'responsible' for the standing appropriation within the meaning of the [*Finance Minister's Orders*], at least while the later appropriation is in place. Ultimately, however, this question can only be resolved on a case by case basis, having regard to whether Parliament intended to repeal or suspend the earlier standing appropriation or to provide two appropriations, either of which could be used.

3.9 Another significant example of multiple appropriations for the same purpose, noted by ANAO, involved the Supported Accommodation Assistance Program (SAAP). This program provides assistance to people who are homeless or at risk of homelessness due to social disadvantage or housing and income crises. The Commonwealth shares the cost of the program with the States and Territories, which also administer the program. The majority of the funding is provided through Special Purpose Payments to the States under Annual Appropriation Act No.2. The Commonwealth Parliament has also passed legislation providing extra funding to SAAP. In particular, Section 3 of the *Appropriation (Supplementary Measures) Act (No.1) 1999* (Supplementary

Measures Act No.1) provided a Special Appropriation limited to \$15 million for the purposes of SAAP in respect of each of the 2000–01, 2001–02, 2002–03 and 2003–04 financial years.

3.10 FaCS, the department responsible for administering this Act, has not disclosed the Special Appropriation provided by the Supplementary Measures Act No.1 in its financial reports, and advised ANAO that it has not been used. Rather, FaCS advised that, in each of the financial years 2000–01 to 2003–04 inclusive, the \$15 million was drawn down as a Special Purpose Payment under Annual Appropriation Act No.2. Consequently, the amounts have been paid once, but appropriated twice.

Records of Commonwealth statutes

3.11 An important aspect of Parliamentary democracy is that the laws approved by the Parliament be accessible to administrators, the courts and the public.⁴⁸ OPC is the Government's repository of printed copies of bills signed into law by the Governor-General.⁴⁹ The Office of Legislative Drafting (OLD) within AGD publishes laws based on the electronic version of the Bills, which are received from the Parliament. OLD's compilations are the source of the laws listed in AGD's *SCALEplus* on-line database.⁵⁰ The *SCALEplus* database is the usual reference point on Commonwealth laws for the public and Commonwealth entities.

3.12 ANAO's survey of Special Appropriations included an examination of the laws published in the *SCALEplus* database. ANAO compiled a list of published laws containing Special Appropriations and compared it to entity appropriation disclosures and to the Schedule attached to the AAO (which lists the laws administered by portfolios).⁵¹ ANAO found:

- two current laws⁵² embodying current Special Appropriations that were not included in the Schedule or on the *SCALEplus* on-line database;

⁴⁸ Office of Parliamentary Counsel, *Annual Report and Financial Statements 2002-2003*, September 2003, p. 7.

⁴⁹ Currently, four copies of each Bill are presented to the Governor-General for assent. When assented to, two copies are returned to the Parliament, one for the originating House and one for the other House. The Governor-General's Office retains one copy and forwards the other to OPC. OLD subsequently publishes the law, and details of assent are published in the Commonwealth Gazette by the authority of the Clerk of the House or the Clerk of the Senate, as appropriate. Source: *House of Representatives Practice 2001*, pp. 387 and 391 and advice from OLD to ANAO.

⁵⁰ Compilations incorporate amendments to the original law so as to provide a current version.

⁵¹ The audit examination of *SCALEplus* commenced in November 2003 and concluded on 9 December 2003. The basis of the audit examination was the AAO of 18 December 2003.

⁵² The *Appropriation (Supplementary Measures) Act (No.1) 1999* and the *Appropriation (Supplementary Measures) Act (No.2) 1999*.

- the compilation of one law shown on the *SCALEplus* on-line database incorrectly incorporated a Special Appropriation that had been repealed;⁵³ and
- one inoperative law was listed as current on the *SCALEplus* on-line database.⁵⁴

3.13 During the course of this performance audit, ANAO drew these issues to the attention of AGD, with appropriate changes subsequently being made to *SCALEplus*.

3.14 AGD advises users that *SCALEplus* is yet to achieve legislative backing to make it the authoritative source of Commonwealth legislation in electronic form.⁵⁵ AGD provided advice to the ANAO, as follows:

At present, and based on Section 153 of the *Evidence Act 1995*, the authoritative source of reference for Commonwealth Acts and statutory rules is the printed Acts and Statutory Rules series and the Reprint (compilation) series of Acts and Rules.

OLD provides electronic compilations on *SCALEplus* for most Acts within a few days of receiving copies of amending legislation. However, the Department has insufficient resources to make a separate compilation for every amendment of some Acts that are subject to frequent and complicated amendments, or to remake compilations that are affected by retrospective amendments.

3.15 In ANAO's view, Commonwealth entities and the public currently have no readily accessible, definitive and complete source of reference for Commonwealth laws and statutory rules. In this respect, entities cannot readily rely on a single source for definitive knowledge of their legal responsibilities for laws in general and those containing Special Appropriations in particular. In August 2004, AGD advised ANAO that:

The *Legislative Instruments Act 2003*, which will come into operation on 1 January 2005, establishes an electronic Federal Register of Legislative Instruments and makes the electronic versions of instruments published on the Register authoritative. 'Legislative Instruments' include regulations and other statutory rules presently published in the Statutory Rules series and on *SCALEplus*, together with all other instruments declared to be disallowable for the purposes of Section 46A of the Acts Interpretation Act and a large number of other instruments that are not presently published systematically. The

⁵³ The *Surplus Revenue Act 1908*.

⁵⁴ The *Council for Aboriginal Reconciliation Act 1991* ceased to have effect from 1 January 2001, by operation of the sunset clause at Section 32.

⁵⁵ See <<http://scaleplus.law.gov.au>>.

Register will be part of a new legislative database that will replace *SCALEPlus*. The new database will include Acts.

Administrative responsibility for Special Appropriations

3.16 Determining the Commonwealth entity that is responsible for administering laws is not always clear-cut. With respect to responsibilities for laws containing Special Appropriations, Finance advised entities on 20 May 2004 that, in the first instance:

Portfolios should refer to the appropriate [*Administrative Arrangement*] Orders and report Special Appropriations for all Acts that they administer. The Departments of State should ensure that all Special Appropriation Acts for which the Portfolio is responsible, are recognised and disclosed. Where no other Portfolio agency recognises and discloses an appropriation Act for which the Portfolio has responsibility, the Department of State must recognise and disclose that appropriation Act.⁵⁶

3.17 ANAO concurs with this first step, but also notes that this approach alone is unlikely to definitively determine entities' responsibilities for Special Appropriations.

Allocation of responsibility

3.18 The AAO is an Order of the Governor-General in Council. It describes the responsibilities of each Department of State and Minister, including their responsibilities for administering Commonwealth laws. It assigns responsibility for all Commonwealth laws to portfolios, either explicitly, in a Schedule, or implicitly, by providing for Departments of State to deal with laws as required. The Schedule to the AAO assigns to each Minister responsibility for the laws administered by their department of State (or portfolio).⁵⁷ It may also assign responsibilities under the same law to different

⁵⁶ Accounting Policy Branch of the Department of Finance and Administration, *Special Appropriation Disclosure*, circulated to agencies via email, 20 May 2004.

⁵⁷ Not every law is listed in the Schedule to the AAO. Nevertheless, clause 2(b) of the AAO does assign responsibility for every law, as follows: 'The legislation administered by a Minister of State administering a Department is: (a) the legislation referred to in the Part of the Schedule relating to that Department; and (b) legislation passed before or after the date of this Order, that relates to a matter dealt with by the Department, not being legislation referred to in another Part of the Schedule.' (ANAO emphasis.) The AAO also assigns more general responsibilities to each Department of State.

portfolios.⁵⁸ The Department of the Prime Minister and Cabinet (PM&C) drafts the Schedule based on advice received from the relevant entities.⁵⁹

3.19 Some laws also provide powers to delegate the authority to exercise a particular Special Appropriation.⁶⁰ Responsibilities may also change as new laws are made and responsibilities are acquired from, or relinquished to, other agencies as matters arise.⁶¹

3.20 Further, the provisions of the AAO and individual Acts notwithstanding, responsibilities may also be assigned to Ministers or departments by Orders of the Governor-General made under Sections 19B and 19BA of the *Acts Interpretation Act 1901* (Acts Interpretation Act). Such Orders can effectively replace an Act's existing references to specific Ministers or departments with references to another Minister or department. Section 18C of the Acts Interpretation Act also empowers a Minister to allow another Minister to exercise their responsibilities.

3.21 There is currently no comprehensive register of the arrangements made under the Acts Interpretation Act to assist agencies and departments in determining their responsibilities. The Federal Register of Legislative Instruments, due to commence on 1 January 2005, will not include delegations made under laws.⁶²

Uncertain custody

3.22 ANAO observed a number of instances in which there was inadequate understanding by Commonwealth entities of the Special Appropriations for which they were responsible. Some entities believed another entity to be responsible for managing and disclosing Special Appropriations that ANAO's analysis had indicated were the former's responsibility. Other entities were unaware of their responsibilities for managing particular Special Appropriations. In some instances, more than one entity claimed exclusive responsibility for a particular Special Appropriation.

⁵⁸ For instance, responsibility for the *A New Tax System (Bonuses For Older Australians Act) 1999* is assigned to: the Treasury portfolio, to the extent that it relates to ATO customers; the Family and Community Services portfolio, to the extent that it relates to Family and Community Services customers; and the Defence portfolio, to the extent that it relates to Veterans' Affairs customers.

⁵⁹ PM&C asks each department and agency for advice as to which Acts each administers, and consolidates the responses into a draft Schedule. The Governor-General's signature puts an AAO and the attached Schedule into effect, and they are then gazetted.

⁶⁰ For instance, the *A New Tax System (Family Assistance) (Administration) Act 1999* provides an express power to delegate responsibility for administration and making payments to other officials, including those in other agencies and portfolios.

⁶¹ Where agency functions do change, Section 32 of the FMA Act provides a mechanism for adjustment of relevant appropriations.

⁶² Australian Government Solicitor, *Legislative Instruments Act 2003*, Legal Briefing No.61, pp. 1–3.

3.23 ANAO found that the Schedule to the AAO has not included all Special Appropriations. Further, while the AAO broadly describes the authority of Ministers and Departments of State to administer laws, it does not prescribe responsibilities in detail. To ascertain these, it is frequently necessary to refer directly to provisions in individual laws, especially those that define particular responsibilities of Ministers, departments or agencies, including responsibilities for Special Appropriations.

3.24 In that context, ANAO found a number of current Acts containing Special Appropriations that were explicitly assigned to particular Ministers by the 18 December 2003 AAO, but for which entity administrative responsibility was unclear. For example the *Loan Securities Act 1919* provides Special Appropriations at sub-sections 6(1) and 6(3) to be exercised by the Finance Minister for the payment of judgements in relation to stocks or securities. The AAO assigns responsibility for this Act to the Treasury portfolio. The AOFM, within that portfolio, is responsible for the management of Commonwealth debt. Following discussions with Treasury and the AOFM, in October 2004, Finance advised ANAO that it was responsible for these Special Appropriations. Finance has reported these Special Appropriations in its 2003–04 Financial Statements with nil transactions.⁶³

3.25 Most of the instances of uncertain custody identified by ANAO were resolved by the relevant entities through the process of responding to audit queries.⁶⁴ However, going forward, Commonwealth entities will need to monitor closely the accurate and complete assignment of responsibility for existing and, where relevant, newly provided Special Appropriations.

