

RE-INVIGORATING THE ACCOUNTABILITY AND TRANSPARENCY OF THE AUSTRALIAN GOVERNMENT'S EXPENDITURE

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[The implementation of the central concepts captured by the final arrangements in ss 81 and 83 of the Australian Constitution has evolved over decades. However, some uncertainty as to their actual content and meaning remains. Significantly, the roles of the High Court of Australia and Parliament have been major forces in the breakdown of Parliament's control of the executive's expenditures, opening the way for the adoption of the current accountability and transparency arrangements. Recent actions by Parliament show that it is re-asserting its control over appropriations. However, this article advocates that the focus should be on expenditure rather than appropriations, taking advantage of the potential accountability and transparency afforded by the recent public administration reforms.]

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I INTRODUCTION

The financial transitional arrangements finally adopted in the *Australian Constitution* provided for the Commonwealth to take over the collection and control of state customs duties and excise,¹ and then for the Commonwealth to impose uniform customs duties within two years of its establishment.² 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.³ During the five years after uniform customs duties were imposed, or 'until the Parliament otherwise provide[d]', the Commonwealth was

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¹ *Constitution* s 86.

² *Constitution* s 88. The Commonwealth did impose uniform customs duties at 4pm on 8 October 1901: *Customs Tariff Act 1902* (Cth) s 4. Notably, Western Australia 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.

³ *Constitution* s 89.

to account to the states,⁴ and thereafter make payments to the states of the surplus 'on such basis as [Parliament] deems fair'.⁵ Central to this delicate compromise was the maintenance of Parliament's authority over the executive's future expenditure, the *Constitution* providing in part:

81 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*.

...

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

This article charts the unresolved tension in this compromise between the *Constitution's* apparent requirements for parliamentary control over the Australian government's (the executive's) expenditure,⁶ and the roles of the High Court of Australia and Parliament in asserting Parliament's apparent constitutional paramountcy in these matters.⁷ This analysis is timely as the losing parties in *Combet v Commonwealth*⁸ who challenged various aspects of the Australian government's expenditure on constitutional grounds⁹ are now Members of the House of Representatives and of the Australian government,¹⁰ with direct involvement in Parliament's formulation of future Australian government expenditure arrangements. Further, the recently elected Australian government campaigned for much greater disclosure of government financial information, expressly citing loose appropriations and the loss of Parliament's control over expenditure.¹¹ The analysis presented in this article traces in detail the various

⁴ *Constitution* s 93.

⁵ *Constitution* s 94.

⁶ See, eg, John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 812; *Victoria v Commonwealth* (1975) 134 CLR 338, 384–7 (Stephen J) ('*Australian Assistance Plan Case*'); *Combet v Commonwealth* (2005) 224 CLR 494, 535–7 (McHugh J).

⁷ Various aspects of appropriations have been addressed by others: see, eg, Geoffrey Lindell, 'The *Combet* Case and the Appropriation of Taxpayers' Funds for Political Advertising — An Erosion of Fundamental Principles?' (2007) 66 *Australian Journal of Public Administration* 307; Rosemary Laing, 'Accounting and Accountability' (2007) 22(1) *Australasian Parliamentary Review* 19; Charles Lawson, "'Special Accounts' under the *Constitution*: Amounts Appropriated for Designated Purposes' (2006) 29 *University of New South Wales Law Journal* 114; Maurice Kennedy, 'Cheques and Balances' (Research Paper No 16, Parliamentary Library, Parliament of Australia, 2002); Cheryl Saunders, 'Parliamentary Appropriations' in Cheryl Saunders et al (eds), *Current Constitutional Problems in Australia* (1982) 1–36; Enid Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145.

⁸ (2005) 224 CLR 494.

⁹ For reviews of this decision, see Lindell, above n 7; John Uhr, 'Appropriations and the Legislative Process' (2006) 17 *Public Law Review* 173; Lotta Ziegert, 'Does the Public Purse Have Strings Attached? *Combet and Anor v Commonwealth of Australia and Ors*' (2006) 28 *Sydney Law Review* 387. See also Ernst Willheim, 'Review of Australian Public Law Developments' (2006) 30 *Melbourne University Law Review* 269, 286–7.

¹⁰ These were the Hon Greg Combet AM, MP, Member for Charlton and Parliamentary Secretary for Defence Procurement, and the Hon Nicola Roxon MP, Member for Gellibrand and Minister for Health and Ageing.

¹¹ See Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2005, 9 (Lindsay Tanner); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 Feb-

decisions of the High Court to illustrate the uncertainty reflected in these decisions and the opportunity this has presented for the Australian government, with Parliament's approval, to undermine Parliament's control over the Australian government's expenditure. Although recent measures in Parliament may address some of these concerns, this article advocates that the focus should be on expenditure rather than appropriations and that this would provide enhanced accountability and transparency of the government's expenditure beyond that afforded by the recent public administration reforms.

Part II of this article considers the *Constitution's* Consolidated Revenue Fund ('CRF') to illustrate the ambiguous High Court conceptions of the CRF which led Parliament to give to the Australian government the details of the CRF's determination. Part III looks at the *Constitution's* closely related surplus revenue provisions to illustrate that Parliament, with the support and approval of the High Court, is undermining a key restriction on linking appropriations to the amounts of money actually held by the Commonwealth (and within the CRF). Part IV examines the *Constitution's* appropriation requirements to illustrate the High Court's apparent preference for Parliament to resolve the detail of appropriations. Part V considers the requirement that Senate amendment of appropriations is limited to those described as not for the 'ordinary annual services of the Government' and how this is now a matter for resolution entirely by agreement between Parliament and the Australian government. Part VI then concludes that Parliament needs to change its focus from the annual appropriation Bills to after-the-event reporting, accountability and transparency arrangements afforded by the recent public administration reforms, and in particular to the linkage between the appropriation Bills (and associated Portfolio Budget Statements), the related financial statements according to the *Financial Management and Accountability Act 1997* (Cth) and the Annual Reports according to the *Public Service Act 1999* (Cth). Various means of achieving this are discussed.

II THE CONSOLIDATED REVENUE FUND

Section 81 of the *Constitution* articulates the concepts of '[a]ll revenues or moneys' and 'raised or received' in respect of the 'one [CRF]'. The terms 'revenues' and 'moneys' are critical to the evolution of the modern conception of the CRF. The words in the original draft of the *Constitution* were 'duties, revenues and moneys'.¹² At the Adelaide Convention the words 'duties' and 'moneys' were removed to make it clear that loan moneys did not go to the CRF.¹³ This was confirmed at the Melbourne Convention 'for the same reasons'.¹⁴ However, the word 'moneys' was again included in the *Constitution* and the reasons for this inclusion remain unclear.¹⁵ As a consequence, loan moneys

ruary 2006, 118 (Lindsay Tanner). See also Australian Labor Party, *Operation Sunlight: Enhancing Budget Transparency* (2006); AAP, 'Labor Calls for Reforms to the Way Budget Presented', *Australian National News Wire*, 23 October 2005.

¹² See Quick and Garran, above n 6, 811.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

were considered to be separate from the CRF¹⁶ so that the *Audit Act 1901* (Cth) operated a ‘Consolidated Revenue Fund’¹⁷ with a separately accounted Loan Fund¹⁸ and a Trust Fund.¹⁹ The revenues and moneys from different sources were credited under these *Audit Act 1901* (Cth) arrangements to the separate ‘Consolidated Revenue Fund’, Loan Fund and Trust Fund accounts,²⁰ with each ‘component’ of the Loan Fund and Trust Fund accounted for separately under comprehensive and centrally controlled ledger arrangements.²¹

These developments in Parliament were paralleled by the High Court’s uncertainty over the form of the CRF and establishing when revenues and moneys entered and moneys left the CRF. The High Court first contemplated the CRF in *New South Wales v Commonwealth* (‘*Surplus Revenue Case*’).²² There the *Old-Age Pensions Appropriation Act 1908* (Cth) and the *Coast Defence Appropriation Act 1908* (Cth) appropriated amounts to two *Audit Act 1901* (Cth) trust accounts ‘for Invalid and Old-Age Pensions’ and ‘for Harbour and Coastal (Naval) Defence’ respectively.²³ The *Audit Act 1901* (Cth) also provided an appropriation that satisfied the provision that ‘moneys standing to the credit of a Trust Account may be expended for the purposes of the account’.²⁴ The amounts were credited to these trust accounts but were not disbursed during the financial year of the appropriation.²⁵ Meanwhile the *Surplus Revenue Act 1908* (Cth) provided that ‘all payments to Trust Accounts, established under the *Audit Act*

¹⁶ A contrary view has been expressed by Sir Owen Dixon before the Royal Commission on the *Constitution* of the Commonwealth of Australia: Commonwealth, Royal Commission on the *Constitution* of the Commonwealth of Australia, *Report* (1929). His Honour contemplated that the CRF was ‘a continuous fund that might be appropriated irrespective of the money going into [the CRF including loan moneys]’: see Campbell, above n 7, 149.

¹⁷ 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’ as ‘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’.

¹⁸ *Audit Act 1901* (Cth) s 55. Having a separate Loan Fund was required by the *Financial Management and Accountability Act 1997* (Cth) s 19 until the *Financial Management Legislation Amendment Act 1999* (Cth) sch 1.

¹⁹ *Audit Act 1901* (Cth) s 60. The separate Trust Fund was reflected in the *Financial Management and Accountability Act 1997* (Cth) ss 20–1 through the creation of a separate Reserved Money Fund and a Commercial Activities Fund. This was until the *Financial Management Legislation Amendment Act 1999* (Cth) sch 1 abolished these sections.

²⁰ For an illustration of the model showing typical transfers, see Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report No 395 (2003) app J.

²¹ This was done through cash accounting, and the Department of Finance and Administration also maintained a central ledger dealing with each and every payment made by the Commonwealth. For a description of these arrangements in dealing with trust accounts, see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 574–5 (Mason CJ, Deane, Toohey and Gaudron JJ) (‘*Cemetery Reserve Case*’). For an early account, see Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 1901, 1249 (George Turner, Treasurer).

²² (1908) 7 CLR 179.

²³ *Ibid* 186 (Griffith CJ), 191–2 (Barton J), 200–1 (Isaacs J), 203 (Higgins J).

²⁴ *Audit Act 1901* (Cth) s 62A(6). This was an amendment expressly directed to appropriating amounts received in Commonwealth ‘trading’: see *Audit Act 1906* (Cth) s 13; Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1906, 2066 (John Forrest, Treasurer).

²⁵ *Surplus Revenue Case* (1908) 7 CLR 179, 186 (Griffith CJ), 191–2 (Barton J), 199 (O’Connor J), 201–2 (Isaacs J), 203 (Higgins J).

1901–06, of moneys appropriated by law for any purpose of the Commonwealth shall be deemed to be expenditure²⁶, and that these appropriations did not lapse.²⁷ The issue before the High Court was whether these appropriated but unexpended amounts were a part of the surplus revenue of the Commonwealth and so payable to the states.²⁸ In deciding that they were not,²⁹ the majority considered that, in the words of Griffith CJ, the ‘Appropriation Act does ... operate as a provisional setting apart or diversion from the Consolidated Revenue Fund of the sum appropriated by the Act.’³⁰ However, there were different conceptions of exactly how these transactions should be characterised. Griffith CJ and Higgins J considered that the *Old-Age Pensions Appropriation Act 1908* (Cth) and the *Coast Defence Appropriation Act 1908* (Cth) validly appropriated amounts (or authorised expenditure of amounts) from the CRF,³¹ while Barton, O’Connor and Isaacs JJ considered that the Acts appropriated the CRF and that amounts were drawn from the Treasury and paid to the trust accounts.³²

Later in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (‘*Cemetery Reserve Case*’),³³ the High Court again considered appropriations involving an *Audit Act 1901* (Cth) trust account.³⁴ There the *Training Guarantee Act 1990* (Cth) imposed a charge (a tax) on employers of an amount equal to the employer’s shortfall of a minimum set training expenditure and incorporated the *Training Guarantee (Administration) Act 1990* (Cth).³⁵ The purpose of the *Training Guarantee (Administration) Act 1990* (Cth) was

to increase, and improve the quality of, the employment related skills of the Australian workforce so that it works more productively, flexibly and safely, thereby increasing the efficiency and international competitiveness of Australian industry.³⁶

The *Training Guarantee (Administration) Act 1990* (Cth) established the Training Guarantee Fund as an *Audit Act 1901* (Cth) trust account.³⁷ Some of the amounts paid to the Commonwealth by employers were then to be paid into this fund, and then used to pay the Commonwealth and the states under separate

²⁶ *Surplus Revenue Act 1908* (Cth) s 4(4)(d).

²⁷ *Surplus Revenue Act 1908* (Cth) s 5. Notably, the *Audit Act 1901* (Cth) s 36 provided for all appropriations to lapse at the end of a financial year, subject to some limitations.

²⁸ *Constitution* s 94. See also *Surplus Revenue Case* (1908) 7 CLR 179, 186–7 (Griffith CJ), 191–2 (Barton J), 197 (O’Connor J), 199 (Isaacs J), 203 (Higgins J).

²⁹ *Surplus Revenue Case* (1908) 7 CLR 179, 191 (Griffith CJ), 196–7 (Barton J), 199 (O’Connor J), 203 (Isaacs J), 206 (Higgins J).

³⁰ *Ibid* 190–1 (Griffith CJ). See also at 194 (Barton J), 199 (O’Connor J), 200 (Isaacs J), 206 (Higgins J).

³¹ *Ibid* 191 (Griffith CJ), 203 (Higgins J).

³² *Ibid* 196 (Barton J) (‘withdrawn from the Treasury and paid to’), 199 (O’Connor J) (‘paid out’), 201 (Isaacs J) (‘pay it out’).

³³ (1993) 176 CLR 555.

³⁴ Other cases also dealt with *Audit Act 1901* (Cth) trust accounts, although they do not provide significant insights into the CRF: see, eg, *Luton v Lessels* (2002) 210 CLR 333, 349–50 (Gaudron and Hayne JJ).

³⁵ *Cemetery Reserve Case* (1993) 176 CLR 555, 564–6 (Mason CJ, Deane, Toohey and Gaudron JJ), 585–6 (Dawson J).

³⁶ *Training Guarantee (Administration) Act 1990* (Cth) s 3(1).

³⁷ *Training Guarantee (Administration) Act 1990* (Cth) s 32.

agreements and in reimbursing employers for overpayments or errors in payments.³⁸ The issues before the High Court included whether the *Training Guarantee (Administration) Act 1990* (Cth) required payments directly to the trust account, bypassing the constitutional requirement of payment into the CRF and then an appropriation from the CRF.³⁹ Specifically, the *Training Guarantee (Administration) Act 1990* (Cth) required ‘amounts paid to the Commonwealth under this Act’ and ‘amounts paid to the Commonwealth for the purposes of the [Training Guarantee] Fund’ to be paid into the Training Guarantee Fund trust account,⁴⁰ and provided that

money in the [Training Guarantee] Fund may be applied for the purposes of ... reimbursing the Commonwealth ... making payments under training guarantee agreements ... refunding any overpaid amounts ... or any amounts paid ... in error.⁴¹

The *Audit Act 1901* (Cth) also provided that for trust accounts, such as the Training Guarantee Fund, ‘[m]oneys standing to the credit of a Trust Account may be expended for the purposes of the account.’⁴² In addressing these issues the High Court provided some insights into its conception of the CRF.

The High Court accepted that *all* the moneys received by the Commonwealth formed part of the CRF and required an appropriation to be disbursed.⁴³ Further, all the judges considered that there was a valid appropriation from the CRF and that the arrangements set out in the *Training Guarantee Act 1990* (Cth) and the *Training Guarantee (Administration) Act 1990* (Cth) validly complied with the *Constitution*.⁴⁴ They differed, however, in their conceptions of the mechanics of payments to the CRF and payments through appropriations or actual expenditure. The details of the *Cemetery Reserve Case* decisions are significant because they reveal the potential breadth of the CRF conception and the broad potential for the Australian government and Parliament to craft appropriation and expenditure arrangements that comply with the *Constitution*.

The joint judgment in the *Cemetery Reserve Case* accepted that the moneys forming the CRF could not be separately identified and that the accounting scheme adopted under the *Audit Act 1901* (Cth) did not necessarily coincide with the CRF: ‘[t]here are no fiscally separate moneys which can be identified as constituting each of the three accounts, the Consolidated Revenue Fund, the Loan Fund and the Trust Fund.’⁴⁵ The arrangements under the *Training Guarantee (Administration) Act 1990* (Cth) were then characterised as payments from employers to the CRF with a standing appropriation in the *Training Guarantee*

³⁸ *Training Guarantee (Administration) Act 1990* (Cth) ss 33–4.

