

The Auditor-General
Audit Report No.12
Performance Audit

Taxation Reform

Community Education and Information Programme

□ Commonwealth
of Australia 1998

ISSN 1036-7632

ISBN 0 644 39057 3

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Canberra ACT
29 October 1998



Dear Madam President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit in accordance with the authority contained in the *Auditor-General Act 1997*. I present this report of this audit to the Parliament. The report is titled *Taxation Reform – Community Education and Information Programme*.

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 'P. J. Barrett'.

P. J. Barrett
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

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Executive Summary

Request from the Leader of the Opposition in the Senate

1. The Leader of the Opposition in the Senate has written to me about a number of matters in respect of the Government's community education and information programme (CEIP) for a new taxation system which the latter proposed to introduce in the life of the new Parliament if re-elected on 3 October. Members of the public have also written raising similar issues in relation to the program.

2. The issues raised include:

- the legality of the use of taxpayers' funds on CEIP;
- the use of the Advance to the Minister for Finance and Administration (AMFA - contingency funds) to fund expenditure on the CEIP;
- the use of public servants to staff a telephone call centre, ie the appropriate duties and responsibilities of public servants;
- the use of Commonwealth copyright material for party-political advertising purposes in electorates; the alleged combination of CEIP materials with electoral advertising in letter-box drops; the conduct of Commonwealth sponsored mail-outs, and
- the use of the confidential database of pensioner and veterans' names and addresses for the dissemination of party-political advertising material.

3. In view of the public interest considerations raised, I decided to undertake a limited scope performance audit of the program to clarify the above issues, provide some comment and suggestions, and a report to the Parliament.

Developing a new tax system

4. The Government's taxation reform agenda proposes a new tax system affecting, among other things, personal income tax rates and thresholds, business tax, assistance for families, Commonwealth-State financial relations and the indirect tax system.

5. A taxation reform package has been under development since August 1997. At that time a Tax Reform Group (TRG) was established within Treasury and staffed by a small group of officers with experience in tax matters. The TRG provided advice to a Taxation Task Force (TTF), an interdepartmental group and others, headed by Treasury on policy options for reform of the taxation system within guidance provided by the Government. In turn the TTF reported to a small group of Ministers responsible for preparing the Government's reform package.

6. In April 1998, the Government agreed to the CEIP. The program was launched on 13 August at the same time as the Government's proposals were announced. Budget Measures 1998-99 (Budget Paper No.2) explains that Treasury was allocated \$10 million in 1997-98 under the CEIP to inform the public of the nature of the Australian taxation system and changes required to reform it. The program was designed to assist taxpayers understand the nature of the reform of the tax system which is intended to result in better compliance and development of a more efficient revenue base.

7. The program involved the use of television, radio and print advertising, mail-outs, letter-box drops, the internet and telephone call centres to provide information to the public. A private sector teleservices company was contracted to provide a call centre service in Sydney to disseminate general information in response to public inquiries on the information line. A second 'call back' centre in Canberra, staffed by public servants, followed up requests which could not be dealt with by the Sydney centre.

8. Expenditure and commitments on the program as at 31 August 1998, the date on which the program formally ceased due to the caretaker convention, were \$14.9 million.

Summary of Findings

9. The issues examined by the ANAO were considered on two levels. First, there are the legal and ethical processes which focus on whether there are any impediments to the Government and public service implementing the CEIP in the way they have. The issues raised by the Leader of the Opposition in the Senate and members of the public turn largely on the question of whether the CEIP was for Government or party-political purposes.

10. The other level on which these issues were considered is from the viewpoint of public accountability. This is clearly a matter of public interest that has been widely raised in public discussions, editorials of

major newspapers and by individual citizens in correspondence to the ANAO. It basically comes down to the way in which decisions are made to spend public monies and for what purposes. In turn, these issues raise questions about the relationship between, and authority of, the Government and Parliament. They may also involve consideration of what might be regarded as proper or responsible conduct by governments and the public service.

Legal and Ethical Processes

11. The ANAO's findings on the legal and ethical processes raised are as follows:

Was the CEIP for a Commonwealth purpose?

12. The short answer is yes. Both the Australian Government Solicitor and further separate legal advice obtained by the ANAO confirm that the program was for Commonwealth purposes. As well, the fact that the policy proposal put forward in the CEIP had been developed during one term of Government but may be implemented during a future term of Government has no bearing on the issue. The legal advice also confirms that the fact a Government advertising campaign contains 'political matter' or 'electoral matter' does not preclude expenditure on the campaign being for purposes of the Commonwealth within the terms of Section 81 of the Constitution.

Use of the Advance to the Minister for Finance and Administration

13. Annual Appropriation Acts provide for Parliamentary scrutiny and the necessary authority to spend Commonwealth funds. Provision is made in the Appropriation Bills for a 'contingency fund' known as AMFA to be used by the Government for providing funds for urgent and unforeseen services in advance of the regular supply procedures of Parliament.

14. In the light of legal advice received, the ANAO was satisfied that the approval of funds from the AMFA met the legislative conditions that the requirement for the funds was urgent and unforeseen. However, in the ANAO's view, at the cut-off time for the 1998-99 Appropriation Bills in early May 1998, Treasury's expectation that there would be no requirement for funds in 1998-99 was arguably optimistic given the lead time, program length, guidelines, and normal commercial billing conditions for this type of program, as subsequent events have shown.

At the time of this report (late October 1998) some payments were still to be made.

15. Although Treasury did not know the launch date for the CEIP, it was most unlikely that all funds could have been spent in 1997–98. In the circumstances, the ANAO considers that Treasury should have advised the Government that not all funds would be spent in 1997–98 and at least some minimum estimated amount would then have had to be included in the 1998–99 Appropriation Bills to cover likely payments in that financial year. If the estimated amount for 1998–99 proved to be insufficient, it would have been open to Treasury to have applied for funds from the AMFA subsequently. In the ANAO's view this would have been more in accord with the 'exceptional' nature of AMFA and the sensitivity of its use with the Parliament.

16. The public concerns surrounding this use of AMFA inevitably raise questions about what is required of all those involved in the AMFA process, including the Minister for Finance and Administration and his delegate, to ensure the AMFA criteria are applied stringently given the special nature of the funding and ongoing Parliamentary interest about the circumstances in which AMFA should be used. While it is stressed that the ANAO considers there is no evidence that the relevant processes were not adhered to in this matter, the public concerns focus attention on the assessment of the circumstances giving rise to any AMFA request and the extent to which the person supporting its use has to satisfy him/herself of the basis of that assessment. Any tightening of the AMFA rules is a matter for the Government and/or the Parliament.

Public Servants – duties and responsibilities

17. Given the legal advice that the CEIP was for Commonwealth purposes, on the basis of the evidence available, there was no breach of the Public Service Regulations or the *Financial Management and Accountability Act 1997* by Commonwealth officers. The role of Commonwealth officers was limited to program implementation and providing factual information and explanations on the tax reform proposals.

18. In short, the conduct of the CEIP was for a Commonwealth purpose and therefore falls within the range of public servants' duties. A refusal by an agency head or his or her officers to undertake work associated with the CEIP could have been regarded as a failure to perform his or her duty under the *Public Service Act 1922*.

Copyright material, mail-outs

19. Concerns surrounding possible breaches of Commonwealth copyright have not been investigated by AusInfo (an Office within the Department of Finance and Administration). There is evidence, however, that requests for use of Commonwealth copyright material for CEIP were not made until 31 August 1998. Requests were approved by AusInfo on 1 September allowing the Liberal and National parties to utilize Commonwealth developed CEIP material for the election campaign. The decision to approve use of Commonwealth material for party-political purposes was taken with regard to the standard criteria applied by AusInfo ('commercial' and 'appropriate use') in decisions to approve the use of Commonwealth copyright materials. The granting of use of material developed at the Commonwealth's expense for party-political purposes in a caretaker period involves a judgment on politically sensitive issues. The current criteria do not satisfactorily address party-political purposes. Consequently, it would seem appropriate for the criteria applied by AusInfo to be reviewed to ensure those criteria facilitate decision-making across a broad spectrum of requests for the use of Commonwealth copyright material, including for party-political use.

20. Advice obtained by the ANAO indicates that the DSS mail-out was lawful, although it is noted that there are arguments that this was not the case. On a few occasions, the delivery of tax reform booklets coincided with delivery of campaign brochures from candidates. The delivery of these items was contracted for independently but subcontracted through the same delivery company in parts of Sydney and parts of Tasmania. On this basis, it would be difficult to argue that these arrangements were designed to obtain an improper political advantage.

Privacy issues

21. Inquiries by the ANAO surrounding the use of pensioners' and veterans' names and addresses by the Department of Social Security to support a mail out of tax reform information indicated that the information was provided to pensioners pursuant to the *Social Security Act 1991*. However, there are arguments that this is not the case. The matter has been referred to the Privacy Commissioner, who is conducting preliminary inquiries into the issues, to ascertain whether the use of pensioner and veteran mailing lists held by Centrelink should be reviewed.

Public Accountability and Proper Conduct

22. The other level of ANAO's consideration of the CEIP is the more debatable issue about conformity with the demands of public accountability. The Government and the Parliament have set the boundaries of that framework through legislation, guidance, convention and conduct. The keys to any accountability framework are openness and transparency. In regard to these aspects, public perception about its operation and effectiveness is as important as the framework itself and what it involves in terms of operations, actions, and responsibilities of all concerned.

23. The issues raised in relation to this program have been influenced by:

- the limited opportunity for Parliament to debate the taxation reform plans released on 13 August 1998, particularly where there were no options being canvassed as, for example, in previous Government 'Green Papers' as opposed to 'White Papers' which conveyed Government policy;
- the Government's intention to introduce the new taxation system as a total package after the next election (if elected); and
- funding for the CEIP in both 1997-98 and 1998-99 using the AMFA that required satisfaction of urgent and unforeseen criteria to justify not getting prior Parliamentary approval.

