

‘SPECIAL ACCOUNTS’ UNDER THE *CONSTITUTION*: AMOUNTS APPROPRIATED FOR DESIGNATED PURPOSES

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I INTRODUCTION

The finance clauses of the *Constitution* are rarely examined and have been subjected to very limited scrutiny by the High Court. This is perhaps surprising given that these provisions were amongst the most contentious during the Constitutional Convention debates.¹ The compromise of these debates was to leave the practical implementation of the finance clauses after the transition period to future Parliaments.² The Parliament has willingly undertaken this task over the decades. Recently, however, with the advent of modern governance arrangements favouring devolved responsibility and new methods of accrual budgeting,³ the Parliament has introduced a new legislative financial framework. This article traces the interpretation of those provisions in the *Constitution* that must be satisfied in order to sustain Special Accounts in this new financial framework. As exceptional creations under the Australian Government’s accrual budgeting arrangements, Special Accounts fulfil the requirements of modern

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1 The finance clauses at the Premiers Conference of 1899 ‘proved the hardest of all to solve, and nearly caused a break-up of the Conference’, with the Melbourne Convention clauses being retained, as ‘all other proposals are open to more serious objection’: see John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901) 219.

2 The transitional arrangements finally agreed to provide for the Commonwealth on its establishment to take over the collection and control of State customs duties and excise (*Constitution* s 86), and then for the Commonwealth to impose uniform customs duties within two years of its establishment (*Constitution* s 88). In the period before the Commonwealth imposed uniform customs duties, the Commonwealth was required to pay monthly the balance of the States’ customs duties less any expenditure (*Constitution* s 89). During the five years after uniform customs duties were imposed, or ‘until the Parliament otherwise provides’, the Commonwealth was to account to the States (*Constitution* s 93), and thereafter make payments to the States of the surplus ‘on such basis as it [the Parliament] deems fair’ (*Constitution* s 94).

3 ‘Accrual accounting is a basis of accounting whereby the financial effects of transactions and events are recognised when they occur (and not as cash is received or paid) and included in financial statements for the reporting periods to which they relate’: Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) 3.

governance arrangements while maintaining links to their origins in the early implementation of the *Constitution*. The use of Special Accounts also demonstrates a significant shift in this new financial framework towards after-the-event accountability and, arguably, better transparency of Australian Government expenditures.

Special Accounts are a method by which money may be drawn from the 'Treasury of the Commonwealth'⁴ for the expenditure purposes of the Commonwealth. As a ledger⁵ of the Consolidated Revenue Fund (CRF),⁶ Special Accounts at once articulate the requirements of an appropriation from the CRF, set out an authorisation to expend, and identify the Commonwealth purposes for which that money may be expended.⁷ Under the *Financial Management and Accountability Act 1997* (Cth) ('*FMA Act*') Special Accounts can be established either by the Finance Minister⁸ making a written determination to that effect,⁹ or by legislative provision.¹⁰

While there is no limit to the circumstances for which a Special Account may be suitable, they tend to be operated in those circumstances that require greater accountability and transparency. For example, Special Accounts are used for particular Australian Government commitments, joint Commonwealth and State programs, joint Commonwealth and industry enterprises, Australian Government business operations, and dealings with money held by the Australian Government on trust.¹¹ Perhaps most importantly, they are now the *only* mechanism by which payments made to the Australian Government are formally hypothecated and immediately appropriated for particular purposes. This reflects the arrangement originally contemplated when the *Audit Act 1901* (Cth) ('*Audit Act*') was amended to introduce the progenitor Trust Fund trust accounts.¹² The Second Reading provided:

The principal clause of this [Audit] Bill [1906] is cl 13, which is to legalize certain accounts which have been in existence for some time. The following may be termed 'trading accounts', namely: The Commonwealth Ammunition Material Account, the Small Arms Ammunition Account, the Defence Clothing Material Account, the Small Arms Account and the Defence Force Stores Collection Account (Queensland). In connexion with all of these, material is sold to members of rifle clubs and others, and

4 This is 'any fund or sum of money standing to the credit of the Crown in right of the Commonwealth': *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 573 (Mason CJ, Deane, Toohey and Gaudron JJ); in other words, the moneys actually held by the Commonwealth.

5 They are an 'account ... used to record moneys received for a designated purpose and expenditure of those moneys': Explanatory Memorandum, above n 3, 3.

6 See *Constitution* s 81. See also *Constitution* ss 66, 82.

7 See Commonwealth, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003) 3–15.

8 *FMA Act* s 5. The 'Finance Minister' is currently the Minister for Finance and Administration: see *Administrative Arrangements Order*, 27 January 2006, pt 9.

9 *FMA Act* s 20.

10 *FMA Act* s 21. A list of these Acts was set out in Joint Committee of Public Accounts and Audit, Parliament of Australia, *Report 395: Inquiry into the Draft Financial Framework Legislation Amendment Bill* (2003) app K.

11 *Ibid*, 10–11.

12 See *Audit Act 1906* (Cth) s 13. This inserted the *Audit Act 1901* (Cth) s 62A(1) providing, in part, '[t]he Minister may establish Trust Accounts and define the purposes for which they are established'.

the proceeds of the sales are paid into the accounts, in order that the fresh purchases made by the Government may be paid out of such proceeds. A strict reading of the law would probably require the proceeds to be paid into revenue, and the fresh purchases to be charged to a vote of Parliament. Such a course would, however, show the expenditure of the Commonwealth as much more than the amount which is really borne by the general taxation of the people; and it is thought that these special receipts should be devoted wholly to the purpose of replacing the goods sold ...¹³

The purpose of this article is to draw together the various elements of the *Constitution*'s finance clauses and consider their application to Special Accounts as exceptional creations under the Australian Government's accrual budgeting arrangements. While this provides only limited insight into how the High Court might interpret the finance clauses in the future, the article shows how the Australian Government has addressed and resolved contentious issues through its modern financial framework. Part II traces the legislative developments establishing the legislative context for the place of Special Accounts under the *FMA Act* in the modern governance framework; Part III reviews the relevant High Court decisions, which opened the way for the modern 'self-executing' CRF; Part IV considers some of the limits applying to appropriations, both in terms of the process by which money is appropriated and in terms of the actual content of the appropriation; Part V reviews the impact of Special Accounts on the calculation of surplus revenue; and Part VI sets out the place of Special Accounts in the current accrual budgeting arrangements. The use of Special Accounts is indicative of a move away from before-the-event Parliamentary scrutiny of expenditure towards after-the-event accountability and transparency. The result is a financial framework that fulfils both the arrangements of modern governance and the requirements of the *Constitution*. However, the framework demands increased Parliamentary scrutiny and this, in turn, raises the question of whether such scrutiny can provide appropriate controls over future expenditure.

II LEGISLATIVE HISTORY

There have been three key legislative reforms which, cumulatively, have established the context for Special Accounts under the *FMA Act* in a modern governance framework. The first tranche of these reforms was set out in the original *FMA Act*¹⁴ of 1997 ('original *FMA Act*'),¹⁵ which replaced the *Audit Act*.¹⁶ The original *FMA Act* established a 'regulatory/accounting/accountability framework for dealing with and managing the money and property of the Commonwealth'. The Act specified the 'responsibilities and powers necessary for the efficient, effective and ethical use of the resources lawfully available to

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1906, 2066 (John Forrest, Treasurer).

14 See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8344 (John Fahey, Minister for Finance).

15 'Original *FMA Act*' is used here to denote the Act before the amendments made by the *Financial Management Legislation Amendment Act 1999* (Cth), the *Financial Framework Legislation Amendment Act 2005* (Cth) and the *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) amendments.

16 *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 1.

the Commonwealth to carry out its program' and provided 'for appropriate mechanisms to ensure that the stewardship and management performance of those who are responsible for those resources can be made visible and, thereby, allow them to be held accountable'.¹⁷ This was to be achieved by requiring Agency¹⁸ Chief Executives¹⁹ to manage their resources efficiently, effectively and ethically,²⁰ and setting out mandatory accounting requirements to satisfy the Finance Minister's role of preparing an account of the Commonwealth for Parliament.²¹ The central objective of this reform was to devolve financial management to Commonwealth Agencies by giving Chief Executives the powers to make, and then be accountable for, decisions about expenditure and the use of the money and other resources of the Commonwealth under their control.²²

The second tranche of financial framework reform was set out in the *Financial Management Legislation Amendment Act 1999* (Cth),²³ which aligned the legislative framework of the original *FMA Act* with accrual budgeting arrangements. The amending Act essentially replaced the 'fund accounting' that had been carried over from the *Audit Act*:²⁴ it removed the requirement that all cash transactions be debited or credited to a fund account in a central ledger and provided for the transactions of Agencies to be processed and recorded in their own accounting systems. This arrangement still retained an Agency's ability to hypothecate²⁵ money for particular purposes through Special Accounts.²⁶ That is,

17 *Parliamentary Debates*, above n 14, 8344–5.

18 *FMA Act* s 5. It is notable that some of the 'prescribed Agencies' in the *FMA Act* sch 1 are subject to the *Commonwealth Authorities and Companies Act 1997* (Cth) for their handling of 'public money'.

19 *FMA Act* s 5.

20 *FMA Act* s 44. This was assisted through issuing Chief Executive Instructions (s 52), implementing a Fraud Control Plan (s 45) and requiring an Agency Audit Committee (s 46).

21 *FMA Act* ss 54–57. The standards are proscribed by the Finance Minister's Orders (s 63).

22 See *Parliamentary Debates*, above n 14, 8345.

23 See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, 2283 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration). Other amendments were included in the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth), *Financial Management and Accountability Amendment Act 2000* (Cth), *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) and the *Parliamentary Service (Consequential and Transitional) Determination 2000/1* (Cth).

24 The change being the '[r]equirements for debiting and crediting all cash transactions to a fund account in a central ledger will be removed. In future, transactions of Agencies will be processed and recorded in their own accounting systems. The amendments will therefore facilitate the move to devolved accounting and banking arrangements for agencies, consistent with more business like approaches used in the private sector': Explanatory Memorandum, above n 3, 1.

25 In essence, pledging that an identified amount may be expended without actually delivering or transferring that amount; thus, '[a] Special Account is a ledger within the [CRF] established by section 81 of the Constitution ... (which) allows an identified amount of money to be set aside and spent for specific purposes': Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee, 20 November 2002, 22 (Senator Stephen Conroy) citing an unidentified Department of Finance and Administration publication.

26 See Explanatory Memorandum, above n 3, 1. Notably, Special Accounts are generally operated by *FMA Act* 'Agencies' (*FMA Act* s 5), although they may also be operated by bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth): see Financial Management Guidance No 7, above n 7, 3; Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Finance Circular 2003/09 (2003).

using a Special Account, Agency's could still pledge that an identified amount of money may be expended without actually delivering or transferring that amount.

These Special Accounts served the same purpose as, and are analogous to, Trust Fund trust accounts under the *Audit Act*. The *Audit Act* had maintained a separate CRF, Loan Fund²⁷ and Trust Fund.²⁸ Revenue and money from different sources was credited to these separate accounts, including the 'components' making up the Trust Fund 'trust accounts'. Each 'component' was accounted for separately under a comprehensive accounting framework controlled by the Department of Finance and Administration. Under the original *FMA Act*, all revenue and money received by the Commonwealth as 'public money'²⁹ was to be credited to the CRF,³⁰ unless it was 'special public money'³¹ or overdraft drawings.³² Amounts in the CRF could be transferred to the Loan Fund.³³ Amounts from either the CRF or Loan Fund could then be transferred to 'components' of the Reserve Money Fund³⁴ and the Commercial Activities Fund.³⁵ The Reserve Money Fund and Commercial Activities Fund were a 'purpose based' replacement for the Trust Fund.³⁶ The 'components' of the Reserve Money Fund and Commercial Activities Fund were established by a written determination for the purposes specified in the determination³⁷ or a specified commercial activity³⁸ respectively, and existing *Audit Act* Trust Fund trust accounts were subjected to transition arrangements.³⁹ Each 'component' of

27 Made up of 'components' under 'separate heads': *Audit Act 1901* (Cth) s 55(2).

28 Made up of 'components' known as 'trust accounts': *Audit Act 1901* (Cth) ss 60, 62A. Section 62A was an amendment by section 13 of the *Audit Act 1906* (Cth) 'to legalise certain accounts which have been in existence for some time': Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1906, 2066 (John Forrest, Treasurer).

29 Being 'money in the custody or under the control of the Commonwealth' or 'money in the custody or control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money', and these both include 'money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth': see *FMA Act* s 5. It is notable that 'special public money' is a subset of 'public money' (ss 5, 16).

30 Original *FMA Act* s 18; for an illustration of the model showing typical transfers, see *Report 395*, above n 10, app J.

