



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Reference: Review of the draft Financial Framework Legislation Amendment Bill

FRIDAY, 7 MARCH 2003

CANBERRA

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JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Friday, 7 March 2003

Members: Mr Charles (*Chairman*), Ms Plibersek (*Vice-Chairman*), Senators Colbeck, Hogg, Lundy, Murray, Scullion and Watson and Mr Ciobo, Mr Cobb, Mr Georgiou, Ms Grierson, Mr Griffin, Ms Catherine King, Mr Peter King and Mr Somlyay

Senators and members in attendance: Mr Charles, Senator Conroy, Ms Catherine King, Senator Lundy and Ms Plibersek

Terms of reference for the inquiry:

To inquire into and report on:

The draft Financial Framework Legislation Amendment Bill to determine whether the Bill makes an appropriate contribution to improving the financial framework and reporting on the Commonwealth public sector, including in relation to:

- alignment of financial management provisions and practices with the *Financial Management Legislation Amendment Act 1999*;
- consolidation of approval powers in relation to money raising, investments and guarantees by, and for, specific entities that are legally separate from the Commonwealth; and
- information to be included in determinations of the Finance Minister under the Financial Management and Accountability Act 1997 that establish Special Accounts.

WITNESSES

ALLEN, Mr Mike, Chief Executive Officer, Australian Office of Financial Management	1
BARR, Mr James, General Manager, Networking the Nation, Department of Communications, Information Technology and the Arts	1
BARRETT, Mr Paul, Chief Financial Officer, Aboriginal and Torres Strait Islander Commission	1
CARUANA, Mr Kevin, Senior Director, Research and Development, Australian National Audit Office.....	1
CHEAH, Mr Christopher Michael, Chief General Manager, Telecommunications, Department of Communications, Information Technology and the Arts	1
COUSINS, Mr Troy, Business Manager, Product Integrity, Animal and Plant Health, Department of Agriculture, Fisheries and Forestry	1
CROSSLEY, Mr David, Executive Director, Audit Assurance Services, Australian National Audit Office	1
CULHANE, Mr Michael, Branch Manager, Finance and Banking, Department of Finance and Administration	1
EVANS, Mr Harry, Clerk of the Senate, Department of the Senate.....	1
GALE, Ms Jennifer, Chief Financial Officer, Department of Communications, Information Technology and the Arts	1
GAUKROGER, Mr Allan, Chief Financial Officer, Department of Agriculture, Fisheries and Forestry.....	1

GEHRIG, Mr Robert, Manager, Corporate Treasury, Department of Agriculture, Fisheries and Forestry	1
HARRIS, Ms Jan, General Manager, Commonwealth-State Relations Division, Department of the Treasury	1
HUNTING, Ms Kerry, Chief Finance Officer, Insolvency and Trustee Services Australia.....	1
HURST, Mr Jeff, Senior Budgets Officer, Corporate Budgets Section, Department of Communications, Information Technology and the Arts	1
HUTSON, Mr Jonathan, Division Manager, Financial Framework Division, Financial Management Group, Department of Finance and Administration	1
KENNEDY, Mr Maurice John (Private capacity)	1
MARKUS, Mr Don, General Counsel, Department of Communications, Information Technology and the Arts	2
McPHEE, Mr Ian, General Manager, Financial Management Group, Department of Finance and Administration	2
MOWBRAY-d'ARBELA, Mr Marc, Branch Manager, Legislative Review, Department of Finance and Administration.....	2
PERROTT, Mr David, Corporate Accountant, Australian Quarantine and Inspection Service, Department of Agriculture, Fisheries and Forestry.....	2
ROGERS, Mr Scott, Analyst, Governance and Insolvency Unit, Corporate Governance Division, Department of the Treasury	2
STACEY, Mr Brian, Group Manager, Land and Development, Aboriginal and Torres Strait Islander Commission.....	2
STURGISS, Mr Rob, Manager, State Finances and Reporting Unit, Department of the Treasury	2
TIMOTHEOU, Mr Christopher George, Analyst, Superannuation, Retirement and Savings Division, Department of the Treasury	2
WU, Mr Marcus, Policy Analyst, Department of the Treasury	2

Committee met at 9.34 a.m.