24. Custodianship of the accountability framework by both the Parliament and the Government not only dictates the disciplines that both agree to be subject to but also the many trade-offs that are necessary to ensure that the framework operates efficiently and effectively. Introducing the ethical dimension no doubt complicates the judgements and decisions to be made but is arguably the 'glue' that holds the framework together and keeps it credible and acceptable.

25. In contrast to some other jurisdictions, there are no Commonwealth guidelines or protocols on information and advertising campaigns which would inform members of the Parliament and the Government on the framework to be applied, covering matters such as distinguishing between government and party-political advertisements, the distribution of unsolicited material and conduct of campaigns in the lead up to an election. Perhaps, more importantly, the issue of guidelines or protocols in such situations has not been the subject of detailed Government or Parliamentary debate or inquiry. It is not a matter that officials can duly decide for themselves. There would seem to be benefit in the Government and/or Parliament pursuing such a course, particularly as history shows it is not uncommon for Government advertising to

increase in the period immediately preceding an election. Only those who made the decisions at the time are likely to be able to attribute cause and effect and, therefore, the particular factors which bore on those decisions and their relationships (if any) to particular events.

26. In addition, if a Government and Parliament have any concerns with the use of AMFA for such purposes, it is open to them to pursue a further tightening of the provisions relating to the AMFA appropriation, as reported earlier. The circumstances applying to AMFA can only be resolved by those parties. It is clearly more than an administrative issue that can be settled by officials. Where there are political sensitivities involved, DOFA's AMFA guidelines note that delegates of the Minister for Finance and Administration have looked to the Minister for a decision as to the urgency of such expenditure. The use of AMFA provides necessary management flexibility through contingency funding but, for the most part, only in urgent and unforeseen circumstances. However, by its nature, it avoids ex ante Parliamentary scrutiny and thus circumvents the usual methods of Parliamentary scrutiny in respect of the purpose and amount of individual appropriation items. It has always been recognised as a sensitive source of contingency funding. This is reflected both in the relevant DOFA guidelines and by the then Joint Committee of Public Accounts (JCPA) as discussed later in this report.

Conclusion

27. It goes without saying that governments have a responsibility and a right to keep the public informed and consult the public on their policies and their implementation. The extent of any framework designed to satisfy these responsibilities is, pragmatically, up to the Government of the day in the first instance and, subsequently, subject to oversight, debate and approval by the Parliament as the representatives of the people.

28. Government programs are also subject to examination by the Auditor-General but only to the extent of ensuring that the expenditure incurred and authority exercised are in accordance with the Parliament's legislation and Government guidelines, including for financial reporting, and that the management of programs has been efficient and effective.

29. Expenditure from AMFA for 1997-98 and in 1998-99 was appropriately approved. However, on the basis of an examination of the evidence, in the ANAO's view the Government should have been advised that not all funds would be spent in the 1997-98 year and it

would be necessary to include provision in the relevant 1998–99 Appropriation Bill. If further funding were necessary, it could be sought from AMFA subsequently. Such action would have reinforced the confidence and perception about the use of AMFA in situations only where it is not practicable to include the expenditure in Appropriation Bills that will be subject to Parliamentary debate.

30. Nevertheless, on the basis of the evidence available and legal advice, the ANAO concluded that the Government acted legally and officials acted ethically.

31. However, in the light of reported public and previous and current Parliamentarians’ concerns surrounding the use of public monies for government information and advertising and, in particular, the use of AMFA for such purposes, the ANAO suggests that the Government and/or Parliament consider such concerns and determine whether, in the interests of public accountability and confidence, it is necessary to establish:

- a Parliamentary review of government information and advertising arrangements to assist in determining appropriate guidelines (suggestions are provided at Appendix 1) for taxpayer funded programs including, for example, whether arrangements should be limited by time, expenditure limits or other parameters, particularly in the period leading up to elections; and
- as part of that review, or separately, an examination as to whether the legislative provisions of the Appropriation Bills governing the use of AMFA ensure appropriate scrutiny where Parliamentary and the general public interest indicate a matter is likely to be contentious or of some sensitivity. This may include, for example, tightening up on the legislative provisions in the Appropriation Bills governing the use of AMFA, reviewing the DOFA Guidelines, or perhaps more regular and/or more detailed reporting requirements on the use of AMFA.

32. The ANAO also suggests that there would be benefit in reviewing the guidelines for assessment of requests for copyright of Commonwealth developed material so that the licensing of copyright for party-political purposes during an election period is specifically addressed and clarified for those decision-makers involved.

Agency responses

33. All interested agencies were invited to comment on a draft of this report. Where appropriate, these comments have been incorporated into the report. As well as specific comments, Treasury and DoFA also provided general comments. These are summarised below.

Treasury

34. A theme of the report is that the CEIP was not subject to Parliamentary scrutiny because it was funded through the AMFA. This is not supported by the facts. The proposal to fund the CEIP programme was fully disclosed in the 1998–99 Budget, and was extensively scrutinised during the Senate estimates process.

DoFA

35. DoFA welcomes the conclusion that the ‘Government acted legally and officials acted ethically’, but does not consider that the suggestion that an incoming Government and/or Parliament might wish to consider the reviews suggested by the ANAO are substantiated by the evidence presented in the report. DoFA considers that the current arrangements are adequate and appropriate.

Audit Findings and Conclusions

1. Introduction

1.1 On 13 August 1997 the Prime Minister announced the Government's plan to reform the Australian tax system. As part of the reform process the Government instructed its Taxation Task Force (headed by Treasury with representatives from Prime Minister and Cabinet, the Australian Taxation Office, the Treasurer's Office and the Cabinet Policy Unit) to prepare options for the reform of the taxation system.

1.2 In early April 1998 the Government approved \$10 million to be allocated in 1997-98 for a comprehensive information campaign explaining proposals for the reform of the taxation system to be conducted at an appropriate time and to be funded from AMFA. The Government also agreed that such an information campaign would only be appropriate in a period when the Government was not in a caretaker role and noted relevant precedents in relation to similar information campaigns on major reform proposals without specifying what these were. However, in later statements by the Treasurer and others the 1985 Tax Package was cited as a precedent.

1.3 In late July 1998 the Government agreed to the provision of a further \$10 million funding in 1998-99 for advertising the taxation package and related health package, to be divided as follows:

- \$3 million for an advertising tax package (which would be in addition to the \$10 million already agreed);
- \$2 million for advertising the related health package; and
- up to \$5 million for the related tax reform 'call centres'.

Key Events

1.4 A sequence of key events in relation to the program up to the date the 'caretaker period' commenced is set out in Table 1.

Table 1.**Community Education and Information Programme—Sequence of Key Events**

Date	Event
13 August 97	Prime Minister announces the Government's plan to reform the Australian taxation system.
18 December 97	Reference to advertising as part of \$5m estimate included in the 1997–98 Mid-year Economic and Fiscal Outlook under initial funding for tasks associated with a proposed tax reform program.
24 February 98	Treasury, with OGIA assistance, prepares submission to appoint a market research consultant in relation to tax reform program. Although a brief was developed it was not put to the Ministerial Committee on Government Communications (MCGC) for approval.
7 April 98	The Government approved the allocation of \$10 million in 1997–98 for CEIP to be funded from AMFA.
4 May 98	First planning meeting held attended by Treasury team members, PM&C, ATO and OGIA. Working assumption for target date of launch mid-June.
6 May 98	Treasury seeks agreement to undertake research into community views on tax issues and the development of the CEIP including a proposed timetable.
6 May 98	'Cut off' date for latest inclusion of expenditure items in 1998–99 budget papers (including Appropriation Bills).
9 May 98	1998–99 Appropriation Bills sent to printer.
12 May 98	Budget night. Budget Paper No 2 1998–99 and Treasury Portfolio Budget Statements note that \$10 million was allocated for CEIP in 1997–98 ie. no specific appropriation was provided in 1997–98 or 1998–99.
14 May 98	Initial AMFA application for \$250 000 to enter into commitments. Approved 18 May 1998.
4 June 98	Treasury official tells the Senate Economics Legislative Committee that Treasury expects to spend some of the funds in 1997–98 but most will be spent in 1998–99.
25 June 98	Treasurer writes to the Minister for Finance and Administration, copied to the Prime Minister, noting that the bulk of the CEIP expenditure was expected to occur in 1998–99 and seeking concurrence to rollover the balance of the approval of \$9.750m as well as any unspent funds from the 18 May AMFA approval into 1998–99.
1 July 98	Minister for Finance and Administration agrees to

	Treasurer's proposal.
10 July 98	AMFA application for \$1 000 000 from Treasury. Approved 13 July 1998.
28 July 98	Government approves up to an additional \$10 million for CEIP.
31 July 98	Treasurer gives approval to public launch of CEIP.
5 August 98	AMFA application for \$4 500 000 from Treasury. Approved 5 August 1998.
6 August 98	Treasury receives consolidated advice on the Broadcasting Services Act and the Commonwealth Electoral Act in relation to Tax Reform Advertising.
10 August 98	Treasury receives advice from AGS on use of AMFA for CEIP.
10 August 98	AMFA application for \$4 000 000. Not approved by DoFA because funds still on hand.
13 August 98	Taxation reform policy launch by Prime Minister and Treasurer.
14 August 98	Call centres in operation, first advertisements run.
25 August 98	DSS mail-out to Pensioners and Veterans.
30 August 98	Election announced. Notification to Advertisers to cease campaign. Call Centers close down.
31 August 98	'Caretaker period' commences.
31 August 98	AusInfo received a request from both Liberal and National Party for copyright licence.
1 September 98	Copyright licence approved for both Liberal and National Party
8 September 98	Pre-Election Economic and Fiscal Outlook Report notes policy decision of additional \$7 million for CEIP.
22 September 98	AMFA application for \$3 500 000. Not approved by DoFA because funds still on hand.
25 September 98	AMFA application for \$5 700 000 from Treasury. Approved 25 September 1998.

Government Information and Advertising

1.5 Government departments and agencies regularly develop public education campaigns to inform the public of government policy or departmental programs. These can involve market research and both public relations and advertising campaigns. The advertising campaigns themselves can use a variety of media including television, radio, cinema and press advertisements as well as mail-outs and letter box drops.