⁶³ Finance has also advised that it was liaising with AGD in relation to clarifying which entity had responsibility for reporting Special Appropriations provided by sub-sections 23(3) and 41(2) of the *Crimes (Superannuation Benefit) Act 1989*.

⁶⁴ For example, the AAO assigns responsibility for the *Telstra Corporation Act 1991* to the Communications, Information Technology and the Arts portfolio. The Department of Communications, Information Technology and the Arts is responsible for administering the Special Appropriation at Section 8BA(3) of the Act (to compensate for certain property acquisitions). However, Finance is responsible for the Special Appropriations at Sections 8AL(1) and 8AS(3) of the Act, which relate to the costs of the sale of Telstra. The sale of the first and second tranches of Telstra shares occurred in 1997 and 1999. Finance had not disclosed those Special Appropriations in its financial reporting up to and including 2002–03, and, in its response to the initial audit survey, did not claim responsibility for these Special Appropriations. In its September 2004 comments on the audit Discussion Paper provided in July 2004, Finance advised ANAO that it was responsible for the appropriation. Finance further advised that: 'The extent to which these Sections will be called on in the future will depend on decisions that have not yet been made by the Government on the approach to and structure of future Telstra share offers. The Special Appropriation will be reported in Finance's 2003–04 Financial Statements with nil figures.'

Recommendation No.2

3.26 ANAO *recommends* that Portfolio Departments review their processes for providing information to the Department of the Prime Minister and Cabinet for the purpose of updating, consolidating or amending the Administrative Arrangements Order, in order to confirm that the information provided is accurate and includes all relevant legislation administered by their Ministers.

Agency responses

3.27 ACS, AEC, AGD, AOFM, ASIC, ATO, AusAID, Centrelink, Comcare, CSIRO, DAFF, DCITA, Defence, DEST, DFAT, DHA, DITR, DoS, DoTRS, DVA, FaCS, Finance, HIC, PM&C and Treasury agreed.

3.28 In responding to this recommendation, PM&C commented that it must rely on Departments to provide information that is up to date and accurate. PM&C stated that it intends to write to Department Chief Executives seeking their cooperation in this regard.

Disclosure of Special Appropriations

3.29 The financial reporting requirements for Commonwealth agencies and authorities are contained in Finance Minister's Orders (FMOs) made under Section 63 of the FMA Act and Section 48 of the CAC Act. The FMOs provide minimum mandatory disclosure and reporting requirements for each Commonwealth agency and authority. The mandatory requirements of the Finance Minister are combined with guidance (formally identified as Explanatory Notes) prepared by Finance. They are published in a single document.

3.30 The FMOs identify a number of tables that entities must include in their financial statements in respect to appropriations disclosures. Table 3.2 summarises ANAO's analysis of the reporting requirements that applied between 1998–99 and 2003–04 in relation to Special Appropriations.

Table 3.2**Disclosure requirements for Special Appropriations: 1998–99 to 2003–04**

Disclosures required	Year					
	1998–99	1999–00	2000–01	2001–02	2002–03	2003–04
Each Special Appropriation for which the entity is responsible	✓	✓	✓	✓	✓	✓ ^A
Particulars of parent legislation (including purpose of appropriation)	✓	✓	✓	✓	✓	✓
Amounts for each appropriation where an Act provides for more than one	✓	✓	✓	✓	✓	No ^A
Administered appropriations reported by outcomes	N/A	N/A	✓	✓	✓	✓
Departmental appropriations reported by output or capital items	N/A	N/A	✓	✓	✓	✓
Comparative years	✓	✓	✓	No	✓	✓
Note A: For 2003–04, entities are required to prepare a disclosure table for each Act containing Special Appropriations for which they are responsible. This may include an aggregation of the drawings made under multiple Special Appropriations contained within a single Act.						

Source: ANAO analysis of FMOs.

3.31 The proper reporting of appropriations consistent with the FMOs is essential to chief executives discharging their accountability to Parliament under the FMA Act and subordinate legislation.

3.32 During 2002–03, there were 414 Special Appropriations available to entities covered by this performance audit. In their 2002–03 financial statements, entities disclosed 162 of these Special Appropriations (that is, 39 per cent).

Disclosure of unused Special Appropriations

3.33 For the majority of non-disclosed Special Appropriations, entities that responded to ANAO's survey advised that the appropriation had not been used during 2002–03.

3.34 Appropriations represent an authority to draw cash from the CRF. Accordingly, for limited Special Appropriations, it is relevant for the Parliament to be informed of the amount, if any, still available to be drawn from that appropriation. In addition, disclosure of the non-use of an available Special Appropriation can provide important information to the Parliament and other users of the entities' financial reports, as the following examples demonstrate:

- The *Sydney Airport Demand Management Act 1997* provided for a cap on aircraft movements at Sydney (Kingsford Smith) Airport. To protect the integrity of the cap, a system of penalties for unauthorised movements was included in the Act, together with a Special Appropriation for the payment to the slot manager of civil penalties and infringement notice penalties received by the Commonwealth. The responsible agency, the Department of Transport and Regional Services (DoTRS), has never reported on this Special Appropriation. In June 2004, DoTRS advised ANAO that, to date, there had been no fines or penalties imposed under the Act and, therefore, no payments made using the Special Appropriation.
- The *Native Title Act 1993* includes a Special Appropriation for the payment of compensation related to successful native title claims. The responsible agency, AGD, has never reported on this Special Appropriation. In June 2004, AGD advised ANAO that no expenditure had been incurred under this Special Appropriation.

3.35 The disclosure of Special Appropriations not used in a given year would also provide relevant information to Parliament in those instances where there is more than one appropriation that may be validly drawn upon for the one type of payment.

3.36 The FMOs have consistently stated that entities should prepare separate disclosures for each Special Appropriation or, for 2003–04, each Act containing Special Appropriations for which an entity is responsible. However, the FMOs have not explicitly stated that this should include disclosures relating to Special Appropriations that have not been used during the year and/or, for limited Special Appropriations, that do not have any remaining balance (that is, they have been exhausted). However, the FMOs also do not state that unused Special Appropriations should not be disclosed.

3.37 ANAO considers that the better view is that entities should include in their annual financial reports to the Parliament disclosure of all Special Appropriations for which they were responsible in that year, including those that were not used in the period. However, a number of entities informed ANAO that they held the view that, in the past, the FMOs did not require disclosure of Special Appropriations that had not been used during the year.

For example, the Department of Employment and Workplace Relations (DEWR) commented to ANAO that the 2003–04 FMOs differ from the 2002–03 FMOs due to the addition of a clause stating that appropriation disclosures are material by nature. DEWR advised that the absence of a similar clause in the 2002–03 FMOs explains why Special Appropriations with no transactions or zero balances were not disclosed by DEWR in the past.

3.38 Changes were made in the 2003–04 FMOs to remove any doubt that entities should disclose all Special Accounts (and the related Special Appropriation) for which they are responsible, regardless of whether they have been used during the year and of whether they have a nil or positive balance. Previously, the Special Account disclosure requirements were encapsulated within the general requirements for reporting Special Appropriations. However, differing views remain as to the impact the revised requirement in respect to Special Accounts has on the broader disclosure of unused Special Appropriations.

3.39 Where a Special Appropriation no longer serves a purpose, it may be advisable to consider the full or partial repeal of the parent Act. In this respect, the Victorian Auditor-General commented in April 2003 that, given the ongoing and generally uncapped nature of Special Appropriations, it is important that they be continually reviewed to ensure they remain appropriate.⁶⁵

Shared responsibility

3.40 In most instances, legislation and any related appropriations are administered by a single entity. This generally makes administrative responsibility and accountability for the use of the appropriations relatively straightforward. However, there are a number of instances where more than one entity has a role in the administration of a Special Appropriation.⁶⁶ In some cases, the entities that make the actual payments using the Special Appropriation are not the entity that is assigned administrative responsibility for the relevant Act. This often involves entities in more than one portfolio.

3.41 When multiple entities are involved in the administration of a Special Appropriation, it is important that clear and effective arrangements are established for disclosing its use. ANAO identified some significant instances where this has not occurred.

3.42 One example noted related to the range of entities involved in the administration of the Special Appropriations provided in a number of Acts for

⁶⁵ Report of the Victorian Auditor-General, op. cit., April 2003, pp. 20, 41 and 42.

⁶⁶ For example, Sections 28 and 39 of the FMA Act provide the legal authority and relevant appropriation to all agencies that are subject to the FMA Act to carry out certain functions.

the payment of salary and allowances to Members of Parliament, Judicial office holders and Ministers of State.⁶⁷ Those entities have taken differing and inconsistent approaches to disclosing their use of the Special Appropriations, including, in some cases, non-disclosure.

3.43 ANAO noted that one of those entities, the Department of the Senate (DoS), had disclosed all such payments made by it as relating to one Special Appropriation, rather than disaggregating the payments against each relevant Special Appropriation. In this respect, DoS advised ANAO in May 2004 that it does not have responsibility for either of the Acts under which it makes payments to Parliamentarians on behalf of Finance and DEWR⁶⁸ and, as such, is not, strictly speaking, responsible for any Special Appropriations (and, therefore, for acquitting the reporting requirements under the FMOs). DoS further advised that it accepts that this may raise a question as to the manner in which such arrangements should be disclosed, both in annual financial statements and in the PBS.

3.44 ANAO understands that, at the time of audit, Finance was discussing the administration of the Special Appropriation provided by the Parliamentary Entitlements Act with DoS and the Department of the House of Representatives (DHR). In this respect, DoS commented to ANAO as follows:

Leaving the solution to this reporting ambiguity to the departments themselves may not be ideal and there may well remain a case for a review of the financial statement guidelines (the FMOs) to deal directly with this situation.

Budget estimates

3.45 The relationship between reporting documents covering any one financial year (particularly PBSs, Portfolio Additional Estimates Statements (PAES) and agencies' Annual Reports) is referred to as the 'clear read' principle. It is a fundamental tenet of the Australian Government's financial management framework.⁶⁹ It is also an essential part of the accountability

⁶⁷ The current AAO assigns responsibility for the *Parliamentary Entitlements Act 1990* (Parliamentary Entitlements Act) to the Minister for Finance and Administration. However, three separate entities—Finance, the Department of the House of Representatives (DHR), and the Department of the Senate (DoS)—make payments drawing upon the Special Appropriation provided by that Act. Similarly, responsibility under the current AAO for the *Remuneration and Allowances Act 1990* (Remuneration and Allowances Act) is assigned to the Minister for Employment and Workplace Relations, but AGD, DoS, and DHR have all drawn against the Special Appropriation provided by the Act.