³⁹ *Cemetery Reserve Case* (1993) 176 CLR 555, 572 (Mason CJ, Deane, Toohey and Gaudron JJ), 581–2 (Brennan J), 590–1 (Dawson J), 600 (McHugh J).

⁴⁰ *Training Guarantee (Administration) Act 1990* (Cth) ss 33(a)–(b).

⁴¹ *Training Guarantee (Administration) Act 1990* (Cth) s 34(1).

⁴² *Audit Act 1901* (Cth) s 62A(6).

⁴³ *Cemetery Reserve Case* (1993) 176 CLR 555, 572–3 (Mason CJ, Deane, Toohey and Gaudron JJ), 580–1 (Brennan J), 591 (Dawson J), 599 (McHugh J).

⁴⁴ *Ibid* 577–8 (Mason CJ, Deane, Toohey and Gaudron JJ), 584–5 (Brennan J), 593 (Dawson J), 603 (McHugh J).

⁴⁵ *Ibid* 573 (Mason CJ, Deane, Toohey and Gaudron JJ).

(*Administration*) Act 1990 (Cth) from the CRF to the Training Guarantee Fund fulfilling the requirements of s 81 of the *Constitution*.⁴⁶ The authority to expend the moneys credited to the trust account was then found in either the *Training Guarantee (Administration) Act 1990* (Cth)⁴⁷ or the *Audit Act 1901* (Cth),⁴⁸ in order to comply with the requirements of s 83 of the *Constitution*.⁴⁹ Significantly, the joint judgment expressly rejected the plaintiff's contention that the moneys paid under the *Training Guarantee (Administration) Act 1990* (Cth) bypassed the CRF, instead accepting that the Training Guarantee Fund was 'something different and apart from the [CRF]'.⁵⁰ Unfortunately, the joint judgment was not clear about when the moneys left the CRF, and whether this was on appropriation to the trust account or on exercising the authority to expend.

Dawson J focused on the Trust Fund under the *Audit Act 1901* (Cth) and on the Training Guarantee Fund being a Trust Fund trust account.⁵¹ As a consequence, he considered that amounts paid under the *Training Guarantee (Administration) Act 1990* (Cth) 'must initially form part of the [CRF] and must therefore, having regard to s 81 of the *Constitution*, be appropriated to the Trust Fund before they can be regarded as constituting part of that [Trust] Fund.'⁵² The distinct and separate nature of the Trust Fund from the CRF was apparent, according to Dawson J, from the decision in the *Surplus Revenue Case* finding that moneys appropriated out of the CRF to the Trust Fund were not part of the 'surplus revenue'.⁵³ Once the amounts were appropriated to the Trust Fund, an authority to expend those amounts was then found in the *Audit Act 1901* (Cth) trust account standing appropriation.⁵⁴ However, his Honour also considered that the *Training Guarantee (Administration) Act 1990* (Cth) might itself provide the same authority.⁵⁵ Unfortunately, his Honour did not clarify whether moneys left the CRF on crediting the trust account or on expenditure according to the *Training Guarantee (Administration) Act 1990* (Cth).

McHugh J traced the historical development of the English Consolidated Fund from its origins as a collection of many separate accounts that had been used to trace the collection of tax and its expenditure for the specific purpose for which it was collected.⁵⁶ This model of the Consolidated Fund, according to McHugh J, was then applied as the CRF detailed in s 81 of the *Constitution*.⁵⁷ Hence:

⁴⁶ Ibid 576–7.

⁴⁷ *Training Guarantee (Administration) Act 1990* (Cth) s 34(1).

⁴⁸ *Audit Act 1901* (Cth) s 62A(6).

⁴⁹ *Cemetery Reserve Case* (1993) 176 CLR 555, 577–8 (Mason CJ, Deane, Toohey and Gaudron JJ).

⁵⁰ Ibid 572.

⁵¹ Ibid 591–2.

⁵² Ibid 592.

⁵³ Ibid.

⁵⁴ Ibid 593.

⁵⁵ Ibid.

⁵⁶ Ibid 598–9.

⁵⁷ Ibid 599.

The [CRF] is an abstraction which is descriptive of the totality of moneys received 'by the Executive Government of the Commonwealth' irrespective of where they happen to be held. Once moneys are received by the Executive Government, they become part of the [CRF] by force of s 81 of the *Constitution*. ... [T]he purpose ... 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 the authority of Parliament.⁵⁸

McHugh J then held that moneys received under the *Training Guarantee (Administration) Act 1990* (Cth) became part of the CRF, and that 'the moneys standing to the credit of the Trust Fund remain part of the [CRF] unless and until they have been appropriated by Parliament'.⁵⁹ His Honour then considered that the *Training Guarantee (Administration) Act 1990* (Cth) led to a valid appropriation by a combination of directing moneys to the Training Guarantee Fund and then authorising expenditures from that trust account for the 'purposes of the Commonwealth'.⁶⁰ Unfortunately, it is not entirely clear whether the moneys ceased to be part of the CRF on appropriation or on some other event such as expenditure.

Meanwhile, Brennan J considered that moneys paid to the Commonwealth 'form part of the CRF from the moment that 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'.⁶¹ In short, Brennan J characterised the transaction as an employer payment into the CRF that was then appropriated by the *Training Guarantee (Administration) Act 1990* (Cth) with the money leaving the CRF on its disbursement from the Training Guarantee Fund according to the *Training Guarantee (Administration) Act 1990* (Cth).⁶² His Honour also considered, albeit as 'a question of interest but not of practical difficulty', that the *Audit Act 1901* (Cth) provided a valid appropriation 'with little or no work to do'.⁶³ Relevantly, Brennan J stated that '[a]s it stands, s 81 appears to stamp the character of the CRF on all Commonwealth revenue raised and all moneys received by the Executive Government, irrespective of source', although his Honour did not find it necessary to determine the categories of moneys that formed the CRF (such as revenue receipts and non-revenue receipts including loan payments).⁶⁴

Following the repeal of the *Audit Act 1901* (Cth),⁶⁵ the *Financial Management and Accountability Act 1997* (Cth) (as passed) maintained the distinction between the 'Consolidated Revenue Fund' and the Loan Fund, although *all*

⁵⁸ Ibid.

⁵⁹ Ibid 602.

⁶⁰ Ibid 603.

⁶¹ Ibid 584–5.

⁶² Presumably, the payments of amounts authorised by ss 33 and 34 of the *Training Guarantee (Administration) Act 1990* (Cth) to the Commonwealth are 'notional' payments and these amounts remain part of the CRF: see *Cemetery Reserve Case* (1993) 176 CLR 555, 583 (Brennan J).

⁶³ Ibid 583–4.

⁶⁴ Ibid 580–1.

⁶⁵ *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) s 3, sch 1.

revenues and moneys received by the Commonwealth as ‘public money’⁶⁶ were to be credited to the ‘Consolidated Revenue Fund’⁶⁷ (unless it was ‘special public money’⁶⁸ or overdraft drawings),⁶⁹ and any borrowed moneys were to be transferred to the Loan Fund.⁷⁰ Amounts from either the ‘Consolidated Revenue Fund’ or Loan Fund could then be transferred to ‘components’ of the Reserve Money Fund⁷¹ and the Commercial Activities Fund⁷² that were a ‘purpose based’ replacement for the Trust Fund.⁷³ The *Financial Management Legislation Amendment Act 1999* (Cth) then merged the Loan Fund and the ‘components’ of the Reserve Money Fund and the Commercial Activities Fund into the single CRF.⁷⁴ Significantly, ‘special public money’ and overdraft drawings ceased to be classed separately and merely formed part of the same common CRF.⁷⁵ The ‘new’ Special Accounts preserved the rights and obligations of the ‘components’ of the Reserve Money Fund and Commercial Activities Fund,⁷⁶ but hypothecated amounts for specific (designated) purposes, supported by an appropriation.⁷⁷ In addition to these formal legislative changes, the Australian government also

⁶⁶ ‘Public money’ was defined as ‘money in the custody or under the control of the Commonwealth’ or ‘money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money’, including ‘money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth’: *Financial Management and Accountability Act 1997* (Cth) s 5. Notably, ‘special public money’ is a subset of ‘public money’: ss 5, 16(4).

⁶⁷ *Financial Management and Accountability Act 1997* (Cth) s 18, repealed by *Financial Management Legislation Amendment Act 1999* (Cth) s 17. For an illustration of the model showing typical transfers, see Joint Committee of Public Accounts and Audit, above n 20.

⁶⁸ ‘Special public money’ is defined as ‘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: *Financial Management and Accountability Act 1997* (Cth) s 16. The note to this section provides that ‘[m]oney held on trust for another person is an example of special public money’, although note that the place of the Commonwealth as a trustee of money may not result in that money being outside, or separate from, the CRF.

⁶⁹ *Financial Management and Accountability Act 1997* (Cth) s 8. Notably, this did not include ‘advances’ made according to s 38.

⁷⁰ *Financial Management and Accountability Act 1997* (Cth) s 19, repealed by *Financial Management Legislation Amendment Act 1999* (Cth) s 17.

⁷¹ *Financial Management and Accountability Act 1997* (Cth) s 20, repealed by *Financial Management Legislation Amendment Act 1999* (Cth) s 17.

⁷² *Financial Management and Accountability Act 1997* (Cth) s 21, repealed by *Financial Management Legislation Amendment Act 1999* (Cth) s 17.

⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8345–6 (John Fahey, Minister for Finance); Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, 1352 (Ian Campbell, Parliamentary Secretary to the Treasurer).

⁷⁴ See Joint Committee of Public Accounts and Audit, above n 20, 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, 1999); Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (2003) <<http://www.finance.gov.au/publications/fmg-series/docs/Special-Accounts-Guidelines-Final.pdf>>.

⁷⁵ See *Financial Management Legislation Amendment Act 1999* (Cth) sch 1, ss 8, 17.

⁷⁶ *Financial Management Legislation Amendment Act 1999* (Cth) s 5. See also Explanatory Memorandum, *Financial Management Legislation Amendment Bill 1999* (Cth) 6.

⁷⁷ *Financial Management and Accountability Act 1997* (Cth) ss 20(4), 21(1). The term ‘hypothecated’ also includes situations where the Commonwealth holds money as a genuine trustee for the states as part of a business operation, and so on: see Commonwealth, *Proof Committee Hansard*, Joint Committee of Public Accounts and Audit, 7 March 2003, PA8 (Ian McPhee, General Manager, Financial Management Group, Department of Finance and Administration).

adopted the view that the terms ‘raised and received’ no longer required amounts to be physically credited to a central ledger before becoming part of the CRF; instead, any amount ‘raised and received’ automatically became part of the CRF — the ‘self-executing CRF’.⁷⁸ The ‘self-executing CRF’ also enabled the use of non-lapsing appropriations so that there was no longer a requirement to set aside amounts from the CRF to another place to avoid lapsing the appropriation each year,⁷⁹ and this has been accepted by Parliament in subsequent appropriation Bills.⁸⁰

Despite the ambiguities and uncertainties following the *Cemetery Reserve Case* (and the *Surplus Revenue Case*), the Australian government has articulated its conception of the nature and composition of the CRF in the following terms:

- The CRF is ‘self-executing’. That is, all revenues or moneys received by the Commonwealth automatically form part of the CRF, whether or not the Commonwealth has credited those moneys to a fund or account which is designated as part of the CRF.
- The CRF includes money borrowed by the Commonwealth and ‘trust money’, as well as money in the nature of revenue. As a result, an appropriation is required to spend all such money, including that held on trust.
- The wide range of circumstances in which Commonwealth money is raised or received makes it *impracticable to identify the precise balance of the CRF* at any particular time.⁸¹

The effect of the *Financial Management Legislation Amendment Act 1999* (Cth) and the interpretation of the High Court’s decisions by the Australian government (in particular Brennan J’s approach in the *Cemetery Reserve Case*) removed the need for fund accounting through a central ledger⁸² and opened the

⁷⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, 2284 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration); Commonwealth, *Parliamentary Debates*, Senate, 22 March 1999, 2914 (Jocelyn Newman, Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status of Women); Minister for Finance and Deregulation, *Budget: Agency Resourcing*, Budget Paper No 4 (2008) 1. See also Department of Finance and Administration, ‘Appropriations and the Consolidated Revenue Fund’ (Finance Circular No 2004/06, 2004); Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004–05 (2004) 32.

⁷⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, 2284 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration); Commonwealth, *Parliamentary Debates*, Senate, 22 March 1999, 2914 (Jocelyn Newman, Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status of Women). See also Senate Standing Committee on Finance and Public Administration, Commonwealth Parliament, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) 12, 27–30.

⁸⁰ The long title of appropriation Bills now provides: ‘An Act to appropriate money out of the [CRF] for the ordinary annual services of the Government, and for related purposes’ (see, eg, *Appropriation Act (No 1) 2007–2008* (Cth)). The earlier long title provided, for example: ‘An Act to appropriate money out of the [CRF] for the service of the year ending on 30 June 2000, and for related purposes’ (see, eg, *Appropriation Act (No 1) 1999–2000* (Cth)).

⁸¹ Australian National Audit Office, *Financial Management of Special Appropriations*, above n 78, 32–3 (emphasis added). See also Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee (Estimates), 15 February 2005, F&PA 53 (Ian McPhee, General Manager, Financial Management Group); Department of Finance and Administration, ‘Appropriations and the Consolidated Revenue Fund’, above n 78; Joint Committee of Public Accounts and Audit, above n 20, 66–7, app J.

⁸² See Explanatory Memorandum, above n 76, 1, 6.

way for accrual budgeting.⁸³ This was a significant change, perhaps even ‘profound’,⁸⁴ because the focus moved from cash transactions and cash balances to the financial effects of transactions and events when they occur.⁸⁵ The consequence has been the fragmentation of the locations and contents of the CRF from a central cash ledger to a multitude of accrual ledgers throughout the Commonwealth. Importantly, Parliament has provided a broad delegation to the Finance Minister through the *Financial Management and Accountability Act 1997* (Cth), subject only to disallowance by Parliament,⁸⁶ to establish the accounting principles and standards that determine the boundaries and dealings with amounts that comprise the CRF.⁸⁷ In effect, Parliament has given over the details of the CRF’s determination to the Australian government.

This may have been ameliorated in part with the reporting of cash balances according to the *Charter of Budget Honesty Act 1998* (Cth) of moneys actually held by the Commonwealth,⁸⁸ and with the reporting of information about the true costs and liabilities incurred by the Commonwealth (such as outstanding employee entitlements).⁸⁹ Further, since 2002 the Australian government has also attempted to quantify the cash balances of the CRF, albeit noting that ‘[t]here is ... no requirement for the [CRF] to be accounted for in any particular form’.⁹⁰ The CRF is quantified, ‘for practical purposes’, as the Australian government’s total General Government Sector cash,⁹¹ less the cash controlled and administered by bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth),⁹² plus ‘special public monies’.⁹³ Parliament appears to have

⁸³ See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 1999, 2284 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration); Commonwealth, *Parliamentary Debates*, Senate, 22 March 1999, 2913 (Jocelyn Newman, Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status of Women); Explanatory Memorandum, above n 76.

⁸⁴ See Kennedy, above n 7, ii.

⁸⁵ See Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 6–10. See also Explanatory Memorandum, above n 76, 1, 6.

⁸⁶ *Financial Management and Accountability Act 1997* (Cth) s 63(3).

⁸⁷ See *Financial Management and Accountability Act 1997* (Cth) ss 48(1), 63; *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2007) 2007* (Cth) O 3, sch 1. Notably, a similar situation existed under the *Audit Act 1901* (Cth) s 40.

⁸⁸ See, eg, the Commonwealth’s Final Budget Outcomes: Department of Finance and Administration, *Final Budget Outcome 2006–07* (2007) 46.

⁸⁹ See, eg, *Appropriation Act (No 1) 2005–2006* (Cth) sch 1 and *Portfolio Budget Statements* setting out in detail the full cost of the price of outputs forming the appropriation.

⁹⁰ Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2003* (2003) 160. See also Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2007* (2007) 159.