31 Being 'public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth' according to Special Instructions issued by the Finance Minister: *FMA Act* s 16. The note to this section provides '[m]oney held on trust for another person is an example of special public money'; although the place of the Commonwealth as a trustee of money may not result in that money being outside, or separate from, the CRF.

32 Original *FMA Act* s 8; although this did not include 'advances' made according to s 38.

33 Original *FMA Act* s 19.

34 Original *FMA Act* s 20.

35 Original *FMA Act* s 21.

36 Commonwealth, *Parliamentary Debates*, above n 14, 8345–6. Many of the features of the Reserve Money Fund and Commercial Activities Fund reflected the *Audit Act 1901* (Cth) s 60 accounts, although the Reserve Money Fund and Commercial Activities Fund authorise expenditure and so included a standing appropriation up to the amount credited to the account, and therefore also included a special procedure for parliamentary scrutiny (Original *FMA Act* s 22).

37 Original *FMA Act* s 20(2). These determinations were subject to special disallowance rules (s 22).

38 Original *FMA Act* s 21(2). These determinations were subject to special disallowance rules (s 22).

39 See *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 2. Note Original *FMA Act* s 25.

the Reserve Money Fund and Commercial Activities Fund was accounted for by Chief Executives according to directions issued by the Finance Minister.⁴⁰

The *Financial Management Legislation Amendment Act 1999* (Cth) merged the Loan Fund and the 'components' of the Reserve Money Fund and the Commercial Activities Fund into the single CRF.⁴¹ Significantly, 'special public money' and overdraft drawings ceased to be classed separately and merely formed part of the same common CRF.⁴² The 'new' Special Accounts preserved the rights and obligations of the 'components' of the Reserve Money Fund and Commercial Activities Fund,⁴³ but hypothecated amounts for specific purposes, supported by an appropriation.⁴⁴ In other words, they are 'no longer part of a separate fund (represented by money set aside from the CRF) but are simply ledger accounts recording the right to draw money from the [CRF]'.⁴⁵ The significance of this arrangement was the use of non-lapsing appropriations: there was no longer a requirement to set aside amounts from the CRF to another place (usually another fund) until payment was actually required. This removed the need for fund accounting through a central ledger⁴⁶ and opened the way for accrual budgeting.

The third tranche of financial framework reform was set out in the *Financial Framework Legislation Amendment Act 2005* (Cth) and the *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth). The *Financial Framework Legislation Amendment Act 2005* (Cth) included amendments 'clarifying and expanding the information required, or allowed, in a determination of the Finance Minister that establishes a Special Account'.⁴⁷ The *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) implemented consequential amendments that ensured consistent terminology for

40 Original *FMA Act* ss 24, 48, 63. See also *Financial Management and Accountability Orders 1997* (Cth).

41 See *Report 395*, above n 10, app J. See also Department of Finance and Administration, *Reserved Money Fund (RMF) and Commercial Activities Fund (CAF) – Transition to 'Special Accounts'*, Finance Circular 1999/03; Financial Management Guidance No 7, above n 7.

42 See Original *FMA Act* ss 8, 17.

43 *Financial Management Legislation Amendment Act 1999* (Cth) s 5; see Explanatory Memorandum, above n 3, 6.

44 *FMA Act* ss 20(4), 21(1). The term 'hypothecated' also includes situations where the Commonwealth holds money as a genuine trustee, for States, as part of a business operation, and so on: see Commonwealth, *Committee Hansard*, Joint Committee of Public Accounts and Audit, 7 March 2004, PA8 (Ian McPhee).

45 Explanatory Memorandum, above n 3, 6. Put another way, '[s]pecial Accounts allow money in the CRF to be set aside for particular spending purposes, and moneys in a Special Account can only be spent for the purposes nominated': *Committee Hansard*, *ibid*.

46 See Explanatory Memorandum, above n 3, 1, 6; this was a significant change as this also removed the requirement to transfer money between accounts to keep them in positive balance.

47 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2004, 5 (Sharman Stone, Parliamentary Secretary to the Minister for Finance and Administration); *Financial Framework Legislation Amendment Act 2005* (Cth) sch 1 (pt 2) 'contains two broad types of proposed amendments: references to components of the [Reserve Money Fund] are replaced with references to Special Accounts; and references to "paid to Consolidated Revenue Fund" are replaced with references to "paid to the Commonwealth"': Explanatory Memorandum, Financial Framework Legislation Amendment Bill 2004 (Cth) 6; for the *FMA Act* Special Account amendments, see *Financial Framework Legislation Amendment Act 2005* (Cth) sch 1 (items 139–144).

Special Accounts.⁴⁸ These Acts also implemented consequential amendments that ensured consistent terminology across the statute book that had been foreshadowed in the *Financial Management Legislation Amendment Act 1999* (Cth); transferred the powers from the Treasurer to the Finance Minister to approve investments, money raising and guarantees for certain bodies that are legally and financially separate from the Commonwealth; clarified certain delegation powers of the Finance Minister;⁴⁹ and repealed certain ‘redundant’ Acts.⁵⁰

The result of these legislative developments is a modern financial framework based around accrual budgeting arrangements that include Special Accounts as a mechanism to formally hypothecate amounts and appropriate those amounts for defined purposes. The following Parts address the requirements of the *Constitution*: the CRF (Part III), appropriations (Part IV) and surplus revenue (Part V).

III CONSOLIDATED REVENUE FUND

The *Constitution* contemplated a ‘Consolidated Revenue Fund’ that reflected the Consolidated Fund of Great Britain,⁵¹ and provides in section 81 that:

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Section 83 of the *Constitution* then provides that *any* money ‘drawn’ from the ‘Treasury of the Commonwealth’ requires an ‘appropriation made by law’ (addressed further below). Thus, ‘the revenues of the Crown constituted one general pool or fund from which the present and future liabilities of the Crown were to be met’ and ‘no part of that fund could be appropriated without the authority of an Act of the Parliament’.⁵² However, the concept of the

48 *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) sch 1; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 2004, 17 (Sharman Stone, Parliamentary Secretary to the Minister for Finance and Administration).

49 *Financial Framework Legislation Amendment Act 2005* (Cth) schs 1 (pt 1), 2. See also *Parliamentary Debates*, 1 December 2004, above n 47, 4; Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, 2285 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration).

50 *Financial Framework Legislation Amendment Act 2005* (Cth) sch 3; *Financial Framework Legislation Amendment Act (No 1) 2006* (Cth) sch 4.

51 See Quick and Garran, above n 1, 812. This historical relationship is conveniently articulated in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 597–9 (McHugh J), although similar commentary is present in other judgements.

52 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 599 (McHugh J). See also *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 506 (Mason CJ, Brennan, Deane and Gaudron JJ).

Constitution's CRF has not been without some doubt,⁵³ and there remains some uncertainty about when money formally leaves the CRF.⁵⁴

The *Constitution's* reference to 'revenues and moneys' underwent some changes during the various drafts at the Constitutional Conventions. The words in the original draft were 'duties, revenues and moneys'.⁵⁵ However, at the Adelaide Convention, the words 'duties' and 'moneys' were removed from the draft to make it clear that loan moneys did not go to the CRF. This was confirmed at the Melbourne Convention 'for the same reasons', but the word 'moneys' was included again in the final *Constitution* and the reasons for this change remain unclear.⁵⁶ As a result of this, loan moneys were considered to be separate from the CRF⁵⁷ so that the *Audit Act* operated a 'Consolidated Revenue Fund'⁵⁸ with a separately accounted Loan Fund⁵⁹ and a Trust Fund.⁶⁰ However, the 'money' for each fund was maintained as part of the Commonwealth Public Account.⁶¹ This scheme arguably appears to have contemplated that the Loan Fund and Trust Fund were not part of the CRF and, interestingly, established a similar requirement that an appropriation exist before an amount might be expended, presumably to maintain parliamentary authority over expenditure.⁶² However, the High Court has been careful to note that the terms of the *Audit Act*

53 Although, in practice, this has not been an issue as the incentive to carefully quantify the CRF has been obviated by appropriations, State grants and other political measures to provide the States with adequate funding: see, eg, *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 250 (Latham CJ) ('*Pharmaceutical Benefits Case*').

54 For example, the *Financial Management Legislation Amendment Act 1999* (Cth) provided for components of the Reserve Money Fund to become Special Accounts with references to amounts being 'transferred' from the CRF to a Reserve to be read as references to 'crediting' the relevant account (s 5(6)(a)), and references to amounts being 'transferred' to the CRF to be read as 'debiting' the relevant account (s 5(6)(b)), perhaps with the implication that components of the Reserve Money Fund were outside the CRF.

55 See Quick and Garran, above n 1, 811.

56 Ibid.

57 Although a contrary view has been expressed by Sir Owen Dixon before the *Royal Commission on the Australian Constitution 1928–1929* where he contemplated that the CRF was a continuous fund that might be appropriated irrespective of the money going into the CRF (including loan moneys): see Enid Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145, 149.

58 At the time of its repeal (by the *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) sch 1) the *Audit Act 1901* (Cth) s 2 defined 'public moneys' to mean 'revenue, loan, trust and other moneys received or held by any person for or on behalf of the Commonwealth or a prescribed authority, and includes all moneys forming part of the Consolidated Revenue Funds, the Loan Fund or the Trust Fund'.

59 *Audit Act 1901* (Cth) s 55. This was also reflected in the *FMA Act* until the *Financial Management Legislation Amendment Act 1999* (Cth), with a separate Loan Fund.

60 *Audit Act 1901* (Cth) s 60. This was also reflected in the *FMA Act* until the *Financial Management Legislation Amendment Act 1999* (Cth), with a separate Reserved Money Fund and Commercial Activities Fund.

61 See *Audit Act 1901* (Cth) ss 22, 23, 55, 62 (although Money Order Accounts received special consideration: ss 26, 26A). The exceptions to this generalisation were: money received, and not yet paid, into a bank account forming the Commonwealth Public Account; and bank accounts not forming part of the Commonwealth Public Account (s 21(1)(b)).

62 See *Audit Act 1901* (Cth) ss 62A(6), 57(1).

‘cannot control the construction of the Constitution’,⁶³ although it did not clearly characterise the true nature of amounts credited to the Loan Fund and Trust Fund.

The High Court did consider the *Audit Act* Trust Fund trust account arrangements in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*⁶⁴ where the *Training Guarantee Act 1990* (Cth) imposed a charge on employers that was equal to the shortfall in the amount employers spent on employee training below a fixed amount.⁶⁵ The *Training Guarantee (Administration) Act 1990* (Cth) provided that the amounts received from employers would discharge their liability, with any outstanding amounts being a debt due to the Commonwealth.⁶⁶ The *Training Guarantee (Administration) Act 1990* (Cth) established the Training Guarantee Fund as a trust account as part of the *Audit Act* Trust Fund,⁶⁷ and provided that amounts paid to the Commonwealth under the *Training Guarantee (Administration) Act 1990* (Cth) were to be paid into this fund.⁶⁸ The money in the Training Guarantee Fund was then to be applied for the purposes set out in the *Training Guarantee (Administration) Act 1990* (Cth), being the reimbursement of the Commonwealth, making payments to the States under separate agreements and reimbursing overpayments or errors in payments.⁶⁹ As a matter of practice, the amounts paid by employers to the Commonwealth were placed into an authorised bank account outside the Commonwealth Public Account, and then moved the following day to a bank account forming part of the Commonwealth Public Account. A record was made in a central ledger of an amount credited to the classification ‘Trust Fund’ and a sub-classification of ‘Training Guarantee Trust Account’.⁷⁰ There was, however, no ledger recording an amount being credited to the CRF.⁷¹ The relevant issues in the present context were the characterisation of the moneys paid by the employers to the Commonwealth under the *Training Guarantee (Administration) Act 1990* (Cth), when those moneys formed part of the CRF and when they ceased to be part of the CRF. The argument before the High Court was that the *Training Guarantee (Administration) Act 1990* (Cth) required payments directly to the Trust Fund, thereby bypassing the CRF and the further limitation of a necessary appropriation from the CRF.⁷²

63 *New South Wales v Commonwealth* (1908) 7 CLR 179, 190 (Griffith CJ); see also *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 577 (Mason CJ, Deane, Toohey and Gaudron JJ) and 602 (McHugh J).

64 (1993) 176 CLR 555 (‘*Cemetery Reserve Case*’).

65 *Training Guarantee (Administration) Act 1990* (Cth) ss 5, 6; the relevant provisions are set out in *Cemetery Reserve Case* (1993) 176 CLR 555, 563–6, 573–4 (Mason CJ, Deane, Toohey and Gaudron JJ).

66 *Training Guarantee (Administration) Act 1990* (Cth) s 76(1).

67 *Training Guarantee (Administration) Act 1990* (Cth) s 32; *Audit Act 1901* (Cth) s 62A.

68 *Training Guarantee (Administration) Act 1990* (Cth) s 33; although this expressly excluded ‘amounts paid in satisfaction or partial satisfaction of penalties imposed by courts’ (s 33(a)).

