

Special Accounts

Introduction

- 4.1 This chapter discusses proposed amendments to the FMA Act covering Special Accounts as well as issues raised in submissions, and at the hearing, relating to Special Accounts. There are some 260 Special Accounts of which about half record trustee type moneys.¹

Constitutional status of Special Accounts

Background

- 4.2 A Special Account is an account (established by the Finance Minister under the FMA Act, or by another Act) used to record moneys received for a designated purpose and expenditure of those moneys.²

1 Mr Ian McPhee, Finance, *Transcript*, p.15.

2 Source: Explanatory Memorandum for the *Financial Management Legislation Amendment Bill 1999*.

- 4.3 The framework for Special Accounts includes the following provisions in the Constitution:
- section 81 – ‘all revenue and moneys raised or received by the Executive Government of the Commonwealth shall form one CRF, to be appropriated for the purposes of the Commonwealth ...’
 - the first sentence of section 83 - ‘no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law’.
- 4.4 Finance provided an exhibit to the inquiry which depicts the CRF during the following three time periods since federation in 1901:
- prior to 1 January 1998, when the Trust Fund existed separately from the CRF;
 - from 1 January 1998 to 30 June 1999, when the RMF existed separately from the CRF; and
 - from 1 July 1999, when Special Accounts have applied, recording amounts **in** the CRF.³
- 4.5 The exhibit also includes a one page description of the connection between the CRF and Special Accounts. This exhibit is reproduced at Appendix J.

Discussion

- 4.6 The Clerk of the Senate stated:

...the assurances of the Department of Finance and Administration that the statutory provisions about Special Accounts, and the manner in which they are created and managed, are in accordance with 81 and 83 of the Constitution are not entirely convincing to some senators. On one view the provisions which allow the creation of Special Accounts amount to a scheme for money to bypass sections 81 and 83.⁴

The system of Special Accounts and the whole financial framework that we have been led into by this legislation is unconstitutional in the broad sense at least.⁵

3 *Exhibit No.1: The Consolidated Revenue Fund.*

4 The Clerk of the Senate, *Submission No.1*, p.1.

5 The Clerk of the Senate, *Transcript*, p.10.

- 4.7 Finance responded, in a submission, that section 81 did not address how moneys forming the CRF should be kept, or how public moneys should be audited. Legal support for this view was provided by a High Court decision, *Northern Suburbs General Cemetery Reserve Trust v Commonwealth of Australia* (1993) 176 CLR 555 at 580.⁶ Finance added that the appropriation of CRF for the purposes of Special Accounts under the FMA Act ‘largely continues the approach that had previously applied to Trust Accounts ... under the *Audit Act 1901* [Audit Act], from 1906 ... and that had applied to components of the RMF and the CAF under the FMA Act until 1 July 1999. Accordingly, the framework for the operation of Special Accounts (and their predecessors) [was] very long standing’.⁷
- 4.8 Finance further advised it had sought the advice of the Australian Government Solicitor (AGS) on the constitutionality of Special Accounts. Finance stated that:

AGS noted that the precise basis upon which the statutory scheme for Special Accounts may be considered inconsistent with sections 81 and 83 of the Constitution is not entirely clear.⁸

The only issue in relation to the validity of the Special Account regime would relate to the standing appropriation provided by subsection 20(4) of amounts in relation to Accounts established by the Finance Minister.⁹

AGS advised that there are substantial grounds for arguing that there is no prohibition on the Parliament delegating to the Executive the power to determine the purposes for which money may be drawn out of the Treasury where the relevant legislation reserves to each House of Parliament the right to scrutinise and reject any purpose which is proposed by the Executive before it can take effect.¹⁰

6 Finance, *Submission No.17*, p.58.

7 Finance, *Submission No.17*, p.61.

8 Finance, *Submission No.17*, p.62.

9 Finance, *Submission No.17*, p.63. Subsection 20(4) of the FMA Act is: The CRF is hereby appropriated for expenditure for the purposes of a Special Account established under section (1), up to the balance for the time being of the Special Account.

10 Finance, *Submission No.17*, p.64.

...AGS concludes that a court would find the appropriation provided by subsection 20(4) of the FMA Act to be constitutionally valid.¹¹

- 4.9 Mr Kennedy provided his view of the underlying reasons for the establishment of a Fund additional to the CRF:

... the Consolidated Revenue Fund was intended to result in an identifiable balance of surplus revenue that would be returned to the States. That is under a number of sections of the Constitution. It means that the Consolidated Revenue Fund is in fact an accounting construct which is there so that you can identify from the accounting the level of surplus revenue.

...at least one other fund other than the CRF is necessary because the Constitution leads us towards it.¹²

- 4.10 Finance did not agree:

... advice [taken by the Department] indicates that the existence of a current appropriation of moneys standing to the credit of the CRF will be sufficient to prevent those moneys from being characterised as surplus revenue, irrespective of whether or not such moneys are transferred to another fund outside the CRF.¹³

Committee comment

- 4.11 The Committee notes that while some have raised doubts about the constitutionality of Special Accounts established by the Finance Minister it also notes the conclusion of the AGS that a court would find them constitutionally valid. The Committee accepts this view.