⁹¹ The General Government Sector, in contrast to the Public Non-Financial Corporations Sector and the Public Financial Corporations Sector, is the ‘[g]overnment departments and agencies that provide non-market public services and are funded mainly through taxes’: see, eg, Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2007*, above n 90, 60. See also Australian Bureau of Statistics, *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, ABS Catalogue No 5514.0.55.001 (2005) 256; Australian Accounting Standards Board, *Financial Reporting of General Government Sectors by Governments*, AASB 1049 (2006) 29.

⁹² That is, bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth) that are ‘financially autonomous incorporated Commonwealth bodies that can acquire legal ownership in

accepted this methodology for calculating the CRF — which is the Australian government's conception of the *Constitution's* CRF⁹⁴ — such that there are significant amounts held by the Commonwealth outside the bounds of the CRF,⁹⁵ with the consequential uncertainty about where the boundaries of the CRF may lie at any given point in time.⁹⁶ This result undoubtedly owes its beginnings to the High Court's early pronouncement about the surplus revenue and the obviation of the need to precisely define the balance of the CRF. The nature of the surplus revenue is considered next.

III SURPLUS REVENUE

During the five years after uniform customs duties were imposed, and 'until otherwise provide[d]', the *Constitution* provided for the Commonwealth to account to the states⁹⁷ and thereafter make payments to the states 'on such basis as [Parliament] deems fair' of 'all surplus revenue of the Commonwealth'.⁹⁸ Significantly, the *Constitution* did not set out how the repayments of the surplus were to be determined or how they were to be paid.⁹⁹ After the five-year

their own right': Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8346 (John Fahey, Minister for Finance).

⁹³ 'Special public monies' are 'public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth' such as '[m]oney held by the Commonwealth on trust for another person'. The *Financial Management and Accountability Act 1997* (Cth) ss 5, 16 define 'public money' as 'money in the custody or under the control of the Commonwealth' or 'money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money', including 'money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth'. See also Minister for Finance and Administration, *Special Instruction Regarding Special Public Money 2003/01* (2003); Department of Finance and Administration, 'Special Instruction Regarding Special Public Money' (Finance Circular 2003/10, 2003).

⁹⁴ Despite this, there have been some recent concerns about the formal requirements of identifying an appropriation and accounting for the expenditure under the appropriation: see, eg, Australian National Audit Office, *Financial Management of Special Appropriations*, above n 78, 13–14. See also Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 18–19; Senate Standing Committee for the Scrutiny of Bills, Commonwealth Parliament, *Fourteenth Report of 2005: Accountability and Standing Appropriations* (2005) 271–2.

⁹⁵ This now includes investments under *Financial Management and Accountability Act 1997* (Cth) s 39 and amounts held by *Commonwealth Authorities and Companies Act 1997* (Cth) bodies (except those holding 'public money' in respect of that 'public money': *Financial Management and Accountability Regulations 1997* (Cth) reg 5 sch 1 pt 2). See also Australian National Audit Office, *Financial Management of Special Appropriations*, above n 78, 65–7 (there are certain bodies established by the *Commonwealth Authorities and Companies Act 1997* (Cth) that are able to hold money in their own right). Notably, the amounts collected as taxation under *A New Tax System (Goods and Services Tax) Act 1999* (Cth) are now considered to be part of the CRF, although they had previously been considered to be a 'State tax' collected by the Commonwealth: see Department of Finance and Administration, *Consolidated Financial Statements for the Year Ended 30 June 2007*, above n 90, 1; Minister for Finance and Deregulation, *Budget: Strategy and Outlook*, Budget Paper No 1 (2008) 5–26.

⁹⁶ See, eg, Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee (Estimates), 14 February 2005, F&PA 173 (Brian Boyd). The only concern appears to be the over-expenditure of an appropriation: see Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 18–19.

⁹⁷ *Constitution* s 93.

⁹⁸ *Constitution* s 94.

⁹⁹ This reflects the difficulty of achieving an agreement during the drafting of the *Constitution*: see Quick and Garran, above n 6, 218–19.

transition period, 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,¹⁰⁰ and introduced a scheme to ‘ascertain the balance of revenue over expenditure’ each month and ‘pay that balance to the States as surplus revenue.’¹⁰¹ The sting was that the legislation also provided that ‘all payments to Trust Accounts, established under the *Audit Act 1901–06* (Cth), of moneys appropriated by law for any purpose of the Commonwealth shall be deemed to be expenditure’¹⁰² and, further, that these appropriations did not lapse.¹⁰³ This meant that the amounts appropriated were no longer part of the surplus revenue of the Commonwealth and they were 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 by a state when amounts appropriated were not disbursed during the financial year (albeit deemed expended) and those amounts were not included in the surplus revenue calculations and payments.¹⁰⁴

In the *Surplus Revenue Case*, the plaintiff state contended that these unexpended appropriated amounts ought to be distributed among the states and that attempts to set aside future disbursements were outside Parliament’s powers under the *Constitution*.¹⁰⁵ The High Court concluded that lawful appropriations had the effect of segregating the revenue and money of the Commonwealth so that unexpended appropriated amounts did not enter into the calculation of the surplus revenue due to the states under the *Constitution*.¹⁰⁶ 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’s share of the alleged surplus revenue — was lawfully deducted from the balance payable to the states.¹⁰⁷ 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’¹⁰⁸ 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. Griffith CJ, Barton, O’Connor, Isaacs and Higgins JJ all shared a similar view,¹⁰⁹ expressed in the following way by Griffith CJ:

¹⁰⁰ *Surplus Revenue Act 1908* (Cth) s 3.

¹⁰¹ *Surplus Revenue Act 1908* (Cth) s 4(3).

¹⁰² *Surplus Revenue Act 1908* (Cth) s 4(4)(d).

¹⁰³ *Surplus Revenue Act 1908* (Cth) s 5.

¹⁰⁴ The details of the arrangements are set out in the *Surplus Revenue Case* (1908) 7 CLR 179, 180–1.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* 191 (Griffith CJ), 196–7 (Barton J), 199 (O’Connor J), 202–3 (Isaacs J), 206 (Higgins J). See also *Cemetery Reserve Case* (1993) 176 CLR 555.

¹⁰⁷ *Surplus Revenue Case* (1908) 7 CLR 179, 181.

¹⁰⁸ 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, and thus the meaning of ‘expenditure’ in the *Constitution* s 89 governs the meaning of ‘surplus’ in s 94: see *ibid* 188–9 (Griffith CJ).

¹⁰⁹ *Surplus Revenue Case* (1908) 7 CLR 179, 190–1 (Griffith CJ), 193–4 (Barton J), 199 (O’Connor J), 199–202 (Isaacs J), 205–6 (Higgins 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 that period is authorised 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.¹¹⁰

Later in the *Cemetery Reserve Case*, the High Court commented on the *Surplus Revenue Case*.¹¹¹ Significantly, Brennan J considered that the *Surplus Revenue Case* established in the context of the *Training Guarantee (Administration) Act 1990* (Cth) that moneys ceased to be part of the CRF on withdrawal and that they were expenditure for the purposes of 'surplus revenue' when they were appropriated (that is, credited) to the Training Guarantee Fund.¹¹² As set out above, however, the other justices were unclear about when an amount actually left the CRF.¹¹³

The significance of the *Surplus Revenue Case* was its removal of a key measure of accountability for Commonwealth expenditure¹¹⁴ and its validation of an Australian government strategy, with the approval of Parliament, to avoid the distribution of any surplus revenue to the states under the *Constitution* by merely appropriating a similar amount to take it outside the surplus revenue calculations.¹¹⁵ Thus, while the surplus revenue provisions still apply,¹¹⁶ the Australian

¹¹⁰ Ibid 190–1.

¹¹¹ See *Cemetery Reserve Case* (1993) 176 CLR 555, 584 (Brennan J), 592 (Dawson J), 600 (McHugh J).

¹¹² Ibid 584.

¹¹³ See *ibid* 572–8 (Mason CJ, Deane, Toohey and Gaudron JJ), 590–4 (Dawson J), 597–603 (McHugh J).

¹¹⁴ This conclusion relies on the proposition that the purpose of s 94 of the *Constitution* was more than just the return of surplus revenue to the states. While this proposition is open to debate, it seems likely that s 94 and other financial provisions in combination were intended to afford a measure of 'accountability', because the states were concerned that the new Commonwealth should be economical with the expenditure of the states' revenues and moneys: see, eg, Quick and Garran, above n 6, 169–71.

¹¹⁵ This is a profound rebalancing of the relations between the states and the Commonwealth, essentially placing financial control of the states within the ambit of the Commonwealth: see, eg, Michael Coper, *Encounters with the Australian Constitution* (1987) 204–42; A J Hannan, 'Finance and Taxation' in R Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) 247–73. As a measure of the significance of the amounts of 'surplus revenue' that might be involved, the 2008 Budget Papers provided:

The Government ... will invest most of the 2007–08 and 2008–09 Budget *surpluses* in three new funds for *education, health and infrastructure* for long-term investment to build a modern nation ... An underlying cash surplus of \$21.7 billion (1.8 per cent of GDP) is expected in 2008–09 — the largest surplus as a proportion of GDP since 1999–00 — with further strong surpluses projected in the following three years.

Minister for Finance and Deregulation, *Budget: Strategy and Outlook*, above n 95, 1-1 (emphasis added).

government has effectively circumvented their effect so that the present day Australian government considers 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 s 94 of the *Constitution*’.¹¹⁷ Perhaps the most surprising aspect in considering the surplus revenue question is the Australian government’s apparent re-characterisation of the entire constitutional compromise as voluntary Commonwealth largesse, rather than a constitutional obligation.¹¹⁸

It was always envisaged when the *Constitution* was being drafted that the Commonwealth would raise more revenue than it would need to perform its core functions. Consequently, explicit provisions were included to *allow* the Commonwealth to transfer surplus revenue in the form of general revenue assistance to the States.¹¹⁹

The Australian government still calculates the surplus revenue according to the following formula: the balance of the CRF plus the other amounts invested,¹²⁰ less undrawn appropriations for specified amounts, the amounts specified in the annual appropriation Bills, standing appropriations for debt repayment that are quantifiable and certain with respect to the due date for payment and the balance of all Special Accounts.¹²¹ The Australian government considers that ‘[a]s far as can reasonably be determined, *no* surplus revenue of the Commonwealth has existed for distribution since 1908–09’.¹²² While the states appear to accept this

¹¹⁶ Section 3 of the *Surplus Revenue Act 1908* (Cth) provides for the effective ceasing of s 93 of the *Constitution*. Section 3 of the *Surplus Revenue Act 1910* (Cth) also provides for the effective ceasing of s 87 of the *Constitution*. To comply with s 94 of the *Constitution*, s 5 of the *States Grants Act 1927* (Cth) provides that the

Treasurer shall pay to the several States of the Commonwealth, in proportion to the number of their people, any surplus revenue in his hands at the close of the financial year commencing on the first day of July One thousand nine hundred and twenty-seven, and at the close of each financial year thereafter.

See also *Australian Assistance Plan Case* (1975) 134 CLR 338, 358 (Barwick CJ); Australian National Audit Office, *Financial Management of Special Appropriations*, above n 78, 38.

¹¹⁷ 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 No 374 (1999) 12.

¹¹⁸ This change in the federation’s fiscal balance (comprising the ‘vertical fiscal imbalance’ and ‘horizontal fiscal equalisation’ — see Minister for Finance and Deregulation, *Budget: Agency Resourcing*, Budget Paper No 3 (2008) 3–4 — has affected some of the High Court’s deliberations: see, eg, *Australian Assistance Plan Case* (1975) 134 CLR 338, 354–8 (Barwick CJ). For an overview of these financial expenditure arrangements, and in particular the role of the *Constitution* s 96, see C A Saunders, ‘The Development of the Commonwealth Spending Power’ (1978) 11 *Melbourne University Law Review* 369, 389–96. Notably, the term ‘may’ in the *Constitution* s 94 has a ‘mandatory’ faculty: see *Australian Assistance Plan Case* (1975) 134 CLR 338, 358–9 (Barwick CJ).

¹¹⁹ Minister for Finance and Deregulation, *Budget: Agency Resourcing*, above n 118, 3 (emphasis added). Notably, the states rely on Commonwealth financial assistance to meet between 40–80 per cent of their average funding requirement, and this is made up of all GST revenue, more than 90 different payments for specific purposes and a small amount of other general revenue assistance: at 3. None of this is now characterised as ‘surplus revenue’.

¹²⁰ See *Financial Management and Accountability Act 1997* (Cth) s 39.

¹²¹ See Australian National Audit Office, *Financial Management of Special Appropriations*, above n 78, 37–8.

¹²² *Ibid* 38, citing the advice from the Department of Finance and Administration in October 2004. See also Treasury, Commonwealth Parliament, *Annual Report 2006–07* (2007) 229; Treasury,

calculation,¹²³ there seems little doubt that a precise calculation of the surplus revenue in the form of its conception at federation as a cash balance is now almost impossible.¹²⁴ As a consequence, the Australian government, with the support and approval of the High Court and Parliament, has undermined a key restriction on linking appropriations to the amounts of money actually held by the Commonwealth (and within the CRF). In effect, breaking the link between appropriations and a calculation of the amounts of money actually held by the Commonwealth means that parliamentary scrutiny of appropriations may no longer be a good mechanism for ensuring the accountability and transparency of expenditure because appropriations exceed the amounts of actual money. This conclusion becomes even more likely when the formal requirements for appropriations are considered in Part IV.

IV APPROPRIATIONS

Since federation there has been a proliferation of the forms of appropriation in addition to the annual appropriation Acts.¹²⁵ These include special (or standing) appropriations,¹²⁶ special accounts (from the progenitor *Audit Act 1901* (Cth) trust fund trust accounts),¹²⁷ net appropriation agreements,¹²⁸ advances to the Finance Minister¹²⁹ and recoverable goods and services taxes ('GST').¹³⁰ Each

Commonwealth Parliament, *Annual Report 2005–06* (2006) 232; Treasury, Commonwealth Parliament, *Annual Report 2004–05* (2005) 216; Treasury, Commonwealth Parliament, *Annual Report 2003–04* (2004) 247–8.

¹²³ There does not appear to have been such a request since 1910: see Australian National Audit Office, *Financial Management of Special Appropriations*, above n 78, 37; Commonwealth, *Committee Hansard*, Senate Finance and Public Administration Legislation Committee (Estimates), 15 February 2005, F&PA 66 (Ian Watt).

¹²⁴ See Australian National Audit Office, *Financial Management of Special Appropriations*, above n 78, 32–3; Department of Finance and Administration, 'Appropriations and the Consolidated Revenue Fund', above n 78; Kennedy, above n 7, 34–8.

¹²⁵ Notably, in addition to these appropriations there are other appropriation-like arrangements such as the non-lapsing of appropriations carrying amounts across years, tax expenditures and, until recently, the Goods and Services Tax: see Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 27–36.

¹²⁶ These are appropriations by Acts other than the annual appropriations Acts and which generally continue for longer than a financial year: see Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 15–18. Notably, this form of appropriation now accounts for approximately 80 per cent of amounts appropriated: see Senate Standing Committee for the Scrutiny of Bills, above n 94, 270.

¹²⁷ These are mechanisms in Acts or determinations used to record amounts in the CRF that are set aside for designated purposes with a Standing Appropriation up to the balance of the Special Account: *Financial Management and Accountability Act 1997* (Cth) ss 20–1. See also Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 19–21.

¹²⁸ These are mechanisms used to direct amounts received from non-appropriated sources to appropriated 'departmental items' that are appropriated (according to 'net appropriations') in the annual appropriation Acts: *Financial Management and Accountability Act 1997* (Cth) s 31. See also Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 22–6; Australian National Audit Office, *Management of Net Appropriation Agreements*, Audit Report No 28 2005–06 (2005).

¹²⁹ This is a mechanism whereby the annual appropriation Acts authorise the Finance Minister to approve expenditure as a contingency for urgent funding 'where the appropriated funds prove to be insufficient or a new appropriation is required': Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 33–5.

of these appropriations is subject to some constitutional constraint. Section 83 of the *Constitution* provides that any ‘money’ that is ‘drawn’ from the ‘Treasury of the Commonwealth’ requires an ‘appropriation made by law’.¹³¹ Where that is moneys derived from the CRF,¹³² s 81 then requires that the appropriation must be for ‘the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this *Constitution*’.¹³³ In effect, this means that Parliament must have passed an appropriation law,¹³⁴ with the exception of specific appropriations found in the *Constitution* itself,¹³⁵ and restricts any expenditure to ‘the purposes of the Commonwealth’.¹³⁶ The critical question is how constrained must the appropriation law be in prescribing the ‘purposes of the Commonwealth’?¹³⁷ This in turn poses two questions: what are the boundaries of the Commonwealth’s purposes, and how precisely must those purposes be articulated? The High Court decisions show over time that these are contentious and difficult questions to resolve, essentially leaving considerable latitude to Parliament in the form and content of a valid appropriation law. These questions are now considered in turn.