69 *Training Guarantee (Administration) Act 1990* (Cth) s 34.

70 See *Cemetery Reserve Case* (1993) 176 CLR 555, 574–5 (Mason CJ, Deane, Toohey and Gaudron JJ).

71 *Ibid* 575.

72 *Ibid* 572.

The High Court joint judgment⁷³ accepted that there were 'no fiscally separate moneys which can be identified as constituting each of the three [*Audit Act*] accounts, the CRF, the Loan Fund and the Trust Fund', even though moneys credited to the Loan Fund and Trust Fund were identifiable as money in bank accounts forming part of the Commonwealth Public Account and accounted for separately.⁷⁴ Further, the joint judgment accepted that moneys standing to the credit of the CRF could be held in bank accounts outside the bank accounts constituting the Commonwealth Public Account.⁷⁵ Considering the provision in the *Training Guarantee (Administration) Act 1990* (Cth) that amounts received from employers were to be paid to the Training Guarantee Fund, the joint judgment accepted that these moneys were a payment to the CRF which were then appropriated from the CRF to the Trust Fund,⁷⁶ being a standing appropriation in the *Training Guarantee (Administration) Act 1990* (Cth).⁷⁷ However, the appropriation of the amounts credited to the Trust Fund was either in the *Training Guarantee (Administration) Act 1990* (Cth)⁷⁸ or the *Audit Act*.⁷⁹ It is not clear from the decision whether the joint judgment considered that the amounts credited to the Trust Fund left the CRF when the money relying on the appropriation was expended. Significantly, the joint judgment accepted the plaintiff's proposition that the 'Training Guarantee Fund is something different and apart from the CRF',⁸⁰ although how 'different and apart' was not clear. The joint judgment did, however, reject the plaintiff's proposition that the *Training Guarantee (Administration) Act 1990* (Cth) directed moneys immediately to the Trust Fund bypassing the CRF, as opposed to a payment to the CRF followed by an appropriation to the Trust Fund.⁸¹

In agreement with the joint judgment, Brennan, Dawson and McHugh JJ considered that all moneys received by the Commonwealth formed part of the CRF and could not be disbursed without an appropriation.⁸² Like the joint judgment, Dawson and McHugh JJ did not directly address the issue of when the moneys left the CRF. Thus, after declining to question the view that moneys credited to the Loan Fund do not form part of the CRF,⁸³ Dawson J considered that the Trust Fund was separate from the CRF and that money paid by employers to the Commonwealth was initially a payment to the CRF, which was

73 Noting that Brennan J referred to the judgement of Mason CJ and Deane, Toohey and Gaudron JJ as the 'majority': Ibid 579 (Brennan J).

74 Ibid 575 (Mason CJ, Deane, Toohey and Gaudron JJ).

75 Ibid. Although the question of whether money paid to a bank account held by the Commonwealth, but not according the authority of the *Audit Act 1901* (Cth) s 20, was not considered.

76 The joint judgment accepted the characterisation articulated in the Second Reading Speech: '[r]evenue collected under the training guarantee will be placed in a special trust account under a standing appropriation from the [CRF]': *Cemetery Reserve Case* (1993) 176 CLR 555, 576–7.

77 *Training Guarantee (Administration) Act 1990* (Cth) s 33(a); ibid 577.

78 *Training Guarantee (Administration) Act 1990* (Cth) s 34(1).

79 *Audit Act 1901* (Cth) s 62A(6); *Cemetery Reserve Case* (1993) 176 CLR 555, 577–8 (Mason CJ, Deane, Toohey and Gaudron JJ).

80 *Cemetery Reserve Case* (1993) 176 CLR 555, 572 (Mason CJ, Deane, Toohey and Gaudron JJ).

81 Ibid.

82 Ibid 580–1 (Brennan J), 591 (Dawson J), 599 (McHugh J).

83 Ibid 592 (Dawson J).

then appropriated to the Trust Fund according to a standing appropriation in the *Training Guarantee (Administration) Act 1990* (Cth).⁸⁴ The expenditure was then authorised under either the *Training Guarantee (Administration) Act 1990* (Cth)⁸⁵ or the *Audit Act*.⁸⁶ In a similar vein, McHugh J considered the issue was whether the CRF was validly appropriated for amounts that were ‘paid’ from the CRF to the Training Guarantee Fund and found that the *Training Guarantee (Administration) Act 1990* (Cth)⁸⁷ constituted a standing appropriation by directing the payment to the Training Guarantee Fund and authorising the expenditure.⁸⁸ Unfortunately, neither clarified whether the payment of the amount credited to the Trust Fund was money leaving the CRF. In contrast to the other justices, Brennan J considered moneys paid to the Commonwealth by employers ‘form part of the CRF from the moment when they are received and that those moneys, though they are immediately credited to the Training Guarantee Fund, remain part of the CRF until they are disbursed’.⁸⁹ Presumably, this means ‘disbursed’ from the Training Guarantee Fund and suggests that the moneys credited to the Training Guarantee Fund remained part of the CRF until actually ‘disbursed’.

The approach of the High Court in the *Cemetery Reserve Case* is consistent with its other decisions,⁹⁰ although this has not assisted in defining exactly when moneys leave the CRF. Thus, in *New South Wales v Commonwealth*,⁹¹ Griffiths CJ ‘express[ed] no opinion about the effect of placing the sums in question to the credit of Trust Accounts’.⁹² More forcefully Barton J considered ‘[t]hese moneys have been “drawn from the Treasury of the Commonwealth ... under an appropriation made by law”’,⁹³ although it is not clear whether this is confined to meaning only that an appropriation merely means that the amount credited to the CRF ceases to be available in the calculation of surplus revenue payable to the States (considered further below).⁹⁴ This corresponds with the views of Griffiths CJ and O’Connor, Isaacs and Higgins JJ that appropriation means, in the words of Isaacs J, ‘legally segregating [the money] from the general mass of the Consolidated [Revenue] Fund and dedicating it to the execution of some purpose which either the *Constitution* has itself declared, or Parliament has lawfully

84 *Training Guarantee (Administration) Act 1990* (Cth) s 33.

85 *Training Guarantee (Administration) Act 1990* (Cth) s 34(1).

86 *Audit Act 1901* s 62A(6); although Dawson J expresses a preference for the *Audit Act 1901* (Cth): *Cemetery Reserve Case* (1993) 176 CLR 555, 593 (Dawson J).

87 *Training Guarantee (Administration) Act 1990* (Cth) ss 33(a) and 34(1).

88 *Cemetery Reserve Case* (1993) 176 CLR 555, 602–3 (McHugh J).

89 Ibid 584–5 (Brennan J). Significantly, Brennan J characterised all moneys standing to the credit of the Loan Fund, Trust Fund and the Commonwealth Public Account as forming the CRF until those amounts were disbursed according to an appropriation. Presumably, amounts credited to bank accounts outside the Commonwealth Public Account, considered by the majority (at 573), would also fall within the CRF according to this view as they are also amount ‘received by the Executive Government’.

90 For example in *Victoria v Commonwealth*, Barwick CJ appears to accept a single CRF for revenues and moneys raised and received by the Commonwealth: (1975) 134 CLR 338, 355.

91 (1908) 7 CLR 179 (*‘Surplus Revenue Case’*).

92 Ibid 191 (Griffiths CJ).

93 Ibid 193 (Barton J).

94 Ibid 193 (Barton J).

determined, shall be carried out'.⁹⁵ Failing to clarify the boundaries of the CRF was an unfortunate outcome, as in this case the appropriation was, like the *Cemetery Reserve Case*, from the CRF to an *Audit Act* Trust Fund trust account. Similarly, in *Attorney-General for Victoria v Commonwealth*,⁹⁶ where the *National Welfare Fund Act 1943* (Cth) established a trust account, known as the National Welfare Fund, as a component of the *Audit Act* Trust Fund.⁹⁷ The *National Welfare Fund Act 1943* (Cth) purported to appropriate the CRF for the purposes of the National Welfare Fund⁹⁸ and pay that amount out of the account.⁹⁹ Chief Justice Latham considered this to be a lawful appropriation together with the authority to make the payments,¹⁰⁰ although this was not the major contention of the parties,¹⁰¹ and was not addressed by the other Justices. Again, this decision did not address whether the crediting of an amount to the National Welfare Fund according to the appropriation was an amount *leaving* the CRF.

While the question of when amounts enter and leave the CRF does not appear to have troubled the Parliament, it is an issue that is central to fulfilling the objectives of the finance clauses of the *Constitution*, which demand that Parliament maintain some authority over expenditure. If an amount credited to a Trust Fund trust account was outside the CRF, there was arguably no formal requirement in the *Constitution* for that amount to be appropriated, leaving the Executive to expend that amount entirely at the discretion of the Minister with the authority to determine its purposes according to the arrangements set out in the *Audit Act*.¹⁰² If that amount remained within the CRF, however, a valid appropriation complying with the requirements of the *Constitution* was still required. This issue has now been addressed, but not by the High Court.

Under the accrual budgeting arrangements set out in the *FMA Act* (through amendments by the *Financial Management Legislation Amendment Act 1999* (Cth)) the Parliament subsumed the Loan Fund and Trust Fund into a single CRF. This avoids any uncertainty about whether crediting a separate fund involves an amount leaving the CRF and makes clear the processes by which amounts received by the Commonwealth are placed in various accounts. This approach is certainly consistent with the view expressed in the *Cemetery Reserve Case* that all revenues and moneys of the Commonwealth form the *Constitution's* CRF

95 Ibid 193 (Isaacs J); similar statements from Griffith CJ (at 190–191), O'Connor J (at 199) and Higgins J (at 205).

96 (1945) 71 CLR 237 ('*Pharmaceuticals Benefits Case*').

97 *National Welfare Fund Act 1943* (Cth) s 4.

98 *National Welfare Fund Act 1943* (Cth) s 5.

99 *National Welfare Fund Act 1943* (Cth) s 6.

100 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 249 (Latham CJ).

101 As a generalisation, the Attorney-General for Victoria was challenging the legislative power of the Commonwealth to make laws for pharmaceutical benefits and challenging the Commonwealth's contention that its power of appropriation in the *Constitution* s 81 allowed it to make appropriation laws; and incidental to this, in accordance with the s 51(xxxix), this included the power to make laws outside any other legislative powers accorded by the *Constitution*: see *ibid* 237–8.

102 See *Audit Act 1901* (Cth) ss 62A(1), (6).

when they are received by the Commonwealth, irrespective of their source.¹⁰³ By making Special Accounts ledgers of the CRF, rather than separate funds, any future doubt about the physical location of the amounts credited to the CRF has been resolved. Further, retaining the hypothecation of particular amounts satisfies the Australian Government's need to collect identified revenue and money and ensure its continued identification through the CRF. Theoretically, this 'self-executing' CRF more truly reflects the notion that a Consolidated Fund is a single source from which the Executive's present and future liabilities might be met subject to Parliamentary authority. However, resolving the doubts about the movement of money between the CRF and other funds raises the question of how amounts credited to Special Accounts must be appropriated. The following Part considers this issue.

IV APPROPRIATIONS

Section 83 of the *Constitution* provides that *any* money 'drawn' from the 'Treasury of the Commonwealth' requires an 'appropriation made by law'. Further, where that is revenue or money derived from the CRF,¹⁰⁴ the appropriation must be for 'the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*'.¹⁰⁵ In effect, this means that the Parliament must have passed the appropriation laws for such laws to be valid as an appropriation,¹⁰⁶ possibly with the exception of appropriations found in the *Constitution*.¹⁰⁷

Like any other amount credited to the CRF, an amount credited to a Special Account may only be expended with a valid appropriation.¹⁰⁸ Special Accounts are therefore established with a standing appropriation: '[t]he CRF is hereby appropriated for expenditure for the purposes of a Special Account ... up to the balance for the time being of the Special Account',¹⁰⁹ and 'the CRF is hereby

103 *Cemetery Reserve Case* (1993) 176 CLR 555, 580–1 (Brennan J), 591 (Dawson J), 599 (McHugh J). See also *Parliamentary Debates*, above n 23, 2283–4; Department of Finance and Administration, *Appropriations and the Consolidated Revenue Fund*, Finance Circular 2004/06 (2004).

104 Theoretically, there may be money that was part of the CRF, that was moved out of the CRF with a relevant appropriation while remaining part of the 'Treasury of the Commonwealth' (satisfying the requirements of the *Constitution* s 81) and that the government seeks to expend that will not be captured by this provision, although an appropriation law will still be required (to satisfy the requirements of the *Constitution* s 83).

105 *Constitution* s 81.

106 See, eg, *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 271 (Dixon J); *Victoria v Commonwealth* (1975) 134 CLR 338, 353 (Barwick CJ), 392 (Mason J). This may not, however, be so certain, as the commonly cited authority of Viscount Haldane in *Auckland Harbour Board v The King* stated 'no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself', the term 'authorisation' being arguably including something less than a 'law': [1924] AC 318, 326.