ALLEN, Mr Mike, Chief Executive Officer, Australian Office of Financial Management

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CHAIRMAN—The Joint Committee of Public Accounts and Audit will now take evidence, as provided for by the Public Accounts and Audit Committee Act 1951, for its review of the draft Financial Framework Legislation Amendment Bill. I welcome everyone here this morning to this roundtable public hearing. The committee has had a long-term interest in the financial framework of the Commonwealth. When the legislation underpinning the current financial framework—the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997—were first introduced to parliament in 1994 they were referred to the committee for review. More recently, in 2000, the committee again reviewed the legislation. The committee welcomes the opportunity to review the draft Financial Framework Legislation Amendment Bill. It is unusual for a parliamentary committee to review a bill before it is introduced to the parliament. The committee believes this reflects the JCPAA's long-held interest in the area and the significance of the bill in bringing numerous acts up to date.

I would like to draw the attention of participants to the procedure and conduct of the forum. All witnesses will have the opportunity to raise issues and seek comment from other witnesses at the forum. However, in these instances, the committee prefers that witnesses should direct their questions through the committee chairman. This will ensure that the events constitute formal proceedings of the parliament and, therefore, attract parliamentary privilege. Statements and comments by witnesses should, as far as possible, be brief—and I will make sure that that occurs. Quite a number of you here have appeared before the JCPAA more than once over the last 5½ years, and you know that I mean that. We want to cover all the issues in the time available. You will note that the seating arrangements around the table make for a tight fit. I ask therefore that, where there are more than three representatives from a particular agency, they

consider reducing their number if there is a shortage of space. As the topics under discussion change, representatives may replace each other at the table as appropriate.

Before commencing proceedings, I advise witnesses that the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and will attract parliamentary privilege. Finally, I refer any members of the press who are present to a committee statement about the broadcasting of proceedings. In particular, I draw the media's attention to the need to report fairly and accurately the proceedings of the committee. Once again, I welcome the witnesses to this roundtable forum. It is my understanding, Mr McPhee, that DOFA would like to make a brief opening statement.

Mr McPhee—Thank you for the opportunity to appear before the committee today to discuss the draft Financial Framework Legislation Amendment Bill. It is a consequential amendment bill which has been developed to refine and update existing legislation to align it with the changes introduced by the Financial Management Legislation Amendment Act 1999. This further bill was foreshadowed by the government in the second reading speech of the FMLA Act. The draft bill seeks to improve the financial framework by providing for consistency of language across legislation, consistency of approval of borrowing powers for the finance minister and improved information requirements to establish special accounts. Finance has consulted extensively with all relevant departments in preparing the legislation and there is wide support for the changes.

In appearing before the committee today we are conscious of the close relationship this committee has had with the development and evolution of the Financial Management and Accountability Act, the Commonwealth Authorities and Companies Act and the Auditor-General Act and, consequently, the extent of the committee's influence over the current financial management framework. To assist the committee today we have prepared two brief background papers on the consolidated revenue fund and special accounts, and I would be happy to table these, Mr Chairman, with your concurrence.

CHAIRMAN—Thank you. Is that it?

Mr McPhee—Yes. I am following your instructions, Chair.

CHAIRMAN—That was brief all right!

Ms PLIBERSEK—Mr McPhee has been here before!

CHAIRMAN—Are there any other participants that would like to make a brief opening statements?

Ms Harris—I would like to give a general overview of Treasury's response to the Financial Framework Legislation Amendment Bill. We have 38 Treasury portfolio acts affected by the bill and another 28 acts which are not Treasury portfolio acts which confer a power to the Treasurer in relation to approval of requests to undertake money raising. I will quickly go through the specific responses in relation to the various elements of the bill. Basically, Treasury is supportive of proposals to transfer the powers of approval over the borrowing provision of

borrowing guarantees and money raising from the Treasurer to the Minister for Finance and Administration.

The Financial Framework Legislation Amendment Bill proposes to align the financial management provisions of a number of acts with the changes introduced by the FMLA Act 1999. Given that this will only alter terminology to ensure consistency across legislation, Treasury does not see any reason for objecting to those proposals, in principle.