¹³⁰ Recoverable GST refers to the amounts of recoverable GST incurred by agencies that is added to their annual appropriation act appropriations: *Financial Management and Accountability Act 1997* (Cth) s 30A. See also *ibid* 36–7.

¹³¹ Notably, *Auckland Harbour Board v The King* [1924] AC 318, 326 (Viscount Haldane) is commonly cited as authority for the proposition that an ‘appropriation made by law’ is necessary: see, eg, *Combet v Commonwealth* (2005) 224 CLR 494, 597–8 (Kirby J); *Cemetery Reserve Case* (1993) 176 CLR 555, 597 (McHugh J); *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Australian Assistance Plan Case* (1975) 134 CLR 338, 392 (Mason J). However, this may not be so certain, as it has been stated that ‘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’ (*Auckland Harbour Board v The King* [1924] AC 318, 326 (Viscount Haldane)), the term ‘authorisation’ arguably including something less than a ‘law’, while what is required is probably something more than just a ‘vote or resolution of either or both Houses of the Parliament’: *Combet v Commonwealth* (2005) 224 CLR 494, 558 (Gummow, Hayne, Callinan and Heydon JJ).

¹³² Theoretically, there may be money that was part of the CRF but was moved out of the CRF with a relevant appropriation while remaining part of the ‘Treasury of the Commonwealth’ (satisfying the requirements of s 81 of the *Constitution*) 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 s 83 of the *Constitution*).

¹³³ *Constitution* s 81. The High Court has been unable to define the terms ‘in the manner’ and ‘subject to the charges and liabilities’ in s 81: see *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 253 (Latham CJ) (*‘Pharmaceutical Benefits Case’*).

¹³⁴ One issue of construction is where the source of power to appropriate is contained in the *Constitution*. Today, this is almost certainly settled as being within s 81 of the *Constitution*: see *Australian Assistance Plan Case* (1975) 134 CLR 338, 392 (Mason J); *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

¹³⁵ See *Constitution* ss 48, 66, 72(iii), 83–4, 85(iii)–(iv), 87, 89, 93–4, 105–105A, 122. Whether these do effect an appropriation is not settled: see, eg, *Australian Assistance Plan Case* (1975) 134 CLR 338, 353 (Barwick CJ) and accompanying footnotes. See also *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

¹³⁶ That s 81 (and s 83) of the *Constitution* refers only to ‘appropriated’ (and ‘appropriation’) has caused the High Court concern as to how this ought to be construed. This concern has focused on whether within these sections there is a requirement for there to be a separate power to ‘expend’ any amounts appropriated: see *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 251 (Latham CJ); *Australian Assistance Plan Case* (1975) 134 CLR 338, 392 (Mason J). See also Saunders, ‘The Development of the Commonwealth Spending Power’, above n 118, 396–407.

¹³⁷ Another related question is determining who has standing to bring such an action: see Lawson, ‘“Special Accounts” under the *Constitution*’, above n 7, 128–9.

A *What Are the Commonwealth's Purposes?*

It remained unclear from the Constitutional Conventions what limits, if any, applied to the scope of valid appropriation purposes.¹³⁸ The High Court has not definitively settled the boundaries of the power, with uncertainty arising where the Commonwealth Parliament seeks to appropriate for purposes beyond the clear legislative powers set out in the *Constitution*.¹³⁹ The detailed nature of the High Court's decisions illustrates the diversity of perspectives and the difficulty in determining the boundaries of the Commonwealth's purposes.

The first substantial High Court decision addressing this question,¹⁴⁰ *Attorney-General (Vic) ex rel Dale v Commonwealth* ('*Pharmaceutical Benefits Case*'), concerned the validity of the *Pharmaceutical Benefits Act 1944* (Cth) that appropriated moneys for the purposes of a pharmaceutical benefits scheme. The Attorney-General for Victoria, on behalf of some of the members of the Medical Society of Victoria, challenged the validity of the *Pharmaceutical Benefits Act 1944* (Cth) as outside the scope of the Commonwealth's legislative powers.¹⁴¹ Essentially there was a Trust Fund trust account¹⁴² established by the *National Welfare Act 1943* (Cth) that provided an appropriation, and for payments 'directed by any law of the Commonwealth ... in relation to health services, unemployment or sickness benefits, family allowances, or other welfare or social services.'¹⁴³ The *Pharmaceutical Benefits Act 1944* (Cth) then set out a scheme for payments in respect of 'pharmaceutical benefits' with a provision expressly providing for those payments to be made out of the *National Welfare Act 1943* (Cth) trust account: '[p]ayments in respect of pharmaceutical benefits shall be made out of the Trust Account established under the *National Welfare Fund Act 1943* and known as the National Welfare Fund.'¹⁴⁴ The critical question for the High Court was whether the *Pharmaceutical Benefits Act 1944*

¹³⁸ See Saunders, 'The Development of the Commonwealth Spending Power', above n 118, 375–9. Notably, at the time of the Constitutional Conventions early commentators were also uncertain about the scope and likely interpretation of these provisions: see, eg, W Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd ed, 1910) 524–5 (limited to 'federal purposes'); John Quick, *The Legislative Powers of the Commonwealth and the States of Australia* (1919) 43 ('any purpose under the sun'); Quick and Garrahan, above n 6, 666 ('the purposes in respect of which the Parliament can make laws').

¹³⁹ Note that if the purpose is identifiable within the legislative powers of the Commonwealth, there is plainly power to appropriate (and expend): see *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 (Mason CJ, Deane and Gaudron JJ), 104 (Wilson and Dawson JJ), 114–15 (Brennan J). Nevertheless, the Commonwealth Parliament has regularly legislated to appropriate for schemes beyond its powers, such as arctic exploration, medical research, literary grants and pensions, public health and giving assistance to distressed Australians: see *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254 (Latham CJ).

¹⁴⁰ The term 'purposes of the Commonwealth' was addressed in passing in the *Surplus Revenue Case* (1908) 7 CLR 179, 192 (Barton J), 200 (Isaacs J). In that case, the justices accepted the purposes of the *Old-Age Pensions Appropriation Act 1908* (Cth) and the *Coast Defence Appropriation Act 1908* (Cth) as being within the *Constitution's* legislative powers.

¹⁴¹ See *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 246 (Latham CJ).

¹⁴² *Audit Act 1901* (Cth) s 62A.

¹⁴³ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 249 (Latham CJ). See further at 264 (Starke J), 280 (Williams J).

¹⁴⁴ *Pharmaceutical Benefits Act 1944* (Cth) s 17. See *ibid* 249 (Latham CJ), 264 (Starke J), 267–8 (Dixon J), 279–80 (Williams J).

(Cth) was a valid law for authorising the payment of Commonwealth moneys for the purposes set out in the Act based on an appropriation in the *National Welfare Act 1943* (Cth) and *Audit Act 1901* (Cth).¹⁴⁵ The plaintiffs contended that the ‘purposes of the Commonwealth’ in s 81 of the *Constitution* meant ‘purposes for which the Commonwealth Parliament has powers to make laws’.¹⁴⁶ Meanwhile, the defendants contended that s 81 of the *Constitution* itself provided an appropriation power (together with incidental expenditure powers under s 51(xxxix)) that was exercised by making laws that expended the appropriated amounts — in short, a power to make laws for any purpose linked with an appropriation including areas outside the Commonwealth’s other constitutional competencies.¹⁴⁷ All the parties accepted that, other than s 81 and its incidental powers, there was no other constitutional legislative power enabling the *Pharmaceutical Benefits Act 1944* (Cth).¹⁴⁸ The justices’ decisions reflect the ongoing graduation of contentions from almost any purposes to only those purposes for which there are express legislative powers.

Latham CJ considered that the ‘purposes of the Commonwealth’ were broader than merely the powers to make laws identified in the *Constitution*.¹⁴⁹ His Honour also considered that the valid purposes were ‘general in the sense that it is for Parliament to determine whether or not a particular purpose shall be adopted as a purpose of the Commonwealth.’¹⁵⁰ Further, his Honour considered that ‘the determination of whether a particular purpose should be regarded and adopted as a Commonwealth purpose is a political matter.’¹⁵¹ His Honour then concluded:

in my opinion, the provisions in s 81 can fairly be read as intended to mean that it is the Commonwealth Parliament, and not any court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes.¹⁵²

However, in finding that the *Pharmaceutical Benefits Act 1944* (Cth) was invalid as an exercise of the Commonwealth’s legislative powers, Latham CJ distinguished between laws providing for the expenditure of money and a broad expansion of Commonwealth power to legislate beyond its stated constitutional powers under the guise of an expenditure law: he analogised that ‘[a] company may have power to subscribe to a hospital or a football club without having

¹⁴⁵ See *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 248–9 (Latham CJ), 264 (Starke J), 267 (Dixon J), 273 (McTiernan J), 276 (Williams J).

¹⁴⁶ *Ibid* 252 (Latham CJ). See further at 276 (Williams J).

¹⁴⁷ *Ibid* 252 (Latham CJ), 265 (Starke J), 269 (Dixon J), 280–1 (Williams J).

¹⁴⁸ *Ibid* 249–50 (Latham CJ), 265 (Starke J), 268 (Dixon J).

¹⁴⁹ *Ibid* 253.

¹⁵⁰ *Ibid* 254.

¹⁵¹ *Ibid* 256. Notably, this argument was made with respect to a similarly ‘general power’ subject to one qualification in s 51 of the *Constitution* to make tax laws subject to being for the peace, order and good government of the Commonwealth. That too was considered to be a matter that ‘depends entirely upon the will of the Commonwealth Parliament’, and ‘entirely a political matter’: at 255–6.

¹⁵² *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 256.

power to conduct a hospital or to organize and control a football club.¹⁵³ Latham CJ considered that the *Pharmaceutical Benefits Act 1944* (Cth) sought to control doctors, chemists, drug sales, and dealings with doctors and chemists, and conferred rights and duties. As such, it was a law outside the Commonwealth's legislative powers and so was invalid.¹⁵⁴

Along similar lines, McTiernan J considered that the 'purposes of the Commonwealth' were 'such purposes as the Parliament determines'.¹⁵⁵

Any purpose for which the elected representatives of the people of the Commonwealth determine to appropriate the revenue is a purpose of the Commonwealth. If it were otherwise, judicial scrutiny of a purpose for which Parliament appropriated revenue could take place in order to determine whether the purpose was lawful or not. The *Constitution* puts the power of the purse in the hands of the Parliament, not in the hands of the Courts. I think that the object of s 81 is to put this power in the hands of Parliament. ... When Parliament has appropriated revenue for any purpose the Court could not decide the question whether it was a purpose of the Commonwealth without entering into a consideration of matters of policy which are peculiarly and exclusively within the legislative sphere.¹⁵⁶

However, McTiernan J then qualified this broad proposition, finding valid any provisions that 'define, specify or limit the purpose to which the revenue is appropriated or because they are merely machinery for the expenditure of the money appropriated or provide safeguards for its due expenditure'.¹⁵⁷ Meanwhile, a provision establishing a right to charge was considered by his Honour to be outside this scope and so invalid (and in this case severable from the remaining valid parts of the *Pharmaceutical Benefits Act 1944* (Cth)).¹⁵⁸

The remaining justices were more circumscribed in their views. Starke J considered that the appropriation power in s 81

must be construed liberally; it is a great constitutional power, but it does not authorize the Commonwealth appropriating its revenues and moneys for any purpose whatever 'without regard to whether the object of expenditure is for the purpose of and incident to some matter which belongs to the Federal Government' ...¹⁵⁹

Meanwhile Dixon J, with whom Rich J agreed, stated that s 81

is a provision in common constitutional form substituting for the usual words 'public service' the word 'purposes' of the Commonwealth only because they are more appropriate in a Federal form of government, and, on the other hand, that s 83, in using the words 'by law' limits the power of appropriation to what can be done by the enactment of a valid law. In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a

¹⁵³ Ibid 256–7.

¹⁵⁴ Ibid 258–63.

¹⁵⁵ Ibid 273.

¹⁵⁶ Ibid 274.

¹⁵⁷ Ibid 274–5.

¹⁵⁸ Ibid 275.

¹⁵⁹ Ibid 266, citing Harrison Moore, above n 138, 523–7 (Moore was of the opinion that the power was limited to 'federal purposes').

national government occupies and ... to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States.¹⁶⁰

In concluding that the whole of the *Pharmaceutical Benefits Act 1944* (Cth) was invalid, Dixon J considered that the content of the legislation was ‘not relevant to any power which the *Constitution* confers on the Parliament.’¹⁶¹ Critically, Dixon J expressly considered the claim that ss 81 and 83 authorised Parliament to expend moneys without any limitations as to purposes.¹⁶² In dealing with this proposition, Dixon J concluded that this argument was not relevant because ‘the *Pharmaceutical Benefits Act* appropriation of money is the consequence of the plan; the plan is not consequential upon or incidental to the appropriation of money.’¹⁶³ If the contrary had been in issue, Dixon J opined that it would have been necessary ‘to consider how much [of the *Pharmaceutical Benefits Act 1944* (Cth)] could be supported under s 81 and how much of the rest could be stripped from the enactment without changing its essential character.’¹⁶⁴

Finally, Williams J considered that the phrase ‘purposes of the Commonwealth’ was included in s 81 to limit the Commonwealth’s appropriating powers so that ‘[t]hese purposes must all be found within the four corners of the *Constitution*.’¹⁶⁵ Unfortunately, Williams J did not elaborate how these purposes might be identified.

Later in *Victoria v Commonwealth* (‘*Australian Assistance Plan Case*’),¹⁶⁶ the High Court considered a line item appropriation in the *Appropriation Act (No 1) 1974–75* (Cth) that provided an appropriation out of the CRF for the ‘Australian Assistance Plan’ according to the line items ‘Grants to Regional Councils for Social Development’ and ‘Development and Evaluation Expenses’.¹⁶⁷ The nature of the Australian Assistance Plan and the Regional Councils was set out in guidelines and discussion papers of an interim committee of the Committee of the Social Welfare Commission¹⁶⁸ following a request by the Minister for assistance in ‘the development of a new project’ in contemplation of future legislation to implement the Australian Assistance Plan.¹⁶⁹ However, money was

¹⁶⁰ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 271–2 (Dixon J), 264 (Rich J).

¹⁶¹ *Ibid* 267.

¹⁶² *Ibid* 268–9.

¹⁶³ *Ibid* 270.

¹⁶⁴ *Ibid*. Significantly, Dixon J accepted (at 269) that:

Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government [the implied nationhood power] ...

¹⁶⁵ *Ibid* 282.

¹⁶⁶ (1975) 134 CLR 338.

¹⁶⁷ *Appropriation Act (No 1) 1974–75* (Cth) s 3, sch 2 div 530 no 4. See *Australian Assistance Plan Case* (1975) 134 CLR 338, 344–5 (Barwick CJ), 366 (McTiernan J), 376 (Gibbs J), 398 (Mason J), 402 (Jacobs J), 416 (Murphy J).

¹⁶⁸ The Committee of the Social Welfare Commission was an entity established under the *Social Welfare Commission Act 1973* (Cth); see *Australian Assistance Plan Case* (1975) 134 CLR 338, 345–6 (Barwick CJ), 407 (Jacobs J).