107 *Constitution* ss 3, 48, 66, 72(iii), 84, 85(iii), 85(iv), 87, 89, 93, 94, 105; but see *Victoria v Commonwealth* (1975) 134 CLR 338, 353 (Barwick CJ).

108 *Constitution* s 81. There are also other mandatory formalities, such as the need for a valid 'drawing right' according to sections 26 and 27 of the *FMA Act*, that satisfy the obligations of section 97 of the *Constitution*.

109 *FMA Act* s 20(4).

appropriated for expenditure for those purposes, up to the balance for the time being of the Special Account'.¹¹⁰ Within these few words, there are a number of important restrictions imposed by the *Constitution*.

The validity of an appropriation from the CRF is affected by both the *process* of appropriation and the *purpose* of appropriation. Each of these will now be considered in turn.

A Constraints on the Process of Appropriation

The limitations on the process of making appropriation laws that affect the validity of that appropriation reflect the 'main compromise' at the Constitutional Conventions to accommodate the differences of population and the differences of revenues.¹¹¹ This compromise established exclusive authority in the Executive Government to control Commonwealth finances through limits on 'money and revenue' appropriations,¹¹² though this authority is always subject to proper disclosure to the Parliament.¹¹³ The elements of the compromise included that Appropriation Bills were to originate in the House of Representatives,¹¹⁴ the Senate was forbidden from amending Bills appropriating 'the necessary supplies for the ordinary annual services of Government',¹¹⁵ such Bills were to be dealt with separately, and the Senate would be able to return such Bills with a message about 'omission or amendment'.¹¹⁶ Despite these arrangements, the ability of the Senate to amend some legislation in the nature of an appropriation remained unclear and has only been resolved through agreement between the Senate and the Executive Government.

With the *FMA Act* including a standing appropriation for Special Accounts and with the content of that appropriation in some circumstances being set out in a determination,¹¹⁷ there is the prospect that the purposes of those appropriations set out in the determination might contravene the agreement between the Senate and the Executive. A constitutional problem might also arise where the purposes of the Special Account were for something within the bounds of the 'ordinary annual services of the Government'; and, so, outside the bounds of the requirements of the *Constitution* that '[t]he proposed law which appropriates revenue or moneys for the ordinary annual services of the Government *shall deal only with such appropriations* (emphasis added)'.¹¹⁸ Put another way, an appropriation for the Special Accounts in the *FMA Act* will probably fall foul of the *Constitution* if the purposes of the Special Account are something within the bounds of the 'ordinary annual services of the Government', because the *FMA*

110 *FMA Act* s 21(1).

111 Quick and Garran, above n 1, 131.

112 See *ibid* 682–3.

113 *Constitution* s 56.

114 *Constitution* s 53; Quick and Garran, above n 1, 131.

115 *Constitution* s 53; see Quick and Garran, above n 1, 131–2.

116 *Constitution* s 53; see Quick and Garran, above n 1, 132.

117 *FMA Act* s 20(1)(c).

118 *Constitution* s 54. Notably section 53 of the *Constitution* appears to contemplate an appropriation law that is consistent with section 54 in the form of a Bill that might be amended (albeit only by a message from the Senate).

Act deals with more than just the Special Account appropriation. Presumably, the *FMA Act* provisions have been accepted by the House of Representatives and the Senate as satisfying the requirements of the *Constitution* as the *FMA Act* and its amendments have been passed without this matter being raised. Any concerns may also have been addressed, at least in part, by the specific requirements in the *FMA Act* for the disallowance of Special Account determinations.¹¹⁹ The effect of these requirements is that the written determination Special Account does not become effective until the day after the five sitting days after the tabling of the determination in both Houses of Parliament.¹²⁰ This contrasts with the general requirements for ‘disallowable instruments’¹²¹ that take effect as soon as they are notified,¹²² and may be disallowed within 15 sitting days of being tabled before both Houses of Parliament.¹²³ Significantly, the form of the *FMA Act* appropriation is not justiciable as they address matters of process about proposed laws.¹²⁴

The issue of standing may also restrict the justiciability of the purposes of appropriation legislation and standing to challenge such laws. Thus, in *Victoria v Commonwealth*,¹²⁵ Barwick CJ and Gibbs J considered laws making appropriations from the CRF empowered by section 81 of the *Constitution* were justiciable by persons, in the words of the Chief Justice, with ‘an appropriate interest in the statute or its operation’.¹²⁶ In this instance, Barwick CJ and Gibbs and Mason JJ considered the State’s interest in protecting the surplus revenue or determining the meaning of the *Constitution* to be sufficient to establish standing.¹²⁷ Justices McTiernan and Stephen decided that the matter was not justiciable.¹²⁸ Justice Stephen also considered that the State and State Attorney-General had no standing.¹²⁹ Justices Jacobs and Murphy avoided the issue entirely.¹³⁰ This same disagreement is also apparent in other decisions,¹³¹ with a

119 *FMA Act* s 22.

120 *FMA Act* ss 22(3), 22(4).

121 *Legislative Instruments Act 2003* (Cth) s 42.

122 Unless a specified date, specified time on a specified date or a specific Act sets out the commencement: *Legislative Instruments Act 2003* (Cth) s 42.

123 *Acts Interpretation Act 1901* (Cth) ss 48(4), 48(5).

124 See *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Cemetery Reserve Case* (1993) 176 CLR 555, 578 (Mason CJ, Deane, Toohey and Gaudron JJ); *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ).

125 (1975) 134 CLR 338 (*‘Australian Assistance Plan Case’*).

126 *Ibid* 364 (Barwick CJ), 378–380 (Gibbs J); see also *Combet v Commonwealth* [2005] HCA 61, [297], [300] (Kirby J).

127 *Australian Assistance Plan Case* (1975) 134 CLR 338, 365–66 (Barwick CJ), 383 (Gibbs J), 401–2 (Mason J). Notably, Barwick CJ then declined to determine the standing of the State Attorney-General, although commenting that the Attorney-General was ‘an unnecessary party’ given the *Constitution*’s recognition of the State as a litigant: at 366. Justice Gibbs was certain that the Attorney-General did have standing although considered the State a more appropriate plaintiff: at 383. Justice Mason did not address the standing of the Attorney-General, but did suggest an individual citizen or individual taxpayer did not have standing as they had no interest in moneys standing to the credit of the CRF: at 402.

128 See *ibid* 370 (McTiernan J), 387 (Stephen J).

129 See *ibid* 387 (Stephen J).

130 See *ibid* 415 (Jacobs J), 424–5 (Murphy J). Justice Jacobs dismissed the matter on the basis no cause of action was disclosed by the pleadings: at 415. Justice Murphy considered it unnecessary to determine the matter, although expressing a preference for the reasons of Stephen J: at 424.

significant distinction being made between the standing to challenge the validity of an appropriation law within the legislative competence of the Commonwealth and the legitimacy of a particular spending item.¹³² There seems little doubt that a taxpayer, as an individual, will lack standing however the challenge is characterised.¹³³

B Constraints on the Purpose of Appropriation

Limitations also apply to the *content* of an appropriation by way of the requirement that the CRF is *only* 'to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*'.¹³⁴ There is no doubt that an appropriation must disclose its purpose and that this purpose must also be a 'purpose of the Commonwealth'.¹³⁵ This latter requirement has been examined by the High Court to determine what valid Commonwealth purposes are,¹³⁶ and how broadly a Commonwealth purpose may be claimed.¹³⁷ Unfortunately, the High Court's decisions do not comprehensively settle the matter, although these decisions perhaps provide some guidance.

In the *Australian Assistance Plan Case*, the plaintiffs challenged a line item appropriation in the *Appropriation Act (No 1) 1974–1975* (Cth), which provided an amount of \$5.97 million for the Australian Assistance Plan according to the line items 'Grants to Regional Councils for Social Development' and

131 See, eg, *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 247–8 (Latham CJ), 266 (Starke J), 272 (Dixon J), 275–6 (McTiernan J), 277–8 (Williams J); *Combet v Commonwealth* [2005] HCA 61, [96]–[97] (McHugh J), [297]–[300] (Kirby J).

132 Thus, in the *Pharmaceutical Benefits Case*, Latham CJ considered that the validity of the appropriation law was justiciable, with the State alone having standing to challenge the particular appropriation of money: (1945) 71 CLR 237, 246–7. Justices Rich and Starke considered that the Attorney-General had standing to challenge the validity of the appropriation law and both appear to consider the appropriation of money was only challengeable by the State: at 264 and 266 respectively. Justices Dixon and Williams only considered the justiciability and standing to challenge the validity of the appropriation law and concluded the State Attorney-General had standing: at 272–3 and 278–9 respectively. Justice McTiernan reserved his opinion on standing: at 276. See also *Tasmania v Victoria* (1935) 52 CLR 157; *Attorney-General for Victoria v Commonwealth* (1935) 52 CLR 533.

133 See, eg, *Australian Assistance Plan Case* (1975) 134 CLR 338, 402 (Mason J). Similarly, in *Logan Downs Pty Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 177 the High Court opined that a taxpayer had no standing to challenge an appropriation of the CRF by the *Wool Industry Act 1962–1964* (Cth) ss 32, 32A: at 188, 190; see also Enid Campbell, 'The Federal Spending Power: Constitutional Limitations' (1968) 8 *University of Western Australia Law Review* 443, 451–8. However, individuals might challenge the validity of an appropriation in 'extraordinary circumstances', although it is not clear what those 'circumstances' might be: *Davis v Commonwealth* (1988) 166 CLR 79, 96 (Mason CJ, Deane and Gaudron JJ). An individual – as a union official representing union members – may have standing, as their interest may be more than 'ephemeral, purely intellectual or emotional': *Combet v Commonwealth* [2005] HCA 61, [311]–[314] (Kirby J).

134 *Constitution* s 81.

135 See, eg, *Australian Assistance Plan Case* (1975) 134 CLR 338, 392 (Mason J); *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 253 (Latham CJ); *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198, 224 (Isaacs and Rich JJ); *New South Wales v Commonwealth* (1908) 7 CLR 179, 200 (Isaacs J).

136 *Australian Assistance Plan Case* (1975) 134 CLR 338.

137 *Brown v West* (1990) 169 CLR 195.

‘Development and Evaluation Expenses’.¹³⁸ This expenditure for the Australian Assistance Plan was neither authorised by statute nor by the Governor-in-Council. Rather, the expenditure was authorised by the writings of the Committee of the Social Welfare Commission, which was assisting the Social Welfare Commission (itself established by the *Social Welfare Commission Act 1973* (Cth)).¹³⁹ In effect, the Executive sought to establish – entirely outside the consideration of Parliament – a social welfare program, and only sought an appropriation to finance the program through line items in the appropriation for the annual services of government.¹⁴⁰ One of the issues before the High Court was the meaning of the term ‘for the purposes of the Commonwealth’ in section 81 of the *Constitution*, and whether the appropriation for the Australian Assistance Plan was, accordingly, within the Commonwealth’s purposes.¹⁴¹ There was no clear reasoning among the Court’s judgments. Chief Justice Barwick and Gibbs J found the appropriation invalid,¹⁴² while McTiernan, Mason, Jacobs and Murphy JJ found the appropriation valid.¹⁴³ Justice Stephen considered the matter on another issue and rejected the plaintiffs’ standing.¹⁴⁴

As a generalisation, and in an attempt to crystallise a useful outcome from the *Australian Assistance Plan Case*, the judgments do set out some clear arguments. There are, arguably, extreme boundaries as to what might be considered the Commonwealth’s purposes, being only those within the Commonwealth’s powers according to the *Constitution*,¹⁴⁵ or any purposes determined by the Parliament.¹⁴⁶ For example, Barwick CJ considered ‘the expression in s 51(xxxi) of the *Constitution* “for any purpose in respect of which the Parliament has power to make laws” is a reasonable synonym for the expression “the purposes of the Commonwealth” in s 81’.¹⁴⁷ On this basis he was able to conclude that

138 *Appropriation Act (No 1) 1974–1975* (Cth) div 530.

139 *Social Welfare Commission Act 1973* (Cth) ss 14, 15, 17. See *Australian Assistance Plan Case* (1975) 134 CLR 338, 345 (Barwick CJ).

140 Details of the program are set out in the *Australian Assistance Plan Case* (1975) 134 CLR 338, 345–53 (Barwick CJ).

141 *Ibid* 352–64 (Barwick CJ), 366–70 (McTiernan J), 370–9 (Gibbs J).

142 *Ibid* 364 (Barwick CJ), 378–9 (Gibbs J).