1.6 Most Commonwealth agencies are obliged to place advertising through the central advertising system, operated by the Office of Government Information and Advertising (OGIA), to ensure that the best rates are achieved on the strength of total Commonwealth spending on advertising.

1.7 The strategy and creative content of advertising campaigns are required to be approved by the Ministerial Committee on Government Communications (MCGC). The MCGC, established in 1982, aims to ensure that all government information campaigns meet the information needs of the community and conform with the government's priorities and objectives.

1.8 In the case of the tax reform education campaign, Treasury was the client department responsible for drawing up the campaign strategy, with OGIA's advice, and arranging for appropriate authorisations for expenditure of funds.

Guidelines

1.9 OGIA advised that, other than the legislative requirements set out in the *Commonwealth Electoral Act 1918* (Section 328 requires identification of authorisation of electoral advertisements), there are currently no guidelines on the use of the central advertising system in relation to party-political advertising in particular, which distinguish between government program and party-political advertising.

1.10 The *Broadcasting Services Act 1992* also imposes conditions on licences held under the Act with regard to broadcasts of 'political matter at the request of another person' or 'matter relating to a political subject or current affairs'. If such material is broadcast, the broadcaster must cause the required particulars (for example, the name of the political party, the principal office location and the person authorising the broadcast) to be announced in a form approved by the Australian Broadcasting Authority (ABA). In the case of a breach of this legislation, it is the broadcaster rather than the advertiser who is liable.

1.11 The ABA released its 'Guidelines for the Broadcasting of Political Matter' on 7 August 1998. On 20 August the ABA received a complaint from the leader of the Opposition in the Senate about the Government's taxation reform advertisements. The ABA finalised its investigation on 30 September and found that the required particulars, announced immediately after the advertisements, complied with the relevant provisions of the *Broadcasting Services Act 1992*.

Caretaker Convention

1.12 When an election is called, the ‘caretaker convention’ comes into operation at the dissolution of the House (or Parliament). Government advertising campaigns are generally ended or suspended at the beginning of the caretaker period unless they are required to inform the community of entitlements or obligations, or of health or welfare issues.

1.13 The Treasury advised and provided the ANAO with documentation demonstrating that instructions to cease CEIP were given at the time of the announcement of the election. However, the ANAO notes that although some advertisements occurred after the instructions had been issued, these were matters beyond Treasury’s control.

CEIP Expenditure

1.14 As at 31 August 1998, the date the CEIP formally ceased due to the caretaker convention, \$14.9 million had been expended and committed on the CEIP as follows:

Table 2

**Breakdown of CEIP Expenditure and Commitments – 31 August 1998
(Commencement of Caretaker period)**

Budget	\$ Amount
Research and evaluation	362 849
Advertising	8 860 276
Call Centres (salaries/establishment costs)	1 290 759
Other	4 423 737
Total	14 937 621

Source: Treasury

The Audit

The audit was a limited scope performance audit in that work has been directed towards the issues raised with the ANAO and, therefore, it did not examine the overall efficiency and effectiveness of the CEIP. The audit was conducted in conformance with ANAO Auditing Standards. The cost of this audit was \$142 000.

2. Commonwealth Purpose

Background

2.1 Correspondence to the Auditor-General expressed a number of public concerns about the legality of expenditure of public funds on the CEIP.

2.2 At issue is whether Government administration of the CEIP is legal and Constitutional. In considering this issue, the distinction between 'political' and 'party-political' advertising is important.

2.3 Electronic and print media advertisements which formed part of the CEIP complied with the requirements of broadcasting and electoral law relating to 'political matter' and 'electoral matter' by carrying 'authorisation tags'. One of the issues raised was that, because these advertisements contained 'political matter' or 'electoral matter' for the purposes of broadcasting or electoral law, they cannot be said to be 'for the purposes of the Commonwealth', and therefore may be unconstitutional. The distinction that must be made here is that advertisements of political matter may be made for the purposes of the Commonwealth, whereas advertisements of party-political matter are considered to be for the purposes of the party in question rather than the Commonwealth.

2.4 In order to form an opinion on this issue, the ANAO considered legal advice provided by the Australian Government Solicitor (AGS) to Treasury on 6 August 1998 and sought a further legal opinion from the AGS on the matter. As well, the ANAO sought additional legal advice from another source noting that AGS were advising Treasury and there could have been a potential conflict of interest.

AGS Legal Advice

2.5 Initial advice by AGS to Treasury concluded that the definitions of 'political matter' and 'electoral matter' contained in broadcasting and electoral law⁵ are very broad. As a result, the taxation reform education program advertisements were likely to contain 'political matter'. AGS noted in their advice to Treasury that it is broadcasting licensees rather than the Commonwealth that are at risk if the obligations under

⁵ *Broadcasting Services Act 1992; Commonwealth Electoral Act 1918.*

broadcasting law are breached. AGS therefore advised that all advertisements should include appropriate authorisation and identification tags. As a consequence of the advice, MCGC made a policy decision that, in future, all Government advertising would carry an appropriate authorisation tag.

2.6 Subsequent advice to the ANAO confirmed that the definition of ‘political matter’ under the *Broadcasting Services Act 1992* is very broad: it is not limited to party-political issues and may cover many broadcasting activities of governments. Similarly, the definitions of ‘electoral matter’ in various legislation of the Commonwealth, the States and the Territories are very broad. AGS noted that the fact a Government advertising campaign contains such matter has no bearing on whether expenditure on the campaign for the purposes of the Commonwealth comes within the terms of Section 81 of the Constitution.

2.7 Section 81 requires that funds are to be appropriated for the purposes of the Commonwealth⁶. AGS advice to the ANAO noted that:

The fact that the present policy proposal has been developed during one term of Government but may be implemented during a future term of Government would have no bearing on the issue. It would, in our view, be constitutionally possible for money to be appropriated and spent to develop, explain and advertise a policy, even though that policy may take several years to be implemented, or may not be implemented at all.

2.8 AGS emphasised that the mere fact that a matter is ‘political’ or ‘electoral’ for the purposes of broadcasting and electoral law cannot lead to a conclusion that money spent on such a matter is not ‘for the purposes of the Commonwealth’. The advice noted that:

It needs to be recognised that the core of the Executive Government is made up of members of Parliament in the political party or parties which command a majority in the House of Representatives. Therefore there is an intimate link between the Government and one or more political parties. Provided the policy is developed, explained and advertised for the Commonwealth Government qua Government, this link is no basis for arguing that this is not done for the purposes of the Commonwealth.

⁶ Section 81 provides that:

All revenues or money 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 and subject to the charges and liabilities imposed by this Constitution.

2.9 AGS further noted that the caretaker conventions will limit the use of public funds for the development, explanation, and advertising of policies during the federal election period.

2.10 The key issue, therefore, relates to the nature and intent of the advertisements, and whether or not they were for the purposes of the Commonwealth.

2.11 The ANAO reviewed the campaign communications strategy and noted that the stated objective of the education program was to enhance community understanding of the problems of the tax system and the proposals for reform. Having spent public funds on the development of Government policies on taxation reform, it is reasonable to expect a corresponding obligation to explain these policies to the community. In the past, this has been provided by ‘Green Papers’ which set out policy options and related pros and cons and ‘White Papers’ which simply set out the Government’s policy and give details of the proposed program. This distinction is of relevance in this current context where the Taxation Reform Policy arguably has the characteristics of a White Paper.

2.12 Correspondence received by the ANAO questioned whether the advertisements were party-political, and therefore not for the purposes of the Commonwealth. However, it is not within the Auditor-General’s mandate to judge the nature of the advertisements (that is, whether they are political or party-political in nature). The ABA did not make a finding as to whether the advertisements are political matter for the purposes of the Broadcasting Services Act. The ABA is not conducting a review of whether the advertisements are political or party-political in nature.

Conclusion

2.13 On the basis of both AGS and other legal advice, the ANAO concluded that the taxation reform program advertisements conform with broadcasting and electoral law, and that expenditure of public funds on the program was for the purposes of the Commonwealth to provide information on Government policy to the community. The ANAO therefore concludes that expenditure of public funds on the taxation reform education program was within the terms of the Constitution.

Guidelines on the Use of Government Advertising

2.14 Correspondence to the ANAO raised the issue of what principles, conventions or guidelines should exist to distinguish between government advertising and party-political advertising. During the course of the audit OGIA told the ANAO that, with the exception of the statutory requirements of broadcasting and election law and ABA guidelines on the broadcasting of political matter, there are currently no regulations or guidelines on the use of government advertising at the Commonwealth level⁷. The ANAO therefore sought information on guidelines or conventions on government advertising in use in Australian states and other countries. The following three key reports reviewed existing guidelines on government advertising in a number of jurisdictions and provided useful suggestions for principles, conventions and guidelines:

- Auditor-General for Victoria: Special Report No.39 Marketing government services: are you being served? March 1996;
- Legislative Assembly of Queensland Parliamentary Committee for Electoral and Administrative Review Report No.22 Review of Government Media and Information Services, April 1994; and
- Auditor-General for British Columbia: Report No.5 1995–96 Public Communications: Distinguishing Between Government Program and Partisan Political Communications.

2.15 In the foreword to his report, the Auditor-General for Victoria noted that the resolution of whether or not taxpayers' funds have been used to fund party-political advertising is a matter for Parliament. It is Parliament that needs to define and articulate what it sees as differentiating party-political and non party-political material. Without such a definition, the Auditor-General said, judgements will continue to be embroiled in political controversy.

2.16 The Auditor-General for Victoria summarised in his report the key conventions and principles adopted in the United Kingdom and New Zealand. These conventions recognise that it is legitimate for governments to use advertising and promotional material to communicate with the public. The ANAO noted that, in the UK in particular, there is recognition that the effectiveness with which the

⁷ ANAO notes that OGIA has had guidelines in place for a number of years that address the process required to manage a government advertising campaign, but these do not address the issue of party-political content.

Government communicates its policies and presents information about them carries political benefits. As long as the communication of policy is conducted in accordance with existing Civil Service and Government Information Service guidelines, such benefits are accepted there as part of the inherent advantages that can accrue to the government party or parties.