¹⁶⁹ *Australian Assistance Plan Case* (1975) 134 CLR 338, 346–52 (Barwick CJ), 376–8 (Gibbs J), 400 (Mason J), 403–5 (Jacobs J).

already being provided to Regional Councils out of the CRF for disbursement for the purposes outlined in the guidelines and discussion papers on the authority of the appropriation.¹⁷⁰ Thus, documents prepared by the interim committee of the Commission set out the purposes of the appropriation.¹⁷¹ The question before the High Court was whether these were the ‘purposes of the Commonwealth’ as required by s 81 of the *Constitution*.¹⁷²

Barwick CJ considered that s 81 imposed a restraint on the Commonwealth’s power to appropriate and expend the CRF so as to maintain the distribution of available governmental revenue agreed in the *Constitution* at the time of federation.¹⁷³ Central to his Honour’s position was the express authority in s 96 of the *Constitution* to make grants to the states that ‘has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative competence.’¹⁷⁴ As a corollary, and as limitation on Commonwealth expenditure out of customs and excise and the distribution of the surplus revenue,¹⁷⁵ the Commonwealth should only intrude on the residual governmental power of the states permitted by the *Constitution* (and ‘the financial federalism of the *Constitution*’).¹⁷⁶ Thus:

a purpose must be seen in the law, either expressly or referentially by description. It must be possible to decide that the law containing the appropriation and authority to expend is valid within the constitutional limitation ... [H]owever evidenced or demonstrated, the purpose of the appropriation, i.e. the purpose on or for which the appropriated money may be spent, must, in my opinion, both appear and satisfy the limitation present in the words of s 81, ‘for the purposes of the Commonwealth’.¹⁷⁷

Barwick CJ then opined about the ‘purposes of the Commonwealth’ in s 81, noting that

the expression in s 51(xxxi) of the *Constitution* ‘for the purpose in respect of which the Parliament has power to make laws’ is a reasonable synonym for the expression ‘the purposes of the Commonwealth’.¹⁷⁸

Based on this analysis Barwick CJ considered the Australian Assistance Plan as not something that the Commonwealth had power or combination of powers to support, and so the appropriation was invalid.¹⁷⁹

Gibbs J adopted a similar view that the ‘purposes of the Commonwealth’ were ‘purposes which the Commonwealth can lawfully put into effect in the exercise of the powers and functions conferred upon it by the *Constitution*’.¹⁸⁰ Based on

¹⁷⁰ Ibid 352–3 (Barwick CJ), 407 (Jacobs J).

¹⁷¹ Ibid 345, 351–3 (Barwick CJ), 376 (Gibbs J), 399–401 (Mason J).

¹⁷² Ibid 345, 353–4 (Barwick CJ), 366–7 (McTiernan J), 375–6 (Gibbs J), 391 (Mason J), 410 (Jacobs J), 417 (Murphy J).

¹⁷³ Ibid 355–6.

¹⁷⁴ Ibid 357.

¹⁷⁵ Ibid 358.

¹⁷⁶ Ibid 357–8.

¹⁷⁷ Ibid 360–1.

¹⁷⁸ Ibid 363.

¹⁷⁹ Ibid 364.

¹⁸⁰ Ibid 373–4.

this reasoning, his Honour considered that there was no power to legislate for the Australian Assistance Plan and, as a consequence, that the appropriation for the purposes of the Plan was invalid.¹⁸¹ However, his Honour then opined that

it is not necessary that an Appropriation Act should set out such particulars as would establish that every purpose referred to is a Commonwealth purpose; if a purpose referred to could be a purpose of the Commonwealth — that is, if it does not appear on the face of the Act that the purpose is one with which the Commonwealth could not possibly be concerned — it should in my opinion be assumed, in the absence of proof to the contrary, that the appropriation is valid.¹⁸²

The other justices adopted different approaches, drawing distinctions between the appropriation power and a necessary expenditure power. Mason J followed the reasoning of Latham CJ in the *Pharmaceutical Benefits Case* saying: ‘I would give the words “for the purposes of the Commonwealth” in s 81 the meaning ... for such purposes as the Parliament may determine.’¹⁸³ However, Mason J then distinguished between an appropriation law with limited effect (‘a *rara avis* in the world of statutes’)¹⁸⁴ and laws that give authority for the Commonwealth’s involvement in activities in connection with the expenditure of moneys.¹⁸⁵ Based on this distinction, Mason J concluded that the appropriation law was valid, but that the executive power necessary to expend the moneys was outside the bounds of the Commonwealth’s powers.¹⁸⁶ The consequences of this were that the Australian Assistance Plan was invalid but the appropriation for the Australian Assistance Plan was valid.¹⁸⁷ Like Mason J, McTiernan J also identified the reasoning of Latham CJ in the *Pharmaceutical Benefits Case* that the Commonwealth Parliament was ‘entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes’.¹⁸⁸ Based on this view, McTiernan J considered the appropriation to be valid.¹⁸⁹

Jacobs J adopted a different approach, conceiving of the appropriation as ‘an earmarking of the money, which remains the property of the Commonwealth’,¹⁹⁰ and that the plaintiff needed to challenge a particular expenditure rather than the appropriation — ‘[t]here is no analogy between the validity of legislation and the

¹⁸¹ *Ibid* 378.

¹⁸² *Ibid* 375.

¹⁸³ *Ibid* 396.

¹⁸⁴ *Ibid* 393.

¹⁸⁵ *Ibid* 396.

¹⁸⁶ *Ibid* 400.

¹⁸⁷ *Ibid* 402.

¹⁸⁸ *Ibid* 369, citing *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 256 (Latham CJ). Perhaps McTiernan J’s citing of Latham CJ’s reasoning should be viewed with caution. In his reasoning, 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* by relying on that subject matter being incidental to the appropriation power: see *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 263 (Latham CJ).

¹⁸⁹ *Australian Assistance Plan Case* (1975) 134 CLR 338, 369–70 (McTiernan J).

¹⁹⁰ *Ibid* 411.

validity of expenditure.¹⁹¹ As the plaintiff had not identified a particular expenditure, there were no grounds to provide the requested relief.¹⁹² However, his Honour then considered the ‘assumption that some part of the proposed expenditure may be beyond Commonwealth power.’¹⁹³ His Honour rejected the contention that the expenditure was beyond power on two grounds. The first was his finding that the proposal had the requisite national character reflected in the growth of a ‘national character’ and the expanding powers in the *Constitution*.¹⁹⁴ The second ground for rejection was on the basis that the incidental powers of the Commonwealth in the *Constitution* did not cover the expenditure.¹⁹⁵

Murphy J accepted the reasoning of Latham CJ in the *Pharmaceutical Benefits Case*, saying that ‘Parliament is the authority to determine what purposes are the purposes of the Commonwealth’.¹⁹⁶ His Honour reasoned that nothing in the *Constitution* warranted limiting the appropriation power to the enumerated powers in the *Constitution*. Express limitation was not apparent in respect of appropriations when it was in respect of other subjects, implying as a matter of interpretation that express limitation would have been provided for appropriations if that was intended. Moreover, ‘it would be quite impossible to conduct the finances of the country if the appropriation power was so limited’ (a ‘chilling effect’).¹⁹⁷ The only limits on the *Constitution*’s expenditure power were considered to be free trade within the Commonwealth (s 92), religious freedom (s 116) and disability and discrimination among residents between states (s 117).¹⁹⁸

Perhaps the most prescient remark was from Stephen J, concluding that there was no standing to challenge an appropriation, perhaps echoing McTiernan J’s view that appropriations are ‘within the field of politics not of law’.¹⁹⁹

Appropriation Acts represent one aspect of the legislature’s control over the executive arm of government in matters financial, that concerned with the expenditure of government revenue as distinct from the raising of that revenue. The exercise of this control has long been regarded as a fundamental principle of parliamentary democracy on which is said to be grounded ‘the whole law of finance, and consequently the whole British Constitution’ ... [H]owever the present importance of appropriation by Parliament, when the Crown and the executive have come to represent the same forces as control a majority in the lower house, may be rather different from what it formerly was and may now lie principally in the opportunity which it affords for criticism by the Opposition and for scrutiny by the public.²⁰⁰

¹⁹¹ Ibid.

¹⁹² Ibid 412.

¹⁹³ Ibid.

¹⁹⁴ Ibid 413–14.

¹⁹⁵ Ibid. In respect of the implied nationhood power, see *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 269 (Dixon J).

¹⁹⁶ *Australian Assistance Plan Case* (1975) 134 CLR 338, 417.

¹⁹⁷ Ibid 417–18.

¹⁹⁸ Ibid 421.

¹⁹⁹ Ibid 370 (McTiernan J).

²⁰⁰ Ibid 384 (Stephen J) (citations omitted).

This analysis shows that these decisions of the High Court have not come to a concluded view about the scope of the ‘purposes of the Commonwealth’, there being a range of views between, on the one hand, only those purposes within the Commonwealth’s powers according to the *Constitution*²⁰¹ or, alternatively, *any* purposes determined by Parliament.²⁰² There has also been recognition of the expanding powers of the Commonwealth under the *Constitution* including the kinds of purposes the Commonwealth acquires through ‘growth of national identity’.²⁰³ However, the High Court’s most recent exploration of the ‘purposes of the Commonwealth’ occurred obliquely in *Combet v Commonwealth*, showing a reluctance on the part of the majority of the High Court to intervene in determining the restricted purposes under the public administration reforms after the *Financial Management Legislation Amendment Act 1999* (Cth) and related changes.²⁰⁴

In this case, a union official and a Member of the House of Representatives challenged the expenditure identified in the *Appropriation Act (No 1) 2005–2006* (Cth) under the one-line appropriation as ‘[e]fficient and effective labour market assistance’, ‘[h]igher productivity, higher pay workplaces’ and ‘[i]ncreased workforce participation’.²⁰⁵ The expenditure was being used to conduct an advertising campaign in anticipation of legislation to reform workplace relations.²⁰⁶ While the dispute concerned the meaning of the purposes stated in the *Appropriation Act (No 1) 2005–2006* (Cth) of one-line appropriation (discussed

²⁰¹ Ibid 363 (Barwick CJ), 375 (Gibbs J); *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J), 267 (Dixon J), 282 (Williams J). See also *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 454 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ). Notably in *Davis v Commonwealth* (1988) 166 CLR 79, 96, Mason CJ, Deane and Gaudron JJ referred to the *Australian Assistance Plan Case* as standing for ‘the proposition that the validity of an appropriation act is not ordinarily susceptible to effective legal challenge’. For further commentary about the constraints on the process of appropriation, see Lawson, ““Special Accounts” under the *Constitution*”, above n 7, 127–9.

²⁰² *Australian Assistance Plan Case* (1975) 134 CLR 338, 368–9 (McTiernan J), 396 (Mason J), 410–11 (Jacobs J), 417 (Murphy J); *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254–6 (Latham CJ), 273–4 (McTiernan J). See also *Davis v Commonwealth* (1988) 166 CLR 79, 95–6 (Mason CJ, Deane and Gaudron JJ); Australian Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 2, 831–4.

²⁰³ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 266 (Starke J), 269 (Dixon J); *Australian Assistance Plan Case* (1975) 134 CLR 338, 361–2 (Barwick CJ), 412 (Jacobs J). Notably, Mason J in the *Australian Assistance Plan Case* suggests that a narrow interpretation has potentially significant consequences (at 394):

It is not lightly to be supposed that the framers of the *Constitution* intended to circumscribe the process of parliamentary appropriation by the constraints of constitutional power and thereby to expose the items in an appropriation act to judicial scrutiny and declarations of invalidity. Consequences more detrimental and prejudicial to the process of Parliament would be difficult to conceive. Any item in the Act would be subject to a declaration of invalidity after the Act is passed, even after the moneys in question are withdrawn from Consolidated Revenue and perhaps even after the moneys are expended, for an appropriation, if it be unlawful and subject to a declaration of invalidity, does not cease to have that character because Acts have taken place on the faith of it.

²⁰⁴ Relevantly, these reforms introduced accrual budgeting and outcomes and output appropriations: see Department of Finance and Administration, *Specifying Outcomes and Outputs: The Commonwealth’s Accrual-Based Outcomes and Outputs Framework* (1999).

²⁰⁵ *Combet v Commonwealth* (2005) 224 CLR 494, 526 (Gleeson CJ), 540 (McHugh J), 562 (Gummow, Hayne, Callinan and Heydon JJ).

²⁰⁶ Ibid 521 (Gleeson CJ), 533–5 (McHugh J), 558–9 (Gummow, Hayne, Callinan and Heydon JJ), 581–5 (Kirby J).

in detail below), the joint judgment adopted a construction of the provision with possible consequences for determining the ‘purposes of the Commonwealth’.²⁰⁷

In the view of the dissenting justices, the joint judgment of the majority accepted an appropriation without a stated purpose (an appropriation in blank) because they accepted that an amount appropriated as a ‘departmental item’ was validly appropriated even though the expenditure under that item was not tied to any nominated outcome(s).²⁰⁸ However, the joint judgment did address this proposition in expressly addressing the plaintiff’s general proposition that ‘the purpose identified in the law [appropriating money] must be a purpose that was notified to the Parliament [and] that was therefore capable of being scrutinised by the Parliament’.²⁰⁹ In dealing with this proposition, the joint judgment found that the appropriation was for the purposes of ‘departmental expenditure of one of the department of State of the Commonwealth’,²¹⁰ and concluded:

It is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified [citing Latham CJ in the *Pharmaceutical Benefits Case*]. It may readily be accepted that the constitutional provisions examined earlier in these reasons are to be understood as providing for what, in 1903, was said in relation to the House of Commons to be ‘a comprehensive and continuous guardianship over the whole finance’ of the Commonwealth. But the manner of exercising that guardianship, within the relevant constitutional limits, is to be determined by the Parliament. In that regard it is essential to recall, as Mason J pointed out in [the *Australian Assistance Plan Case*], that: ‘It has been the practice, born of practical necessity, in this country and in the United Kingdom, to give but a short description of the particular items dealt with in an Appropriation Act. No other course is feasible because in many respects the items of expenditure have not been thought through and elaborated in detail.’

What is apparent from consideration of past practice is that at least since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual appropriation Acts has been to specify the amount that may be spent rather than further define the purposes or activities for which it may be spent. There is, therefore, nothing in the relevant constitutional framework or in past parliamentary practices which suggests some construction of the *Appropriation Act (No 1) 2005–2006* different from the construction required by its text.²¹¹

Similarly Gleeson CJ, in the majority with the joint judgment, considered that ‘[i]t is for the Parliament, in making appropriations, to determine what purposes are purposes of the Commonwealth’.²¹² In short, Gleeson CJ and the joint judgment were placing the burden of properly elaborating the purposes of the Commonwealth squarely upon Parliament as a matter for Parliament to resolve, consistent with some of the perspectives adopted in earlier High Court judg-

²⁰⁷ Ibid 568 (Gummow, Hayne, Callinan and Heydon JJ).

²⁰⁸ Ibid 553–4 (McHugh J), 614–15 (Kirby J).

²⁰⁹ Ibid 568–9 (Gummow, Hayne, Callinan and Heydon JJ).

²¹⁰ Ibid 568.

²¹¹ Ibid 577 (citations omitted) (emphasis in original).

²¹² Ibid 522, citing *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254 (Latham CJ). Notably, this was also the view favoured by Mason J in *Australian Assistance Plan Case* (1975) 134 CLR 338, 396.

ments.²¹³ Notably, the 1988 Constitutional Commission also recommended ‘that section 81 be amended to allow the appropriation of the [CRF] for any purpose that the Parliament thinks fit’, reasoning that leaving appropriations open to review by the courts ‘could bring the operations of government to a halt’ and leave the courts with the difficult if not impossible task of determining the purpose and the evidence to consider in assessing compliance with that purpose.²¹⁴

B *How Precisely Must Those Purposes Be Specified?*

There is little doubt that ‘one-line appropriations’ are valid.²¹⁵ However, it is unclear how precisely the purposes need to be specified. The decisions of the High Court established that ‘there cannot be appropriations in blank, appropriations for no designated purpose’²¹⁶ and that every effort should be made to find an appropriation law valid.²¹⁷ The articulation of the purposes might be brief, but so long as the purposes are articulated, the requirements of the *Constitution* are satisfied: ‘a purpose must be seen in the law, either expressly or referentially by description.’²¹⁸ Significantly, the High Court has accepted that so long as *some* Commonwealth purpose is disclosed by the construction of the appropriation ‘for which the moneys appropriated might be expended’, then it will be valid.²¹⁹ A further requirement may be that the appropriation ‘must nominate an amount of money to be appropriated or specify a formula or criterion by which the amount appropriated can be determined’.²²⁰ Exactly how broadly the purpose might be stated, however, remains unclear. Nevertheless, the High Court has adopted an

²¹³ See *Australian Assistance Plan Case* (1975) 134 CLR 338, 368–9 (McTiernan J), 384 (Stephen J), 396 (Mason J), 410–11 (Jacobs J), 417 (Murphy J); *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 254–6 (Latham CJ), 273–4 (McTiernan J). See also *Surplus Revenue Case* (1908) 7 CLR 179, 200 (Isaacs J).