143 *Ibid* 367 (McTiernan J), 396 (Mason J), 415 (Jacobs J), 417 (Murphy J). Notably, Mason J distinguished between the appropriation and the Executive’s powers to expend, finding the appropriation valid but not the authority to expend (at 396–401) and Jacobs J that such appropriations were not justiciable (at 411). See also Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 259–260; Michael Crommelin and Gareth Evans, ‘Explorations and Adventures with Commonwealth Powers’ in Gareth Evans (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years* (1977) 41–8.

144 *Australian Assistance Plan Case* (1975) 134 CLR 338, 387 (Stephen J).

145 *Ibid* 363 (Barwick CJ), 375 (Gibbs J). See also *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J), 267 (Dixon J; with whom Rich J agreed, 264), 282 (Williams J); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ); *Davis v Commonwealth* (1988) 166 CLR 79, 95–6 (Mason CJ, Deane and Gaudron JJ).

146 *Australian Assistance Plan Case* (1975) 134 CLR 338, 368–9 (McTiernan J), 396 (Mason J), 410–11 (Jacobs J), 417 (Murphy J). See also *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 273–4 (McTiernan J); note *Davis v Commonwealth* (1988) 166 CLR 79, 95–6 (Mason CJ, Deane and Gaudron JJ); Australian Constitutional Commission, *Final Report of the Constitutional Commission*, vol 2 (1988) [11.296]–[11.315].

147 *Australian Assistance Plan Case* (1975) 134 CLR 338, 363 (Barwick CJ).

because the Australian Assistance Plan was not a purpose of the Commonwealth and was not something the Commonwealth could lawfully implement, then there was no power to appropriate.¹⁴⁸ Expressing a view at the other extreme, Justice McTiernan restated the earlier contention of Chief Justice Latham and Justice McTiernan in the *Pharmaceutical Benefits Case* that the 'purposes of the Commonwealth' were for Parliament to determine, so that *any* purpose was a valid Commonwealth purpose.¹⁴⁹ However, even on a narrow interpretation of Commonwealth purposes there appear to be shades of what might be considered powers of the Commonwealth under the *Constitution*, including the kinds of purposes the Commonwealth acquires through 'growth of national identity'.¹⁵⁰

In dealing specifically with appropriations to *Audit Act* Trust Fund trust accounts, Chief Justice Latham in the *Pharmaceutical Benefits Case* concluded that the *National Welfare Fund Act 1943* (Cth), which established the National Welfare Fund (discussed above), was valid,¹⁵¹ but rejected the provision in the *Pharmaceutical Benefits Act 1944* (Cth) providing that '[p]ayments in respect of pharmaceutical benefits shall be made out of the Trust Account established under the *National Welfare Fund Act 1943* (Cth) and known as the National Welfare Fund'.¹⁵² The decision turned on whether the pharmaceutical benefits scheme, created under the *Pharmaceutical Benefits Act 1944* (Cth), was lawful as incidental to the appropriations power provided by the *Constitution*.¹⁵³ The majority characterised the *Pharmaceutical Benefits Act 1944* (Cth) as an Act for the control of doctors, chemists, the sale of drugs and related purposes; not an Act for the purposes of appropriation and matters incidental to that appropriation. They therefore found the Act invalid, as there was no power in the *Constitution* to make such an Act.¹⁵⁴ Significantly, if the *Pharmaceutical Benefits Act 1944* (Cth) had been an appropriation law within the legislative power of the Commonwealth, then the only valid incidental provisions may have been those used to limit the uses of that money.¹⁵⁵

Presumably, if the *Pharmaceutical Benefits Act 1944* (Cth) had been valid, then the authorisation to make payments out of the National Welfare Fund for the

148 Ibid 363–4 (Barwick CJ).

149 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254–6 (Latham CJ), 273–4 (McTiernan J); *Australian Assistance Plan Case* (1975) 134 CLR 338, 367–9 (McTiernan J). Although Justice McTiernan's citing of Latham CJ should be viewed with caution as, in the *Pharmaceutical Benefits Case*, Latham CJ was careful to distinguish between the legislative power of the Commonwealth to make appropriation laws and its powers to make other laws about subject matter outside the *Constitution's* powers relying on that subject matter being incidental to the appropriation power: (1945) 71 CLR 237, 263.

150 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J); *Australian Assistance Plan Case* (1975) 134 CLR 338, 367–9 (Jacobs J). Notably, Mason J in *Australian Assistance Plan Case* suggests that a narrow interpretation has potentially significant consequences: (1975) 134 CLR 338, 394.

151 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 249 (Latham CJ). The other justices did not address this issue.

152 *Pharmaceutical Benefits Act 1944* (Cth) s 17.

153 See *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 250 (Latham CJ).

154 Ibid 250 (Latham CJ), 266 (Starke J), 267 (Dixon J), 264 (Rich J), 282 (Williams J). In the minority, McTiernan J considered the *Pharmaceutical Benefits Act 1944* (Cth) was valid within the legislative powers conferred by the *Constitution* ss 81 and 51(xxxix), except for the provision purporting to give the person supplying the pharmaceutical the right to make charges: at 275.

155 See ibid 258 (Latham CJ).

purposes of the *Pharmaceutical Benefits Act 1944* (Cth) would have duplicated the authority in the *National Welfare Fund Act 1943* (Cth)¹⁵⁶ and the *Audit Act*.¹⁵⁷ Thus, it seems possible that there may be more than one appropriation and expending authority for the same money in the ‘Treasury of the Commonwealth’,¹⁵⁸ although the High Court has not settled which appropriation should take precedence. The joint judgment¹⁵⁹ and Justice Dawson¹⁶⁰ in the *Cemetery Reserve Case* (discussed above in Part III) considered the appropriation of the amounts credited to the Trust Fund was either under the *Training Guarantee (Administration) Act 1990* (Cth)¹⁶¹ or the *Audit Act*.¹⁶² In contrast to the other justices, Justice Brennan considered amounts were appropriated by the combined operation of the *Training Guarantee (Administration) Act 1990* (Cth) provisions setting out an appropriation and the purposes for which payments might be made, suggesting the *Audit Act* provisions had ‘little or no work to do’.¹⁶³ Despite this uncertainty, these cases confirm the validity of the arrangements for the *Audit Act* Trust Fund trust accounts: that a standing appropriation for moneys credited to the trust account for the expenditure purposes of the account is most probably a valid appropriation law under the *Constitution*, provided that it is also for a Commonwealth purpose.¹⁶⁴ Thus, under the *Constitution*’s appropriation power, the practice of making multiple appropriations for the same amounts appears to be acceptable and has been carried through to the standing appropriations for Special Accounts.

In considering how broadly a Commonwealth purpose may be claimed, the High Court has expressed its view more certainly. In *Brown v West*,¹⁶⁵ a member of the House of Representatives challenged the Minister of State for Administrative Services and other members of the Government over the Minister’s decision to increase the postage entitlement of Senators and Members of the House of Representatives under the *Parliamentary Allowances Act 1952* (Cth). Following a request from the Government, the Remuneration Tribunal under the *Remuneration Tribunal Act 1973* (Cth) determined a postage entitlement of \$9 000 for each Senator and member.¹⁶⁶ Under this scheme, the

156 See *National Welfare Fund Act 1943* (Cth) s 6.

157 See *Audit Act 1901* (Cth) s 62A(6).

158 See *Cemetery Reserve Case* (1993) 176 CLR 555, where there was an appropriation in the *Training Guarantee (Administration) Act 1990* (Cth) and also in *Audit Act 1901* (Cth); presumably the later appropriation in an Act will limit the earlier appropriation in the *Audit Act 1901* (Cth): see Campbell, above n 133, 148.

159 *Cemetery Reserve Case* (1993) 176 CLR 555, 577–8 (Mason CJ, Deane, Toohey and Gaudron JJ).

160 Ibid 593 (Dawson J).

161 *Training Guarantee (Administration) Act 1990* (Cth) s 34(1).

162 *Audit Act 1901* (Cth) s 62A(6): ‘[m]oneys standing to the Credit of a Trust Account may be expended for the purposes of the account’; *Cemetery Reserve Case* (1993) 176 CLR 555, 577–8 (Mason CJ, Deane, Toohey and Gaudron JJ).

163 *Cemetery Reserve Case* (1993) 176 CLR 555, 583–5 (Brennan J).

164 Other similar arrangements have been considered by the High Court and not been found wanting: see, eg, *Luton v Lessells* (2002) 210 CLR 333, 349–50 (Gaudron and Hayne JJ); *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198, 220–1 (Isaacs and Rich JJ).

165 (1990) 169 CLR 195. Notably this case was not challenged when the purpose of an appropriation was challenged in *Combet v Commonwealth* [2005] HCA 61, [231]–[236] (Kirby J).

166 *Brown v West* (1990) 169 CLR 195, 199 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

Remuneration Tribunal made determinations according to its statutory powers and this determination then formed the basis for a payment out of the CRF, together with an appropriation set out in the *Remuneration Tribunal Act 1973* (Cth). The *Remuneration Tribunal Act 1973* (Cth) scheme made no provision for Ministerial discretion in setting the level of the entitlement.¹⁶⁷ The Minister later decided to increase the entitlement under this determination for members to \$30 525 together with an index to movements in the standard mailing rate, and subjected these increased entitlements to the terms of the existing Remuneration Tribunal determination.¹⁶⁸ To justify the additional expenditure, the Minister relied on the *Supply Act (No 1) 1989–1990* (Cth).¹⁶⁹ This provided for various amounts under the heading 'Parliamentary and Ministerial Staff and Services' and an amount of up to \$170 million under the heading 'Advance to the Minister for Finance'; the latter was to enable the Minister for Finance to make various advances and other payments for which no other appropriation existed. The High Court concluded that the broad terms used in the *Supply Act (No 1) 1989–1990* (Cth) could not supplement the existing scheme under the *Parliamentary Allowances Act 1952* (Cth), and *Remuneration Tribunal Act 1973* (Cth) under which the postage allowance was fixed, as there was no expression or intention to override the scheme.¹⁷⁰ Presumably, an expression or intention to override the *Remuneration Tribunal Act 1973* (Cth) scheme would have displaced that scheme in favour of the *Supply Act (No 1) 1989–1990* (Cth) and placed reliance on the *Remuneration Tribunal Act 1973* (Cth) to incur the expense. However, and significantly, the High Court accepted that so long as some Commonwealth purpose was disclosed by the construction of the appropriation 'for which the moneys appropriated might be expended', then it would be valid.¹⁷¹ How broadly an appropriation might be described was not addressed, although the High Court did not make any adverse comments about appropriations such as 'Running Costs',¹⁷² suggesting the threshold for breadth is probably wide.¹⁷³

167 The Commonwealth contended that the Minister's exercise was supported by an exercise of prerogative power, but this was rejected as any such power 'is curtailed by the operation of the relevant statutes in conjunction with the determination of the Tribunal': *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

168 Ibid 199–200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); notably the Minister also increased the Senators entitlement according to an index to movements in the standard mailing rate.

169 *Supply Act (No 1) 1989–1990* was, according to practice, an Act appropriating the CRF for use in the financial year pending the passing of Appropriation Acts, whereupon they ceased to have effect: see *New South Wales v Bardolph* (1934) 52 CLR 455, 479 (Evatt J); *Brown v West* (1990) 169 CLR 195, 206–7 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

170 *Brown v West* (1990) 169 CLR 195, 212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

171 *Brown v West* (1990) 169 CLR 195, 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Combet v Commonwealth* [2005] HCA 61, [231] (Kirby J).

172 *Brown v West* (1990) 169 CLR 195, 212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

173 This decision appears to have been accepted by the High Court in *Cemetery Reserve Case* (1993) 176 CLR 555, 578–9 (Mason CJ, Deane, Toohey and Gaudron JJ), 594–6 (Dawson J); although McHugh J considered that an appropriation should also be required to 'nominate an amount of money to be appropriated or specify a formula or criterion by which the amount appropriated can be determined': at 600.

The recent decision in *Combet v Commonwealth*¹⁷⁴ illustrates how the High Court might interpret these purposes in the context of annual appropriations and serves as a reminder that how widely the purposes might be disclosed remains contentious. In this case, a union official and a Member of the House of Representatives (the Shadow Attorney-General) challenged the expenditure of public money on advertising to provide information about and promote a proposed workplace relations reform package.¹⁷⁵ The parties formulated a series of ‘questions of law in the form of a Special Case for the opinion of the Full Court’¹⁷⁶ with the plaintiffs seeking relief, in part, in the form of a declaration that drawing or paying of money for the advertising was not authorised by the appropriation.¹⁷⁷ These ‘questions of law’ were reduced by the justices to a question about the proper construction of the *Appropriation Act (No 1) 2005–2006* (Cth) and whether the particular payment for this advertising was authorised by the appropriation law.¹⁷⁸ The joint reasons of the majority adopt a construction of the *Appropriation Act (No 1) 2005–2006* (Cth)¹⁷⁹ that avoided having to make any decision about the purposes of the appropriation by finding that the plaintiffs had not addressed that particular issue:

Contrary to the plaintiffs’ case, the question for decision is not whether the advertising expenditure answers one or more of the stipulated outcomes but whether it is applied for departmental expenditure ... Satisfaction of that criterion is not challenged by the plaintiffs.¹⁸⁰

However, in presenting their reasons each judgment provided some commentary about the necessary scope of the Commonwealth’s purposes, and significantly none challenged the earlier approach or decision in *Brown v West*.¹⁸¹ The reasons do show that among the members of the High Court, there remains

174 [2005] HCA 61.