Expenditure on Government Advertising

2.17 In considering this particular aspect of Commonwealth advertising, the ANAO reviewed expenditure on government advertising over the period 1989–90 to the present. Figure 1 shows monthly expenditure on government advertising over that period.

2.18 The patterns of expenditure shown above could raise questions in Parliament and the general community about the nature and purpose of government advertising, particularly in the lead up to elections. Many jurisdictions recognise that, because of such concerns, there is a need for clear principles to be established to provide guidance in this area. For example, the New Zealand framework draws on earlier suggestions from the New Zealand Audit Office that in communicating information:

A government may, for example, disseminate material that:

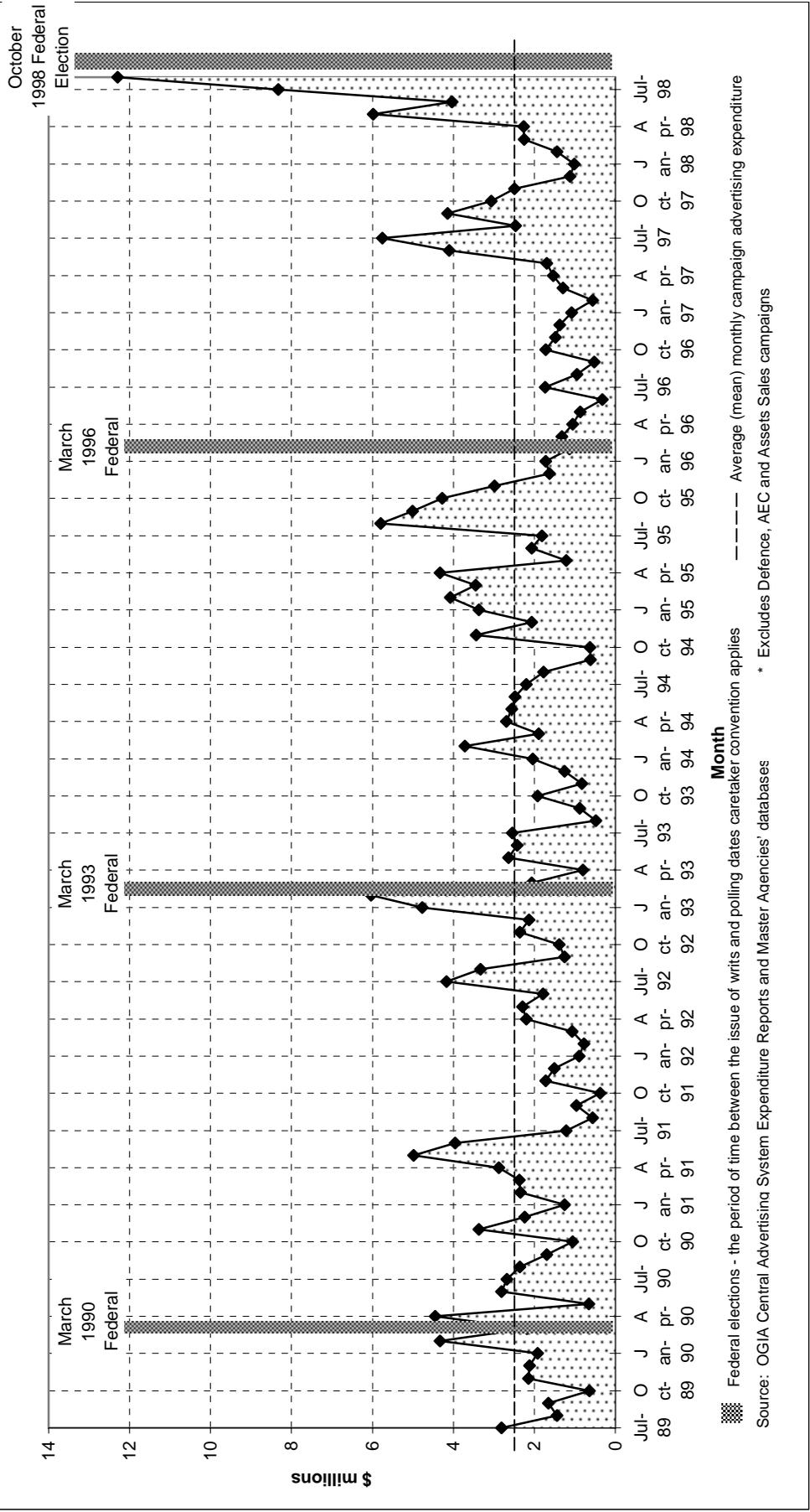
- explains its policies;*
- informs the public of government services available to them; or*
- informs the public of their rights and liabilities under the law.*

A Government should not, for example, disseminate material that:

- is designed to promote, or has the effect of promoting, its interests above those of other parliamentary groupings; or*
- is designed to secure, or has the effect of attempting to secure, popular support for the party-political persuasions of the members of the Government.⁸*

⁸ *Suggested Guidelines for a Convention on Publicly Funded Government Advertising and Publicity* (April 1989) p.5.

Figure 1 - Campaign Advertising Expenditure over Time - placement*



2.19 The ANAO noted that, as a result of the sensitivities associated with the use of public funds in advertising government policies and services, the issue has been addressed in many other jurisdictions but not apparently at the Commonwealth level in Australia. The ANAO therefore considers that the development and adoption of conventions, principles and guidelines that provide more specific guidance on the use of government advertising would be helpful. If the Parliament has concerns over the future usage of government advertising, it is primarily a matter for the Parliament and/or Government to develop and adopt appropriate guidelines that clearly define and articulate characteristics of government advertising which differentiate between Government and party-political material. The main trade-offs in this area of accountability are basically matters for the Government and Parliament as they impact directly on their operations, processes and political advantage or disadvantage.

2.20 Principles and guidelines based on those drawn up, or being considered, in other jurisdictions, are suggested at Appendix 1. The next section considers the use of AMFA.

3. Use of the Advance to the Minister for Finance and Administration (AMFA)

Background

3.1 In his letter of 20 August 1998 to the Auditor-General, the Leader of the Opposition in the Senate expressed concern about the use of the AMFA for the purposes of the CEIP and submitted that the Government had improperly used the AMFA to approve expenditure for this purpose.

3.2 Funds were not appropriated by Parliament in the 1997–98 or 1998–99 Budgets for the CEIP. Instead, funds were approved from the AMFA in both periods.

3.3 Reference was made to the CEIP in both the Budget Measures 1998–99 (Budget Paper No.2) and the Treasury Portfolio Budget Statements 1998–99 (Budget Related Paper No.1.16). Expenditure under the CEIP was also the subject of scrutiny during the Senate estimates process.

Appropriation Arrangements

3.4 The principle of prior parliamentary appropriation of expenditure is an important feature of the Westminster system. This is expressed in section 83 of the Constitution:

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

3.5 Annual Appropriation Acts provide for Parliamentary scrutiny and the necessary legislative authority to spend Commonwealth funds. The main Appropriation Bills (Nos. 1 and 2) are enacted during the Budget sittings, in the normal course, and are supplemented by Appropriation Bills 3 and 4 at the time of ‘Additional Estimates’.

3.6 To provide the Parliament and the Government with some flexibility, but without contravening the Constitution, a special appropriation is passed which has constraints and for which the specific applications of expenditure are communicated to the Parliament at a later date. Provision is made in Appropriation Bills (Nos. 1 and 2) for a ‘contingency fund’ known as AMFA to be used by the Government for providing funds for urgent and unforeseen services in advance of the

regular supply procedures of Parliament.

3.7 Basically there are five situations when such funds may be required:

- in the event of an emergency (eg a natural disaster) which requires immediate payment;
- an unforeseen overrun of payments beyond an appropriation;
- where payment priorities change and ‘transfers’ of moneys from one purpose (appropriated) to another (pending specific appropriations) are required;
- where an amount has been inadvertently omitted from an Appropriation Bill; and
- a new purpose for which funding is urgently required before the passage of the Appropriation Bills (this facility is used only in exceptional circumstances).⁹

3.8 In recent years \$390 million per annum has been appropriated in the Appropriation Acts for the purpose of the AMFA.

3.9 The AMFA is a special area of government expenditure. It is justified as being necessary to provide required financial flexibility to government. Nevertheless, concerns have been expressed within and outside the Parliament as to the reduction of ex-ante Parliamentary scrutiny involved; in particular, any perceived contrived arrangements to avoid such scrutiny. There is clearly a balance to be struck between such divergent requirements of flexibility and scrutiny. The usual procedure is for money to be spent for specific purposes only after it has been scrutinised and approved (appropriated) by Parliament for specific purposes. Reflecting Parliament’s desire to retain authority over how public moneys are spent, the relevant provisions in the Appropriation Acts impose conditions on the Minister, and his or her delegates, in making money available for expenditure from the AMFA. The Appropriation Acts, through the Divisions relating to AMFA, enable the Minister for Finance and Administration, *inter alia*:

(b) *to make money available for expenditure:*

(i) *that the Minister is satisfied is urgently required and:*

(A) *was unforeseen until after the last day on which it was practicable to include appropriation for that expenditure in the*

⁹ Budget Paper No 4 The Commonwealth Public Account 1998-99 p.14

Bill for this Act before the introduction of that Bill into the House of Representatives; or

(B) was erroneously omitted from, or understated in, the Bill for this Act; and

(ii) particulars of which will afterwards be submitted to the Parliament.

3.10 Money that is made available, for expenditure which is urgent and unforeseen at the time of the preparation of the relevant Appropriation Bill, is either adjusted against Appropriation Bills (usually Additional Estimates Bills) later in the same year or, if made available after the enactment of the Additional Estimates Bills, remains as a final charge to the AMFA appropriation.

Reporting Arrangements

3.11 As a reflection of the importance Parliament places on the use of AMFA, monthly statements of all approved drawdowns are tabled in Parliament. A statement of approved drawdowns from AMFA that remain as a final charge to AMFA at 30 June is made to Parliament after the close of each financial year.