Usefulness of the Special Account mechanism

- 4.12 The Committee questioned whether the Special Accounts established in the legislation being amended by the Bill were necessary.

- 4.13 Finance responded:

11 Finance, *Submission No.17*, p.65.

12 Mr Maurice Kennedy, *Transcript*, p.9.

13 Mr Ian McPhee, Finance, *Transcript*, p.10.

...[Special Accounts] provide a useful method of delivering some government programs, particularly ones funded by, say, indirect taxes or other compulsory imposts, contributions by other governments or discretionary contributions by members of the community. Special 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.¹⁴

...Special Accounts may be used for proper trustee type moneys, where the Commonwealth is holding money on behalf of other parties, so genuine trustees' moneys can fit into the Special Account definition. There is a range of purposes for which they are used. I have mentioned business operations and trustee type moneys. Also, where we are holding moneys on behalf of the States and for other similar uses, Special Accounts are an appropriate vehicle as well.¹⁵

- 4.14 Finance continued that it was trying to improve the reporting of Special Accounts and was developing guidelines concerning Special Accounts. It believed that better communication was part of the solution to the issues surrounding Special Accounts.¹⁶

The establishment of Special Accounts by the Finance Minister

Background

- 4.15 The Bill contains an amendment to the provision in the FMA Act covering the establishment of a Special Account by the Finance Minister. Subsection 20(1) authorises the Finance Minister to make a written determination that does **all or any** of the following:
- (a) establishes a Special Account;
 - (b) allows or requires amounts to be credited to the Special Account;
 - (c) specifies the purposes of the Special Account.

14 Mr Ian McPhee, Finance, *Transcript*, pp.7–8.

15 Mr Ian McPhee, Finance, *Transcript*, p.8.

16 Mr Ian McPhee, Finance, *Transcript*, p.8.

- 4.16 Item 127A of Schedule 2 of the Bill proposes that section 20(1) of the FMA Act be amended to require the Finance Minister's determination to include all of the matters already specified in subsection 20(1) as well as specifying amounts that are allowed or required to be debited from the Special Account. The complete proposed amendment to subsection 20(1) contained in the Bill is:

The Finance Minister may make a written determination that does all of the following:

- (a) establishes a Special Account;
- (b) specifies the purposes of the Special Account;
- (c) allows or requires amounts to be credited to and debited from the Special Account.

Discussion

- 4.17 In explaining why the additional provision 'allows or requires amounts to be debited from the Special Account' had been included in subsection 20(1) Finance commented that it saw no compelling reason why all the requirements should not be stated and that there would be the capacity in the determination to describe some debits in detail.¹⁷ Finance added that the addition was recognizing current practice as it was unaware of any determination which did not include **all** of the new provisions.¹⁸
- 4.18 Various other operating procedures were explored by the Committee. The responses from witnesses were:
- The Finance Minister had the power to specify debits from a Special Account which related to the purpose of the Special Account. The specification might allow, or require debits to be made. However any debit must relate to the purpose of the Special Account.¹⁹
 - Inserting the word 'debited' into subsection 20(1) did not create a new power. It was intended to provide 'a clearer capacity to describe payments that may be supported by a specific Special Account'.²⁰

17 Mr Marc Mowbray-d'Arbela, Finance, *Transcript*, pp.40, 51.

18 Mr Jonathan Hutson, *Transcript*, p.40.

19 Mr Marc Mowbray-d'Arbela, Finance, *Transcript*, pp.44–5.

20 Finance, *Submission No.17*, p.57.

- It was possible for amounts to be debited from one Special Account and credited to another Special Account consistent with the purpose of the ‘paying’ Special Account.²¹
 - The transfer of amounts from one Special Account to another could be ongoing, for example from Finance’s Property Account to the Comcover Account to cover insurance purchases.²²
- 4.19 The Committee noted that the proposed paragraph 20(1)(c) allows or requires amounts to be credited to and debited from the Special Account. The Committee sought clarification of the relationship between budget appropriations, the setting up of Accounts and moving money in and out of them.²³
- 4.20 Mr Kennedy commented that while the draft provision specifies the **purpose** of a Special Account, it should specify ‘the purposes for which the Special Account can be debited’. He added that this ensured spending from the Special Account was only for the purpose endorsed by the Parliament.²⁴
- 4.21 Finance advised, after the hearing, that it had obtained legal advice that supported the draft provision linking the reference to ‘debiting an amount’ with the purposes of the Account. The advice also stated that it would be useful if section 20 also recognized that:
- in certain circumstances an amount may be debited for a purpose other than the making of a real or notional payment. ... In relation to this type of debit, the amount remains in the CRF until expenditure of the amount is authorised by an appropriation, other than the standing appropriation provided in subsections 20(4) and 21(1) of the FMA Act. An example of this type of debit is a ‘payment’ to the Commonwealth of amounts due to an individual which are not claimed [by the individual] within a period of time as specified in the enabling Act or Finance Minister’s determination.²⁵
- 4.22 Accordingly Finance proposed that the amendment to subsection 20(1) of the FMA Act should be:

21 Finance, *Submission No.17*, p.57.

22 Mr Jonathan Hutson, *Transcript*, p.49.

23 *Transcript*, p.41.