⁶⁸ The Parliamentary Entitlements Act or the Remuneration and Allowances Act

⁶⁹ Department of Finance and Administration and ANAO, *Better Practice in Annual Performance Reporting*, 8 April 2004, p. 5.

system that compares budgeted targets and figures to those actually achieved, placing a strong emphasis on compatibility between relevant documents.⁷⁰

3.46 For unlimited Special Appropriations, entities are required by the FMOs to disclose in their financial statements a Budget estimate of payments expected to be made under each Special Appropriation in a given financial year, together with an acquittal of actual cash payments made for the year. However, Finance's guidance on the FMOs has not clarified for entities the source or accounting basis to be used in compiling these Budget estimates.

3.47 ANAO found that some entities use the figure from their PBS as the Budget estimate to be included in their financial statements. Other entities use the PAES figure. However, reflecting the adoption of accrual budgeting, the estimates provided in the PBS and PAES are accrual figures. In comparison, the financial statement disclosure of the use of appropriations is a cash-based acquittal, consistent with the CRF being cash-based. Accordingly, entities using PBS or PAES Budget estimate figures in their financial statements to compare with actual cash payments are not comparing like with like.

3.48 Some other entities have recognised this issue and adjust their accrual Budget estimates to provide a more useful comparison in the financial statements. For example, in its 2002–03 financial statements, the AOFM reported both its Special Appropriation Budget estimates and actual expenditure on a cash basis. The AOFM advised ANAO in April 2004 that this was done:

with the aim of facilitating comparison of Budget estimates with actuals (especially where the FMO requirements create a disconnect between Budget estimates reporting and actual reporting).

3.49 ANAO also identified some instances where entities did not provide a Budget estimate for payments from a Special Appropriation in their PBS and/or PAES.⁷¹ In other instances, the entity provided a figure that did not represent the expected use of the Special Appropriation. For example, ATO's 2001–02 Budget estimate of tax refunds under the Tax Administration Act was \$11.25 billion, compared to actual expenditure of \$50.58 billion, a difference of \$39.33 billion or almost 350 per cent. Variations in other years were between 20 per cent and 275 per cent. ATO advised ANAO in June 2004 that:

⁷⁰ In this respect, refer to the Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies—Approved by the JCPAA under sub-sections 63(2) and 70(2) of the Public Service Act 1999*, June 2003.

⁷¹ For example, ATSIC's PBS has not included disclosure of estimated expenses from individual Special Appropriations. In May 2004, the Aboriginal and Torres Strait Islander Services (ATSIS) commented to ANAO that its understanding was that, while the PBS format is suggested across Government, the inclusion of details of estimated expenses from individual Special Appropriations is not mandatory.

Prior to the 2004–05 Budget the practice of reporting in the Portfolio Budget Statements had been to report the estimate of refunds due to individual taxpayers while other heads of revenue, like companies, were reported on a net basis. This meant that expenditure from this Special Appropriation not related to individuals was contained within the revenue line of the budget statements, and not presented as estimated expenditure from the appropriations.

Non-disclosure of active Special Appropriations

3.50 Tables 2.1 and 2.2 in Chapter 2 identified a number of entities that had not recognised and disclosed their use of Special Appropriations in investing public money and/or refunding taxes, levies or charges. Those payments totalled at least \$38.1 billion.

3.51 ANAO's analysis identified a further nine Special Appropriations that had been used by seven entities during the period 1998–99 to 2002–03, in respect of which the FMOs requirement for disclosure of that use in the notes to the relevant entities' accounts had not been met. The payments involved totalled at least \$1.6 billion between 1998–99 and 2002–03. These instances are summarised in Table 3.3, together with a summary of the findings set out in Tables 2.1 and 2.2.

Table 3.3

Special Appropriations used but not disclosed in the Notes to Financial Statements^A

Entity	Appropriation Used	Payments	ANAO comment
12 entities	FMA Act, S.39	At least \$36 805 million, 1998–99 to 2002–03	See Table 2.1
12 entities	FMA Act, S.28 and other legislation providing for refunds from the CRF	At least \$1 251 million, 1998–99 to 2002–03	See Table 2.2
Aboriginal and Torres Strait Islander Commission	<i>Aboriginal and Torres Strait Islander Commission Act 1989</i> , S. 193	\$694.7 million, 1998–99 to 2002–03	Summary disclosures as ‘revenue’ or ‘capital injection’
Attorney General’s Department	<i>Commonwealth Places (Application of Laws) Act 1970</i> , S.20	Agency unable to quantify	AGD does not collect relevant data. See paragraph 2.35
Australian Securities and Investments Commission	<i>Life Insurance Act 1995</i> , S.216	\$10.7 million, 1998–99 to 2002–03	
	<i>Banking Act 1959</i> , S.31	\$40.4 million, 2000–01 to 2002–03	
Comcare	<i>Safety Rehabilitation and Compensation Act 1988</i> , S.97N(2)	\$2.5 million, 2001–02 to 2002–03	Summary disclosure as administered expenses
Great Barrier Reef Marine Park Authority	<i>Great Barrier Reef Marine Park Act 1975</i> , S.39I	\$30.7 million, 1998–99 to 2002–03	Summary disclosure as revenues from Government
Insolvency and Trustee Service Australia	<i>Bankruptcy Act 1966</i> , S.286	\$346 690, 2001–02 to 2002–03	ITSA advised ANAO that earlier years’ non-disclosure was based on the legal advice then available
	<i>Bankruptcy Act 1966</i> , S.20B(7)	\$80.4 million, 2000–01 to 2002–03	
Treasury	<i>Commonwealth Places (Mirror Taxes) Act 1998</i> , S.23	\$790.0 million, 2000–01 to 2002–03	
Note A: All appropriations detailed in this table were disclosed by agencies in their 2003–04 financial statements.			

Source: ANAO analysis of agency financial data and correspondence.

Recommendation No.3

3.52 ANAO *recommends* that accountability for Special Appropriations be improved by the Department of Finance and Administration reviewing financial reporting requirements and related guidance to provide entities with greater clarity about:

- (a) the disclosure requirements for Special Appropriations that have not been used in a given financial year and/or have been exhausted;
- (b) the disclosure obligations that apply where entities access Special Appropriations that are the administrative responsibility of another entity; and
- (c) the approach to be taken to achieving a clear read between budgeted and actual use of Special Appropriations.

Agency responses

3.53 ACS, AEC, AGD, AJF, AOFM, ASIC, ATO, AusAID, Centrelink, Comcare, CSIRO, DAFF, DCITA, Defence, DEST, DFAT, DHA, DHR, DITR, DoS, DoTRS, DVA, FaCS, Finance, GBRMPA, HIC, ORER, PM&C and Treasury agreed.

3.54 In responding to this recommendation, PM&C commented that it would be reasonable for Finance to provide guidance through the FMOs and Portfolio Budget Statement preparation advice to ensure consistency of reporting across the public sector.

3.55 In addition, in agreeing to the recommendation, Finance commented as follows against the parts of the recommendation:

- (a) Finance is currently preparing the 2004–05 *Financial Management and Accountability (Financial Statement) Orders*, which prescribe the reporting requirements, and will include clearer guidance on disclosure requirements for Special Appropriations (Policy 2C).
- (b) Finance is currently preparing the 2004–05 *Financial Management and Accountability (Financial Statement) Orders*, which include, in Policy 2A, guidance on disclosure obligations that apply where entities access Special Appropriations that are the administrative responsibility of another entity.
- (c) Finance will review the treatment adopted in respect of both ex-ante and ex-post reporting to ensure consistency in approach.

4. Devolved Appropriation Management

This chapter assesses entities' financial management of Special Appropriations within the Commonwealth's devolved financial framework.

Drawing on the CRF

4.1 With effect from 1 July 1999, significant amendments were made to the FMA Act by the *Financial Management Legislation Amendment Act 1999* (FMLA Act). The stated purpose of the FMLA Act was to amend the Commonwealth's financial legislation to facilitate the introduction of a full accrual financial framework.⁷²

4.2 Under the arrangements existing up to 30 June 1999, Finance operated a central bank account, payment system and appropriation ledger on behalf of all agencies. As part of the FMLA Act changes, different business processes were introduced to devolve Drawing Right responsibilities to agencies. Drawing Rights allow control over who may lawfully draw upon appropriations and make payments, and allow for conditions and limits to be set in relation to those activities.⁷³

FMA Act agencies

4.3 At the commencement of this performance audit, the FMLA Act changes had been in place for more than four years. To assess FMA Act agencies' implementation of the devolved Drawing Rights regime, ANAO requested 36 agencies within the scope of this audit to provide copies of current Drawing Rights and relevant parts of their Chief Executive's Instructions. ANAO examined agencies' arrangements to see whether they appropriately covered all the functions of debiting and paying from appropriations (as required by the FMLA Act changes of 1999), and whether the delegations extended to the officials carrying out these actions.

4.4 In summary, ANAO found that the majority of agencies examined did not have complete and correct Drawing Rights in place. The more significant types of errors and omissions involved:

- incomplete Drawing Rights, such that one or more of the FMLA Act requirements were not met;
- incomplete delegations, such that not all relevant officials were properly authorised to debit and/or pay from appropriations; and

⁷² Second Reading Speech, *Hansard*, House of Representatives, 10 February 1999, p. 2283.

⁷³ Finance Circular No.2004/07, op. cit., p. 1.

- proper Drawing Rights not being in place for particular appropriations where the agency was drawing on an appropriation that was the responsibility of another agency.

4.5 In the course of the audit, a number of agencies provided ANAO with evidence of action proposed or implemented to address their particular deficiencies. In addition, in July 2004, Finance issued new guidance to officials who have been delegated the power to issue Drawing Rights, and all officials who have been issued with Drawing Rights.⁷⁴ In respect of the Special Appropriations administered by an agency, Finance advised that, in issuing Drawing Rights:

[Agency] Chief Executives (or their delegates) should clearly specify the Act [containing the Special Appropriation] and whether they are issuing Drawing Rights to cover all appropriation clauses within an Act, or only a particular appropriation clause within an Act. ... When issuing Drawing Rights in respect of Section 28 or Section 39 of the FMA Act, [Agency] Chief Executives (or their delegates) should ensure that all officials who are responsible for authorising repayments under Section 28 or investments under Section 39 are issued valid Drawing Rights.⁷⁵

4.6 In respect of appropriations that are the responsibility of one agency, but which are drawn upon by another agency, Finance advised the Chief Executive of the agency responsible for the appropriation to either delegate the power to issue Drawing Rights to the Chief Executive (or another official) of the drawing agency, or to directly issue Drawing Rights to the relevant officials of the drawing agency. In particular, Finance advised that:

The Chief Executive of the responsible agency may also wish to establish an agreement with the Chief Executive of the drawing agency governing the payment, administration and reporting of the appropriations in order to reflect the administration of the appropriation by the drawing agency in accordance with the financial framework...Agencies should consider reviewing their Drawing Rights, particularly any Drawing Rights (or delegations to issue Drawing Rights) in relation to other agencies drawing upon their appropriations.⁷⁶

4.7 The recent Finance advice provides agencies with an opportunity to revise all aspects of their existing Drawing Rights regime, including those

⁷⁴ *ibid.*, replacing earlier guidance in Finance Circular 2003/03.