²¹⁴ Australian Constitutional Commission, above n 202, 831, 834.

²¹⁵ See *Combet v Commonwealth* (2005) 224 CLR 494, 522 (Gleeson CJ); *Brown v West* (1990) 169 CLR 195, 209 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Australian Assistance Plan Case* (1975) 134 CLR 338, 360 (Barwick CJ), 369 (McTiernan J), 375–6 (Gibbs J), 394 (Mason J), 404 (Jacobs J), 421 (Murphy J).

²¹⁶ *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 253 (Latham CJ). See also *Surplus Revenue Case* (1908) 7 CLR 179, 200 (Isaacs J); *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198, 224 (Isaacs and Rich JJ); *Cemetery Reserve Case* (1993) 176 CLR 555, 600 (McHugh J).

²¹⁷ See, eg, *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 267 (Dixon J). See also *Australian Assistance Plan Case* (1975) 134 CLR 338, 375 (Gibbs J).

²¹⁸ *Australian Assistance Plan Case* (1975) 134 CLR 338, 360 (Barwick CJ). See also at 375 (Gibbs J), 394 (Mason J), 404 (Jacobs J), 422 (Murphy J); *Combet v Commonwealth* (2005) 224 CLR 494, 522 (Gleeson CJ), 554 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ), 597 (Kirby J); *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 253 (Latham CJ); *Surplus Revenue Case* (1908) 7 CLR 179, 192 (Barton J), 200 (Isaacs J).

²¹⁹ *Brown v West* (1990) 169 CLR 195, 208 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Combet v Commonwealth* (2005) 224 CLR 494, 522 (Gleeson CJ), 553–4 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ), 614–15 (Kirby J); *Cemetery Reserve Case* (1993) 176 CLR 555, 576–7 (Mason CJ, Deane, Toohey and Gaudron JJ), 582 (Brennan J), 593 (Dawson J), 600 (McHugh J); *Australian Assistance Plan Case* (1975) 134 CLR 338, 404 (Jacobs J).

²²⁰ *Cemetery Reserve Case* (1993) 176 CLR 555, 600 (McHugh J), citing in contrast *Fisher v The Queen* (1901) 26 VLR 781, 800 (Madden CJ).

approach of interpreting the appropriation by seeking its 'true construction'.²²¹ The following decisions illustrate this approach.

In *Brown v West*, an opposition 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).²²² Under existing arrangements, a postal allowance was determined by the Remuneration Tribunal according to the *Remuneration Tribunal Act 1973* (Cth) with an appropriation of the CRF for the determined amounts set out in this Act.²²³ The Minister later decided to increase the postal allowance, include an indexation arrangement and dispense the increased amount according to the terms of the existing *Remuneration Tribunal Act 1973* (Cth) determination.²²⁴ The Minister then relied on the *Supply Act (No 1) 1989–90* (Cth)²²⁵ as the appropriation of the CRF for the additional expenditure.²²⁶ The expressed purposes in the *Supply Act (No 1) 1989–90* (Cth) for which the money might be expended and that were relied on by the Minister were couched in very broad terms. They included an 'Advance to the Minister for Finance' for various advances and unspecified payments for which no other appropriation existed, and 'Parliamentary and Ministerial Staff and Services' described as 'Running Costs' and 'Other Services'.²²⁷ The question for the High Court was whether these purposes included a postal allowance.²²⁸

The High Court in a unanimous decision considered the scope of executive power to alter determinations made under the *Remuneration Tribunal Act 1973* (Cth)²²⁹ and the likely roles of the *Supply Act (No 1) 1989–90* (Cth) provisions.²³⁰ The High Court concluded that there was no executive power for the Minister to override the Remuneration Tribunal determination or any restriction imposed by the *Remuneration Tribunal Act 1973* (Cth).²³¹ The High Court also concluded that the *Supply Act (No 1) 1989–90* (Cth) was not intended to include any appropriations for any new policy such as an increased postal allowance

²²¹ *Brown v West* (1990) 169 CLR 195, 212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²²² *Ibid* 199.

²²³ *Ibid* 199–200.

²²⁴ *Ibid*.

²²⁵ The supply Acts were Acts appropriating the CRF for use in the financial year pending the passing of appropriation Acts, whereupon the aforementioned Acts ceased to have effect. The *Supply Act (No 1) 1989–90* (Cth) provisions were repeated in the *Appropriation Act (No 1) 1989–90* (Cth) whereupon the *Supply Act (No 1) 1989–90* (Cth) then 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, 209–210 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). From 1994, with the change to a financial year, the supply Acts ceased to be necessary: see Commonwealth, *The Commonwealth Budget: Process and Presentation*, Parliamentary Library Research Paper No 6 (2003).

²²⁶ *Brown v West* (1990) 169 CLR 195, 200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²²⁷ *Ibid* 200, 209–11.

²²⁸ *Ibid* 209.

²²⁹ *Ibid* 201–5.

²³⁰ *Ibid* 205–12.

²³¹ *Ibid* 201–5, 212.

determined by the Minister,²³² and that there was no intention expressed in that Act to override the *Remuneration Tribunal Act 1973* (Cth).²³³ The result was therefore that neither the *Remuneration Tribunal Act 1973* (Cth) appropriation nor the *Supply Act (No 1) 1989–90* (Cth) appropriation was valid to support the increased postal allowance.²³⁴ However, the significance of the decision was that the High Court did not found its decision on the scope of the disclosed ‘purposes’ of the appropriations, and did not specifically reject or adversely comment on the broadly stated purposes set out in the *Supply Act (No 1) 1989–90* (Cth). In short, the High Court accepted that an appropriation ‘must designate the purpose or purposes for which the moneys appropriated might be expended’²³⁵ and appeared to accept very broadly stated purposes and, in the case of the ‘Advance to the Minister for Finance’, an amount for *any* purpose.

The subsequent decision of the High Court in *Combet v Commonwealth*, also interpreting the scope of a ‘one-line appropriation’,²³⁶ did not challenge the approach in *Brown v West*, but the contexts of appropriations in the cases were significantly different. That is, *Combet v Commonwealth* considered an appropriation following the adoption of accrual budgeting arrangements and a change in the focus of appropriations from inputs to outcomes/outputs following the *Financial Management Legislation Amendment Act 1999* (Cth).²³⁷ As Gleeson CJ stated:

A recent development in the theory and practice of public administration is the trend towards ‘outcome appropriations’ as a means of stating the purposes for which governments spend public money. ... Typically, outcomes are stated at a high level of generality. ... 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 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.²³⁸

The question agreed on by the parties for the High Court’s consideration was whether the expenditure on advertising was authorised by the one-line outcome

²³² This conclusion was reached after considering ss 53 and 54 of the *Constitution*, highlighting the distinction between appropriations for the ‘ordinary annual services of the Government’ and other appropriations, and the Parliamentary practice of separating out the classes of appropriations according to different supply Acts: *ibid* 205–7, 211.

²³³ *Brown v West* (1990) 169 CLR 195, 205–7, 211–12 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²³⁴ *Ibid* 212.

²³⁵ *Ibid* 208.

²³⁶ *Combet v Commonwealth* (2005) 224 CLR 494, 526 (Gleeson CJ), 540 (McHugh J), 562 (Gummow, Hayne, Callinan and Heydon JJ).

²³⁷ For an overview of these developments, see Department of Finance and Administration, *Specifying Outcomes and Outputs*, above n 204.

²³⁸ *Combet v Commonwealth* (2005) 224 CLR 494, 523.

appropriations ‘[e]fficient and effective labour market assistance’, ‘[h]igher productivity, higher pay workplaces’ and ‘[i]ncreased workforce participation’.²³⁹ The majority comprising Gleeson CJ and the joint judgment (Gummow, Hayne, Callinan and Heydon JJ) rejected the challenge.²⁴⁰ The joint reasons adopted a construction of the *Appropriation Act (No 1) 2005–2006* (Cth) that avoided having to determine whether the expenditure was within the purposes of the outcome appropriation formulated by the agreed question, by finding that the plaintiffs had not addressed that relevant contentious 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.²⁴¹

The joint judgment interpreted the *Appropriation Act (No 1) 2005–2006* (Cth) so that:

the several amounts of Departmental Outputs which are identified against particular outcomes, and together make up the departmental item, are not tied to expenditure for the purpose of achieving any of the nominated outcomes. The only relevant requirement imposed by the Act is that the departmental item be applied only ‘for the departmental expenditure of the entity’.²⁴²

As the plaintiffs did not make any submissions addressing whether the advertising expenditure was outside the meaning of ‘departmental expenditure’, the joint judgement did not address the issue, although they considered that there was an appropriation for the Act’s purpose that ‘included the purpose of appropriating a sum of money for the departmental expenditure of one of the departments of State of the Commonwealth’.²⁴³ The joint judgment and Gleeson CJ both essentially accepted that it was for Parliament to determine the specificity of purpose set out in the appropriation.²⁴⁴ The joint judgment stated that

[w]hat is apparent from consideration of past practice is that at least since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual appropriation Acts has been to specify the *amount* that may be spent rather than further define the purposes or activities for which it may be spent. There is, therefore, nothing in the relevant constitutional framework or in past parliamentary practices which suggests some con-

²³⁹ Ibid 526 (Gleeson CJ), 531, 540 (McHugh J), 560, 562 (Gummow, Hayne, Callinan and Heydon JJ), 579–80 (Kirby J).

²⁴⁰ Ibid 531 (Gleeson CJ), 531 (McHugh J), 579 (Gummow, Hayne, Callinan and Heydon JJ).

²⁴¹ Ibid 568 (Gummow, Hayne, Callinan and Heydon JJ).

²⁴² Ibid 566.

²⁴³ Ibid 568.

²⁴⁴ Ibid 529–30 (Gleeson CJ):

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. ... If Parliament formulates the purposes of appropriation in broad, general terms, then those terms must be applied with the breadth and generality they bear.

See also at 577 (Gummow, Hayne, Callinan and Heydon JJ) (citations omitted):

It is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified. ... [T]he manner of exercising that guardianship, within the relevant constitutional limits, is to be determined by the Parliament.

struction of the *Appropriation Act (No 1) 2005–2006* different from the construction required by its text.²⁴⁵

Meanwhile, Gleeson CJ relied on different reasoning based on a construction of the text of the Appropriation Act within the context of the ‘*Constitution*, parliamentary practice, accounting standards, and principles and methods of public administration’.²⁴⁶ His Honour stated that

[t]he matter of parliamentary appropriation goes to the essence of relations between the Parliament and the Executive, and of relations between the Senate and the House of Representatives. Parliamentary practice comprehends procedures relating to budget estimates, audit, expenditure review, and performance assessment. Such procedures operate in a dynamic, political environment. In public administration, theory and practice change and develop. The *Constitution* was designed to allow for a necessary degree of flexibility in administrative arrangements.²⁴⁷

The significance of both *Brown v West* and *Combet v Commonwealth* was that the High Court majorities crafted decisions that avoided having to determine the scope of the purposes of the appropriations and, as a consequence, adjudicating the content and form of the appropriation laws passed by Parliament. This undoubtedly recognises the broader political context in which appropriations are made and places the responsibility on Parliament to properly balance the *before* the expenditure appropriation laws with the necessary *after* the expenditure scrutiny. Unfortunately, the High Court in *Combet v Commonwealth* did not address the practice at that time, which continues today, of providing for appropriations in the form of the ‘Advance to the Finance Minister’ and net appropriation agreements.²⁴⁸ This is significant because the ‘Advance to the Finance Minister’ sets out a maximum amount but does not clearly provide for the purposes of the appropriation, while the net appropriation agreements set out a purpose but do not clearly specify the amount of the appropriation.

First, the ‘Advance to the Finance Minister’ provides for an amount that may be expended ‘if the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for’ either ‘because of an erroneous omission or understatement’ or ‘because the expenditure was unforeseen’.²⁴⁹ Crucially, these determinations by the Finance Minister are not disallowable instruments for the purposes of the *Legislative Instruments Act 2003* (Cth), limiting the opportunity for Parliament

²⁴⁵ Ibid 577 (Gummow, Hayne, Callinan and Heydon JJ).

²⁴⁶ Ibid 523.

²⁴⁷ Ibid 521–2, citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 401–3 (Gleeson CJ).

²⁴⁸ These forms of appropriation were present in ss 10 (net appropriations) and 12 (Advance to the Finance Minister) of the *Appropriation Act (No 1) 2005–2006* (Cth).

²⁴⁹ *Appropriation Act (No 1) 2008–2009* (Cth) s 14(1); *Appropriation Act (No 2) 2008–2009* (Cth) s 15(1). See also Explanatory Memorandum, Appropriation Bill (No 1) 2008–2009 (Cth) 15–16; Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 33–5; Australian Government, *Issues from the Advance to the Finance Minister as a Final Charge: For the Year Ended 30 June 2006* (2006) and the same titles from previous years; Senate Standing Committee on Finance and Government Operations, Commonwealth Parliament, *Advance to the Minister for Finance* (1979).

to prevent the anticipated expenditure.²⁵⁰ This appears on its face to be an appropriation for potentially any purposes confined only by the maximum amount that might be expended. While not expressly approved in *Combet v Commonwealth*, such an approach would appear consistent with the joint judgment's views that specifying an *amount* alone might have been considered adequate.²⁵¹ Unfortunately, *Brown v West* did not address this issue even though the defence had pleaded that the increased postal allowance was authorised by the 'Advance to the Finance Minister'.²⁵² There, the High Court reasoned that the increased expenditure could not have been intended to be included in the *Supply Act (No 1) 1989–90* (Cth) because it was not an appropriation for new policies.²⁵³ That decision might have been different, however, if the defence had pleaded that the appropriation was addressed by the 'Advance to the Finance Minister' in the *Supply Act (No 2) 1989–90* (Cth), which could cover *new* policies including 'to make money available for expenditure ... that the Minister for Finance is satisfied is expenditure that is urgently required' that was 'unforeseen' or 'particulars of which will afterwards be submitted to the Parliament'.²⁵⁴ In those circumstances, an increased postal allowance might readily have been made (and the expenditure incurred) and then notified to Parliament.

Secondly, net appropriation agreements are an appropriation determined by the Finance Minister under the *Financial Management and Accountability Act 1997* (Cth) from amounts received from non-appropriation sources and added to an existing appropriation authorised by an annual appropriation act.²⁵⁵ The amounts received from the non-appropriation sources and then credited to the annual appropriation act appropriation are not certain at the time the annual appropriation act is made, and they are quantified for the purposes of that appropriation at the discretion of the Finance Minister.²⁵⁶ Significantly, these net appropriation agreements are also not disallowable instruments for the purposes of the *Legislative Instruments Act 2003* (Cth), limiting the opportunity for Parliament to prevent (or modify) the anticipated expenditure.²⁵⁷

²⁵⁰ See *Appropriation Act (No 1) 2008–2009* (Cth) s 14(4); *Appropriation Act (No 2) 2008–2009* (Cth) s 15(4). Notably, the Senate does consider these appropriations, however, it is unable to express dissatisfaction as rejecting them does not remove their authorisation: Harry Evans, *Oggers' Australian Senate Practice* (11th ed, 2004) 273.

²⁵¹ *Combet v Commonwealth* (2005) 224 CLR 494, 577 (Gummow, Hayne, Callinan and Heydon JJ).

²⁵² *Brown v West* (1990) 169 CLR 195, 200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²⁵³ *Ibid* 211.

²⁵⁴ *Supply Act (No 2) 1989–90* (Cth) s 3 sch 2 div 868.

²⁵⁵ See *Appropriation Act (No 1) 2008–2009* (Cth) s 13; *Financial Management and Accountability Act 1997* (Cth) s 31. See also Explanatory Memorandum, Appropriation Bill (No 1) 2008–2009 (Cth), 14–5; Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 22–7; Australian National Audit Office, *Management of Net Appropriation Agreements*, above n 128.

²⁵⁶ See *Appropriation Act (No 1) 2008–2009* (Cth) s 14(2).

²⁵⁷ See *Legislative Instruments Act 2003* (Cth) s 44(2) item 38; *Appropriation Act (No 1) 2008–2009* (Cth) s 14(4).