24 Mr Maurice Kennedy, *Transcript*, p.42.

25 Finance, *Submission No.17*, p.56.

(1) The Finance Minister may make a written determination that does all of the following:

- (a) establishes a Special Account;
- (b) allows or requires amounts to be credited to the Special Account;
- (c) specifies the purposes for which amounts are allowed or required to be debited from the Special Account.

(1A) A determination under subsection (1) may specify that an amount may or must be debited from a Special Account established under subsection (1) otherwise than in relation to the making of a real or notional payment.²⁶

4.23 Finance also advised that it will:

consider a practice of including details similar to the information that appears in PBS [Portfolio Budget Statements] within the explanatory statement that accompanies the tabling of a determination to establish or vary a Special Account.²⁷

Conclusion

4.24 The Committee supports Finance's proposed amendment to subsection 20(1) of the FMA Act outlined above. It notes that the Committee would be notified of the amendment prior to introduction of the Bill in Parliament.

4.25 Finance's proposal that the explanatory statement that accompanies the tabling of a determination to establish or vary a Special Account include details about the Special Account similar to that contained in PBS would assist Parliament's consideration of the determination during the disallowance period.

²⁶ Finance, *Submission No.17*, p.56.

²⁷ Finance, *Submission No.17*, p.57.

Recommendation 1

4.26 The proposed amendments to subsection 20(1) of the FMA Act contained in the draft Financial Framework Legislation Amendment Bill should include the following:

- **A determination of the Finance Minister establishing a Special Account should include a reference to amounts that are allowed or required to be debited from a Special Account and this reference should be linked to the reference to the purposes of the Special Account.**
- **A determination of the Finance Minister may specify that amounts debited from a Special Account may be or must be otherwise than for the making of real or notional payments.**

Notional payments and expenditure of amounts credited to a Special Account

Background

- 4.27** The Bill contains new provisions in the FMA Act concerning notional payments and expenditure of amounts credited to Special Accounts.
- 4.28** Items 128 and 129 of Schedule 2 of the Bill propose the insertion of new subsections 20(4A) and 21(1A) in the FMA Act. Subsection 20(4) applies to a Special Account established by a determination of the Finance Minister. Subsection 21(1A) applies to a Special Account established by an Act.
- 4.29** Both of the proposed subsections are intended to have the same effect. That is, they clarify that if a determination or an Act allows an amount standing to the credit of a Special Account to be expended or applied for a particular purpose, the amount may be applied in making notional payments for that purpose, unless the contrary intention appears.²⁸

²⁸ Notional receipts and payments are also discussed in Chapter 2, from paragraph 2.23.

Discussion

4.30 Finance explained that the reason for the amendment was to ‘ensure consistency between the legal fraternity and the accounting fraternity’ so that if a debit from a Special Account was a notional payment it would be treated in accounting terms as a real payment.²⁹ Because money of all Agencies forms part of the CRF, receipts and payments between Agencies did not affect the CRF; hence legally they were notional receipts and payments. However for accounting and appropriation purposes, they are treated as real receipts and payments.³⁰

4.31 Finance continued by explaining:

The intention is to treat notional payments and receipts as real payments and receipts to allow them to be recorded against appropriations as expenditure and receipts.

It is really about the application of this concept to the specifics of Special Accounts. It is really nothing new or significant. It is just to tighten up the control and make it very clear that notional payments should be treated as real payments.³¹

4.32 Finance explained why the amendments were proposed for sections 20 and 21 of the FMA Act, rather than being covered by section 6 of the FMA Act.³² Special Accounts were not part of an Agency, rather an ‘hypothecated amount of the CRF’. To ensure this technical point was clear, transactions involving Special Accounts were to be treated as transactions in accounting terms. Consequently the amendments were to the section of FMA Act dealing with Special Accounts.³³

Conclusion

4.33 The Committee notes that the proposed new subsections 20(4A) and 21(1A) of the FMA Act covering notional payments and expenditure of amounts credited to a Special Account will clarify the relevance of

29 Mr Marc Mowbray-d’Arbela, Finance, *Transcript*, p.60.

30 Mr Ian McPhee, Finance, *Transcript*, p.61.

31 Mr Ian McPhee, Finance, *Transcript*, p.62.

32 This question was raised by Mr Maurice Kennedy, *Transcript*, p.61. Section 6 of the FMA Act provides for the Act to apply to a notional receipt or a notional payment of an Agency (or part of an Agency) as if it were a real receipt or a real payment by the Commonwealth.

33 Mr Marc Mowbray-d’Arbela, Finance, *Transcript*, p.61.

the concepts of the notional payments and notional receipts to transactions involving Special Accounts.

- 4.34 The Committee also notes that the proposed new subsection 20(1A) of the FMA Act, outlined in paragraph 4.22 of this chapter, will complement the reference to notional payments in the proposed new subsection 20(4A).