⁷⁵ *ibid.*, pp. 2–3.

⁷⁶ *ibid.*, pp. 3–4.

relating to Special Appropriations, so as to confirm that they comply with all relevant requirements.⁷⁷

CAC Act entities

4.8 By definition, CAC Act entities are separate legal entities and hold money on their own account.⁷⁸ In that context, a number of such entities receive funding from Special Appropriations and are responsible for the management and reporting of those funds.

4.9 The FMLA Act envisaged that Finance would undertake a central role in administering the appropriations of CAC Act entities. In particular, the Explanatory Memorandum for the FMLA Act provided as follows:

In future, Finance will automatically make payments from the Official Public Account to [CAC Act] authority bank accounts, according to draw-down schedules agreed between authorities and Finance (as for agencies). However, Commonwealth authorities are separate legal entities and final expenditure of the CRF will take place when Finance makes payments to the authorities. A Finance official will therefore require a Drawing Right to make a 'real' payment and debit an appropriation account for the authority in Finance's records.

4.10 In May 2004, Finance advised ANAO that it had implemented the process identified in the Explanatory Memorandum whereby delegated officials within Finance issue Drawing Rights to responsible Finance officials who pay appropriated moneys to CAC Act entities. According to Finance's advice, seven CAC Act entities receive Special Appropriations moneys drawn by Finance under that process. However, it is apparent from ANAO's audit findings that there has not been a shared understanding regarding the processes that surround the drawing of Special Appropriation funds from the CRF for the use of CAC Act entities.

4.11 For example, in the course of the audit ANAO sought advice from the Australian Prudential Regulation Authority (APRA) as to which Special Appropriation it was accessing in drawing from the CRF in order to refund overpaid financial institutions' levies. APRA had disclosed the use of a Special Appropriation for this purpose, but had not identified the relevant legislative provision. APRA was one of the seven CAC Act entities identified to ANAO as receiving Special Appropriation funds drawn by Finance from the CRF.

⁷⁷ In that respect, in August 2004, DHR advised ANAO that it had received interim Drawing Rights for the 2004–05 financial year [from DEWR] in respect of the *Remuneration Tribunal Act 1973*, pending clarification of the administration of the Special Appropriation provided by that Act.

⁷⁸ Section 7 of the CAC Act.

4.12 In June 2004, APRA advised ANAO that, based on its internal legal advice, it was able to draw on the Special Appropriation provided by Section 28 of the FMA Act in making the refunds but, because it is not an agency within the meaning of the FMA Act, it did not require Drawing Rights. Following queries from ANAO regarding this issue, APRA sought advice from Finance as to that Department's view regarding how Special Appropriations are drawn by CAC Act entities. In August 2004, Finance advised APRA that its view is that CAC Act entities do not require Drawing Rights; do not make payments from appropriations; and do not draw upon the CRF.⁷⁹ Finance further advised APRA that:

In terms of APRA's refunds, we understood that APRA requests a payment through the Cash and Appropriation Management Module system in relation to an overpayment made by a levy-payer to APRA. Our view is that Finance debits the Section 28 appropriation and makes a payment to APRA as set out in the FMLA Bill Explanatory Memorandum. APRA then repays the levy-payer the appropriate amount.

4.13 Another of the CAC Act entities identified by Finance as receiving funding through the Explanatory Memorandum process, in which Finance draws on the CRF, had initially advised ANAO that it believed that it was the entity drawing the amounts from the CRF under the relevant Special Appropriation.⁸⁰ A third CAC Act entity identified by Finance had not recognised, or disclosed, that a drawing on the self-executing CRF, through a Special Appropriation, was involved in the making of refunds of charges collected by it.⁸¹

4.14 ANAO also noted that the arrangements that are currently in operation are not consistent across like CAC Act entities. While Finance applies the FMLA Explanatory Memorandum arrangements to seven CAC entities,

⁷⁹ Finance advised that its comments related to CAC Act entities that are not prescribed for the purpose of the FMA Act and that do not have any specific statutory power to make payments from the CRF. Finance advised APRA that it understood that APRA and the majority of other CAC Act entities fall into this category.

⁸⁰ This involved the Special Appropriation at Section 48 of the *Australian Maritime Safety Authority Act 1990* (AMSA Act). In April 2004, the Australian Maritime Safety Authority (AMSA) had received internal legal advice that: 'It would be unlawful for [its Portfolio Department] DoTRS to have any role, either under the FMA Act or CAC Act, in relation to the standing appropriation to AMSA (that is, contrary to Section 48 of the AMSA Act)'. On that basis, AMSA advised ANAO in May 2004 that: 'As the funds are appropriated to AMSA via the AMSA Act and Section 10 of the AMSA Act sets out how those funds may be used, AMSA has the ability to draw those funds directly from the Consolidated Revenue Fund without setting up drawing rights.'

⁸¹ This involved the refunding of Environmental Management Charges collected by the Great Barrier Reef Marine Park Authority (GBRMPA) (see Table 2.2). GBRMPA advised ANAO that: 'It has been GBRMPA's practice to issue refunds from funds held in the Authority's bank account prior to payment of collections to the Official Public Account and no Special Appropriation for refunds has been required. This procedure has proved to be more administratively efficient due to the uncertainty relating to the number and magnitude of refunds in any one year...'

ANAO identified a further 12 entities that receive funds through Special Appropriations, but which are not covered by the Explanatory Memorandum processes. In that respect, Finance advised ANAO in September 2004 that:

The method for making payments outlined in the FMLA Act Explanatory Memorandum (that is, Finance draws money from the CRF pursuant to an appropriation and makes payments to CAC Act body bank accounts) is not the only valid method. Finance, responsible Portfolio Departments, or other responsible FMA Agencies are able to make payments to CAC Act bodies pursuant to special appropriations.

4.15 However, a lack of shared understanding as to those processes was apparent. For example, at the time of audit, ANAO found that there appeared to be considerable uncertainty as to the drawing arrangements that applied between FaCS and the Health Insurance Commission (HIC) in respect of Childcare Rebate payments made under the transitional provisions of the *A New Tax System (Family Assistance and Related Measures) Act 2000*, following the repeal on 1 July 2000 of the *Childcare Rebate Act 1993*. On this point, HIC advised ANAO in October 2004, as follows:

HIC disagrees that any uncertainty existed. There was in fact a shared understanding between HIC and FaCS for the delivery of payments for the Childcare Cash Rebate underpinned by an agreement between the two entities. Pursuant to that agreement, FaCS was responsible for drawing funds for the payment of the Rebate which had been appropriated in accordance with Section 63 of the [*Childcare Rebate Act 1993*]. The funds were transferred, on a daily sweeping arrangement, to a HIC bank account to cover payments made. FaCS held the drawing rights and reported expenditure from the appropriation in its annual administered financial statements.

4.16 Similarly, at the same time, FaCS advised ANAO that:

In fact, there was no uncertainty, with payments delivered by HIC for Childcare Cash Rebate in accordance with the agreement between HIC and FaCS. FaCS consistently reported the use of this appropriation in its annual reports.

4.17 Nevertheless, the approach taken did not accord with the relevant legislative provisions. This was acknowledged in FaCS' 2003–04 Financial statements, which state that:

The appropriation under the *Childcare Rebate Act 1993* was made available to HIC. FaCS drew on this appropriation instead of HIC.⁸²

⁸² Note 27C to FaCS' Financial Statements 2003–04.

Recommendation No.4

4.18 ANAO *recommends* that the Department of Finance and Administration promulgate advice on the management and disclosure of Special Appropriations used by, or paid to, entities subject to the *Commonwealth Authorities and Companies Act 1997*. This should include advice on the particular roles and responsibilities of Finance, Portfolio Departments and the CAC Act entities.

Agency responses

4.19 ACS, AEC, AGD, AJF, AOFM, ASIC, ATO, AusAID, Centrelink, Comcare, CSIRO, DAFF, DCITA, Defence, DEST, DFAT, DHA, DHR, DIMIA, DITR, DoS, DoTRS, DVA, FaCS, Finance, GBRMPA, HIC, ORER, PM&C and Treasury agreed.

4.20 Some respondents also made comments on the recommendation, as follows.

- DFAT offered specific support for the recommendation, as a lack of clear guidance had caused a degree of misunderstanding in the portfolio.
- PM&C commented that Finance should provide CAC bodies and Portfolio Agencies with advice on the management and disclosure of Special Appropriations. PM&C considered that a Financial Management Guidance document, similar to the booklet on Special Accounts, would be of assistance to agencies.
- Finance advised that it issued Finance Circular 2004/17, titled *Appropriations for payment to CAC Act bodies*, (on 29 October 2004), which addresses this issue.

Banking arrangements

4.21 From July 1999, the Finance Minister delegated to FMA Act Chief Executives the power to enter into agreements with banks in accordance with Section 8 of the FMA Act. Agencies were required to open and manage their own official bank accounts, their payment and receipt arrangements and the relationship with their chosen banker.⁸³

Overdrafts

4.22 The FMA Act envisaged agencies entering into overdrafts for short periods. That is, agencies were prohibited from entering into overdraft

⁸³ Department of Finance and Administration, *Agency Banking Framework Manual*, July 1999, p. 6.

arrangements unless the arrangements provided for each drawing to be repaid within 30 days.⁸⁴ Under changes to the financial framework effective from October 2003, agencies are required to estimate all their funding requirements in accordance with the Finance Minister's delegation to Chief Executives.⁸⁵ Overdrafts remain available where, despite agencies' best endeavours, estimates prove to be incorrect or cheques are dishonoured. However, data supplied to the ANAO by Finance showed FMA Act agencies with overdrafts on 448 occasions in the six months from October 2003 to February 2004 inclusive.

Centrelink

4.23 At the time of audit, Centrelink did not require its client agencies to estimate funding requirements and instead relied on an overdraft facility (with an average daily debit balance of \$250 million) in order to make income support and family assistance payments from its *National Distribution Account* (NDA). FaCS subsequently draws on the Special Appropriation in the *Social Security (Administration) Act 1999* to daily reimburse Centrelink's Account. However, the timing of the reimbursement is such that the NDA is routinely in overdraft at the close of day, at which time it is 'swept' to the Official Public Account (OPA). Sweeping prevents an overnight overdraft of the NDA by effectively offsetting the NDA's daily closing debit balance against the OPA's other cash holdings until FaCS' reimbursement occurs.

4.24 In June 2004, Finance advised Centrelink as follows.

Finance considers that the intra-day debit balance in Centrelink's official administered payments bank account is an overdraft drawing in accordance with sub-section 8(3) of the FMA Act. The power to enter into overdraft drawings under sub-section 8(3) of the FMA Act has been delegated by the Minister for Finance and Administration to the Chief Executive of Centrelink through the Finance Minister's *Financial Management and Accountability (Finance Minister to Chief Executive) Delegation*. This position is also supported by AGS advice.