Treasury Requests for AMFA Funding

3.12 There have been six applications by Treasury to DOFA for funds from AMFA to meet commitments or expenditure associated with the CEIP. Appendix 2 sets out the steps involved in the process of applying for funds from AMFA. Details of the applications examined to the date of the preparation of this report are summarised in Table 3.

Table 3
Treasury Requests for AMFA Funding⁸

Date	Treasury Request (\$)	DOFA Approval (\$)
14 May 1998	250 000	250 000
10 July 1998	1 000 000	1 000 000
5 August 1998	4 500 000	4 500 000
10 August 1998	4 000 000	NIL
22 September 1998	3 500 000	NIL
25 September 1998	5 700 000	5 700 000
TOTAL		11 450 000

Source: DoFA

⁸ AMFA funding requests reflect cash needs only. For total CEIP expenditure and commitments see Table 2. The difference between the two tables is the result of some accounts not yet being finalised.

In the absence of a specific appropriation for the program, recourse to AMFA is also expected for the balance of commitments outstanding.

ANAO Examination

3.13 In its examination of the legality of the use of the AMFA, the ANAO considered whether the key criteria of ‘urgent’ and ‘unforeseen’ had been satisfied. The ANAO examined the documentation, including DOFA Guidelines for the Use of AMFA, JCPA Report No 289 *Advance to the Minister for Finance* and the circumstances associated with the requests as well as legal advice from the AGS. Separate legal advice was also sought.

Urgent Criterion

3.14 Legal advice from AGS to Treasury on 10 August 1998, and made available to DOFA, stated that, if accounts are due, they would meet the ‘urgency’ requirement. Similarly, the ANAO’s legal advice indicated that, subject to satisfaction that there were no other sources of funds available and that payment could not be deferred until the passage of the next Appropriation Bill, a conclusion that the expenditure was urgent is a reasonable application of the AMFA requirements. The ANAO is not in a position to judge whether a Government decision could have been taken that did not require use of the ‘urgency’ requirement. That was a decision by the Government that it was entitled to make.

3.15 DOFA has extensive internal guidelines to assist DOFA officers in their role in processing and approving drawdowns from AMFA. The DOFA Guidelines state that urgency means that circumstances exist under which funds are required immediately from the Advance. Typical situations meeting the test of ‘urgency’ include accounts being expected to be received or being on hand but insufficient funds remain to meet them.

3.16 Based on an examination of the documented approvals for funds to be drawn from AMFA for CEIP, the ANAO found that the criteria for urgency had been examined by the DOFA delegate who was satisfied that funds were required to meet immediate commitments. Indeed, on two occasions Treasury requested funds from AMFA, the delegate was not satisfied that the requirement was ‘urgent’ given that funds from previous advances were still available and accounts on hand could be met from these funds.

Unforeseen Criterion

3.17 On the question of whether or not the expenditure met the unforeseen requirement, advice to the then Department of Finance from the Attorney-General's Department in 1988 stated that, where it is realistic to expect that a particular expenditure will be made in a particular financial year, that expenditure should be included in an item in the relevant Appropriation Act. That advice went on to say that, where the total amount of a proposed expenditure is uncertain but a particular minimum sum will certainly be required, that minimum sum should be included in the relevant Appropriation Act.

3.18 The AGS advice of 10 August 1998 also referred to advice from Treasury that payments were unforeseen because 'the decision to rollover funding was not taken until after the last day on which it was practicable to include an appropriation in the 1997-98 Budget'. That is, it was not until after the last day on which it was practicable to include appropriation for the expenditure in the 1998-99 Bill that it was clear moneys would not be spent in the 1997-98 year and would therefore be required in 1998-99. In the opinion of AGS, in such circumstances, 'unforeseen' could include expenditure which it was unforeseen in 1997-98 would need to be met in 1998-99.

3.19 The advice concluded that the decision to approve funds was within the authority given by the AMFA provisions in the Appropriation Act but that there were (unspecified) arguments that this was not the case.

3.20 The DOFA Guidelines indicate the circumstances in which the amount and/or timing of an expenditure may be unforeseen as follows:

- The amount of expenditure unforeseen includes instances where considerable uncertainty exists about the total amount required in a financial year resulting in insufficient or no provision being made in an Appropriation Bill. However, in those cases where it is known that a minimum amount will certainly be required, that amount cannot be considered to be unforeseen and should be included in an item in the relevant Appropriation Bill.
- Expenditure unforeseen because of timing applies to instances where considerable uncertainty exists about whether a payment will be made within a financial year. Where it is realistically expected that a payment will be made within a financial year this payment cannot be considered to be unforeseen and should be included in an item in the relevant Appropriation Bill.

Cut Off for Appropriation Bills

3.21 The timetable for the preparation of the 1998–99 Appropriation Bills issued by DOFA required agencies to send final comments on items to be included in the Appropriation Bills to DOFA on Friday 1 May with the Bills to go to the printer on Thursday 7 May.

3.22 DOFA has advised that revisions to the Bills could have been made at any time up until some two days before the Bills went to the printer. As the Bills went to the printer early on the morning of 9 May 1998, it was possible to make changes to appropriation items in the relevant Bill up to 6 May 1998.

Omission from 1998–99 Appropriation Bills

3.23 The Treasury Portfolio Budget Statements 1998–99 show an increase in Treasury Sub-Program 1.4 – Taxation Running Costs from an original 1997–98 appropriation of \$4.640 million to a revised 1997–98 appropriation of \$17.982 million. Treasury advised that this increase included \$10 million for the CEIP. This is consistent with the table of the sub-program variations underlying outlays from 1997–98 to 1998–99 which shows a decrease in funding for the CEIP of \$10 million. A footnote to the relevant table notes that the revised appropriation, inter alia, includes amounts from the Advance to the Minister for Finance (sic). DOFA has advised that while this increase anticipated the use of \$10 million from the Advance to the Minister for Finance to meet the costs in 1997–98 for CEIP, it was subsequently decided that Treasury's Running Costs were not an appropriate source of funding for the CEIP. New expenditure items normally appear under Appropriation Bill No.2 rather than as Running Costs under Bill No.1. The Treasury Portfolio Budget Statements are also in error on this point as funds had not been approved from AMFA for this purpose. Accordingly, funds were subsequently sought from AMFA for expenditure under another appropriation item—Appropriation Act No.2—Other Services—and not Running Costs.

3.24 On 7 April 1998, approximately one month before the cut off for the 1998–99 Appropriation Bills, the Government approved the allocation of \$10 million for CEIP in 1997–98. However, funds for expenditure in 1998–99 were not sought in the 1998–99 Appropriation Bills. Provision could have been made in the relevant 1998–99 Appropriation Bill by an amendment to the 7 April decision or a new decision agreed to by the Prime Minister, the Treasurer and the Minister for Finance and Administration. Treasury advised the ANAO that, according to information available to them at the time, these processes

would need to have been completed before 1 May 1998 in line with DoFA's timetable.

3.25 Treasury has also advised the ANAO that the reason for not including an amount in the 1998–99 Appropriation Bills was that, at 6 May, the Department fully expected to spend the \$10 million the Government had allocated in the 1997–98 financial year. According to Treasury advice to the ANAO, the timetable for the advertising strategy was flexible but envisaged a three week lead time prior to the launch of the CEIP with the program to run from a minimum of two weeks to a maximum of four weeks. The actual start time and duration of the program were dependent on a decision by the Government.

3.26 The ANAO sought evidence from Treasury of plans at the time to support their claim that, at the cut off date, all of the \$10 million would be spent in 1997–98 and that there would be no requirement for funds in 1998–99. Treasury referred the ANAO to the Budget Measures 1998–99 Statement which indicated that funds were not expected to be spent on the CEIP in 1998–99 or the forward years and advised that the timetables were all subject to Ministerial guidance. There was no other documentary support provided in respect of planning in the period prior to the cut-off date. However, Treasury was able to provide comprehensive documentation for the period after the cut-off date.

3.27 A major information campaign is normally preceded by a lead-in period which enables market research to be conducted, approval obtained from the MCGC, the advertisements to be designed and produced, the media booked and the campaign run.

3.28 For example, a brief to the Treasurer in February 1998 sought approval for a consultant brief for market research into community attitudes to tax reform. Treasury pointed out this would in part assist the design of an information campaign to explain the Government's reform agenda to the general public and envisaged that the market research component alone would take some 12 weeks. In the case of the CEIP another brief from Treasury to the Treasurer on 6 May 1998, sought approval to engage a market research consultant, and agreement to a six-week lead time with a public launch from the latter half of June.

3.29 Treasury advised the ANAO that at the time revisions could have been made to the 1998–99 Appropriation Bills, Treasury did not have material information regarding the Government's plans concerning the launch date, content of program or duration. Under these circumstances Treasury considers any advice to the Government on the timing of expenditure under the CEIP would, at best, have been conjectural.

3.30 On the other hand at a planning meeting between Treasury and OGIA on 4 May a mid-June launch date was discussed and Treasury also advised the ANAO that the working assumption for the program running time was around three weeks.

3.31 The ANAO accepts that the timing of the launch of the program was a matter for the Government and that, had the Government brought forward the date, Treasury would have endeavoured to reduce the lead time involved.

3.32 The ANAO also accepts that it would have been possible to commit all of the \$10 million before the end of the 1997–98 financial year. However, given the lead times involved, the existence of guidelines, experience with Commonwealth advertising campaigns, the lack of preparedness by Treasury in early May to run a major information program, the invoicing sequence (in the case of media advertising, in the month following the running of the advertisement) and the Commonwealth's normal 30 day payment arrangements for efficient cash management purposes, it is difficult to conclude that some expenditure would not have been required in 1998–99, thus requiring some provision in the relevant Appropriation Bill.

3.33 For example, under normal OGIA arrangements, any advertisement appearing even in May 1998 would have been invoiced to Treasury around 10 June for payment around 10 July 1998. Any later advertisements would, of course, have pushed the payment date well into 1998–99. Treasury advised that they had no discussions with OGIA as to the billing cycle involved and OGIA provided no advice on this until mid-June. The ANAO notes, however, that *Operating Procedures for Client Departments* issued by OGIA in June 1993 describe the billing cycle in some detail. An extract from the then Finance Circular 1989/24, attached as an appendix to the *Procedures*, specified:

One of the most important conditions.....is that the Commonwealth's advertising accounts must be paid on the tenth day of the month next following the month in which the account was rendered.