Use of the name 'Special Account'

- 4.35 The Committee asked whether Finance or Treasury had given any consideration to changing the name of Special Accounts since they are not necessarily accounts. Finance replied that it had and that it was open to helpful suggestions. The Committee suggested the term 'designated accounts'.³⁴

- 4.36 Finance responded:

Finance considers that the term 'Designated Purpose Account' could be considered by the Committee as a possible term that could accurately reflect the legal concept that is currently described as a 'Special Account'. In particular, the term helps to convey the concept of an account that is used to record amounts received, and that are then available for designated expenditure purposes.³⁵

- 4.37 Finance supported the retention of the word 'Account'. First, it provides a useful link to the historical origin of a Special Account as a 'Trust Account'. Second, within the context of financial management the word has a broader meaning than 'bank account', for example a 'ledger account'. Third, the term 'ledger account', was used in the Explanatory Memorandum of the *Financial Management Legislation Amendment Bill 1999*, which introduced the term 'Special Account'.³⁶

- 4.38 Finance considered it appropriate to discard the word 'Special' because it appeared to suggest some form of direct link with the terms 'special public money' and 'Special Instructions' both of which are used in the FMA Act. Special Accounts frequently have amounts

34 Transcript, p.14.

35 Finance, *Submission No.17*, p.52.

36 Finance, *Submission No.17*, p.51.

credited to them that are not special public money. Special Instructions do not relate directly to Special Accounts.³⁷

Conclusion

- 4.39 The Committee agrees that the adoption of the name ‘Designated Purpose Account’ to replace the name ‘Special Account’ would contribute to a greater understanding and recognition of the unique characteristics of the Special Account mechanism.
- 4.40 The Committee notes that amendments to the Bill to change the name of Special Accounts would be notified to the Committee prior to introduction of the Bill in Parliament.

Recommendation 2

- 4.41 **The draft Financial Framework Legislation Amendment Bill should include amendments to the FMA Act and all other relevant Acts to replace references to ‘Special Account’ with references to ‘Designated Purpose Account’.**

Disallowance period for Special Accounts

Background

- 4.42 Parliamentary oversight of a determination of the Finance Minister to establish a Special Account is provided by the determination being disallowable by Parliament. Section 22 of the FMA Act provides that:
- (1) This section applies to a determination made by the Finance Minister under subsection 20(1) or (2).
 - (2) The Finance Minister must cause a copy of the determination to be tabled in each House of the Parliament.
 - (3) Either House may, following a motion upon notice, pass a resolution disallowing the determination. To be effective, the resolution must be passed within 5 sitting days of the House after the copy of the determination was tabled in the House.

37 Finance, *Submission No.17*, p.52.

(4) If neither House passes such a resolution, the determination takes effect on the day immediately after the last day upon which such a resolution could have been passed.

4.43 The arrangement provided for in section 22 of the FMA Act differs from that which generally applies to regulations. The disallowance arrangement for regulations is as follows:

- A regulation must be tabled in each House of the Parliament within 15 sitting days of that House after the making of the regulation. It is void and of no effect if not tabled within that period.
- Within 15 sitting days of the regulation being tabled, any Member may give notice of a motion to disallow it. If the motion has not been withdrawn or otherwise disposed of – that is, passed or rejected – at the end of the 15 sitting days after the notice was given, the regulation is deemed to have been disallowed.³⁸

Discussion

4.44 Mr Kennedy explained the reasoning for making the Finance Minister's determination that establishes a Special Account a disallowable instrument:

Previously, under the Audit Act the Finance Minister could determine the purpose of Trust Accounts. They were not disallowable instruments. In replacing the Audit Act with the FMA Act, we took the view that a determination was clearly an appropriation of the Trust Fund. In setting up the FMA Act, we said that Parliament needs to be involved in this, and that is why we successfully argued that these determinations should be disallowable instruments. Because they are appropriations, and sometimes there is some urgency about the need to spend, we were also successful in arguing that it should have a five-day disallowance period rather than the norm of 15 days.³⁹

4.45 The Committee sought views on the level of scrutiny involved in a disallowable instrument compared with the level of scrutiny associated with a budgetary appropriation.

38 House of Representatives: *Guide to Procedures*, Chapter 14.

39 Mr Maurice Kennedy, *Transcript*, p.42.

4.46 Finance responded:

These instruments do not actually take effect until the five sitting days have passed. Most disallowable instruments take effect on signature, on tabling or on gazettal, and then a disallowance period applies. The Parliament, in either the House or the Senate, may disallow the instrument, and it is no longer effective from that date of disallowance. The FMA Act enshrines a very rigorous situation for these significant delegated instruments because of the appropriation aspect that is within them. They do not take effect until that time has passed.⁴⁰

4.47 The Clerk of the Senate responded:

...these disallowance provisions are different from the normal disallowance provisions. In some respects they are weaker than the normal disallowance provisions ... Admittedly, the instrument does not come into operation until after the time for disallowance has passed. On one hand, that is a stronger provision.