Notwithstanding this, Finance notes that Schedule 4, Part 1 of the delegation also requires Centrelink to comply with the Agency Banking Framework Guidance Manual (the Manual). Paragraph 3.6 of the Manual requires agencies to estimate their funding requirements where payments amounts are unknown by the 2.00 pm (AEST) funding request cut-off time. Finance is able to approve exemptions to this requirement in special circumstances, but to date has not provided Centrelink with an exemption.

⁸⁴ FMA Act, Sections 8(3) and 8(4).

⁸⁵ The Finance Minister has delegated his powers under Section 8 on the condition that Chief Executives comply with the Agency Banking Framework Guidance Manual, issued by Finance.

Finance has been in discussions with Centrelink for some time, with a view to Centrelink estimating its funding requirements. Finance acknowledges that Centrelink will need to change its procedures to comply with these requirements and is working with Centrelink to achieve compliance with the framework.

4.25 In July 2004, Centrelink advised ANAO that:

The overdraft arrangement for the NDA has been in place since the establishment of Centrelink. All administrative, controlling, reconciliation and reporting functions have been built around this arrangement. On this basis, any change will have significant impact on our stakeholders.

Centrelink has undertaken a formal risk assessment over the options available and is now in consultation with [Finance], Client Departments and our transactional banker in order to address all matters comprehensively and to be fully compliant with Section 8 of the FMA Act prior to 30 June 2005.⁸⁶

4.26 In October 2004, Centrelink advised ANAO that it expects to be fully compliant with Section 8 of the FMA Act prior to 30 June 2005.

Department of Veterans' Affairs

4.27 DVA administers those Special Appropriations that provide services to entitled members of the veteran and defence force communities, including Section 199 of the *Veterans' Entitlement Act 1986* and Section 41 of the *Defence Services Homes Act 1918*. The Department operates a number of bank accounts to support its activities. In the course of this audit, ANAO identified that DVA's official administered payments 'head account', as well as various other official administered payments accounts, entered into debit balance inter-day during the 2002–03 financial year. DVA's contract with its transactional banker, the Reserve Bank, does not provide DVA with overdraft facilities.

4.28 DVA advised Finance in August 2004 that the overdrafts arose from automated payment processes established in July 1999 and that, if Finance had agreed suitable arrangements prior to October 2003, breaches of Section 8(3) of the FMA Act could have been avoided. Finance advised ANAO in November 2004 that the requirements on agencies to estimate payments from Special Appropriations have existed since July 1999. Adherence to this requirement should minimise the frequency of debit balances on agencies' bank accounts.

4.29 DVA advised ANAO that it had commenced discussions with Finance to resolve the issue and to clarify with Finance the requirements of agencies in

⁸⁶ Similarly, in September 2004, Finance advised ANAO that: 'Centrelink is currently working with Finance to achieve compliance with the financial framework.'

respect of overdrafts since the October 2003 changes to the Agency Banking Framework Guidance Manual. In particular, DVA advised ANAO that:

Even though Agencies were not notified by [Finance] of this particular change to the Agency Banking Framework Guidelines and consequent breach of Section 8(3) of the FMA Act, DVA is working closely with [Finance] to resolve this issue.

4.30 As with Centrelink, modifications will be required to DVA's agency banking contract.

Consistency in appropriation management

4.31 In 1999, two Acts were passed by the Parliament to provide funding to meet commitments of the Government to the Australian Democrats agreed in the context of the Government's tax reform package.⁸⁷ These were:

- the Supplementary Measures Act No.1, which provided funding of \$75 million each year in respect of the four years 2000–01 to 2003–04; and
- *Appropriation (Supplementary Measures) Act (No.2) 1999* (Supplementary Measures Act No.2), which provided funding of:
 - \$214 million in respect of 2000–01;
 - \$222 million in respect of 2001–02;
 - \$227 million in respect of 2002–03; and
 - \$233 million in respect of 2003–04.

4.32 The Acts included nine different appropriation purposes, set out in Section 3 of each Act.⁸⁸ Each appropriation is limited in financial terms, with separate amounts being specified in respect of each year. Finance advised ANAO in September 2004 that it was allocated these Acts in the AAO.⁸⁹ However, six agencies (not including Finance) were entitled to make payments under the Acts.

4.33 ANAO found significant inconsistencies between agencies' disclosure of these Special Appropriations between 2000–01 and 2002–03, as follows:

⁸⁷ *Hansard*, House of Representatives, 26 August 1999, pp. 9173 and 9174.

⁸⁸ These related to: the Book Industry Assistance Plan; the Supported Accommodation Assistance Program; reuse and recycling of waste oil; in-service emissions testing; gas conversions; photovoltaic systems; renewable energy; remote power generation; and the greenhouse gas abatement program.

⁸⁹ Finance advised ANAO that, specifically in relation to these two Acts: 'All appropriation acts are listed in the schedule to the AAO under the heading "Appropriation Acts", in the Finance portfolio.'

- one agency did not disclose the use of its Special Appropriation in the first year, with another agency not disclosing its Special Appropriation in any of the first three years;
- three agencies incorrectly reported the Special Appropriations as being unlimited in nature. The other two agencies that disclosed the Special Appropriations correctly identified them as being limited; and
- one agency disclosed, in aggregate, payments made by it in respect of each of the five appropriation purposes for which it had responsibility. Other agencies that reported their appropriation provided the necessary separate disclosures for each appropriation.

4.34 In addition, significant differences of view have emerged in terms of whether the Special Appropriations ‘in respect of’ each year actually lapse at the end of the relevant financial year. Between January 2000 and June 2004, four entities (the Department of Environment and Heritage (DEH), the Australian Greenhouse Office (AGO), the Department of Communications, Information Technology and the Arts (DCITA) and FaCS) obtained consistent legal advice in the following terms:

Each of the appropriations in s.3 of the Supplementary Measures Act essentially ceases to operate at the end of the financial year to which it relates. As such, expenditure cannot be incurred under an appropriation for a particular financial year, in subsequent financial years. However, there is one exception to this position. ... if a payment obligation or expense is incurred in a financial year to which an appropriation relates, such as through entry into a contract, the actual discharge of the obligation or meeting of the expense may be undertaken by expenditure against the appropriation in a subsequent financial year.

4.35 Each of these four entities administered the Special Appropriations consistent with those principles. For AGO, the advice had particular significance. Actual expenditure related to the programs funded by its Special Appropriations under the Supplementary Measures Act No.2 is behind the original expectations, although agreements have been entered into for more than 71 per cent of the original funding estimate up to 30 June 2003.⁹⁰ Consistent with the principle outlined in the legal advice provided to agencies, AGO advised ANAO in July 2004 that it was:

restricted by the arrangements initiated by the Department of Finance and Administration to drawing down funding to the amounts of payments made, and, with appropriations not drawn down lapsing at the end of each financial year, the closing (and opening) balances would be “0” each year.

⁹⁰ ANAO Audit Report No.34 2003–04, *The Administration of Major Programs*, Canberra, 5 March 2004, pp. 63–64.

4.36 As a consequence, AGO has subsequently obtained additional funding through Annual Appropriations to meet its commitments under these programs.

4.37 A different approach was adopted by Finance in relation to DITR'S use of its Special Appropriation under the Supplementary Measures Act No.1. For DITR, Finance agreed to the Department rephasing⁹¹ its share of the limited funding under the Act for the Book Industry Assistance Plan between financial years. In July 2004, DITR advised ANAO that it understood that the rephasing involved transferring funds within a given year from DEST or DCITA, the other agencies with appropriations available in each year for the Book Industry Assistance Plan, to DITR.⁹² However, the rephasing agreed to by Finance involved a movement of funds between years, and not between agencies.

4.38 DEST advised ANAO that, in August 2001, it was informed by Finance, on the basis of AGS advice, that rephasing was not required and that the appropriation did not lapse. More recently, DEST obtained legal advice in response to ANAO concerns that it may have nonetheless exceeded its share of the Supplementary Measures Act No.1 Book Industry Assistance Plan Special Appropriation for 2002–03 by \$11.11 million.⁹³ ANAO's analysis had indicated that this had resulted in the overall appropriation limit of \$60 million for 2002–03 being exceeded by \$9.5 million. On the basis that its share from prior years had not been fully expended, DEST considered that the unspent appropriation from those years remained available to it for expenditure in 2002–03 and, accordingly, the overall appropriation limit for 2002–03 had not been exceeded. In this respect, DEST obtained legal advice in July 2004, as follows:

It is open to conclude that amounts appropriated by s.3 become available in the year in respect of which they are appropriated, and do not lapse. However, we think it would be better in the future to avoid the formulation used in the Appropriation (Supplementary Measures) Act (No.1) (and also in the

⁹¹ Rephasings occur where the Finance Minister agrees to reduced funding in the current or previous years and offsets this with the inclusion of an amount of funding in future appropriation bills. The Finance Minister can also agree to move funding from one financial year to another where the legislation establishing the Special Appropriation allows it. Source: Estimates Memorandum 2003/33, op. cit, pp. 20 to 21.

⁹² The allocation between agencies of the Book Industry Assistance Plan Special Appropriation, to ensure the appropriation limits were not exceeded, was an administrative decision of the Government, in accordance with the agreement made with the Australian Democrats.

⁹³ DEST's allocation for 2002–03 was \$36.7 million, compared to payments made of \$47.81 million. In June 2004, DEST advised ANAO that the arrangements put in place to ensure that the three entities sharing the Book Industry Assistance Plan Special Appropriation drew only to the annual limit of the Special Appropriation were through the CAMM system administered by Finance. DEST stated that it was allocated its portion of the appropriation and that it uses its existing controls to ensure it does not exceed the appropriation limit, operating on the basis that the total appropriation limit amounted to the total of the funds provided for over the four years.

Appropriation (Supplementary Measures) Act (No.2)). If it is intended that amounts that become available in one year may be spent at any time in the future, the appropriation Act should make this clear.⁹⁴

4.39 ANAO notes that, had AGO been advised that it was 'open to conclude' that the Special Appropriations do not lapse, it would not have been necessary for AGO to obtain additional amounts in its Annual Appropriations. As it now stands, AGO has access to funding under both the Special Appropriations (which, based on DEST's legal advice, will not lapse for any agency until all amounts are spent), as well as additional amounts under Annual Appropriations.

4.40 ANAO considers that there would have been benefit, and reduced overall administrative costs to the Commonwealth, had an effective coordination arrangement been established for the management of these Special Appropriations within the context of the overarching financial management framework.

Recommendation No.5

4.41 ANAO *recommends* that:

- (a) the Department of Finance and Administration examine options for promoting greater consistency across Commonwealth entities in the management of Special Appropriations; and
- (b) where more than one entity draws on a Special Appropriation, relevant entities agree on appropriate arrangements to effectively coordinate the administration and disclosure of its use.

Agency responses

4.42 ACS, AEC, AGD, AJF, AOFM, ASIC, ATO, AusAID, Centrelink, Comcare, CSIRO, DAFF, DCITA, Defence, DEST, DFAT, DHA, DITR, DoS, DoTRS, DVA, FaCS, Finance, GBRMPA, HIC, PM&C and Treasury agreed.