3.34 Reference to the OGIA guidelines by Treasury or discussions with OGIA prior to the cut-off of the Appropriation Bills by Treasury would have enabled an accurate assessment of the likely expenditure patterns. This assessment would have indicated that payments in 1998–99 were highly likely and, therefore, at least some minimum amount should have been included in the 1998–99 Appropriation Bills for Parliamentary debate.

3.35 The ANAO considers that Treasury's oversight in not advising the Treasurer of the need for funds to be included in the 1998–99 Appropriation Bills was the result of an arguably optimistic assessment that funds would not be required in 1998–99. If minimum funding had been included in the 1998–99 Appropriation Bills, it would have been open to Treasury to have applied later for any further funds required in 1998–99 from AMFA on the standard criteria.

Approvals from AMFA

3.36 The approval for the first application records the satisfaction of the 'unforeseen' criteria as:

The decision to provide funding for the programme was not taken until after Additional Estimates.

3.37 This was the situation in this case as the decision to provide funding was not made until April 1998, that is, after the cut off date for the 1997–98 Budget Bills. The ANAO considers that this request for expenditure was justifiable as unforeseen and the Delegate's decision to make a payment from the AMFA as provided for in the *Appropriation Act 1997–98* was also justifiable.

3.38 The situation in regard to subsequent applications is different (noting that the fourth and fifth applications were not approved). In each case the basis for the expenditure being unforeseen was stated by Treasury to be:

that the decision to rollover funding into 1998–99 was not taken until after the last date on which it was practicable to include appropriation for expenditure in the 1998–99 Budget.

According to the ANAO's legal advice, the timing of the decision to rollover funding is not relevant to the test of being unforeseen which is basically whether there was a likelihood that expenditure would occur in 1998–99.

3.39 The approval by the Delegate for the second and third applications documents the satisfaction of the 'unforeseen criteria' on the basis that the requirement for funds was unforeseen on the last date that an amount could have been included in the Appropriation Acts for 1998–99.

3.40 The approval by the Delegate for the final application inadvertently documented the satisfaction of the unforeseen criteria as:

The decision to rollover funding into 1998-99 was taken after the last date that an amount could have been included in Appropriation Act (No.1) 1998-99.

DoFA advised that the Delegate was familiar with the background to the application and the reason for the amount in question being unforeseen. The reason for the decision was subsequently revised to be consistent with earlier approvals which satisfies the relevant test.

3.41 DOFA has advised that it was clear from page 1–103 of Budget Paper No 2 1998–99 that all expenditure on CEIP was expected to occur in 1997–98. In those circumstances there was no reason to include any provision for that campaign in Appropriation Bill (No.2) 1998–99. In assessing whether the ‘unforeseen criteria’ for the issue of funds from AMFA in 1998–99 had been satisfied, the Delegate was able to make a judgement on the basis of those facts and made no other inquiries of Treasury.

3.42 Legal advice to the ANAO states that the Minister or his or her Delegate must be ‘satisfied’ of the existence of urgency and unforeseeability before expenditure can be authorised. There is no general obligation on a decision-maker to inquire further when matters have been placed before him or her for decision. However, this general rule has been held not to apply where there is something in the material before the decision maker that puts him or her on notice that further facts are relevant and ascertainable. The question is whether there was sufficient evidence before the Minister’s delegate to justify the decision to approve funds from AMFA. The ANAO’s legal advice states that the delegate is in most cases entitled to reach a conclusion on the material presented by the applicant. The test is whether the decision-maker is ‘satisfied’ by that material not whether it was foreseen by Treasury.

3.43 Although the ANAO considers that the expectation by Treasury that there would be no expenditure in 1998–99 was arguably optimistic, it is not unreasonable that the Delegate relied on the accuracy of advice provided by Treasury. As a result, the Delegate’s decision to make a payment from the AMFA as provided for in the *Appropriation Act 1998–99* was legally justifiable.

Cabinet Approval of the Use of AMFA

3.44 Cabinet approval of the use of AMFA was a specific issue raised by the JCPA in its 1988 report. The Committee noted at the public hearing that Cabinet might make a decision for funds from AMF and by-pass the urgent and unforeseen criteria. Their report notes that:

The Department of Finance said it was rare for a Cabinet decision to specifically say that funds from the AMF will be provided. However, even if it did, the officer approving the advance on behalf of the Minister would turn their mind to be satisfied that it was urgent and unforeseen.¹⁰

3.45 The Committee was concerned that an application where Cabinet had approved the use of AMF would not be subject to the same rigorous scrutiny as for other applications. The Department replied as follows:

Probably the scrutiny had taken place before the Cabinet decision...it is a question of fact whether something is required urgently. Cabinet's decision is a fair manifestation of the urgency that is required of this expenditure.

3.46 The ANAO can also find no documentation, in the case of the CEIP, suggesting that the use of AMFA had been subject to any scrutiny before the Cabinet decision. Treasury advised that it only became aware of Cabinet's consideration of the issue when a copy of the decision was provided to the Department.

3.47 The JCPA's 1988 conclusion on this point is relevant:

The Committee is not entirely satisfied by the Department's response and stresses strict adherence to the wording of the Appropriation Acts. The Minister or officer he has authorised on his behalf must not be swayed by the opinion of others.

3.48 The DOFA Guidelines also recognise the risks to proper Parliamentary oversight of the use of AMFA. The Guidelines note there are some special considerations, particularly in relation to new Budget Bill 2 items (that is, items for which there is no existing appropriation). The assumption by DOFA in the normal course is that, unless there is evidence to the contrary, additional funding for Bill 2 items will be made in the normal course of government business that is, when funds are available from the next Appropriation Act. DOFA guidelines also note that issuing AMFA for new Bill 2 items can in effect avoid Senate scrutiny and circumvent the prerogative of Parliament to approve an

¹⁰ Report 289 Advance to the Minister of Finance - Joint Committee of Public Accounts 1988 p 11

appropriation for specified purposes.

3.49 The Guidelines go on to say that, because of the political sensitivities associated with many new Bill 2 items, delegates of the Minister for Finance and Administration are loathe to exercise to the full extent their powers of approval and have looked to the Minister for a decision as to the urgency of such expenditure.

3.50 However, the Guidelines do note that this 'hesitancy' has not been applied to particular Bill 2 items:

- *of a clearly humanitarian nature eg, natural disasters; or*
- *in special cases where the relevant Minister has sought the concurrence of the Opposition to the proposal; or*
- *where the Minister of Finance has been party to the expenditure proposal and it is clear enough that AMF would be required to implement the decision.*

3.51 In the case in question, DOFA has advised that the delegate did not see a need to consult the Minister for Finance and Administration.

3.52 It is apparent that the use of AMFA funds for new government programs has important implications for accountability and transparency in the use of public funds. This is properly an issue for the Government and Parliament to resolve.

Conclusion

3.53 In the light of legal advice received, the ANAO was satisfied that the approval of funds from the AMFA met the legislative condition that the requirement for the funds was urgent and unforeseen. However, in the ANAO's view, at the time that the 1998–99 Appropriation Bills were cut off in early May 1998, Treasury's expectation that there would be no requirement for funds in 1998–99 was arguably optimistic given the lead time, program length, guidelines and normal commercial billing conditions for this type of program, as subsequent events have shown. At the time of this report (late October 1998) some payments were still to be made.

3.54 Although Treasury did not know the launch date for the CEIP, it was most unlikely that all funds could have been spent in 1997–98. In the circumstances, the ANAO considers that Treasury should have advised the Government that not all funds would be spent in 1997–98 and at least some minimum estimated amount should be included in the 1998–99 Appropriation Bills to cover likely payments in that financial year. If the

estimated amount for 1998–99 proved to be insufficient, it would have been open to Treasury to have applied for funds from the AMFA subsequently. In the ANAO’s view this would have been more in accord with the ‘exceptional’ nature of AMFA and the sensitivity of its use with the Parliament.

3.55 The question of whether or not expenditure from AMFA on such a program is an appropriate use of AMFA is ultimately a matter for the Government and Parliament to determine. If Parliament has concerns that AMFA may be used to circumvent appropriate scrutiny, or shares the then JCPA’s concerns that the urgent and unforeseen criteria may be by-passed where Cabinet makes a decision for funds to be obtained from AMFA, it is clearly a matter for the Parliament to address. Options for change include tightening up the legislative provisions in the Appropriation Bills governing the use of AMFA; imposing additional restrictions on its use or placing certain financial limits on particular uses of AMFA; reviewing the DOFA AMFA Guidelines; differentiating, for instance, on characteristics of the material represented by the varying nature of ‘Green’ and ‘White’ policy papers; or, perhaps, requiring more regular and/or more detailed reporting requirements on the use of AMFA. These are not decisions for officials or any ‘independent’ reviewer.

4. Duties and responsibilities of Public Servants

Background

4.1 Two call centres were established by Treasury to answer queries from the public about the taxation reform package. One call centre was designed as a 'first level response' to calls from the public. The service from this centre was provided by a private contractor and designed to respond to basic queries largely by arranging the distribution of fact sheets to callers. More complex questions were referred to a second call centre staffed by public servants drawn from Treasury itself and staff seconded from Centrelink and the Australian Taxation Office. Depending on demand, up to sixty officers staffed this call centre (the Call Centre) over two shifts with half on duty at any one time. Call Centre costs, including staffing costs, were paid for by Treasury out of funds specifically allocated under the CEIP.

4.2 It has been suggested that the establishment of the Call Centre was an unethical and improper use of an apolitical public service. This suggestion is based on a presumption that the reform package and the advertising campaign are 'party-political' rather than for 'purposes of the Commonwealth' and further that public servants were being used to 'promote' the taxation reforms.

4.3 The question as to whether the campaign was for party-political rather than for purposes of the Commonwealth has already been addressed earlier in this report. Legal advice confirms that the tax reform policy proposals can be technically regarded as legitimate for Commonwealth purposes.