[On the other hand] there is no time limit on tabling of the instruments. There is no sanction on non-tabling of instruments ... the normal disallowance provisions have a sanction on non-tabling and a time limit for tabling. They also give a much longer period for giving notice and for resolving a notice of motion for disallowance.⁴¹

In the disallowance provisions in the Acts Interpretation Act all sorts of safeguards are built in. There is a safeguard, for instance, under the provisions against a notice of disallowance motion being given and then stalled until the five sitting days are up. All sorts of safeguards are built into the normal disallowance provisions. This is lacking some of those safeguards. In any case as you have pointed out, having a chance to disallow something is not the same as positively affirming an appropriation.⁴²

4.48 Finance commented:

It is Finance's view that, if anything, the FMA Act creates an incentive for the Finance Minister to table any determination

40 Mr Marc Mowbray-d'Arbela, Finance, *Transcript*, p.41

41 The Clerk of the Senate, *Transcript*, p.41.

42 The Clerk of the Senate, *Transcript*, p.42.

regarding a Special Account as soon as practicable, given that the determination cannot take effect until the disallowance period of 5 sitting days has elapsed.

Nevertheless, Finance consulted the AGD regarding the significance, if any, of the current 5 sitting days disallowance period before these determinations take effect.

The AGD advised Finance that disallowance provisions that are Act-specific, or that depart from the typical arrangements, are not unique. Indeed, the different types of arrangements that exist are set out on the website of the Senate Committee on Regulations and Ordinances.⁴³

Accordingly, there does not seem to be a strong case to propose any changes to the 5 sitting days' disallowance period before these determinations can take effect.

However...Finance does see value for the information provided in relation to those determinations being even more comprehensive in terms of relevant aspects that might interest Parliament.⁴⁴

Conclusion

- 4.49 The Committee considers that, on the information before it, the existing disallowance arrangements for a determination of the Finance Minister to establish a Special Account, contained in section 22 of the FMA Act, are appropriate.

Reporting on Special Accounts⁴⁵

Background

- 4.50 In 2001-02 details of individual Special Accounts were required to be reported in the Portfolio Budget Statements (PBS) and in audited financial statements of Agencies.

43 The address is:
http://www.aph.gov.au/senate/committee/regord_ctte/unusualdis.pdf.

44 Finance, *Submission No.17*, p.55. The additional information is mentioned in paragraph 4.23 of this chapter.

45 A discussion of reporting on matters wider than Special Accounts is contained in Chapter 6.

Discussion

- 4.51 Concern was expressed by the Clerk of the Senate, at this level of reporting. He stated:

The way in which trust accounts have been dissolved into special accounts and have disappeared into the general budgets of departments and agencies, apparently in the process shedding all or some of the restrictions on their application, and the diffused way in which special accounts are reported in budget documentation, also worries senators who are concerned to follow where the money has gone and what it is used for.⁴⁶

- 4.52 Concerns raised by the Committee during the hearing elicited the following responses.

- Special Accounts were not currently reported in the Budget papers, but Finance was examining ways to enhance information in the PBS. Guidance advice was being considered.⁴⁷
- The issue of enhanced reporting at the aggregate level depended on whether readers were interested in such information or whether more detailed information in agency financial statements was of more interest.⁴⁸
- New Finance Minister's Orders for the preparation of financial statements by Agencies and Authorities would require that 'all appropriations accredited to Special Accounts be disclosed in the notes to the financial statements'. Transparency would be enhanced because credits to Special Accounts through appropriations could be tracked.⁴⁹
- While receipts and expenditures of each Special Account would be disclosed, there was no special requirement for information on transfers between Special Accounts. To provide detailed information about particular money flows within Special Accounts was not seen by Finance to be of benefit.⁵⁰

46 The Clerk of the Senate, *Submission No.1*, p.2.

47 Mr Ian McPhee, Finance, *Transcript*, p.11.

48 Mr Ian McPhee, Finance, *Transcript*, p.11.

49 Mr Ian McPhee, Finance, *Transcript*, p.47.

50 Mr Ian McPhee, Finance, *Transcript*, p.49.

- To obtain information about specific payments from a particular Special Account, a direct inquiry to the Agency in question should be made.⁵¹
- There was consistency between Agencies in the reporting of Special Accounts because of financial reporting guidance issued by the Finance Minister. The guidance suggests a minimum standard—Agencies could disclose more information.⁵²

Details of improved reporting on Special Accounts

- 4.53 Requirements for reporting on Special Accounts are contained in the following documents prepared by Finance:
- Guidelines for the Preparation of Portfolio Budget Statements (PBS Guidelines) for 2003-04;⁵³ and
 - the Finance Ministers Orders for the preparation of annual financial statements (FMOs) for reporting periods ending on or after 30 June 2003.⁵⁴
- 4.54 All appropriation flows into Special Accounts have always been reported in the PBS in the context of general appropriation reporting. Increased reporting on Special Accounts contained in the PBS Guidelines⁵⁵ for 2003-04 includes:
- a new table dedicated to Special Accounts recording, for each Special Account, estimated and actual financial flows (that is,

51 Mr Michael Culhane, Finance, *Transcript*, p.15.

52 Mr Ian McPhee, Finance, *Transcript*, p.16.

53 All Agencies and Authorities that are classified in the general government sector are required to contribute to a PBS. The primary function of the general government sector is to provide public services that are mainly non-government in nature, and for the collective consumption of the community, or involve the transfer or redistribution of income. These services are largely financed through taxes and other compulsory levies, although user charging and external funding have increased in recent years. (Source: *Consolidated Financial Statements of the Commonwealth for year ended 30 June 2002*, glossary.)