4.43 In responding to this recommendation, PM&C commented that it would be beneficial for agencies to be provided with comprehensive guidance on the management of Special Appropriations. In addition, when agreeing to the recommendation, Finance commented as follows against the parts of the recommendation.

⁹⁴ In September 2004, Finance advised ANAO that: 'The Book Industry Assistance Plan has operated in adherence to its appropriation limits. In 2002–03 DEST sought Finance's views about whether or not they could move underspends from previous years to 2002–03. Finance approved the movement of funds. This is supported by AGS advice received on 18 June 2001, which stated that appropriations under the *Appropriation (Supplementary Measures) Act (No.1) 1999* do not lapse at the end of the financial year in respect of which they become available.'

- (a) Finance issued Finance Circular 2004/16, titled *Appropriation management: responsibilities of agencies* (on 29 October 2004), clarifying agencies' responsibilities in the management of appropriations and is currently preparing the 2004–05 *Financial Management and Accountability (Financial Statement) Orders*, which will provide information to assist in improving the consistency of reporting Special Appropriations across Commonwealth entities.

In August 2003, Finance released Estimates Memorandum 2003/27, titled *Refresher on appropriation framework—rules*. This memorandum provided information on the management of appropriations.

Where opportunity arises, Finance will examine further options for developing guidance to assist entities. Finance has already published a range of guidance on this issue.

- (b) Finance issued Finance Circular 2004/07, titled *Drawing rights: payments and debiting appropriations* (on 25 July 2004), providing guidance to agencies on arrangements where one agency draws upon the appropriations of another agency. Finance is also currently preparing the 2004–05 *Financial Management and Accountability (Financial Statement) Orders* and proposes to clarify the proper disclosure of these types of arrangements.

Accounts and records

4.44 As part of the 1999 FMLA Act changes, responsibility for maintaining appropriation accounts and records was devolved from Finance to agencies. The Explanatory Memorandum for the FMLA Act stated as follows:⁹⁵

In future, agency officials will require drawing rights to make payments, out of their own bank accounts, and debit appropriation accounts in their own records.

4.45 Consistent with this change, Finance's guidance to entities the following year was as follows:

Responsibility for maintaining an account for each appropriation has been devolved to agencies and authorities from 1 July 1999 with the cessation of the central cash accounting system FIRM. These accounts must be kept in a manner that is consistent with the reporting requirements of this policy and which shows the balance available for expenditure under Section 83 of the Constitution.⁹⁶

⁹⁵ *Financial Management Legislation Amendment Bill 1999*, Explanatory Memorandum circulated by the authority of the Minister for Finance and Administration, the Hon John J Fahey, MP, p. 12.

⁹⁶ 2000–01 Finance Minister's Orders.

4.46 Accordingly, for all appropriations, including Special Appropriations, there is an obligation for the administering entity to maintain proper accounts and records for each Special Appropriation. This obligation stems from:

- the *Financial Management and Accountability Orders 1997* (FMA Orders),⁹⁷ which require that the accounts and records of each agency properly record and explain the agency's transactions and financial position.⁹⁸ Without limiting the generality of this obligation, the accounts and records are also required to ensure that:
 - moneys are only expended for the purposes for which they are appropriated; and
 - the limit on any appropriation is not exceeded; and
- Division 2 of Part 4 of the FMA Act, which requires amounts to be debited against an appropriation (*emphasis added*), not a group of appropriations or an Act.⁹⁹

Aggregation

4.47 In 2003, Finance advised the Joint Committee of Public Accounts and Audit that a valid appropriation must specify, with reasonable clarity, the purpose for which amounts are being appropriated.¹⁰⁰ In this context, different appropriations generally have different purposes. This usually remains the case even where one Act includes more than one Special Appropriation, and where different Acts include Special Appropriations relating to a similar area of public administration.

⁹⁷ Order 2.3(e) and Order 2.3(f).

⁹⁸ A similar obligation exists in Section 20 of the CAC Act, for entities governed by that Act.

⁹⁹ In this context, in August 2004, Finance obtained the following advice from AGS:

'In our view, Order 2.3(e) as currently drafted probably does require accounts and records to link particular expenditure with a particular appropriation. It may not be necessary to report on these appropriations in a [dis]aggregated way, but the actual payment of amounts appears under the Act to require a person either paying an amount or debiting an appropriation to focus on what appropriation supports the payment. In this respect, Section 27(1)(c) of the FMA Act allows drawing rights to be issued to an official that authorise the official to '*debit an amount against a particular appropriation*' (*emphasis added*).

It is true that in the case of an uncapped standing appropriation it is not possible for an official to exceed the limit of the appropriation. Accordingly, the concern addressed by Order 2.3(f), ensuring the limit of an appropriation is not exceeded, does not arise in relation to such appropriations. However, Order 2.3(e) is directed to a different concern – requiring a system of accounts and records that, consistently with the drawing rights regime of the Act, ensures to the greatest extent possible that the purpose of a payment corresponds to the appropriation that is debited in respect of that payment.'

¹⁰⁰ *Second Submission to the Inquiry by the Joint Committee of Public Accounts and Audit into the Draft Financial Framework Legislation Amendment Bill*, Department of Finance and Administration, May 2003, pp.26–27.

4.48 Consistent with these principles, up to and including 2002–03, entities were required by the FMOs to separately disclose each Special Appropriation for which they were responsible. In this context, AGS has advised one department that, in applying the recommended tables in the FMOs for disclosing Special Appropriations up until 2003–04:

[When] those tables are read with their accompanying notes, it is reasonably clear that expenditure against special appropriations in legislation must be disclosed on an appropriation-by-appropriation basis.

4.49 ANAO's examination of entity disclosure of Special Appropriations for the period 1998–99 to 2002–03 identified a number of instances where entities disclosed, in aggregate, expenditure from different appropriations provided by the same Act. ANAO also found instances of entities reporting appropriations contained in different Acts in aggregate, rather than separately. Seven of the eleven entities that had disclosed Special Appropriations in aggregate were able to provide disaggregated payment information to ANAO for each appropriation in the period up to and including 2002–03, or satisfied ANAO that disaggregation was possible.¹⁰¹

4.50 A major change made to the FMOs for 2003–04 in respect to appropriations disclosures was to change the previous requirement to prepare a separate disclosure table for each Special Appropriation to a requirement that a separate table be prepared and reported for each Act containing Special Appropriations. The change will mean that, for reporting purposes in 2003–04, entities will be able to aggregate expenditure made under separate Special Appropriations provided by the same Act and still comply with disclosure requirements.¹⁰² On this change, Finance commented as follows to ANAO in November 2004:

The change to Special Appropriations disclosures in the FMOs for 2003–04 reflects the need to provide Parliament with the most meaningful type of disclosures. Specifically, reporting numerous individual tables would not necessarily provide a clear picture of total funding spent on, for instance, pension payments and taxation administration. In addition, Finance notes that if agencies were required to separately disclose Special Appropriations by sections, some agencies would need to provide many disclosure tables, which

¹⁰¹ The four exceptions were the Department of Agriculture, Fisheries and Forestry (DAFF), in relation to \$2.02 billion of payments made under ten appropriating clauses; AGO, in relation to \$120.2 million of payments made under five appropriating clauses in one Act; and DoS and DHR in relation to payments of \$48.96 million and \$93.97 million respectively, made under three appropriating clauses in three Acts. In August 2004, both DAFF and AGO advised ANAO that, for 2003–04, they have recorded individual Special Appropriation payment information.

¹⁰² Whilst noting the changed requirement for 2003–04, ANAO's Better Practice Guide *AMODEL Agency Illustrative Financial Statements for the Year Ended 30 June 2004* recommends that each appropriation section within an Act be separately disclosed. This is on the basis that each appropriation section is likely to serve a different purpose. Source: ANAO, *Better Practice Guide: AMODEL Agency Illustrative Financial Statements for the Year Ended 30 June 2004*, p. 178.

would not improve the ability of users to extract information from the Financial Statements.

4.51 Notwithstanding the change to disclosure requirements for 2003–04, FMA Act agencies are still required to maintain proper accounts and records for each Special Appropriation. In this context, Finance advised ANAO in September 2004 as follows:

Finance notes that there is no legal or policy requirement for agencies to maintain separate appropriation ledger records for each Special Appropriation. ... Finance does, however, consider that an agency would need to maintain accounts and records to a sufficient extent that would enable the agency to identify the particular appropriation that supports a payment and to be able to reconstruct spending decisions such that amounts could be attributed to individual Special Appropriations, irrespective of whether those special appropriations can be reported in aggregate, as required by the FMOs.

Disclosure against an incorrect or non-existent Special Appropriation

4.52 Proper accounting for, and reporting of, appropriations enables entities to discharge their accountability for the purposes of Section 83 of the Constitution. In this context, Section 48 of the FMA Act requires the Chief Executive of each agency to ensure that accounts and records are kept as required by the FMOs. In turn, Order 2.3 of the FMA Orders requires that the accounts and records of each agency ensure that: moneys are only expended for the purpose for which they are appropriated; and the limit on any appropriation is not exceeded.

4.53 In 2003, in the context of the audit of 2002–03 entity financial statements, ANAO obtained legal advice that there is a duty on agencies to ensure that an appropriation exists before spending funds from the CRF. To do otherwise represents a breach of Section 48 of the FMA Act. ANAO was further advised that a contravention of Section 48 of the FMA Act occurs where expenditure is attributed to an incorrect or non-existent appropriation, even where a valid alternative appropriation existed. This is because the accounts and records have not properly recorded and explained the relevant transaction(s).

4.54 During this performance audit, ANAO identified nine instances across five agencies of expenditure being disclosed against incorrect appropriation authorities. These drawings involved payments of \$394 million between 1998–99 and 2002–03. In addition, errors were also identified in the reporting and disclosure of Special Appropriation spending. In one instance, an entity disclosed in 2001–02 and 2002–03 a total of \$7.2 billion in spending against proposed legislation that had not been passed by the Parliament (see Table 4.1).

Recommendation No.6

4.55 ANAO *recommends* that, to meet their accountability obligations in respect of Section 83 of the Constitution, entities that draw amounts from the Consolidated Revenue Fund establish and maintain accounts and records that accurately link expenditure with a specific valid appropriation.

Agency responses

4.56 ACS, AEC, AGD, AJF, AOFM, ASIC, ATO, AusAID, Centrelink, Comcare, CSIRO, DAFF, DCITA, Defence, DEST, DFAT, DHA, DIMIA, DITR, DoS, DoTRS, DVA, FaCS, Finance, GBRMPA, HIC, PM&C and Treasury agreed.

4.57 Some respondents also made comments on the recommendation, as follows.

- Centrelink advised that its current accounting system complies with the recommendation.
- PM&C stated that agencies should be able to track Special Appropriations like all other appropriations.
- Finance stated that it issued Finance Circular 2004/16, titled *Appropriation management: responsibilities of agencies* (on 29 October 2004), reminding agencies of their responsibility for the management of appropriations, including maintaining records that link transactions to appropriations.