175 Ibid [104]–[107] (Gummow, Hayne, Callinan and Heydon JJ), [37]–[43] (McHugh J), [174]–[189] (Kirby J).

176 These were: ‘(1) Do the Plaintiffs, or either of them, have standing to seek the relief sought in the Statement of Claim in the Further Amended Writ of Summons? (2) If yes to (1), is the withdrawal of money from the Treasury of the Commonwealth to pay for the Government’s Advertisements authorised by the Departmental Appropriation? (3) If no to (2), have the Plaintiffs established a basis for any, and if so which, of the relief sought in the Amended Statement of Claim? (4) If yes to (3), should any such relief be refused on discretionary grounds? (5) Who should pay the costs of the proceedings?’: ibid [110] (Gummow, Hayne, Callinan and Heydon JJ).

177 Ibid [108]–[109] (Gummow, Hayne, Callinan and Heydon JJ). The other relief sought was a declaration that the ‘drawing rights’ issued under section 27 of the *FMA Act* were invalid or of no effect and an injunction restraining the issuing of further ‘drawing rights’.

178 Ibid [1] (Gleeson CJ), [43] (McHugh J), [102] (Gummow, Hayne, Callinan and Heydon JJ), [168] (Kirby J).

179 Ibid [107], [136] (Gummow, Hayne, Callinan and Heydon JJ), with whom Gleeson CJ agreed, albeit for different reasons: at [3]. This construction was comprehensively criticised in the dissenting judgements: at [80]–[91] (McHugh J), [277]–[294] (Kirby J).

180 Ibid [136] (Gummow, Hayne, Callinan and Heydon JJ). Although, Kirby J notes that ‘[a]lthough the interpretation now favoured by the joint reasons was briefly raised by members of the majority during argument, neither party was invited to provide supplementary submissions’ (at [281]).

181 Notably, Kirby J, ibid [236], stressed the requirement of a ‘distinct authorization from Parliament itself’ reflecting the remarks of Mason J in the *Australian Assistance Plan Case* (1975) 134 CLR 338, 392 and cited with approval in *Brown v West* (1990) 169 CLR 195, 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

some disagreement over exactly how broadly this purpose might be disclosed. Chief Justice Gleeson stated that '[i]t is for the parliament, in making appropriations, to determine what purposes are purposes of the Commonwealth'.¹⁸² He then cites with approval the statements of Jacobs J in the *Australian Assistance Plan Case* that '[p]rovided that purposes are stated it is a matter for the Parliament how minute and particular shall be the expression of purposes in any particular case',¹⁸³ and Murphy J in the same case that '[t]he purpose of any appropriation may be indicated generally. "One-line" appropriations are valid'.¹⁸⁴ In addressing the specific contentions of the plaintiffs following his construction of the *Appropriation Act (No 1) 2005–2006* (Cth) as requiring a determination of whether the advertising expenditure was a 'departmental expenditure' within the broadly stated outcomes of '[e]fficient and effective labour market assistance' (outcome 1), '[h]igher productivity, higher pay workplaces' (outcome 2) and '[i]ncreased workforce participation' (outcome 3),¹⁸⁵ Gleeson CJ considered this was essentially a matter for the Parliament to determine:

The plaintiffs, in their submissions to the Court, acknowledged that the outcomes listed in Sch 1 'are statements of purpose at a very high level of abstraction'. So much is clear. Provided such statements are not so general, or abstract, as to be without meaning, they represent parliament's lawful choice as to the manner in which it identifies the purpose of an appropriation. To the extent to which it is necessary to have regard to those statements of purpose in order to decide whether expenditure bears the character of departmental expenditure referred to in s 7 [*Appropriation Act (No 1) 2005–2006* (Cth)], then the generality, and the political character, of a statement may make it difficult to establish that particular expenditure is not related to the relevant purpose. ... It does not follow that the purpose should be confined, or stripped of its political content. ... If parliament formulates the purposes of appropriation in broad, general terms, then those terms must be applied with the breadth and generality they bear.¹⁸⁶

The joint reasons appear to share this sentiment: '[i]t is for the parliament to identify the degree of specificity with which the purpose of an appropriation is identified'¹⁸⁷ and 'the manner of exercising that guardianship [over the finance of the Commonwealth], within the relevant constitutional limits, is to be determined by the parliament'.¹⁸⁸ The joint reasons also considered that parliamentary practice had developed to specify an amount that might be expended 'rather than further define the purposes or activities for which it may be spent'.¹⁸⁹ This suggests, as McHugh J asserts, that an appropriation may not require any

¹⁸² *Combet v Commonwealth* [2005] HCA 61, [5] (Gleeson CJ).

¹⁸³ *Ibid*; *Australian Assistance Plan Case* (1975) 134 CLR 338, 404 (Jacobs J).

¹⁸⁴ *Combet v Commonwealth*, [2005] HCA 61, [5]; *Australian Assistance Plan Case* (1975) 134 CLR 338, 422 (Murphy J).

¹⁸⁵ See *Combet v Commonwealth* [2005] HCA 61, [42] (Gleeson CJ).

¹⁸⁶ *Ibid* [27] (Gleeson CJ).

¹⁸⁷ *Ibid* [160] (Gummow, Hayne, Callinan and Heydon JJ).

¹⁸⁸ *Ibid* [160] (Gummow, Hayne, Callinan and Heydon JJ).

¹⁸⁹ *Ibid* [161] (Gummow, Hayne, Callinan and Heydon JJ);. Note, of course, that the decision of these justices did not require them to actually assess whether the purposes of the 'Departmental expenditure' was a purpose of the Commonwealth: at [136].

purpose,¹⁹⁰ or as Kirby J suggests, that the purpose might be ‘virtually unconstrained’ focussing on the entity performing the expenditure rather than the subject matter of the expenditure.¹⁹¹

The dissenting reasons provide further guidance, articulating in more detail the thresholds of what is, in Chief Justice Gleeson’s words, ‘not so general, or abstract, as to be without meaning’.¹⁹² Justice McHugh suggested that ‘the better way of stating the issues is to say that the expenditure is authorised if there is a rational connection between the spending and the outcome’.¹⁹³ Applied to the facts in this case, and on a construction of the *Appropriation Act (No 1) 2005–2006* (Cth) requiring the advertising expenditure to be within the purpose of ‘[h]igher productivity, higher pay workplaces’ (Outcome 2), McHugh J considered there was ‘simply nothing in the advertisements that could result in an increase in productivity or wages ... there is no rational connection between the advertisements and Outcome 2’.¹⁹⁴

Justice Kirby suggested that there was a need for a ‘distinct authorization from Parliament itself’,¹⁹⁵ and in this matter there was no such authorisation for the advertising as ‘propounded’ by the defendants.¹⁹⁶

However much the requirement of specificity and distinctiveness of appropriations is blunted by executive government practice, and even parliamentary acquiescence, it cannot be denuded of meaning in Australia, given the constitutional provision that requires that appropriations must be for designated purposes. Parliamentary appropriations cannot be given in blank or with no reference to a purpose. The purpose must either be declared in the *Constitution* itself or lawfully determined by the parliament. In the exigencies of modern government, it may be accepted that such purpose can be declared at a level of generality. However, that generality cannot be so vague and meaningless as to negate the significant constitutional consequences that attach to the designation of the appropriation and its purpose.¹⁹⁷

The other requirement regarding the content of an appropriation by the *Constitution* is that the appropriation for the Commonwealth purpose must be ‘in the manner and subject to the charges and liabilities imposed by the *Constitution*’.¹⁹⁸ Except for the term ‘liabilities’, these terms are ‘stock provisions, to be found in all the colonial Constitutions’.¹⁹⁹ The term ‘liabilities’ was intended to reflect the limitations placed on the *Constitution* by the surplus revenue requirements, and the term ‘charges’ to reflect the other impositions on

190 Ibid [89] (McHugh J).

191 Ibid [283], [290] (Kirby J).

192 Ibid [27] (Gleeson CJ).

193 Ibid [92] (McHugh J).

194 Ibid [92]–[93], [95] (McHugh J).

195 Ibid [236] (Kirby J).

196 Ibid [257] (Kirby J).

197 Ibid [258] (Kirby J). Notably, Kirby J also identified the ‘facilitation of public scrutiny of economic policy and performance’ through the *Charter of Budget Honesty Act 1998* (Cth) and that ‘[i]t should therefore be presumed that enactments, including those for appropriations, are intended to fulfil this commitment to honesty, transparency and accountability and to contribute to their observance in the budget processes of the parliament’: at [259].

198 *Constitution* s 81.

199 Quick and Garran, above n 1, 812; these ‘liabilities’ are the *Constitution* ss 89, 93, 94.

the Commonwealth's finances set out in the *Constitution*.²⁰⁰ However, whether these words have any other effect is unclear. Chief Justice Latham commented that '[p]rima facie no words in any statute should be regarded as meaningless, but I admit that I find it difficult to give any effect to the words "in the manner and subject to the charges and liabilities imposed by the *Constitution*"'.²⁰¹

In the context of Special Accounts, both Special Accounts established by the 'Finance Minister'²⁰² and by 'other Acts',²⁰³ set out a standing appropriation.²⁰⁴ The purpose for which that expenditure is authorised is also set out in the Finance Minister's determination or the legislation establishing the Special Account.²⁰⁵ Based on the High Court's views in *Brown v West* and *Combet v Commonwealth* these purposes need only be very generally disclosed to be valid, and this appears to have been the accepted practice.²⁰⁶ Further, the standing appropriation may be duplicated in other Acts.²⁰⁷ This is likely to be a problem only where the purposes of the Special Account are framed more broadly than the authority to expend, whereupon the broadly framed Special Account might undermine the more confined statutory limitation.²⁰⁸ However, there remains the question of whether an amount appropriated to a Special Account as a ledger of the CRF avoids the calculation of the surplus revenue due to the States under the *Constitution*.²⁰⁹ The following Part considers this issue.

V SURPLUS REVENUE

The *Constitution* was framed with the intention that the new Commonwealth would take over some of the States' sources of revenue,²¹⁰ and, in a transition period, develop a mechanism to return any surplus revenue to the States²¹¹ and limit its own expenditure from its receipts from customs and excise.²¹² The

200 Quick and Garrahan, above n 1, 812; these 'charges' are the *Constitution* ss 82, 96.

201 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 253 (Latham CJ).

202 *FMA Act* s 20.

203 *FMA Act* s 21.

204 *FMA Act* ss 20(4), 21(1).

205 *FMA Act* ss 20(1), 21(1).

206 See, eg, Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee, 28 May 2003, 401–8.

207 See *Cemetery Reserve Case* (1993) 176 CLR 555, where there was an appropriation in the *Training Guarantee (Administration) Act 1990* (Cth) and also in the *Audit Act 1901* (Cth). Presumably, the later appropriation in an Act will limit the earlier appropriation in the *Audit Act 1901* (Cth): see Campbell, above n 133, 148.

208 This issue has been canvassed by Parliament: see Commonwealth, *Committee Hansard*, above n 25, 406–8.

209 *Constitution* s 94. Another issue that has not been addressed here is the double (or more) counting of appropriations in the calculation of the surplus revenue where theoretically the same amount has been appropriated twice (or more often).

210 In broad terms, the Commonwealth was to have exclusive power over customs and excise (*Constitution* s 90), more limited power over taxation (s 51(ii)) and a power to borrow money 'on the public credit of the Commonwealth' (s 51(iv)).

211 Although *Constitution* s 95 made special provision for Western Australia.

212 *Constitution* s 87. Note that the financial clauses 'proved the hardest of all to solve, and nearly caused a break-up of the [Premier's] Conference [of 1899]': Quick and Garrahan, above n 1, 219.

transitional arrangements finally agreed to provided for the Commonwealth, on its establishment, to take over the collection and control of State customs duties and excise,²¹³ and then for the Commonwealth to impose uniform customs duties within two years of its establishment.²¹⁴ In the period before the imposition of uniform customs duties, the Commonwealth was required to pay the balance of the States' customs duties, less any expenditure, on a monthly basis.²¹⁵ During the five years after uniform customs duties were imposed, and 'until the Parliament otherwise provides', the Commonwealth was to account to the States,²¹⁶ and thereafter make payments to the States 'on such basis as it [the Parliament] deems fair' of 'all surplus revenue of the Commonwealth'.²¹⁷ Notably, the *Constitution* did not set out how the repayments of the surplus were to be determined or how they were to be paid.²¹⁸

The Commonwealth imposed uniform customs duties at 4.00 pm on 8 October 1901.²¹⁹ After the five-year transition period the Parliament enacted the *Surplus Revenue Act 1908* (Cth) which, in part, ceased the operation of accounting for customs duties to the States in the transition period,²²⁰ and introduced a scheme to 'ascertain the balance of revenue over expenditure' each month and 'pay that balance to the States as surplus revenue'.²²¹ The sting was that the legislation also provided for 'all payments to Trust Accounts, established under the *Audit Act 1901–1906*, of money appropriated by law for any purpose of the Commonwealth shall be deemed to be expenditure',²²² and further, these appropriations did not lapse.²²³ This meant that the amounts appropriated were no longer part of the surplus revenue of the Commonwealth and dealt with as if they were already expended for the purpose of calculating the surplus revenue to be paid to the States.