54 The FMOs cover the preparation of annual financial statements required under section 49 of the FMA Act and clause 2 of Schedule 1 of the CAC Act. The Orders made under both Acts are the same. This means that they apply to all Agencies and all Authorities. The FMOs for reporting periods ending on or after 30 June 2003 are being considered by Parliament. The disallowance period ends on 25 June 2003.

55 In previous years and currently, the PBS Guidelines encourage Agencies and Authorities to provide information relevant to the needs and requirements of their Senate Legislation Committee. Some Agencies specifically included increased Special Account disclosures where these were a prominent feature of their funding (for example: the Department of Communications, Information Technology and the Arts, the Department of Environment and Heritage and the Department of Transport and Regional Services).

opening balance, total receipts, total payments, adjustments and closing balance);

- additional information to be included in the existing Total Resources for Outcome tables. The main additional disclosures on Special Accounts in the PBS Guidelines for 2003-04 are:
 - ⇒ transfers from administered appropriations to a Special Account;
 - ⇒ transfers from departmental appropriations to a Special Account (by output);
 - ⇒ transfers of revenue from other sources to a Special Account (by output);
 - ⇒ payments from the balance of a Special Account (by outcome).

4.55 The Requirements for Annual Reports of Departments, Executive Agencies and FMA Agencies are aligned, as a matter of principle, with requirements for the PBS. The Requirements for Annual Reports are prepared by the Department of the Prime Minister and Cabinet and are approved by the Committee under subsections 63(2) and 70(2) of the *Public Service Act 1999*.

4.56 Increased reporting on Special Accounts contained in the FMOs for reporting periods ending on or after 30 June 2003 includes:

- disclosures of appropriations are to include separate information in appropriations credited to Special Accounts;
- disclosures of amounts credited to Special Accounts, other than appropriated amounts, are to be disaggregated into costs recovered and the major classes identified in the FMOs;
- disclosures of amount paid from Special Accounts are to be disaggregated into the major classes recorded in the FMOs; and
- the inclusion of additional explanatory notes and guidance. These include the requirement that entities with Special Accounts state the purpose of each Special Account.

Conclusion

4.57 The Committee notes the improvements in reporting on Special Accounts which have been introduced. The Committee will keep a watching brief on the implementation of these new requirements to ascertain whether concerns about adequate disclosure are being satisfactorily addressed.

Appropriated amounts and Special Accounts

Background

- 4.58 Appropriated amounts apply to Special Accounts in the following ways:
- The FMA Act provides standing appropriations for **expenditure** for the purposes of a Special Account up to the balance for the time being of the Special Account.⁵⁶
 - Other Acts (mainly annual Appropriation Acts) provide for appropriated amounts to be **credited** to a Special Account. Section 13 of both the *Appropriation Act (No. 1) 2002-2003* and the *Appropriation Act (No. 2) 2002-2003* contain the following provision:

If any of the purposes of a Special Account is a purpose that is covered by an item (whether or not the item expressly refers to the Special Account), then amounts may be debited against the appropriation for that item and credited to that Special Account.
- 4.59 There are 42 Special Accounts established by Acts. The Acts which establish 15 of those Accounts each contain a provision that all money appropriated by the Parliament for the purposes of the Account must be, or may be, credited to the Account.⁵⁷
- 4.60 A determination of the Finance Minister that establishes a Special Account typically provides for appropriated amounts to be credited to the Special Account.

Discussion

- 4.61 Mr Kennedy suggested that the Committee consider the provisions in the annual Appropriation Acts that allow amounts to be credited to a Special Account from an (appropriation) item, so long as the purpose of the Account is covered by that item.⁵⁸
- 4.62 Finance pointed out where an appropriated amount is credited to a Special Account:

56 For a Special Account established by the Finance Minister the standing appropriation is provided in subsection 20(4) of the FMA Act; for a Special Account established by an Act the standing appropriation is provided in subsection 21(1) of the FMA Act.

57 Details are provided in Appendix K, footnote (1).

58 Mr Maurice Kennedy, *Transcript*, p.47.

...there has actually been a narrowing of the purpose for which the money could ultimately leave the CRF. The outcome of that Agency is quite broad and it must be more than the outcome of the Special Account to which a notional payment would be made ... the Agency would actually reduce their capacity to ultimately make a payment that leaves the CRF, because the broad outcome must be broader than the specific purposes of the Special Account.⁵⁹

Conclusion

- 4.63 The Committee notes that items in annual Appropriation Acts normally have broad outcomes and that these Acts contain sections which provide that an appropriated amount may be credited to a Special Account for expenditure on the purposes of the Account as long as any of the purposes of the Account are covered by an outcome.
- 4.64 The annual Appropriation Acts appear to facilitate the crediting of appropriated amounts to Special Accounts whereas some Acts that establish particular Special Accounts do not specifically provide for appropriated amounts to be credited to those Accounts.
- 4.65 The Committee believes this anomaly should be addressed.