V ORDINARY ANNUAL SERVICES

To comply with ss 53 and 54 of the *Constitution*, the annual appropriation Acts are divided.²⁵⁸ There is one dealing with the ‘ordinary annual services of the Government’ and another dealing with expenditure other than the ‘ordinary annual services of the Government’.²⁵⁹ The significance of this division is that the Senate can only amend the annual appropriation act for expenditure other than the ‘ordinary annual services of the Government’,²⁶⁰ and that other measures should not be co-mingled with the ‘ordinary annual services of the Government’ appropriations (‘tacking’) so as to avoid Senate amendment.²⁶¹ The divide between what are and are not the ‘ordinary annual services of the Government’ has been contentious,²⁶² and continues to evolve as an agreement between the Senate and the Australian government.²⁶³ At present this agreement is reflected in the ‘Compact of 1965’ together with the alterations agreed to in 1987 following the introduction of the ‘running costs’ system of appropriations and in 1999 on the introduction of accrual budgeting and outcome/output arrangements.²⁶⁴ Significantly, the Senate can decline to pass the ‘ordinary annual services of the Government’ annual appropriation Bills and items in those Bills until relevant requested information is provided²⁶⁵ or request that an ‘omission or amendment’ be made.²⁶⁶ However, there appears to be renewed interest in the Australian government finding resolution to any disagreements

²⁵⁸ This also assumes that the proposed appropriation law has, in the same session, been recommended by a message of the Governor-General to the Parliament: *Constitution* s 56.

²⁵⁹ See, eg, *Appropriation Act (No 1) 2008–2009* (Cth), which dealt with the ‘ordinary annual services of the Government’, and *Appropriation Act (No 2) 2008–2009* (Cth), which dealt with expenditure other than the ‘ordinary annual services of the Government’. Notably, additional appropriation Acts also maintain the distinction by subsequent numbering (see, eg, *Appropriation Act (No 3) 2008–2009* (Cth); *Appropriation Act (No 4) 2008–2009* (Cth)): Evans, above n 250, 271–2.

²⁶⁰ *Constitution* s 53. Notably, the Senate sends a request to the House of Representatives asking the House to amend such a Bill: see Evans, above n 250, 270.

²⁶¹ *Constitution* s 54.

²⁶² See, eg, Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 37–42; Evans, above n 250, 282–4.

²⁶³ Appropriations and Staffing Committee, Commonwealth Parliament, *Annual Report 2006–07* (2007) 1–2, app 1; Appropriations and Staffing Committee, Commonwealth Parliament, *Annual Report 2005–06* (2006) 2, app 1. See also Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 37–42.

²⁶⁴ See Commonwealth, *Parliamentary Debates*, Senate, 22 April 1999, 4198 (motion adopting Senate Appropriations to which the Staffing Committee agreed). See also Appropriations and Staffing Committee, Senate, *Thirtieth Report* (1999) 3; Minister for Finance and Deregulation, *Budget: Agency Resourcing*, above n 78, 1; Appropriations and Staffing Committee, *Annual Report 2006–07*, above n 263; Appropriations and Staffing Committee, *Annual Report 2005–06*, above n 263. Notably, there remains some dispute about the division of content between the appropriation Acts: see, eg, Evans, above n 250, 272 (and 2008 supplement); Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 37–42; Senate Standing Committee on Finance and Public Administration, Commonwealth Parliament, *Annual Reports (No 2 of 2007)* (2007) 7–8.

²⁶⁵ The Senate has, in the past, exercised this authority: see Evans, above n 250, 271 (and 2008 supplement).

²⁶⁶ *Constitution* s 53. See also Evans, above n 250, 299–307.

with the Senate, and clarifying what are and are not the ‘ordinary annual services of the Government’.²⁶⁷

The significance of the cases addressing this aspect of the *Constitution* is to show that while the content of the ‘ordinary annual services of the Government’ may not be justiciable,²⁶⁸ the location of an appropriation within an annual appropriation act according to the ‘ordinary annual services of the Government’ division does have consequences. Thus, in *Brown v West* the appropriation of an amount for an increased postal allowance was argued to be found in the *Supply Act (No 1) 1989–90* (Cth).²⁶⁹ The High Court rejected this contention on the basis that parliamentary practice dictated that an appropriation in the *Supply Act (No 1) 1989–90* (Cth) was only for the ‘ordinary annual services of the Government’ and could not include an appropriation for a new policy.²⁷⁰ As the increased postal allowance was a new policy, the *only* place such an appropriation might be found was in an Appropriation Bill (No 2) or in separate legislation as a standing appropriation.²⁷¹ However, in *Combet v Commonwealth* the argument was that payments made for an advertising campaign in anticipation of legislation (a new policy) could not be appropriated in the *Appropriation Act (No 1) 2005–2006* (Cth) as they were not for the ‘ordinary annual services of the Government’.²⁷² Gleeson CJ and the joint judgment both agreed that the boundaries of the appropriations were unclear and that parliamentary history and practice were of little assistance,²⁷³ with the joint judgement commenting:

what does emerge from consideration of the Compact of 1965 and subsequent events is the difficulty of marking any clear boundary around the types of ex-

²⁶⁷ See Commonwealth, *Parliamentary Debates*, Senate, 19 March 2008, 1344–8 (Andrew Murray); Commonwealth, *Parliamentary Debates*, Senate, 20 March 2008, 1410 (John Faulkner, Special Minister of State).

²⁶⁸ Notably under *Constitution* ss 53–4, the intra-mural activities of the Parliament are not justiciable: see *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ), 351–2 (Barton J), 355–6 (O’Connor J); *Buchanan v Commonwealth* (1913) 16 CLR 315, 329 (Barton ACJ); *Cormack v Cope* (1974) 131 CLR 432, 454 (Barwick J); *Victoria v Commonwealth* (1975) 134 CLR 81, 184 (Mason J); *Australian Assistance Plan Case* (1975) 134 CLR 338, 421–2 (Murphy J); *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 471 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Western Australia v Commonwealth* (1994) 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), 585 (Brennan J), 594 (Dawson J); *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388, 409–10 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also *Combet v Commonwealth* (2005) 224 CLR 494, 535–8 (McHugh J), 572–5 (Gummow, Hayne, Callinan and Heydon JJ), 598–604 (Kirby J); *Brown v West* (1990) 169 CLR 195, 211 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²⁶⁹ *Brown v West* (1990) 169 CLR 195, 200 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²⁷⁰ *Ibid* 209–11.

²⁷¹ *Ibid* 211. See also *Cemetery Reserve Case* (1993) 176 CLR 555, 578–9 (Mason CJ, Deane, Toohey and Gaudron JJ), 585 (Brennan J), 594 (Dawson J), 603 (McHugh J).

²⁷² *Combet v Commonwealth* (2005) 224 CLR 494, 521 (Gleeson CJ), 531–2 (McHugh J), 559 (Gummow, Hayne, Callinan and Heydon JJ), 579–80 (Kirby J). However, it is important to note that the major argument was about the construction of the *Appropriation Act (No 1) 2005–2006* (Cth).

²⁷³ *Combet v Commonwealth* (2005) 224 CLR 494, 531 (Gleeson CJ), 575–6 (Gummow, Hayne, Callinan and Heydon JJ). Notably, Gleeson CJ stated that ‘departmental expenditure’, being expenditure for the ‘ordinary annual services of the Government’, does not include ‘expenditure which is so clearly unrelated to the business of the Department that it could not rationally be regarded as expenditure for the purpose of that business’: at 529.

penditure that after 1987–1988 were included within the ‘running costs’ appropriation for a department, or, since the adoption of accrual accounting and budgeting, fall within a ‘departmental item’. Rather, as counsel for the defendants submitted, neither the Compact of 1965 in its original form, nor in the form it now takes, sheds any useful light on that question.²⁷⁴

Even when a resolution has been found between the government and the Senate, this has only affected ‘annual’ appropriations, leaving unaffected the majority of standing appropriations.²⁷⁵ The distinction between an appropriation act dealing with the ‘ordinary annual services of the Government’ and another appropriation act will then remain a basis for asserting a particular construction of an appropriation. However, the decisions in *Brown v West* and *Combet v Commonwealth* to validate broadly stated purposes, and the latter case to legitimise an appropriation limited only by a stated amount,²⁷⁶ might make such an argument difficult to establish. The resolution is in practice for Parliament to find at the time of making an appropriation act what are and are not the ‘ordinary annual services of the Government’, and this appears to have been taken up by the government and the Senate.²⁷⁷

VI CONCLUSIONS

Federation and the compact reflected in the *Constitution* over the distribution of the Commonwealth’s revenues and moneys were almost certainly a delicate compromise.²⁷⁸ That compromise reflected the uncertainty about the scope of the appropriations power (ss 81 and 83), the specific procedure for appropriation Bills (s 53), the effect and scope of the grants power (s 96), the guarantee of certain revenue to the states (the ‘Braddon clause’ (s 87)) and so on. Most of these matters were left for future Parliaments to resolve. This article has only focused on ss 81 and 83 and shows that the High Court has essentially vacated the field, leaving uncertain the boundaries of the CRF (*Surplus Revenue Case* and *Cemetery Reserve Case*), avoiding a comprehensive assessment of the surplus revenue calculation (*Surplus Revenue Case*), leaving open the scope and specificity of the appropriations power (and the justiciability questions) (*Pharmaceutical Benefits Case*, *Australian Assistance Plan Case* and *Combet v Commonwealth*), and leaving up to Parliament any assessment of the scope of the ‘ordinary annual services of the Government’ requirement for appropria-

²⁷⁴ Ibid 575–6 (Gummow, Hayne, Callinan and Heydon JJ).

²⁷⁵ See *Brown v West* (1990) 169 CLR 195, 206–8 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Cemetery Reserve Case* (1993) 176 CLR 555, 578–9 (Mason CJ, Deane, Toohey and Gaudron JJ), 579 (Brennan J), 594 (Dawson J), 603 (McHugh J).

²⁷⁶ *Combet v Commonwealth* (2005) 224 CLR 494, 577 (Gummow, Hayne, Callinan and Heydon JJ).

²⁷⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 October 2005, 9 (Lindsay Tanner); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2006, 118 (Lindsay Tanner). See also Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 37–42.

²⁷⁸ See Quick and Garran, above n 6, 219. See also *Australian Assistance Plan Case* (1975) 134 CLR 338, 354–9 (Barwick CJ): ‘The limitation on the power of appropriation and disbursement was an indispensable part of the financial arrangements contemplated in the progress towards federation which are embodied in the *Constitution*’: at 359.

tion Acts (illustrated by *Brown v West* and *Combet v Commonwealth*).²⁷⁹ Most importantly, the detail of these decisions shows that distilling relevant principles about the constitutional requirements is almost impossible, leaving Parliament considerable scope in meeting the *Constitution's* obligations. In other words, these constitutional questions are now almost completely confined to the competence of Parliament.²⁸⁰ What remains unclear is whether Parliament is up to this task, and whether it has the appropriate procedures to properly hold the Australian government accountable and transparent.²⁸¹ The remainder of the article addresses these issues.

Following recent inquiries,²⁸² and the election of a new Parliament,²⁸³ the following matters appear to be under active consideration:

- (a) developing more detailed descriptions of appropriations in *Portfolio Budget Statements*;²⁸⁴
- (b) adopting 'program-level' information in the annual appropriation Acts and related documentation that had been aggregated into higher level outcomes and outputs;²⁸⁵
- (c) additional documentation, with the annual appropriation Acts setting out the expenditure from all Special (or Standing) Appropriations;²⁸⁶
- (d) the ongoing and periodic review of all Special (or Standing) Appropriations;²⁸⁷
- (e) the reporting of transfers of amounts between appropriations in Special Accounts;²⁸⁸

²⁷⁹ This is by no means a unique observation or conclusion as there is a long record of commentary detailing the increasing scope of the Commonwealth Parliament's authority with the imprimatur of the High Court: for one of many examples, see Harry Gibbs, 'Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1.

²⁸⁰ See also Senate Finance and Public Administration References Committee, Commonwealth Parliament, *Government Advertising and Accountability* (2005) 45, citing the submission of the Clerk of the Senate.

²⁸¹ For a similarly expressed sentiment in respect of Special Accounts, see Lawson, "'Special Accounts' under the *Constitution*", above n 7, 146.

²⁸² These include Appropriations and Staffing Committee, *Annual Report 2006–07*, above n 263; Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 2006–07 (2007); Appropriations and Staffing Committee, *2005–06 Annual Report*, above n 263; Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Review of the Accrual Budget Documentation*, Report No 388 (2001); Finance and Public Administration Legislation Committee, Commonwealth Parliament, *The Format of the Portfolio Budget Statements: Third Report* (2000) and the earlier reports in this series.

²⁸³ See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2008, 1.

²⁸⁴ Lindsay Tanner, 'Enhancing Budget Reporting' (Press Release, 15 April 2006). See also Australian Labor Party, above n 11; Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 46–50.

²⁸⁵ Senate Standing Committee on Finance and Public Administration, above n 79, 50–2; Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, above n 282, 90–1.

²⁸⁶ Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 18–19.

²⁸⁷ *Ibid* 19.

²⁸⁸ *Ibid* 22.

- (f) the return of net appropriation agreements to the annual appropriation Acts or some other means that is transparent to Parliament;²⁸⁹
- (g) the reporting of unspent appropriation at the end of the financial year with reasons for the underspend;²⁹⁰ and
- (h) the Senate and the Australian government continuing to resolve what constitutes the 'ordinary annual services of the Government' and the content of the annual appropriation Acts.²⁹¹

Unfortunately, these concerns focus on resurrecting the *Constitution's* paradigm of Parliament asserting its role over the Australian government's expenditure at the time of making appropriations.²⁹² Clearly, with the *Financial Management Legislation Amendment Act 1999* (Cth) and the adoption of accrual budgeting and the outcomes/outputs appropriations, the focus of accountability and transparency has shifted to expenditures. In the words of the then Minister for Finance and Administration:

An important change under the accrual budget will be the provision of consistent information in the Appropriation Bills, *Portfolio Budget Statements* (PBS) and *Annual Reports*, as all the documents will be presented on an outcomes basis. The lack of linkages between the Bills, PBS and *Annual Reports* has long been a concern to Parliament. Agency *Portfolio Budget Statements* (which will be available on Budget night) will contain detailed information on planned performance of outputs and outcomes on the same outcomes basis as the bills. Additionally, information on actual performance will be published on an outcomes basis in agencies annual reports, enabling a clear read between the Bills, PBS and *Annual Reports*.

Not only will Senators and Members be able to make more informed assessments of the merits of appropriation bills using agency PBS, they will be able to assess actual versus planned performance by comparing information on:

- price, quantity and quality of outputs; and
- performance indicators for outcomes,

in an agency's PBS with actual performance information in its *Annual Report*. This will improve Parliamentary scrutiny of the Bills and agency performance.²⁹³

To effect these changes, the content of the appropriation Bills and associated *Portfolio Budget Statements* (budget framework) were linked with the related financial statements according to the *Financial Management and Accountability Act 1997* (Cth) (financial management framework) and the *Annual Reports* according to the *Public Service Act 1999* (Cth) (people management framework)

²⁸⁹ Ibid 27.

²⁹⁰ Ibid 29.

²⁹¹ Ibid 41–2.

²⁹² This also appears to be the preference of most commentators: see, eg, Lindell, above n 7; Senate Finance and Public Administration References Committee, above n 280, 45, citing the submission of the Clerk of the Senate.

²⁹³ Appropriations and Staffing Committee, *Annual Report 2005–06*, above n 263, app 1.

through outcome statements and performance measures.²⁹⁴ In effect, these changes were designed to alter the accountability and transparency of the government from *how* the moneys were expended, to revealing *why* the government wants to expend those resources (outcomes and outputs) and *how* those ends have been achieved (performance).²⁹⁵ That is, this is a shift in Parliament's focus from scrutinising the future expenditure intentions of the government (appropriations) to assessing its track record on the expenditures that had been made (audit). While this might be characterised as a breakdown in Parliament's control over the government's expenditures,²⁹⁶ a better view is that modern governmental administration requires Parliament to embrace the changes and develop new skills, processes and procedures to properly scrutinise government's expenditures. This is also consistent with the practical reality of appropriations that it is the Australian government (the majority in the House of Representatives) that initiates expenditure proposals (appropriations) that are either accepted or rejected by Parliament.²⁹⁷ This is not an argument to abolish the scrutiny of appropriations; rather, it is a change of emphasis recognising that it is the expenditure reporting that is critical to accountability and transparency:

The main purpose of the budget documentation is to enable Parliamentarians and other users to understand the economic and financial outlook of the [Australian] Government. It explains the composition of the Budget including new budget measures, and expected outputs and outcomes and performance measures for the budget year. At the end of the cycle the annual reports provide audited financial statements and details of the achievements towards the outcomes proposed in earlier budget papers.²⁹⁸

The surprising development so far has been Parliament's reliance on the government to establish the appropriate standards for the necessary *after* the expenditure scrutiny.²⁹⁹ This is almost exclusively conducted according to

²⁹⁴ For an illustration of the relationship between these frameworks in practice, see Charles Lawson, 'Managerialist Influences on Granting Patents in Australia' (2008) 15 *Australian Journal of Administrative Law* 70, 74–87.