The validity of the *Surplus Revenue Act 1908* (Cth) arrangements were challenged when amounts appropriated to Trust Fund trust accounts created under the *Audit Act* were not disbursed during the financial year and those amounts were not included in the surplus revenue calculations and payments.²²⁴ In the *Surplus Revenue Case*,²²⁵ the plaintiff State contended that these unexpended appropriated amounts ought to be distributed among the States and that attempts to set aside future disbursements was outside the Parliament's

213 *Constitution* s 86.

214 *Constitution* s 88.

215 *Constitution* s 89.

216 *Constitution* s 93.

217 *Constitution* s 94.

218 This reflects the difficulty of achieving an agreement during the *Constitution*'s drafting: see Quick and Garran, above n 1, 218–19.

219 *Customs Tariff Act 1902* (Cth) s 4; except Western Australia which levied customs duty on a reducing scale over a period of five years 'on goods passing into that State and not originally imported from beyond the limits of the Commonwealth': *Constitution* s 95.

220 *Surplus Revenue Act 1908* (Cth) s 3.

221 *Surplus Revenue Act 1908* (Cth) s 4(3).

222 *Surplus Revenue Act 1908* (Cth) s 4(4)(d).

223 *Surplus Revenue Act 1908* (Cth) s 5.

224 The details of the arrangements are set out in *Surplus Revenue Case* (1908) 7 CLR 179, 180–1.

225 *Ibid* 180–1.

powers under the *Constitution*. The High Court concluded that lawful appropriations had the effect of segregating the revenue and money of the Commonwealth so that it did not enter into the calculation of the surplus revenue due to the States under to the *Constitution*.²²⁶ The validity of the *Surplus Revenue Act 1908* (Cth) was not challenged as the parties *only* sought the High Court's decision about whether a sum of £162 000 – being New South Wales' share of the alleged surplus revenue – was lawfully deducted from the balance payable to the States.²²⁷ However, the significance of the decision in the present context was in the detail of the appropriations and payments.

The *Surplus Revenue Case* dealt with two different *Audit Act* Trust Fund trust accounts. The first of these was created under the *Old-Age Pension Appropriation Act 1908* (Cth), which appropriated £750 000 to the Invalid and Old-Age Pensions Fund for 'Invalid and Old-Age Pensions';²²⁸ the second was created under the *Coastal Defence Appropriation Act 1908* (Cth), which appropriated £250 000 to the Harbour and Coastal Defence (Naval) Account for 'Harbour and Coastal Defence (Naval) purposes'.²²⁹ The Treasurer paid the full amount of the appropriation to the credit of the Harbour and Coastal Defence (Naval) Account, but paid only £182 000 of the amount appropriated to the credit of the Invalid and Old-Age Pensions Fund.²³⁰ The amounts credited to the trust accounts were debited against the surplus revenues due to the States. Significantly, at the time the case was brought to the Court no payments had been made out of the Harbour and Coastal Defence (Naval) Account and the provisions establishing an entitlement to invalid pensions under the *Old-Age Pension Appropriation Act 1908* (Cth) had not yet commenced.²³¹ The question in issue was whether the £432 000 (£250 000 plus £182 000) appropriated, but not paid out of the Invalid and Old-Age Pensions Fund, was a Commonwealth 'expenditure'²³² and therefore outside the calculation of the surplus revenue. The High Court concluded that it was; and so too were the other amounts appropriated but not yet paid to the credit of the trust accounts. Chief Justice Griffiths²³³ and Barton,²³⁴ O'Connor,²³⁵ Isaacs²³⁶ and Higgins²³⁷ JJ all expressed a similar view. In the words of Griffiths CJ:

226 Ibid 191 (Griffith CJ), 197 (Barton J), 199 (O'Connor J), 203 (Isaacs J) 206 (Higgins J). This decision has been reaffirmed in subsequent decisions: see, eg, *Cemetery Reserve Case* (1993) 176 CLR 555. Note that it is only a State that can bring such an action as it is the party seeking a sum allegedly due to it: see *Pharmaceutical Benefits case* (1945) 71 CLR 237, 247 (Latham CJ).

227 See *Surplus Revenue Case* (1908) 7 CLR 179, 181.

228 *Old-Age Pension Appropriation Act 1908* (Cth) s 2.

229 *Coastal Defence Appropriation Act 1908* (Cth) s 2.

230 See *Surplus Revenue Case* (1908) 7 CLR 179, 180.

231 See *ibid* 181.

232 The plaintiff contended that the calculation of the Commonwealth's surplus revenue required the deduction of the revenue and money actually collected from those expended or disbursed. Thus, the meaning of 'expenditure' in section 89 of the *Constitution* governs the meaning of 'surplus' in section 94: see *ibid* 188 (Griffith CJ).

233 Ibid 190–1 (Griffith CJ).

234 Ibid 193–4 (Barton J).

235 Ibid 199 (O'Connor J).

236 Ibid 199–202 (Isaacs J).

The Appropriation Act does ... operate as a provisional setting apart or diversion from the [CRF] of the sum appropriated by the Act. So far, therefore, as regards the ascertainment of a surplus for any given period, all moneys the expenditure of which during the period is authorized must be taken into account in making up the provisional balances. It is entirely in the discretion of the Parliament when authorising the expenditure of the public revenue to fix the period during which it may be disbursed. It follows that, if a sum of money is lawfully appropriated out of [the CRF] for a specific purpose, that sum cannot be regarded as forming part of a surplus until the expenditure of it is no longer lawful or no longer thought necessary by Government.²³⁷

The effect of the *Surplus Revenue Case* has been that Trust Fund appropriations can be used as a mechanism for the Commonwealth to effectively circumvent the operation of the *Constitution*'s requirement to distribute the surplus revenue.²³⁹ This can be achieved simply by ensuring that appropriations always set apart or divert more of the CRF than there are moneys in the 'Treasury of the Commonwealth'.²⁴⁰ Thus, the present-day Department of Finance and Administration considers, based on a Solicitor General's opinion, that:

the existence of current accrual appropriations in excess of the balance of the [CRF] will prevent the latter from being characterised as 'surplus revenue' for the purposes of section 94 of the *Constitution*.²⁴¹

There seems little doubt that the standing appropriation in the Special Account will be sufficient to characterise the balance of the amount credited to the Special Account as outside the calculation of surplus revenue for the purposes of the *Constitution*.²⁴² In other words, an amount credited to a Special Account will be treated as expended for the purposes of calculating the surplus revenue due to the States.

VI CONCLUSION

This article set out to consider those provisions in the *Constitution* that must be satisfied in order to sustain Special Accounts as exceptional creations under the Australian Government's accrual budgeting arrangements. The analysis

237 Ibid 205–6 (Higgins J).

238 Ibid 190–1 (Griffith CJ).

239 Although the *Constitution* s 94 is still effective and the legal consequences are still relevant: see *Australian Assistance Plan Case* (1975) 134 CLR 338, 357 (Barwick CJ).

240 *Cemetery Reserve Case* (1993) 176 CLR 555, 581 Justice Brennan considered the 'Treasury of the Commonwealth' was 'the repository of the CRF: it is a term which embraces every bank, office, institution or place in which any part of the CRF is or may be kept'; the majority expressed a similar view (573; Mason CJ, Deane, Toohey and Gaudron JJ). Notably, Dawson J contemplated that moneys forming part of the Loan Fund might not be part of the CRF, but did not decide the matter (592); McHugh J appears to consider the moneys constituting the CRF were money in the Commonwealth Public Account (599).

241 Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, Report 374 (2000) [2.28]; grants to States are likely to contribute significantly to reducing the 'surplus revenue': see *Australian Assistance Plan Case* (1975) 134 CLR 338, 358 (Barwick CJ).

242 See also Maurice Kennedy, *Cheques and Balances*, Parliamentary Library Research Paper No 16 (2002) 36.

confirms that Special Accounts can comply with the existing technical CRF, appropriation and surplus revenue requirements as they have been considered by the High Court, albeit that the validity of a Special Account has not been subject to a separate adjudication. These conclusions are significant because Special Accounts are the *only* mechanism whereby payments made to the Australian Government are formally hypothecated and immediately appropriated for designated purposes.²⁴³ As such, the operation of Special Accounts reflect the arrangements originally contemplated by the amendments to the *Audit Act*, which were intended to accommodate the 'trading account' practices of the Commonwealth.²⁴⁴ More broadly, however, Special Accounts demonstrate the move away from before-the-event parliamentary scrutiny of expenditure (contemplated by the *Constitution* at Federation) to after-the-event accountability and transparency (which has been adopted by the Parliament with the apparent approval of the High Court). While this corresponds with the modern governance arrangements, whereby responsibility for expenditure decisions is delegated to Chief Executives under the *FMA Act*, it also poses new problems for reconciling the authority of Parliament over expenditure with the need to adequately account for that appropriated expenditure.²⁴⁵

The historical basis for requiring a separate CRF and an appropriation law for all the 'revenues and moneys' raised and received by the Commonwealth can be found in the imperial and colonial imperative that Parliament should exert some control over the expenditure of the Executive:

243 There are other similar schemes, such as the statutory requirement to make payments of amounts equal to a specific levy (taxation) collection under the *Primary Industries and Energy Research and Development Act 1989* (Cth) s 30 and related Acts for 'R&D Corporations', but these require a separate annual appropriation out of the CRF and there is no hypothecation of the levy (tax) amount: see *Appropriation Act (No 1) 2006–2007* (Cth) s 7(3). Another similar example is net appropriation agreements under section 31 of the *FMA Act*: see Auditor-General, *Management of Net Appropriation Agreements*, Report No 28 2005–06 (2005).

244 These were articulated at the time: see *Parliamentary Debates*, above n 13, 2066.

245 This has recently been considered by the Senate in respect of 'standing appropriations'. The Senate Standing Committee for the Scrutiny of Bills resolved 'that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. It will do so under provisions (1)(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills: (iv) inappropriately delegate legislative powers; or (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny. In accordance with its usual practice, the committee will look to the explanatory memorandum [of] the bill for an explanation of the reason for the standing appropriation. Where circumstances warrant, the committee will also seek from the responsible minister an explanation justifying the inclusion of the provision and the exclusion of the appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process': Senate Standing Committee for the Scrutiny of Bills, *Accountability and Standing Appropriations*, Report No 14 (2005) 272; see also Commonwealth, *Parliamentary Debates*, Senate, 1 March 2006, 123–5 (Andrew Murray, Nicholas Sherry and Richard Colbeck, Parliamentary Secretary to the Minister for Finance and Administration).

the purpose of s 81 of the *Constitution* is not to ensure that revenue raised by the Commonwealth is held in any particular bank account or at any particular place but to ensure that once moneys are received by the Commonwealth they are not expended except under authority of parliament.²⁴⁶

At the Constitutional Conventions these imperial and colonial concerns merged with concerns that the new Commonwealth distribute its surplus revenue to the States. The inability to resolve *how* this was to be achieved is now reflected in the important distinction between a CRF as an ‘abstraction’²⁴⁷ and the ‘Treasury of the Commonwealth’ as an institution dealing with real and actual money. The *Surplus Revenue Case* confirmed and entrenched this distinction while, at the same time, providing the Commonwealth with a mechanism, through appropriation of the CRF, to avoid the distribution of the real and actual money that formed the surplus revenue of the Commonwealth in the ‘Treasury of the Commonwealth’.²⁴⁸ Following this decision, and the earlier practices that initiated retrospective legislative action to ‘legalise’ the practice of using ‘trading accounts’,²⁴⁹ the role of Parliament in maintaining the nexus between the ‘abstraction’ and real and actual money has further diminished. This is evidenced by the Parliament’s practice of enacting the majority of appropriation laws as standing appropriation²⁵⁰ (and the remaining annual appropriations as non-lapsing); its failure to ensure that its appropriations were followed by real and actual money; and its practice of requiring the disclosure of ‘the purposes of the Commonwealth’ in appropriation laws only very superficially.