4.4 The suggestion that the involvement of the public service in the staffing of the call centres was unethical is addressed in this section.

What are the requirements?

4.5 In considering the duties and responsibilities (including ethical responsibilities) of Commonwealth Officers, reference must be made to the *Public Service Act 1922* and the Public Service Regulations.

4.6 Section 25(2) of the *Public Service Act 1922* states that:

The Secretary of a department shall, under the Minister, be responsible for its general working, and the business thereof, and shall advise the Minister in all matters relating to the Department.

4.7 Section 56(a) of the *Public Service Act 1922* provides for it to be a failure for an officer to fulfil his or her duty if he or she wilfully disobeys or disregards a direction given by a person having authority to give a direction, with which it is the officer's duty to comply. Section 57 renders a Secretary, and Section 61 renders an officer, who has failed to fulfil his or her duty liable to disciplinary action.

4.8 Regulation 5 of the Public Service Regulations (amendment - interim requirements) 1998 details public service values. The following is a relevant extract:

The Australian Public Service values are as follows:

- (a) the Australian Public Service is apolitical, performing its functions in an impartial and professional manner;*
- (d) the Australian Public Service has the highest ethical standards;*
- (e) the Australian Public Service is accountable for its actions, within the frameworks of ministerial responsibilities, to the government, the Parliament and the Australian public; and*
- (f) the Australian Public Service is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and implementing the Government's policies and programs.*

Staff in the Call Centre

4.9 In order to clarify the role played by Commonwealth Officers in the Call Centre, the ANAO sought advice from Treasury as to the nature of the instructions provided to officers staffing the Call Centre. Legal advice was also obtained from the AGS as to whether the use of public servants constituted a breach of either the Public Service Regulations or the Financial Management and Accountability Act. Legal advice from a firm contracted to the ANAO was also sought to clarify, the responsibilities and duties of a public servant pursuant to the *Public Service Act 1922*.

4.10 The ANAO found that, the written instructions issued to Call Centre staff provide suggested responses to 'caller scenarios'. While the instructions are brief, they do highlight the informational role of the Call

Centres. Extracts from the instructions clearly support this observation as follows:

This is the part of the Call Centre information service which is staffed by Commonwealth public servants to answer questions and provide information on the new tax system Suggest to the caller that complaints or any feedback on the policy are a matter for the Government. Your role is only part of an information service to answer caller queries, and provide written material, on the new tax system.

Treasury also advise that substantial emphasis was placed on the informational role during staff training.

4.11 It is clear, therefore, that the expectations of Commonwealth Officers staffing the Call Centre were that they provide information and explanations on the proposed changes to the taxation system. In addressing whether this role is consistent with the requirements and expectations of the duties of Commonwealth Officers, advice from the Australian Government Solicitor indicated:

in our view, the value enshrined in Regulation 5 concerning apolitical behaviour is focused on ensuring that the Australian Public Service, and individual public servants, act without partisan political preference.

4.12 The advice goes on to point out that:

it is clear in our view that the functions of the public service include developing, explaining and implementing the policies of the government of the day. The focus of Regulation 5(a) is that the public service and public servants must perform these functions whichever political party is in power. They must do so without their personal political views affecting the performance of these functions.

A public servant who is answering factually questions about the current government's policy on taxation reform would, in our view, be acting apolitically in accordance with the terms in Regulation 5.

4.13 Legal advice obtained by the ANAO also confirms that the conduct of the CEIP program falls into the range of public servants' duties, and therefore a refusal by an agency head or his or her officers to undertake work associated with the program could have been regarded as a failure to perform his or her duty under the *Public Service Act 1922*. This is a fundamental issue for public servants whose duty it is to uphold the law.

4.14 The ANAO is also aware that as a result of concerns in this area, the Leader of the Opposition in the Senate has written to a number of agency heads and the Public Service Commissioner questioning, among other things, the appropriateness of public servants being utilized in CEIP activities including the staffing of the call centres. The ANAO notes that many have responded to the Leader of the Opposition in the Senate indicating that they were satisfied that these concerns were unfounded and the officers involved were appropriately engaged in Commonwealth duties.

Conclusion

4.15 On the basis of the information and explanations provided by agencies, the advice provided by the Australian Government Solicitor and the available evidence, there was no breach of the Public Service Regulations or the Financial Management and Accountability Act. The role of Commonwealth officers was limited to providing factual information and explanations. It is possible that, if agency heads did not approve the release of resources for the information campaign, they could have been in breach of the requirements of the *Public Service Act 1922*.

5. Program Materials — Copyright Mail-Out, and Privacy Issues

Background

5.1 Concerns have also been raised with the ANAO surrounding the use of Commonwealth copyright CEIP material for electorate purposes, the alleged combination of CEIP program materials with electoral advertising in mail-outs to Australian households, and the use of a confidential database of pensioners' and veterans' names and addresses for the dissemination of advertising material. These concerns have also been reported widely in the media.

Copyright

5.2 The copyright on CEIP program materials used in advertising is held by the Commonwealth and administered by AusInfo (an Office within the Department of Finance and Administration). Initial ANAO inquiries made with AusInfo revealed that no permission had been requested or given for the use of CEIP program material for any purpose. AusInfo also informed the ANAO that no action had been taken to follow-up any alleged breaches of Commonwealth copyright and it did not have the resources to do so. However, on 31 August 1998, AusInfo received a request from the Liberal and National Parties to reproduce unlimited 'relevant materials' from the CEIP publications (refer to Table 4). Approval for the use of copyright was granted to the Liberal and National parties on 1 September 1998. AusInfo information provided to the ANAO indicates that normally copyright requests take up to two weeks which would not be unreasonable given the complex issues involved.

Table 4
Request to use Commonwealth Copyright Material

The new Tax System – Working for Small Business	ISBN 0642-261855
The new Tax System – GST how it works	ISBN 0642-261547
A new Tax System – Overview	ISBN 0642 261588 [□]
A new Tax System	ISBN 0642 261839 [□]

[□] The licence to reproduce this material required a fee of 20 percent of the AusInfo recommended retail price for each whole copy published.

5.3 The essential criteria for assessing requests to grant Commonwealth copyright is whether the material requested will be used for an appropriate and/or commercial use. As an election campaign was not a commercial use, AusInfo, after advice from the Attorney-General's Department, decided that the licence arrangement with normal copyright conditions could be issued.

5.4 In the ANAO's view, the licensing of Commonwealth copyright for party-political purposes during an election period is an issue beyond the capacity of the broad criteria for assessment normally used for assessing requests for Commonwealth copyright. The latter centre around the question of commercial use and give little assistance to decision makers involved. The current guidelines therefore allow material developed at significant expense to the taxpayer to be used for party-political purposes during an election period. This suggests there would be benefit in reviewing the guidelines for assessment of requests for copyright of Commonwealth materials particularly when they are made for political purposes in a caretaker period.

Mail-out activities

5.5 As part of the CEIP program Treasury arranged for a national distribution of CEIP information booklets to Australian households. McCann-Erickson was contracted to arrange the mail-out.

5.6 Concerns were raised that CEIP information booklets and Liberal party electorate material were combined in the mail-out to households in parts of Tasmania and parts of Sydney.

Tasmanian and Sydney mail-out

5.7 Advice received from Treasury was that McCann-Erickson had contracted distribution of the CEIP materials to Direct Response. Direct Response contracted with Progress Printers and Distributors to deliver materials in Tasmania and other areas. Progress Printers and Distributors were also contracted independently by election candidates to deliver campaign brochures. Advice received by Treasury from Progress Printers and Distributors regarding this issue was as follows:

The delivery of various campaign brochures from different candidates coincided with deliveries of the GST brochure. All delivery instructions and orders were received by our company from different

clients and the appearance of these articles in the letterbox at the same time is an unavoidable coincidence.

It would seem likely that had Progress Press not handled the delivery of the pamphlet, one of their competitors would have been engaged to do so with the end result being the same.

5.8 Progress Printers and Distributors also assured the Direct Response Company that the electorate material distributed in the electorate of the Federal Member for Lindsay were not inserted into the Tax Reform Booklet.

5.9 The issue of the Tasmanian mail-out was referred to the Tasmanian Electoral Commissioner who, after initial inquiries, chose not to pursue the matter as he was of the opinion that there had not been a breach of the *Electoral Act 1985 (Tas)*.

Mail-out by the Department of Social Security

5.10 The Department of Social Security (DSS) conducted a mail-out to 1.7 million pensioners and veterans sending a letter from the Minister for Social Security and material explaining the impact of the proposed tax reform on pensioners. The cost of \$795,895 for the mail-out was met by the Department. The source of the address list for the mail-out was a database held by Centrelink including DSS and DVA information.

5.11 The mail-out list was the same as that normally used for the distribution of the newsletter 'Age Pension News', produced by Centrelink on behalf of DSS, which includes the names of veterans. It is understood that it was initially intended to include the mail-out materials in an issue of 'Age Pension News'. However, in the end, the planned timing of the mail-out did not coincide with the issue of the 'Age Pension News'.

5.12 Concerns have been raised that the use of funds appropriated to DSS for the mail-out was an improper use of funds and that the use of the Centrelink database was a breach of the Privacy Act.

5.13 Advice from the Department notes that the mail-out was conducted under the authority of the Department Secretary

as part of a long established procedure whereby pensioners and veterans are advised from time to time of announced government policies, and how these policies will affect them when implemented ... The stimulus for the provision of this type of information may come

from the Minister as occurred here, but it is often initiated by the Department.

5.14 The Department also advised that the mail-out in part satisfied the provisions in the *Social Security Act 1991*. Section 1296 of the Act requires, amongst other things, that the Secretary have regard to the desirability of ensuring the ready availability to members of the public of advice and information services relating to income support. According to the Department, this includes matters relating to the impact of policies in place or those intended to be implemented by the Government. 'Specifically, it provides advice on the effect of the contents of the Government's taxation package on pensioners' and veterans' income support.'