²⁹⁵ See, eg, Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 9–10; Appropriations and Staffing Committee, *Annual Report 2005–06*, above n 263, app 1; Department of Finance and Administration, *The Outcomes and Outputs Framework Guidance Document* (2000) 3–5.

²⁹⁶ See, eg, Evans, above n 250, 289; Joint Committee of Public Accounts and Audit, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, above n 20, 26. See also Lindell, above n 7, 313–21; Tyrone M Carlin and James Guthrie, 'Accrual Output Based Budgeting Systems in Australia: The Rhetoric—Reality Gap' (2003) 5 *Public Management Review* 145, 154–8; Kennedy, above n 7, 34–8.

²⁹⁷ See Saunders, 'Parliamentary Appropriations', above n 7, 13. See also *Australian Assistance Plan Case* (1975) 134 CLR 338, 384 (Stephen J).

²⁹⁸ Joint Committee of Public Accounts and Audit, *Review of the Accrual Budget Documentation*, above n 282, 8.

²⁹⁹ *Ibid*; Joint Committee of Public Accounts and Audit, *Review of the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997*, above n 117; Finance and Public Administration Legislation Committee, *The Format of the Portfolio Budget Statements: Third Report*, above n 282 and the earlier reports in this series; Commonwealth, *Report 341: Financial Reporting for the Commonwealth — Towards Greater Transparency and Accountability: Joint Standing Committee on Public Accounts*, Parl Paper No 300 (1995); Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Accrual Accounting: A Cultural Change* (1995).

subordinate legislation under the *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth). According to the arrangements under the *Financial Management and Accountability Act 1997* (Cth), the Australian government promulgates (in some instances subject to disallowance by Parliament)³⁰⁰ the safeguarding of Commonwealth money and property,³⁰¹ the accounting standards for financial statements,³⁰² guidelines on financial and governance standards,³⁰³ drawing rights³⁰⁴ and so on. Under the *Commonwealth Authorities and Companies Act 1997* (Cth), these arrangements include the accounting standards for financial statements³⁰⁵ and the form of annual reporting.³⁰⁶ While these traditional approaches are undoubtedly useful, there are very few (if any) restrictions on Parliament taking control and establishing its own standards and principles, and requiring the Australian government to comply through reporting standards and obligations. To some extent this already occurs, although its potential does not appear to have been considered in detail by Parliament.³⁰⁷ Examples of these kinds of existing Parliamentary controls include:

- (a) The *Public Accounts and Audit Committee Act 1951* (Cth), which provides for the Joint Committee of Public Accounts and Audit to examine and report on various financial activities of the Australian government and to determine the audit priorities of Parliament, although the Auditor-General is not obliged to follow these priorities;³⁰⁸
- (b) The *Auditor-General Act 1997* (Cth), which requires that the Auditor-General (an independent officer of Parliament)³⁰⁹ must have regard to

³⁰⁰ See *Financial Management and Accountability Act 1997* (Cth) ss 16 (instructions for ‘special public money’), 63 (orders, except certain determinations), 65 (regulations); *Legislative Instruments Act 2003* (Cth) s 42. Notably, ss 63 (certain determinations according to orders) and 64 (guidelines) are exempted: *Legislative Instruments Act 2003* (Cth) s 44(2) items 20–1.

³⁰¹ See *Financial Management and Accountability Act 1997* (Cth) s 63; *Financial Management and Accountability Orders 2008* (Cth).

³⁰² See *Financial Management and Accountability Act 1997* (Cth) s 63; *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2007)* (Cth).

³⁰³ See *Financial Management and Accountability Act 1997* (Cth) s 64. Relevant examples include: Department of Finance and Administration, *Guidelines for Issuing and Managing Indemnities, Guarantees, Warranties and Letters of Comfort*, Financial Management Guidance No 6 (2003); Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, above n 74; Department of Finance and Administration, *The Role of the CFO — Guidance for Commonwealth Agencies*, Financial Management Guidance No 11 (2003).

³⁰⁴ See *Financial Management and Accountability Act 1997* (Cth) s 27.

³⁰⁵ See *Commonwealth Authorities and Companies Act 1997* (Cth) s 48; *Commonwealth Authorities and Companies Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2007)* (Cth).

³⁰⁶ See *Commonwealth Authorities and Companies Act 1997* (Cth) s 48; *Commonwealth Authorities and Companies (Report of Operations) Orders 2005* (Cth).

³⁰⁷ See, eg, Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability*, above n 79, 63–7, which appears to endorse only the existing arrangements such as encouraging further scrutiny by Senate committees, further assistance from the Auditor-General, further assistance to Senators by Senate committee staff, reasserting the approval process for appropriations, and so on.

³⁰⁸ *Public Accounts and Audit Committee Act 1951* (Cth) s 8; *Auditor-General Act 1997* (Cth) s 10.

³⁰⁹ *Auditor-General Act 1997* (Cth) s 8(1). See also Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, 1350 (Ian Campbell, Parliamentary Secretary to the Treasurer); Com-

the audit priorities of Parliament,³¹⁰ conduct audits and ‘performance audits’, provide reports to Parliament³¹¹ and set auditing standards;³¹²

- (c) The *Public Service Act 1999* (Cth) *Annual Reports* prepared according to guidelines approved by the Joint Committee of Public Accounts and Audit, which links the financial management (under the *Financial Management and Accountability Act 1997* (Cth)) and people management (under the *Public Service Act 1999* (Cth)) arrangements within an outcomes and outputs framework in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) that accompany the annual appropriation Acts;³¹³ and
- (d) The *Charter of Budget Honesty Act 1998* (Cth), which imposes reporting obligations including that the Treasurer make public a midyear economic and fiscal outlook report by either the end of January in each year or within six months after the last budget (whichever is later),³¹⁴ a budget economic and fiscal outlook report with each budget,³¹⁵ and a final budget outcome report within three months of the end of each financial year.³¹⁶

These measures illustrate that Parliament can impose obligations on the Australian government to comply with accountability and transparency standards. However, the thesis of this article is that modern governmental administration requires the development of new skills, processes and procedures to properly scrutinise the government’s expenditures. In effect, this requires Parliament to re-invigorate its oversight role. The following might improve Parliament’s oversight roles:

- (a) The Joint Committee of Public Accounts and Audit under the *Public Accounts and Audit Committee Act 1951* (Cth) or the Auditor-General under the *Auditor-General Act 1997* (Cth) should set the accounting and financial reporting standards that are currently promulgated by the Finance Minister under the *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997*

monwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8342 (John Fahey, Minister for Finance). However, there are some significant restrictions that may be imposed on the Auditor-General by the Australian government (Attorney-General): see Legal and Constitutional Legislation Committee, Senate, *Auditor-General Bill 1996: Clauses 35 and 37* (1997) 3–11.

³¹⁰ *Auditor-General Act 1997* (Cth) s 10; *Public Accounts and Audit Committee Act 1951* (Cth) s 8(1)(m).

³¹¹ *Auditor-General Act 1997* (Cth) ss 11–13 (‘audits’), 15–17 (‘performance audits’), 18 (‘general performance audits’).

³¹² *Auditor-General Act 1997* (Cth) s 24.

³¹³ *Public Service Act 1999* (Cth) ss 63(1)–(2). See also Department of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2007); Australian National Audit Office and Department of Finance and Administration, *Better Practice Guide: Better Practice in Annual Performance Reporting* (2004); Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 2003–04 (2003); Australian National Audit Office, *Performance Information in Portfolio Budget Statements: Better Practice Guide* (2002).

³¹⁴ *Charter of Budget Honesty Act 1998* (Cth) s 14(1).

³¹⁵ *Charter of Budget Honesty Act 1998* (Cth) s 10.

³¹⁶ *Charter of Budget Honesty Act 1998* (Cth) s 18.

(Cth).³¹⁷ The accounting and financial reporting standards need to reflect the specific interests and needs of Parliament.³¹⁸ Importantly, these standards might mandate ‘program-level’ information and other aggregates of information that could assist in determining the true ‘performance’ of expenditure arrangements and assist the efficiency and effectiveness of the Auditor-General’s auditing functions;

- (b) The focus of Senate Estimates presently coincides with the annual and additional appropriation Bills in May–June and February–March respectively.³¹⁹ This focus should be shifted to a more detailed analysis of expenditures incurred against performance measures that coincides with the tabled *Public Service Act 1999 (Cth) Annual Reports* in September/October.³²⁰ This is necessary because the *Annual Report* sets out audited financial statements³²¹ and is, in effect, the ‘key reference docu-

³¹⁷ Currently, financial statements are presented in various formats with moves towards unifying the financial statistics with the accounting standards: see, eg, Treasurer and Minister for Finance and Administration, *Budget Strategy and Outlook 2008–09*, Budget Paper No 1 2008–09 (2008) 3.22–3.24; Australian Accounting Standards Board, *Financial Reporting of General Government Sectors by Governments*, above n 91. Notably, important distinctions between the different approaches to financial statements and financial statistics may be lost if this unification process occurs. This is especially so where the economic stocks (such as the liabilities) are defined according to the accounting standards.

³¹⁸ However, a potential tension between the Joint Committee of Public Accounts and Audit and the Auditor-General needs to be resolved. Under current arrangements, the Joint Committee of Public Accounts and Audit can ‘determine the audit priorities of the Parliament and ... advise the Auditor-General of those priorities’: *Public Accounts and Audit Committee Act 1951 (Cth)* s 8(1)(m). On the other hand, for the Auditor-General ‘[t]here are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the Parliament’: *Auditor-General Act 1997 (Cth)* s 8(2). Significantly, the Joint Committee of Public Accounts and Audit cannot ‘direct the activities of the Auditor-General’: *Public Accounts and Audit Committee Act 1951 (Cth)* s 8(1A). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, 8349 (John Fahey, Minister for Finance); Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, 1355 (Ian Campbell, Parliamentary Secretary to the Treasurer). As a matter of practice, the Auditor-General determines the work program in consultation with the Joint Committee of Public Accounts and Audit: see Australian National Audit Office, *Annual Report 2006–2007* (2007) 26; Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Annual Report 2005–2006* (2006) 3. The Auditor-General ‘may’ further undertake audits requested by the Joint Committee of Public Accounts and Audit (the Committee acting on requests from other parts of Parliament): Australian National Audit Office, *Annual Report 2006–2007* (2007) 26. According to these arrangements, the Auditor-General is potentially *not* completely independent of the executive, and the rhetoric of the Auditor-General being an independent officer of the Parliament (such as ‘functional independence’: Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Review of the Auditor-General Act 1997* (2001) 2) needs to be considered within the context of the potential powers exercisable over the Auditor-General: see Legal and Constitutional Legislation Committee, above n 309, 13–24. This contrasts with the evolution of an independent auditor function from which the Australian institution was originally fashioned: see A J V Durell, *The Principles and Practice of the System of Control over Parliamentary Grants* (1917) 157–8.

³¹⁹ See Commonwealth, *The Senate: Standing Orders and Other Orders of the Senate* O 26(1). For an overview of the process, see Evans, above n 250, 307–8, 364–9. Notably, the Supplementary Budget Estimates are confined to answering questions on notice from the May–June Senate Estimates hearings: at 308.

³²⁰ Department of the Prime Minister and Cabinet, above n 313, 2.

³²¹ The *Financial Management and Accountability Act 1997 (Cth)* imposes auditing arrangements conducted by the Auditor-General according to the *Auditor-General Act 1997 (Cth)* s 10 and 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)* s 8(1)(m): *Financial Management and Accountability Act 1997 (Cth)* ss 56–7; *Public Service Act 1999 (Cth)* ss 63(1),

ment³²² that links the financial management and people management arrangements within an outcomes and outputs framework set out in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) accompanying annual appropriations Bills.³²³ The present practice of referring tabled *Public Service Act 1999* (Cth) *Annual Reports* to Senate Standing Committees³²⁴ and a House of Representative Standing Committee³²⁵ is effectively a formalities check that does not address the substance of performance against appropriation,³²⁶ despite the possibility of a comprehensive analysis.³²⁷ The accountability and transparency should coincide with the annual reporting and not occur some months later within a context focused on future expenditure;

- (c) Further assistance to Senate and House of Representatives Committees in assessing past performance through education of Senators and Members about assessing performance measures from the outcome and output frameworks should be provided, so that the mass of information already provided through *Public Service Act 1999* (Cth) *Annual Reports* and the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) that accompany the annual appropriation Acts can be more effectively assessed. This is essential as the accountability and transparency of the Australian government ultimately rests with the interest, vigilance and knowledge of the Senators and Members of Parliament; and
- (d) There should be a formal requirement to disclose all Australian government documents that relate to the expenditure of Commonwealth money and property, including the performance measures against which expenditure is to be assessed.³²⁸ With the devolution of decision-making authority

70(1). Notably, the form of the *Annual Reports* is approved by the Joint Committee of Public Accounts and Audit: see *Public Service Act 1999* (Cth) ss 63(2), 70(2); Department of the Prime Minister and Cabinet, above n 313, 1. Similarly, audits are conducted by the Auditor-General that are included in the annual report: *Commonwealth Authorities and Companies Act 1997* (Cth) ss 8–9, sch 1.

³²² Australian National Audit Office, *Annual Performance Reporting*, above n 313, 21; Australian National Audit Office and Department of Finance and Administration, *Better Practice Guide*, above n 313.

³²³ See Australian National Audit Office, *Guide on Annual Performance Reporting*, above n 313, 5–6. See also Department of the Prime Minister and Cabinet, above n 313, 3–4.

³²⁴ Commonwealth, *The Senate: Standing Orders and Other Orders of the Senate* O 25(20). See also Evans, above n 250, 386–7.

³²⁵ Commonwealth, *House of Representatives: Standing and Sessional Orders* O 215(c). See also Ian Harris (ed), *House of Representatives Practice* (5th ed, 2005) 624.

³²⁶ Where the Senate and House of Representatives committees have reported, their reports are very brief: see, for recent examples, Senate Standing Committee on Economics, Commonwealth Parliament, *Annual Reports (No 1 of 2007)* (2007); Senate Standing Committee on Economics, Commonwealth Parliament, *Annual Reports (No 1 of 2006)* (2006). For example, the House of Representatives Standing Committee on Industry and Resources has not assessed any recent Annual Reports: see Lawson, 'Managerialist Influences on Granting Patents in Australia', above n 294, 86–7.

³²⁷ See Commonwealth, *The Senate: Standing Orders and Other Orders of the Senate* O 25(20)(e); Commonwealth, *House of Representatives: Standing and Sessional Orders* O 215(c).

³²⁸ This will include the performance measures in employment arrangements applying to specific public servants who exercise authority over the management of budget funded programs and those performance measures might presently be restricted documents: see *Freedom of Informa-*

that was a hallmark of the *Financial Management and Accountability Act 1997* (Cth) and the *Public Service Act 1999* (Cth), there should also be the obligation to make the various management incentives driving performance (and their appropriateness) accountable and transparent.

In short, Parliament needs to change its focus from *before-the-event* annual appropriation Bills to *after-the-event* reporting to take advantage of the accountability and transparency arrangements reflected in the budget, financial management and people management frameworks.³²⁹ The attempts so far to re-invigorate the appropriations process, while faithful to the *Constitution's* generation at the time of federation, fails to take account of the considerable advances in public administration since then, the plethora of data and information now available and in particular the price, quantity and quality of outputs and the performance indicators for outcomes. Without Parliament shifting its focus, the accountability and transparency promised by the move to an accrual budget and outcomes and outputs are unlikely to be delivered. More importantly, such a change promises to re-invigorate the accountability and transparency of the Australian government's expenditure.

tion Act 1982 (Cth) ss 41(1) (documents affecting personal privacy), 43(1)(c) (documents relating to business affairs etc).

³²⁹ For an illustration of the intended operation of these overlapping framework arrangements, see Lawson, 'Managerialist Influences on Granting Patents in Australia', above n 294, 74–87.