These practices appear to have been expressly endorsed by the High Court in *Brown v West* and, more recently, with the apparent endorsement in *Combet v Commonwealth* of the outcome and output appropriations form of appropriations laws. Chief Justice Gleeson perhaps confirmed this approval in *Combet v Commonwealth* saying:

While the generality of statements of outcome may increase the difficulty of contesting the relationship between an appropriation and a drawing, appropriations are made in a context that includes public scrutiny and political debate concerning budget estimates and expenditure review. The higher the level of abstraction, or the greater the scope for political interpretation, involved in a proposed outcome

246 *Cemetery Reserve Case* (1993) 176 CLR 555, 599 (McHugh J). This principle has been recently been restated in *Combet v Commonwealth* [2005] HCA 61, [5] (Gleeson CJ), [160] (Gummow, Hayne, Callinan and Heydon JJ), [44]–[48] (McHugh J), [221]–[236] (Kirby J).

247 See *Cemetery Reserve Case* (1993) 176 CLR 555, 599 (McHugh J) and the references therein.

248 For example, the 2006–2007 Budget provided: ‘[a]n underlying cash surplus of \$10.8 billion is expected in 2006–07, with further surpluses projected for the three years following’: Treasurer and Minister for Finance and Administration, *Budget Strategy and Outlook 2005–06*, Budget Paper No 1 2006–07 (2006) 1.1.

249 *Audit Act 1906* (Cth) s 13; *Audit Act 1901* (Cth) s 62A; Commonwealth, *Parliamentary Debates*, above n 13, 2066.

250 Estimated to be 80 per cent in 2002–2003: see Evans, above n 143, 289. See also Auditor-General, *Report No 15 2004–05 Financial Management of Special Appropriations* (2004) 12; Joint Committee on Public Accounts and Audit, *Review of Auditor General’s Reports (Audit Reports tabled between 18 January and 18 April 2005)* (2005) 167; Senate Standing Committee for the Scrutiny of Bills, *Accountability and Standing Appropriations*, Report No 14 (2005) 270–1; Commonwealth, *Parliamentary Debates*, Senate, 29 November 2004, 74–8 (Andrew Murray and Nicholas Sherry).

appropriation, the greater may be the detail required by parliament before appropriating a sum to such a purpose; and the greater may be the scrutiny involved in review of such expenditure after it has occurred. Specificity of appropriation is not the only form of practical control over government expenditure. The political dynamics of estimation and review form part of the setting in which appropriations are sought, and made.²⁵¹

These developments might be characterised and criticised as a further breakdown in the Parliament's control over the expenditures of the Executive.²⁵² Alternatively, while this may not have been the preferred balance for those formulating the *Constitution*, or for the Parliament regulating the Executive's proposed expenditure under a cash accounting system of the *Audit Act*, it is certainly better suited to the accrual budgeting arrangements of the *FMA Act* relying on the outcomes and outputs framework.²⁵³ Significantly, both these developments, and the outcomes and outputs framework approach, are certainly within the bounds of the text of the *Constitution* – particularly its express recognition that Parliament would implement appropriate auditing arrangements as part of its expenditure obligations.²⁵⁴ The real advances in these modern governance arrangements are reflected in the increased reporting requirements that potentially enhance Parliament's control over the Executive's expenditure, though this is based on the Executive's track record as opposed to its future intentions.²⁵⁵ The contemporary reporting requirements imposed by the Parliament, in effect, re-instate the nexus between the CRF and moneys actually in the 'Treasury of the Commonwealth'. These reporting requirements are expressly provided for in the *FMA Act* and the *Charter of Budget Honesty Act 1998* (Cth).

The *FMA Act* requires proper accounts and records²⁵⁶ financial statements published monthly,²⁵⁷ annual statements,²⁵⁸ and an audit of the annual financial

251 *Combet v Commonwealth* [2005] HCA 61, [7] (Gleeson CJ); the joint reasons also refer to this statement: at [160] (Gummow, Hayne, Callinan and Heydon JJ).

252 See *Report 395*, above n 10, 26; Evans, above n 143, 289; Maurice Kennedy, *Cheques and Balances*, Parliamentary Research Paper No 6 (2002) 34–8. This also avoids many of the procedures developed over time in the Senate and House of Representatives to scrutinise proposed governmental expenditures: see Evans, above n 143, 307–12; Department of the House of Representatives, *House of Representatives Practice* (5th ed, 2005) 407–29; Department of Finance and Administration, *Government Response to the Recommendations and Conclusions in the JCPAA Report 395: Inquiry into the Draft Financial Framework Legislation Amendment Bill* (2004) 5–6.

253 Although this conclusion is contested: see, eg, Evans, above n 143, 289–90. The Auditor-General has recently recommended improvements to accountability and transparency: see Auditor-General, above n 250, 16–7; see also Joint Committee on Public Accounts and Audit, above n 250, 170–8.

254 See *Constitution* s 97.

255 For Special Accounts this has been described as 'The 1999 Time Bombs': see Kennedy, above n 252, 34.

256 *FMA Act* ss 19, 48, 63. Chief Executives of Agencies are required to keep accounts and records in accordance with the Finance Minister's Orders. For example, the *Financial Management and Accountability Orders 2005* (Cth) [2.3].

257 *FMA Act* s 54.

258 *FMA Act* s 55. These financial statements must include an operating statement, a statement of financial position, a statement of cash flows, and notes to the financial statements (*Financial Management and Accountability Regulations 1997* (Cth) r 22A(1)) and a true and fair view of the Commonwealth's financial position and the results of operations and cash flows (r 22A(2)) or information and explanations that will give a true and fair view (r 22A(2)).

statements of the general government sector (GGS) by the Auditor-General.²⁵⁹ Each Agency Chief Executive is also required to prepare annual financial statements²⁶⁰ and submit these to the Auditor-General for audit.²⁶¹ The *Auditor-General Act 1997* (Cth) provides for the Auditor-General to undertake the audits required by the *FMA Act*²⁶² and other audits.²⁶³ As an officer of the Parliament, this helps to ensure that the Auditor-General's obligations under the *Auditor-General Act 1997* (Cth) are understood to be owed to the Parliament rather than to the Executive.²⁶⁴ In addition to the particular requirements relating to financial statements and audits, the *Charter of Budget Honesty Act 1998* (Cth) requires the Treasurer to make public a mid-year economic and fiscal outlook report by the end of January in each year, or within 6 months after the last budget, whichever is later;²⁶⁵ a budget economic and fiscal outlook report with each budget;²⁶⁶ and a final budget outcome report within 3 months of the end of each financial year.²⁶⁷ The effect of these financial statement and financial statistics reporting requirements is to provide to the Parliament information in the form of cash balances of moneys actually held by the Commonwealth (including the money forming the 'Treasury of the Commonwealth'),²⁶⁸ as well as information about the true costs and liabilities incurred by the Commonwealth (such as outstanding employee entitlements).

Contemporary Special Accounts dramatically illustrate the shift from before-the-event parliamentary control contemplated by the *Constitution* to after-the-event accountability and transparency. The recent reviews of the operations of Special Accounts have confirmed their important place in modern Australian Government administration, and perhaps some of the problems with their maintenance and operation.²⁶⁹ Special Accounts at least maintain the sentiments of the *Constitution* by providing an appropriation for amounts credited to those accounts, together with the allowable purposes for that expenditure. The shifting emphasis from before-the-event parliamentary control to after-the-event accountability and transparency is reflected in the appropriation being a standing appropriation. This appropriation varies according to the balance standing to the credit of the account and continues to authorise the expenditure until revoked or repealed. Further, the appropriation is, potentially, for very broadly worded

259 *FMA Act* s 56.

260 *FMA Act* s 49; see also *Financial Management and Accountability Orders 2005* (Cth) [2.4].

261 *FMA Act* s 57.

262 *Auditor-General Act 1997* (Cth) s 11.

263 *Auditor-General Act 1997* (Cth) ss 12, 13, 15–18, 20.

264 *Auditor-General Act 1997* (Cth) s 10; these primarily include the audit priorities of the Parliament determined by the Joint Committee of Public Accounts and Audit under the *Public Accounts and Audit Committee Act 1951* (Cth).

265 *Charter of Budget Honesty Act 1998* (Cth) s 14(1).

266 *Charter of Budget Honesty Act 1998* (Cth) s 10.

267 *Charter of Budget Honesty Act 1998* (Cth) s 18.

268 See, eg, the Commonwealth's Consolidated Financial Statements: Commonwealth, *Consolidated Financial Statements for the Year Ended 30 June 2004* (2004).

269 See Auditor-General, *Report No 24 2003–04 Agency Management of Special Accounts* (2004); Joint Committee of Public Accounts and Audit, *Review of Auditor-General's Reports 2003–04: First and Second Quarters* (2004) 77–92.

purposes, subject only to a valid 'drawing right' being issued before an expenditure is made and the appropriation debited.²⁷⁰ For Special Accounts that are established by determination, the Commonwealth purposes of the appropriation that are set out in the determination are made by the Australian Government with merely the approval of the Parliament,²⁷¹ as opposed to a law made by Parliament according to the various procedural rules adopted by the Senate and the House of Representatives, and according to the *Constitution's* limitations.²⁷² This is, however, balanced with an additional means of increasing accountability and transparency by promoting the authority of Parliament over the actual expenditures through enhanced reporting requirements. These additional reporting requirements apply in the form of notes to the financial statements. These notes require particulars about balances carried from a previous period, appropriations for reporting periods, receipts from other sources, refunds credited, goods and service tax credits, amounts available for payments, payments made and the balance carried to the next period.²⁷³ The effect of these requirements and the general obligations on Chief Executives imposed by the *FMA Act*,²⁷⁴ means that information about the money (being the money in the 'Treasury of the Commonwealth') associated with credits to Special Accounts is identifiable. General accounting for Special Accounts is in addition to the general ledger held by an Agency of its financial transactions and the separate Special Account records held by an Agency should provide additional information about the Special Account's transactions.²⁷⁵ The purpose and effect of these Special Accounts therefore allows amounts that have been hypothecated for the purposes of the Special Account to be separately identified and recorded both in terms of recording the appropriations and tracing the flows of actual moneys.²⁷⁶

The conclusion from the analysis in this article is that the enhanced accountability and transparency from the shift to accrual budgeting under the *FMA Act* is both consistent with the *Constitution* and beneficial to the Members of Parliament if they scrutinise the after-the-event reports. There seems little doubt that the *FMA Act* and the *Charter of Budget Honesty Act 1998* (Cth) have

270 *FMA Act* s 26.

271 *FMA Act* s 22.

272 See *Constitution* ss 53, 54. In the case of the House of Representatives, this includes amendment rather than mere disallowance, such as an amendment to narrow the quantum of a proposed expenditure: Department of the House of Representatives, *House of Representatives Practice* (5th ed, 2005) 410–414. For an overview of the relevant practices in the Senate and House of Representatives, see generally, Evans, above n 143, 269–314; Department of the House of Representatives, *ibid* 407–29.

273 *Financial Management and Accountability (Financial Statements for Reporting Periods Ending On or After 1 July 2005) Orders* (Cth) 2E.

274 For example, *FMA Act* s 44 requires Chief Executives to manage the affairs of the Agency in a way that promotes the efficient, effective and ethical use of the Commonwealth resources for which the Chief Executive is responsible; a range of other obligations are also imposed on Chief Executives, such as *Financial Management and Accountability Orders 2005* (Cth) oo 2.1–2.5, 3.1–3.3, 4.1. See also Department of Finance and Administration, *Allocation of Responsibilities for Special Appropriations*, Finance Circular 2005/13 (2005); Department of Finance and Administration, *Appropriation Management: Responsibilities of Agencies*, Finance Circular 2004/16 (2004).

275 Department of Finance and Administration, *Special Accounts – Finance Brief 5* (2002) 2.

276 See, eg, the management, reporting, banking and investment guidelines set out by the Department of Finance and Administration: Financial Management Guidance No 7, above n 7, 21–31.

the potential to deliver better information,²⁷⁷ in a useful form (as either financial statements or financial statistics). The role of the High Court, however, in imposing limits on appropriations, especially after *Combet v Commonwealth*, is probably now very limited. The question then is whether the after-the-event parliamentary scrutiny can, in practice, provide appropriate and adequate controls over future expenditure. It is not clear that the existing procedures exist for Parliament to take advantage of this plethora of information and hold the Australian Government (including the Chief Executives) suitably accountable for its expenditures.

277 Albeit the attempts to harmonise the financial statistics with accounting standards means that important distinctions between the different approaches to financial statements and financial statistics may be lost, especially where the economic stocks (such as the liabilities) are defined according to the accounting standards: see Treasurer and Minister for Finance and Administration, *Budget Strategy and Outlook 2005–06*, Budget Paper No 1 2006–07 (2006) [8–10]; see also Australian Accounting Standards Board, *GAAP/GFS Convergence Project Advisory Panel*, Consultation Paper No 2 (2003).