Table 4.1

Payments disclosed against an incorrect or non-existent Special Appropriation

Entity	Payments	Appropriation disclosed	Correct appropriation
AGD	\$579 886 in 1999–2000	National Firearms Program Implementation Act 1996, S.7	National Firearms Program Implementation Act 1998, S.7
	\$692 965 between 1998–99 and 2002–03	Judges' Pensions Act 1968, S.14	Law Officers Act 1964, S.16
	\$259 442 in 2002–03	Remuneration and Allowances Act 1990, S.8	High Court Justices (Long Leave Payments) Act 1979, S.6
ATO	\$370.607 million between 1998–99 and 2002–03	Taxation (Interest on Overpayments and Early Payments) Act 1983	Taxation Administration Act 1953, S.16
	ATO unable to quantify amounts paid in the past, but processes are being altered to capture the amounts in future years. ^A	Taxation Administration Act 1953, S.16 ^B	A New Tax System (Family Assistance) (Administration) Act 1999, S.223
DVA ^C	\$8.700 m in 2000–01 in benefit payments.	Compensation (Japanese Internment) Act 2001, S.13	Veterans' Entitlements Act 1986, S.199
	At least \$1 388 million in administrative costs.		
OOSGG ^D	\$766 680 between 1998–99 and 2002–03	Governor-General Act 1973, S.3	Commonwealth of Australia Constitution Act, S.3
Finance	\$7 167 million between 2001–02 and 2002–03	Proposed Commonwealth Superannuation Board Act 1999–Member Remuneration ^E	Various appropriating clauses in various Superannuation Acts.
	\$10.700 million between 1998–99 and 2002–03	Ministers of State Act 1952 ^F	Commonwealth of Australia Constitution Act, S.66

Note A: The *A New Tax System (Family Assistance) (Administration) Act 1999* provides a Special Appropriation for paying family assistance. The entitlement can be paid either through the FaCS portfolio or by the ATO. FaCS first disclosed drawings under the appropriation in 2000–01 and advised ANAO that it has always fully reported family assistance payments delivered through the FaCS portfolio each year. The ATO first disclosed that it had drawn on the appropriation in 2002–03, incorrectly reporting the amount in aggregate with drawings made under the *Taxation Administration Act 1953*. Separately, ATO reported administered expenses of \$411 million for Family Tax Benefit in 2002–03. In July 2004, FaCS advised ANAO that it signed an agreement with the ATO on 29 June 2004, formalising the reporting arrangements between the two agencies and clarifying the reporting obligations against the Special Appropriation. ATO advised ANAO that it was not required to report amounts under the Act until that time. ATO reported the Family Tax Benefit amounts against the Taxation Administration Act appropriation in 2002–03 as it had become apparent that there had been a reporting oversight in previous years. It is therefore not clear that the full amount of family assistance drawn under this Special Appropriation has been disclosed in each year.

Note B: In July 2004, ATO advised ANAO that: '[It had] reported [*Family Tax Benefit*] amounts in 2002–03 combined with other general refunds as there was no methodology consistent with relevant legislation for dissecting these amounts from other tax refunds. A methodology has since been determined to accord with the assessment and refund process which will be applied to the 2003–04 financial statements.'

Note C: See paragraphs 4.70 and 4.72.

Note D: Office of the Official Secretary to the Governor-General.

Note E: This Bill was never passed into law by the Parliament. After failing to achieve the support of the Senate, the Bill was withdrawn by the Government. Valid appropriations for these payments existed in other legislation. In April 2004, Finance advised ANAO that: '[It] reported against the Proposed Commonwealth Superannuation Board Act 1999 – Member Remuneration, in the 2002–03 and 2001–02 annual reports, in error. The numbers reported in Finance's 2002–03 and 2001–02 annual reports should actually have been recorded against the Superannuation Act 1922, 1961, 1967, 1976 and 1990 Benefits Surcharge.'

Note F: For a number of years, Finance incorrectly disclosed expenditure on Ministers' salaries as having been made under the *Minister of State Act 1952*, which does not provide an appropriation. The relevant Special Appropriation is provided by Section 66 of the Constitution. Finance's 2003–04 financial statements note the previous year error and disclose the expenditure in that year under the correct Special Appropriation.

Source: ANAO analysis of agency financial data and correspondence

Section 83 contraventions

4.58 Appropriation laws must specify the purpose for which the money is to be spent.¹⁰³ Spending money contrary to the purpose of an appropriation, or in excess of the amount appropriated, contravenes Section 83 of the Constitution.¹⁰⁴ In the course of this audit, ANAO identified two instances where this had occurred.¹⁰⁵

The Aboriginal and Torres Strait Islander Land Fund

4.59 The *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* amended the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act) to establish the Aboriginal and Torres Strait Islander Land Fund Special Account (Land Fund Special Account)¹⁰⁶ and the Indigenous Land Corporation (ILC).¹⁰⁷ The purpose of the Land Fund Special Account is to provide a secure and ongoing source of funds to the ILC to provide economic, environmental, social and cultural benefits for Aboriginal people and Torres Strait Islanders by assisting in the acquisition and management of an Indigenous land base.¹⁰⁸

4.60 The legislation provided for the Land Fund to be built up to become a self-sustaining capital fund by 30 June 2004.¹⁰⁹ For the period 1995–96 to 2003–04 (identified as Category A years), a Special Appropriation under

¹⁰³ Estimates Memorandum 2003/27, op. cit., p. 2.

¹⁰⁴ *ibid.*

¹⁰⁵ ANAO identified a further instance where the administering entity (the Department of Defence (Defence)) overstated the limit of its Special Appropriation. This occurred in relation to the Special Appropriation provided by Section 3 of *Appropriation (East Timor) Act 1999–2000* (East Timor Act), which provided for up to \$860 million in expenditure incurred before 1 July 2000 in relation to the deployment of the Defence Force in East Timor and the generation of additional forces to sustain the deployment. Defence incorrectly increased the limit of this Special Appropriation by \$98 000 by purporting to credit the balance of the Special Appropriation, under the provisions of its FMA Act Section 31 Net Appropriation Agreement, with receipts received from third parties. As this Agreement does not apply to the East Timor Act Special Appropriation, ANAO advised Defence that the amounts needed to be returned to the Official Public Account. As Defence had spent considerably less than the \$860 million appropriated, there was little risk of the appropriation limit being exceeded and Defence advised ANAO that no consequent breach of Section 83 occurred.

¹⁰⁶ The *Aboriginal and Torres Strait Islander Commission Amendment Bill 2004*, if it had been passed by the Parliament, would have implemented the Government's decision to abolish the Aboriginal and Torres Strait Islander Commission. It would not have abolished the Land Fund Special Account or affected the related Special Appropriations. The Bill lapsed when the House of Representatives was dissolved on 31 August 2004, prior to the general election of 9 October 2004.

¹⁰⁷ The ILC is a statutory authority with responsibility for the acquisition and management of newly acquired Indigenous land and for existing Indigenous held land in all States and Territories.

¹⁰⁸ Aboriginal and Torres Strait Islander Commission (ATSIC), *Annual Report 2002–03*, p. 325.

¹⁰⁹ *ibid.*

Section 193 of the ATSIC Act provided for amounts to be credited to the Land Fund Special Account to achieve a target level.¹¹⁰

4.61 Approximately 63 per cent of the amounts credited to the Land Fund have been invested, under Section 39 of the FMA Act, in order to build its capital base up to the target level. The remaining 37 per cent is paid to the ILC for its statutory land acquisition and management responsibilities, and associated costs.¹¹¹

4.62 The credits made to the Land Fund in Category A years were required to be calculated in accordance with the formula provided by Section 193 of the ATSIC Act, using an indexation factor calculated in accordance with Section 193D of the Act. However, that formula was not correctly applied in calculating the amounts credited to the Fund in each of those years. As a result, ANAO estimated that \$18.671 million more was credited to the Land Fund Special Account than was authorised by the ATSIC Act (see Table 4.2). Of this amount, ANAO estimated that \$6.846 million, subsequently paid from the Land Fund to the ILC, reflected a breach of Section 83 of the Constitution.

Table 4.2

Amounts credited to the Land Fund Special Account

Year	Amount credited (\$)	Authorised amount (\$)	Unauthorised amount (\$)
1995–96	123 178 000	122 452 000	726 000
1996–97	126 750 000	126 003 108	746 892
1997–98	129 792 000	128 775 176	1 016 824
1998–99	133 686 000	131 350 679	2 335 321
1999–00	136 359 000	132 401 484	3 957 516
2000–01	139 223 000	134 255 104	4 967 896
2001–02	141 451 000	139 088 287	2 362 713
2002–03	143 997 000	142 148 229	1 848 771
2003–04	146 695 000	145 986 231	708 769
Total	1 221 131 000	1 202 460 298	18 670 702

Source: ANAO analysis of agency financial data.

¹¹⁰ The ATSIC Act also provided a Special Appropriation to bring the actual balance of the Land Fund (calculated in the manner specified by the Act) up to a target level (also calculated in the manner specified by the Act) by 30 June 2004. On 30 September 2004, the Finance Minister determined that the actual balance exceeded the target level and the Special Appropriation was not required.

¹¹¹ ATSIC, op.cit., p. 325.

4.63 In October 2004, the Aboriginal and Torres Strait Islander Service (ATSIS) provided ANAO with the following comments in relation to these findings.

ATSIS remains concerned that the report suggests that ATSIC/ATSIS somehow actively engaged in inappropriate practices which lead to the finding of there being a breach of Section 83 of the Constitution. ATSIC would like to state for the record that:

- The Aboriginal and Torres Strait Land Fund had been adopting the same practice of appropriation draw-downs since its inception in 1994–95. This practice involved the Department of Finance and Administration supplying the relevant indexation factor to ATSIC/ATSIS which it used to calculate the amount to be drawn into the Land Fund from the Official Public Account. Once the indexation factor was applied and the calculation prepared, it was checked by Finance officials. The draw-downs to the Land Fund were always in accordance with the amount determined using this process. ATSIC/ATSIS simply acted in good faith using the official advice provided.
- The ANAO has audited the financial statements of the Land Fund each year since its inception. No mention has ever been made to ATSIC/ATSIS which might have alerted it to the possibility that the amounts being drawn down were incorrect. Unqualified audit opinions were issued each year by the ANAO and the ATSIC Board relied on its auditors (the ANAO) to advise that the appropriate controls were in place and operating effectively.

4.64 In response to these comments, Finance commented to ANAO as follows in November 2004.

While noting the comments of ATSIC in relation to the Land Fund, Finance advises that it was not responsible for the management of the ATSIC Act, nor has it any record of Finance officials checking, outside of this audit report process, the calculation and application of the indexation factor applying to the payments.

4.65 In addition, ANAO considers that it should be emphasized that ATSIC is responsible for the administration of the relevant clauses of the ATSIC Act. In terms of the ATSIC Act Section 193 Special Appropriation, Section 48 of the FMA Act imposes a positive duty upon ATSIC to ensure that appropriations are effected before spending funds. Therefore, ATSIC, and no other agency, had responsibility, as the spending agency, to ensure the accurate calculation of yearly appropriations in accordance with the ATSIC Act.