5.15 It is noted that the Department also obtained internal legal advice as to whether the use of the names and addresses of pensioners for this purpose was not unlawful under the *Privacy Act 1988*. That advice was to the effect that, provided material was for the information of pensioners or was to advise pensioners on matters related to their income support, the pensioners' names and addresses could be used.

5.16 DSS subsequently sought advice from the Attorney-General's Department about whether the use of the DSS pensioner database was a lawful use of the protected information under the Social Security Act and the Privacy Act.

5.17 The Attorney-General's Department advised that, whilst it turned on fine points of interpretation, there is a doubt that the use of the DSS pensioner database was strictly lawful under the Social Security Act and also a doubt that it complied with the Privacy Act.

5.18 This opinion caused DSS and DVA some concern and they agreed to jointly approach the Attorney-General's Department to have it reconsider aspects of its advice. At the time of the audit this matter was unresolved.

5.19 Legal advice obtained by the ANAO confirmed that the mail out was within the powers of the Secretary of the Department under the *Social Security Act 1991*. The legal advice goes on to say

In our opinion, the information provided falls within those categories... (Section 1296)... the material sent out provides advice about income support related to an announced intended policy of the

government. In our opinion it does not matter that the policy would only be implemented if the government were re-elected. It remains information about income support, whether or not the proposals are likely to be implemented immediately or are contingent upon the results of the election.

Conclusion

5.20 For the purpose of this limited scope audit, the ANAO has not attempted to confirm any instances of breaches of copyright material related to the CEIP program (the responsibility for this investigation rests with AusInfo). It is clear, however, that material subject to Commonwealth copyright should not be utilised without the Commonwealth's permission. It is equally clear that advice from AusInfo confirms that permission was not sought by the Liberal and National party until 31 August 1998 and that AusInfo has not sought to investigate any alleged copyright breaches. The use of copyright licensed to the Liberal and National parties was done within the confines of criteria applied by AusInfo to all requests for Commonwealth copyrighted material.

5.21 While the application met the criteria specified, it is considered that the licensing of the use of material developed at the Commonwealth's expense, for party-political purposes, in a caretaker period involves a judgement on politically sensitive questions and is open to question. The current criteria for assessing requests do not satisfactorily address party-political purposes particularly in a caretaker period, and therefore it would seem appropriate for the criteria applied by AusInfo to be reviewed to ensure they facilitate decision-making across a broad spectrum of requests for the use of Commonwealth copyright material, including for party-political use.

5.22 The circumstances surrounding the delivery of CEIP materials to households and the simultaneous delivery of electoral material in parts of Tasmania and some areas of Sydney have been explained as a coincidence. Advice from the mail-out contractors confirms that they were contracted to different clients for the delivery of the material. The ANAO therefore decided not to pursue this matter further, noting that the Tasmanian Electoral Commissioner is of the opinion that, based on the evidence available to him, there has not been a breach of the *Electoral Act 1985 (Tas)*.

5.23 Advice obtained by the ANAO indicates that the DSS mail out was lawful, although it is noted that there are arguments that this may not be the case. The Privacy Commissioner is conducting preliminary inquiries to ascertain whether the use of pensioner and veteran mailing lists held by Centrelink should be reviewed.

Canberra ACT
29 October 1998

P.J. Barrett
Auditor-General

Appendices

Suggested Principles and Guidelines for the Use of Government Advertising

The following principles and guidelines are derived from guidelines adopted in New Zealand and the United Kingdom and suggested as a result of reviews of government advertising in Victoria, New South Wales, Queensland, Western Australia and British Columbia:

Underlying Principles

The fundamental principles governing the use of public funds for government information programs are that:

- all members of the public have equal rights to access comprehensive information about government policies, programs and services which affect their entitlements, rights and obligations, except where access to this information would represent a breach of government responsibilities; and
- governments may legitimately use public funds¹¹ for information programs or education campaigns to explain government policies, programs or services and to inform members of the public of their obligations, rights and entitlements;

Guidelines

1. Material Should Be Relevant To Government Responsibilities

In developing material to be communicated to the public it is suggested that:

- the subject matter should be directly related to the Government's responsibilities;
- an information strategy should be considered as a routine and integral part of policy development and program planning; and
- no campaign should be contemplated without an identified information need by identified recipients based on appropriate market research.

¹¹ Outcomes of any review of the use of AMFA as suggested in para 3.55 would need to be considered as part of the determination of any Principles or Guidelines.

Examples of suitable uses for government advertising include to:

- inform the public of new, existing or proposed government policies, or policy revisions;
- provide information on government programs or services or revisions to programs or services to which the public are entitled;
- disseminate scientific, medical or health and safety information; or
- provide information on the performance of government to facilitate accountability to the public.

2. Material Should Be Presented In An Objective And Fair Manner

The following guidelines are suggested to assist in determining whether the material communicated is presented in an explanatory, fair and objective manner:

- Information campaigns should be directed at the provision of objective, factual and explanatory information. Information should be presented in an unbiased and equitable manner.
- Information should be based on accurate, verifiable facts, carefully and precisely expressed in conformity with those facts. No claim or statement should be made which cannot be substantiated.
- The recipient of the information should always be able to distinguish clearly and easily between facts on the one hand, and comment, opinion and analysis on the other.
- When making a comparison, the material should not mislead the recipient about the situation with which the comparison is made and it should state explicitly the basis for the comparison.

3. Material Should Not Be Liable To Misrepresentation As Party-Political

- Information campaigns should not intentionally promote, or be perceived as promoting, party-political interests. Communication may be perceived as being party-political because of any one of a number of factors, including:
 - what was communicated;
 - who communicated it;
 - why it was communicated;
 - what it was meant to do;

- how, when and where it was communicated;
 - the environment in which it was communicated; or
 - the effect it had.
- Material should be presented in unbiased and objective language, and in a manner free from partisan promotion of government policy and political argument.
 - Material should not directly attack or scorn the views, policies or actions of others such as the policies and opinions of opposition parties or groups.
 - Information should avoid party-political slogans or images. This may involve restrictions on the use of ministerial photographs in government publications.

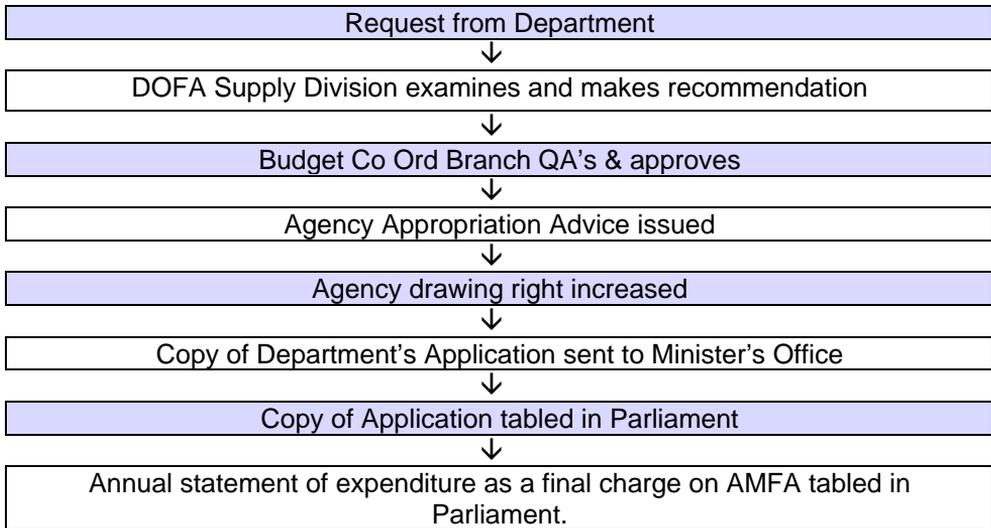
4. *Distribution Of Sensitive Material Should Be Controlled*

- Distribution of sensitive, unsolicited material should be carefully controlled. As a general rule, publicity touching on politically controversial issues should not reach members of the public unsolicited except where the information clearly and directly affects their interests. Generally, they may only be issued in response to individual requests, enclosed with replies to related correspondence or sent to organisations or individuals with a known interest in the area.
- Care should be taken to ensure that Government advertising material is not used or reproduced by members of political parties in support of party-political activities without appropriate approval.
- All advertising material and the manner of presentation should comply with relevant law, including broadcasting, media and electoral law.
- Material should be produced and distributed in an economic and relevant manner, with due regard to accountability
- No information campaign should be undertaken without a justifiable cost/benefit analysis. The cost of the chosen scale and methods of communicating information must be justifiable in terms of achieving the identified objective(s) for the least practicable expense. Objectives which have little prospect of being achieved, or which are likely to be achieved only at disproportionate cost, should not be pursued without good reasons.

- Care should be taken to ensure that media placement of government advertising is determined on a needs basis and targeted accordingly and without favour.
- Existing purchasing/procurement policies and procedures for the tendering and commissioning of services and the employment of consultants should be followed.

Appendix 2

AMFA Approval Process



Series Titles

Titles published in the financial year 1998-99

Audit Report No.1 Performance Audit
Corporate Governance Framework
Australian Electoral Commission

Audit Report No.2 Performance Audit
Commercial Support Program
Department of Defence

Audit Report No.3 Performance Audit - Follow-up
Assessable Government Industry Assistance
Australian Taxation Office

Audit Report No.4 Performance Audit
Client Service Initiatives
Australian Trade Commission

Audit Report No.5 Performance Audit
*Commonwealth Agencies' Security Preparations
for the Sydney 2000 Olympics*

Audit Report No.6 Audit Activity Report
*Audit Activity Report:
January to June 1998*
Summary of Outcomes

Audit Report No.7 Performance Audit
*Management of the Implementation of the
New Employment Services Market*
Department of Employment, Education, Training, and Youth Affairs

Audit Report No.8 Performance Audit
Safeguarding Our National Collections

Audit Report No.9 Performance Audit
Accountability and Performance Information
Australian Sports Commission

Audit Report No.10 Performance Audit
Sale of One-third of Telstra

Audit Report No.11 Performance Audit
OGIT and FedLink Infrastructure
Office of Government Information Technology, Department of
Finance and Administration