Recommendation 3

- 4.66 **The annual Appropriation Acts should not authorise the crediting of appropriated amounts to a Special Account if the Act or the Finance Minister's determination that establishes the Special Account does not specifically provide for appropriated amounts to be credited to the Special Account.**

Acts that establish Special Accounts

Background

- 4.67 Forty two Special Accounts have been established by Acts, 34 of which were established before the commencement of the FMLA Act.

59 Mr Marc Mowbray-d'Arbela, Finance, *Transcript*, p.47.

Eight Special Accounts have been established since the commencement of the FMLA Act on 1 July 1999. These are the:

- Alcohol Education and Rehabilitation Account
- ARC Research Endowment Account
- Confiscated Assets Account
- Gene Technology Account
- Industrial Chemicals Account
- National Blood Account
- National Cultural Heritage Account; and the
- Universal Service Account.⁶⁰

4.68 The provisions in these Acts relating to the Special Accounts are generally well aligned with the amendments contained in the Bill. An exception is the use of the reference ‘money’ in or from an Account. The Bill contains amendments to replace references to ‘money’ with references to ‘amounts’ because Special Accounts are only accounts recording amounts in the CRF, not separate Funds nor always separate bank accounts containing money.

Conclusion

4.69 The Committee believes there is merit in ensuring complete alignment of the eight Special Accounts with the provisions contained within the Bill. Consequently any of those eight Special Accounts which are not aligned should be included in the Bill for amendment.

4.70 The Committee notes that this could be done, in the event of the Government agreeing to change the name ‘Special Account’ to ‘Designated Purpose Account’, in the context of implementing Recommendation 2.⁶¹

4.71 The Committee notes it would be notified of amendments to the Bill prior to its introduction in Parliament.

60 Appendix K includes more detail. The Regional Telecommunications Infrastructure Account is not included. It was originally established by a determination of the Finance Minister and the purposes of the Account were expanded in the *Telstra Corporation Act 1991*.

61 This is contained in paragraph 4.41 of this chapter.

Regional Telecommunications Infrastructure Account

Background

- 4.72 Item 477 of Schedule 1 of the Bill inserts, in the *Telstra Corporation Act 1991* (Telstra Corporation Act), a new section 57A that provides for the continued existence of the Regional Telecommunications Infrastructure Account (RTIA) as a Special Account for the purposes of the FMA Act.

Discussion

- 4.73 The Committee asked for details about the RTIA. The Department of Communications, Information Technology and the Arts (CITA) advised:

There is an instrument which was made at the time of the commencement of the FMA Act, that determined the purpose of ...[the RTIA]... to be for expenditure on financial assistance for telecommunications related projects in regional areas.⁶² That has been enhanced in some respects under Division 4 of Part 9 of the Telstra Corporation Act. It is dealt with in sections 58, 59 and 60.⁶³

- 4.74 CITA advised further:

The legal authority for the RTIA should remain the determination of the Finance Minister.⁶⁴

....amounts standing to the credit of the RTIA which are provided under the supplementation effected by the Telstra Corporation Act can no longer be debited from the RTIA after 30 June 2003 (ie the date specified by the Minister for the purposes of ss.58(4)(b), 59(4)(b) and 60(4)(b)).

...FMA (Act) section 21 requires that an Act which establishes a Special Account must also identify the purposes of that Account. The Telstra Corporation Act does not identify the purposes of the RTIA, except in relation to the statutory supplements which will soon cease to be of ongoing

62 A determination of the Finance Minister, made under section 20 of the FMA Act, established the RTIA.

63 Mr Don Markus, CITA, *Transcript*, p.17.

64 CITA, *Submission No. 12*, p.27.

relevance. Accordingly, it is not clear whether the proposed section 57A would be effective for the purposes of FMA section 21 even if that result had been intended.⁶⁵

Conclusion

- 4.75 The Committee is of the view that establishing a Special Account by one process (in this case a determination of the Finance Minister) and adding to the purposes of the same Account by another process (legislation) can lead to confusion and does not represent good practice.
- 4.76 **Any Special Account established by one process – by determination or legislation— should not be altered by the other process.**
- 4.77 The Committee notes that Finance will need to consult with OPC to ensure that the proposed amendments in the Bill to the Telstra Corporation Act that relate to the RTIA, do not provide for the RTIA to be established by the Telstra Corporation Act.

Aboriginal Advancement Account

Background

- 4.78 Subsection 38(6) of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Condah Framlingham Act) provides that:

The [responsible] Minister shall establish and administer an Aboriginal Advancement Reserve for the purpose of furthering the social and economic advancement of Aboriginal people living in the State of Victoria.