4.66 ANAO further notes that ATSIC is responsible for the maintenance of adequate accounting records and internal controls that are designed to prevent and detect fraud and error. This fundamental division of responsibilities

between management and auditors has been explicitly recognised in ANAO's financial statement audit opinions. In addition, throughout the period in question, ATSIC has issued Management Representation Letters as part of the financial statement audit process. These Representation Letters are used by ANAO as a means of providing further assurance as to operation of controls. For example, the Management Representation Letter issued by ATSIC for 2003–2004 acknowledges ATSIC's 'responsibility for the implementation and operation of accounting and internal control systems that are designed to prevent and detect fraud and error.'

Japanese internment compensation payments

4.67 In the five entities audited in detail, ANAO identified one instance where funds had been drawn from the CRF for a purpose that was contrary to the purpose of the Special Appropriation that was debited. This involved the *Compensation (Japanese Internment) Act 2001* (Compensation Act) administered by DVA.

4.68 In the 2001–02 Budget, the Government proposed once only payments of \$25 000 to, or in respect of, certain persons who had been interned by the Japanese in World War Two. The expected total cost of this Budget measure was \$247.8 million. Statutory provision for the payment was made through two mechanisms, as follows:

- Payments to veteran prisoners of war and their widows or widowers who are dependants under the *Veterans' Entitlements Act 1986* (VEA) are made through the *Veterans' Entitlements (Compensation-Japanese Internment) Regulations 2001* (the Regulations), provided for under Section 106 of the VEA. Section 199 of the VEA provides a Special Appropriation for those payments.
- Payments to Australian civilians and their widows or widowers, and those widows or widowers of veteran prisoners of war who are not eligible for payment under the Regulations, are made under the Compensation Act.

4.69 Section 13 of the Compensation Act provides a Special Appropriation for the making of payments from the CRF. The only payments permitted to be made under the Special Appropriation are the \$25 000 compensation payments to eligible persons. The appropriation is limited to \$133.975 million.¹¹² The Special Appropriation made no provision for any payments other than to eligible persons as defined in the legislation.

¹¹² This represents funding for 5 359 payments.

4.70 DVA drew \$1.5 million from the CRF under the Compensation Act Special Appropriation for the purpose of meeting its estimated departmental costs for the future administration of the compensation payments. ANAO's legal advice is that the Compensation Act Special Appropriation did not permit this drawing of the CRF. ANAO was further advised that the component of that drawing that was expected to relate to administration of compensation payments made under the VEA could have been paid using the VEA Special Appropriation. However, the balance was not within the purposes of either Special Appropriation, thereby representing a contravention of Section 83 of the Constitution.

Corrective action

4.71 The errors made in the administration of the Land Fund and the Compensation Act Special Appropriation involved amounts being drawn from the CRF in contravention of Section 83 of the Constitution. Accordingly, ANAO considers the relevant amounts should be returned to the CRF.

4.72 For the Compensation Act, repaying the relevant amounts would involve DVA returning cash it has previously drawn from the Official Public Account through CAMM. On a simple pro-rata basis according to the actual compensation payments made, the amount to be repaid is at least \$112 277.¹¹³ For a number of reasons,¹¹⁴ ANAO considers that the correct amount is likely to be greater than this figure. As the administration of the payments under the Compensation Act and the VEA were intertwined, DVA has not been able to determine the exact apportionment of the \$1.5 million between the Compensation Act Special Appropriation (a limited special appropriation) and the VEA Special Appropriation.

4.73 DVA advised ANAO in August 2004 that it would consult with Finance regarding the repayment to the CRF of any incorrectly drawn funds. Finance advised ANAO in September 2004 that it was working with DVA in relation to the issues identified. DVA further advised ANAO in October 2004 that it has commenced discussions with Finance regarding the amount incorrectly drawn down.

¹¹³ This calculation reflects a correction to DVA's previous reporting that it paid \$8.7 million in 2000–01 under the Compensation Act. In October 2004, DVA indicated to ANAO that it made no payments under the Compensation Act in 2000–01. Had DVA's reporting been correct, the minimum amount to be repaid would be \$174 703.

¹¹⁴ For example, as processing payments under the Compensation Act required greater administrative effort than payments under the VEA, a simple pro-rata approach is unlikely to be adequate. Adjustment may also be appropriate to reflect that the actual payments made to date have been 25 per cent below those budgeted. More specifically, payments under the Compensation Act have been 90 per cent below the number budgeted.

4.74 The underlying error in the Land Fund was estimated by ANAO to be \$18 670 702. Some of these funds have been invested, and reinvested. Finance has estimated that the investment earnings amounted to \$4 219 977 (up to 30 June 2004). Taking this into account, the total error would be some \$22.89 million. In September 2004, Finance advised ANAO that it was proposing to take the following action:

- That Finance officers liaise with the ILC, ATSIC and ATSIS to seek to recoup, on behalf of the Commonwealth, the excess crediting of the Land Fund as repayments from the Land Fund, the ILC and ATSIC.
- That Finance officers liaise with ATSIC/ATSIS to seek to recoup, on behalf of the Commonwealth, estimated investment earnings related to the excess credits that remained with the Land Fund.

4.75 As at November 2004, the amount of the error in respect of the Land Fund was being finalised between ATSIC and Finance. In October 2004, ATSIS commissioned a review to recalculate the appropriations as specified in the ATSIC Act and the interest component.¹¹⁵ The draft report of this review, provided to ANAO by Finance in November 2004, concluded as follows:

The review supported the ANAO calculation that the Land Fund had been over-appropriated as a result of recurring errors in calculating supporting indices. The review noted the legislatively complex nature of the calculations as a factor resulting in the overpayment that had not been identified until the ANAO Special Appropriations audit.

The Land Fund was over-appropriated by \$16.860 million. Interest earned on capital from the appropriations reinvested over the ten year period has been calculated as \$3.915 million.

Canberra ACT
23 November 2004



Oliver Winder
Acting Auditor-General

¹¹⁵ In its 2003–04 financial statements, signed by the Acting Chief Executive on 5 October 2004 and by the Chair on 22 October 2004, ATSIC disclosed in Note 24D that the error to be corrected was \$18 670 702.

Appendices

Appendix 1: Agency responses

Australian Customs Service

The audit of the Financial Management of Special Appropriations has been beneficial and the opportunity to comment, both consultatively throughout the audit and with this draft reporting phase, has been appreciated.

Australian Greenhouse Office

The Australian Greenhouse Office considers the performance audit of the Financial Management of Special Appropriations to have been worthwhile, providing the opportunity to address the inconsistencies identified in the management and reporting of Special Appropriations.

Australian Industrial Registry

The Australian Industrial Registry currently administers a single Special Appropriation in respect of the *Judges' Pension Act 1968* for retired members of the Industrial Relations Commission.

The Australian Industrial Registry has examined the proposed report and has no specific comments to make in respect of the six recommendations, other than to comment that they appear to be sound and should lead to improvements in the management of Special Appropriations and in particular note Recommendation 3 and the expectation that Finance provide improved guidance which should be of assistance to agencies such as the Australian Industrial Registry in meeting reporting requirements.

Australian Prudential Regulation Authority

The recommendations of the report refer primarily to actions to be taken by Finance, and we therefore have no particular comments to offer. Since the recommendations do not directly require any further action by APRA, we will note the recommendations and will be taking no further action unless advised.

Australian Securities and Investments Commission

The reporting deficiencies identified were rectified in the 2004 financial statements.

Australian Taxation Office

The ATO is taking steps to address all areas of deficiency identified in the audit report, where those steps were not already taken prior to the preparation of the 2003–04 Financial Statements. It is anticipated that these matters will be addressed during the 2004–05 financial year.

Comcare

Comcare has included repayment of premiums in its financial statements in past years, and has obtained audit clearance on the approach it has adopted. While amounts are disclosed, no specific mention is made to Section 97N(2) of the *Safety Rehabilitation and Compensation Act 1988*.

Changes to the *Safety Rehabilitation and Compensation Act 1988* mean that Comcare now receives premium monies into its own bank account – the audit finding covers the period up to and including transition to the new arrangements.

Because of the changes the requirement to draw down funds through Section 97N(2) of the *Safety Rehabilitation and Compensation Act 1988* is unlikely to re-occur for some years, if at all.

Department of Environment and Heritage

The Department notes the findings and recommendations of the report.

Department of Employment and Workplace Relations

The Department of Employment and Workplace Relations notes the Auditor-General's Report and its recommendations. The Department already has in place strategies and processes to address Recommendations 5 and 6.

The Report notes that the FMOs prior to 2003–04 have been open to interpretation in respect of unused Special Appropriations in a given year. Indeed, it recommends that Finance provide greater clarity about these disclosure requirements (Recommendation 3). The Department believes that not disclosing unused Special Appropriations up to 2002–03 in our annual financial statements has been consistent with the FMOs applying in each reporting period. It would appear that the Department's financial statement auditors have concurred with the Department's disclosure in past financial statements and therefore with our view of the application of the FMOs up to 2002–03. This is reflected in the unqualified Audit Reports in relation to the Department's financial statements up to and including 2003–04.

On this basis, it is clear that the Department has complied fully with the FMOs in every reporting period to date. Nonetheless, there is room for improved and better coordinated administration and disclosure of Special Appropriations generally and the Department welcomes the Auditor-General's Recommendations 2 and 3 in this regard.

Department of Health and Ageing

The Department is supportive of the general thrust of the audit, and its findings and recommendations.

Department of the House of Representatives

The audit has assisted in clarifying the administrative arrangements surrounding the financial management of Special Appropriations especially as they relate to the Department's operations and has resulted in changes in the management of Special Appropriations within the Department.

Department of Prime Minister and Cabinet

The Department agreed with the report's recommendations, commenting on recommendations 2, 3, 4, 5, and 6. These comments are reproduced in full after each relevant recommendation.

Department of Veterans' Affairs

DVA agrees with the overall conclusions of this report and acknowledges that some further work in the governance framework is required by DVA to further improve the financial framework for the effective management of Special Appropriations.

Great Barrier Reef Marine Park Authority

GBRMPA's Special Appropriation is used to cover 20 per cent of the cost of ordinary annual services including research, education and management of the Marine Park. Apart from the costs of collection of the Environmental Management Charge, the annual contribution of to the Reef Cooperative Research Centre and reef-related research, the allocation of expenses to the Special Appropriation is on a notional basis.

Insolvency and Trustee Service Australia

In general, the timing of the audit of Special Appropriations in the Commonwealth has been most appropriate. As mentioned in the proposed report, it is now clear (following February 2004 legal advice) that Special Public Money forms part of the CRF. As this represents a change from previous views, the audit has assisted agencies in focusing on the ramifications of that change.

Office of the Renewable Energy Regulator

ORER appreciates the advice of ANAO regarding more appropriate levels of disclosure of expenditure against Special Appropriations as it appears in the agency's annual financial statements. Improvements to ORER's 2003–04 financial statements were made as a result of the findings of the audit of ORER's Special Appropriation disclosure in 2002–03.

ORER highlights the special needs of small agencies for streamlined advice and assistance mechanisms when developing new guidelines on appropriate financial reporting standards.

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