- 4.79 Item 48 of Schedule 1 of the Bill replaces the above provision with:

The Aboriginal Advancement Account may be established for the purpose of furthering the social and economic advancement of Aboriginal people living in Victoria.

Note: The Account was established by subsection 5(3) of the *Financial Management Legislation Amendment Act 1999*.

- 4.80 The Condah Framlingham Act also provides the establishment of:

⁶⁵ CITA, *Submission No. 15*, p.35.

- the Condah Land Reserve (subsection 38(1); and
 - the Framlingham Forest Reserve (subsection 38(3)).
- 4.81 The deeming provisions in section 5 of the FMLA Act converted the Condah Land Reserve and the Framlingham Forest Reserve to Special Accounts and this is recognised in the amendments to the Condah Framlingham Act contained in Item 48 of Schedule 1 of the Bill.
- 4.82 The FMA Act does not recognise Special Accounts established other than by the Finance Minister or by Acts. Subsections 20(4) and 21(1) of the FMA Act provide a standing appropriation for expenditure for the purposes of a Special Account, established by one of these processes, up to the balance of the Account.

Discussion

- 4.83 The Committee asked for advice about whether the Aboriginal Advancement Account had been established.

- 4.84 ATSIC replied:

To the best of my knowledge, the Account was established by section 5(3) of the FMLA Act.⁶⁶

- 4.85 The Committee asked about the usefulness of the Condah Land Account, the Framlingham Forest Account and the Aboriginal Advancement Account.

- 4.86 ATSIC replied:

None of those Accounts have been used. It is the Condah [Land] Account and the Framlingham Forest Account. They have never been used and are not used for the delivery of Commonwealth programs.

These Accounts ... were established on the same basis as the Aboriginals Benefit Account was established under the Northern Territory Land Rights Act, and their purpose was to receive and distribute the equivalent of any mining royalties that might flow from mining interests on the relevant land that was granted under those Acts. As it turns out, there have not been any mining projects on that land.⁶⁷

⁶⁶ ATSIC, *Submission No.11*, p.25.

⁶⁷ Mr Brian Stacey, ATSIC, *Transcript*, p.23.

4.87 The Committee also asked what material difficulties would be encountered if it were proposed that section 38 of the Condah Framlingham Act be amended to establish only one Special Account, called say, the Aboriginal Advancement Account.

4.88 ATSIC advised:

That there are three Accounts created under the Act is a result I believe of negotiations that the Commonwealth entered into with the two Aboriginal groups who benefit from this legislation in Western Victoria. Those groups have significant cultural, historical and political differences and thus I believe the Commonwealth ultimately agreed that to the extent there is any mining activity on their land and royalties are paid, the CRF should be debited for equivalent amounts to be paid into separate Accounts for each group. The other policy consideration that led to the establishment of 3 Accounts was the view of the Commonwealth at that time (and I am not aware of any change) that a proportion of mining royalty equivalents paid to Aboriginals affected by mining should be available for the general benefit of other Aboriginals in a State or Territory. Thus, the reason for creating the Aboriginal Advancement Account.

If the Accounts were to be merged into one Account, the material difficulties would include the need, from our point of view, to seek to negotiate and reach agreement with the Aboriginal groups about the new Account, and also finding a means of distributing any moneys which are received in the future in a way that is fair and practical to all of the beneficiaries. These problems are not insurmountable but will take time and resources of the Commonwealth to resolve.⁶⁸

Conclusion

4.89 The Committee notes that subsection 5(3) of the FMLA Act established Special Accounts only in respect of components of the RMF and the CAF which were in existence prior to the commencement of the FMLA Act on 1 July 1999. There appears to be doubt about whether the Aboriginal Advancement Account was originally established by the responsible Minister under subsection 38(6) of the Condah Framlingham Act.

68 ATSIC, *Submission No.11*, p.25.

- 4.90 The Committee also notes that the FMA Act does not recognise Special Accounts established other than by Acts or a determination of the Finance Minister. There therefore appears to be doubt about whether amounts credited to a Special Account established by a portfolio Minister would be covered by the standing appropriations provided in subsection 20(4) and 21(1) of the FMA Act for expenditure for the purposes of the Account up to the balance for the time being of the Special Account. This could be clarified by the Bill specifically establishing the Aboriginal Advancement Account.
- 4.91 It appears unnecessary for the Condah Framlingham Act to establish more than one Special Account. The allocation of any mining royalties credited to the Account to different aboriginal groups could be achieved by the Act providing for separate notional accounts to be established within the Special Account in the names of particular aboriginal groups or geographical areas.
- 4.92 The Committee notes that it would take time to negotiate and reach agreement on the Condah Framlingham Act establishing only one Special Account. However, since none of the Accounts have been used and seem unlikely to be used in the near future, the time needed for negotiation should not be regarded as an impediment.

Recommendation 4

- 4.93 **The Financial Framework Legislation Amendment Bill should include an amendment to establish the Aboriginal Advancement Account under the section 38 of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*.**

The Condah Land Account and the Framlingham Forest Account should be subsumed into the Aboriginal Advancement Account.