We want to make a number of comments in relation to the proposals for amendments to specific acts. Three of the acts to be amended concern Commonwealth relations with the states and the Northern Territory. I wish to advise the committee that the relevant process for consulting with and obtaining the approval of the states and the Northern Territory under the corporations agreement, regarding amendments to the Corporations Act and the ASIC Act, have been satisfied. The states have also been advised of the proposed amendments to the Financial Agreement Act.

Part 3 of the bill proposes the repeal of 21 acts that are of interest to the Treasury portfolio. In correspondence with the Minister for Finance and Administration, the Parliamentary Secretary to the Treasurer stated that he was not yet in a position to support these proposals and noted that he expected there would be an opportunity to provide additional views in relation to those proposals at a later stage in the consultation process.

CHAIRMAN—What was the date of that?

Ms Harris—That was in November.

CHAIRMAN—Is that still current?

Ms Harris—Yes, it is. Essentially, we are taking a cautious approach. We want to make sure there are no unintended consequences of repealing those bills. We are still going through the process. We expect to be in a position to finalise that relatively soon.

Finally, we have identified a potential source of inconsistency in relation to amendments concerning section 237 of the SI(S) Act, the Superannuation Industry (Supervision) Act, due to the simultaneous progression of amendments to the same section of the act through the Superannuation Industry (Supervision) Amendment Bill 2002, which was introduced to parliament on 12 December 2002. These potential inconsistencies are of a technical, rather than a policy, nature and have been drawn to the attention of the Department of Finance and Administration.

Mr Kennedy—This draft bill is largely about machinery provisions that have been necessitated by the amendment to the FMA Act in 1999. It is unfortunate that this committee did not have a chance to review that bill and test whether some of the amendments that have now become law were unnecessary, ill-conceived and, in some cases, perhaps even unsafe. But that is water under the bridge. As the author of the FMA Act in its original form, I see my role here today as giving whatever assistance the committee may want of me in understanding the FMA's concepts and its complementarity to the constitutional requirements.

Topic 1—Deletion of references to the loan fund

CHAIRMAN—The loan fund was abolished by the Financial Management Legislation Amendment Act 1999 and the balance of the fund subsumed into the consolidated revenue fund on 1 July 1999. Part 1 of schedule 1 of the bill deletes references in 16 acts to the loan fund. Many of these acts are quite old. The Department of Agriculture, Fisheries and Forestry Australia and the Department of the Treasury administer five of the acts which are amended by the schedule. Each of those acts that are being amended is very old. Could AFFA and Treasury tell us whether they support repealing the acts in total, rather than just making amendments?

Mr Gaukroger—I cannot give you a definitive answer on whether to repeal it in total. We do not have any issues with those amendments in the bill. If there is any further information you need on that, I can get it for you.

CHAIRMAN—Thank you. Does Treasury have a view?

Ms Harris—We also do not have any problems with the amendments as proposed in the bill.

CHAIRMAN—But would you have any problem with wiping the legislation?

Ms Harris—In relation to the Qantas legislation, I think we need to go back and check whether there are any outstanding matters that still occur in relation to that legislation. We can get back to you on that. There is a view that the Loans (Australian Industry Development Corporation) Act 1974 would be repealed when the AIDC Sale Act 1997 was proclaimed, but we are not aware of what has happened in relation to that. The sale act is a matter for the Department of Finance and Administration, as we understand it.

CHAIRMAN—Does Finance have a view?

Mr Mowbray-d'Arbela—We have consulted with agencies on acts that could possibly be subject to repeal; those are identified in the repealing part. We certainly think that any acts that could possibly be repealed should be; we encourage that. We think that would tidy up the statute book. But we are leaving it to the portfolios in question.

CHAIRMAN—I will turn this over to my colleagues for questions, but it brings us to a general question: are we creaking and grinding our way to modernity, are we making big, bold steps or are we still stuck with the past and these huge differentials between public sector accounting and accountability and private sector accounting and accountability? Do you have a view on that, Mr McPhee, with your new hat on?

Mr McPhee—Certainly the changes we have seen in public sector administration have been substantial. As one of the papers we put out on the consolidated revenue fund shows, there have been some very substantial changes in the way the government accounting is now implemented. But, as Maurie Kennedy pointed out, some of the significant changes were in the previous legislation and this set of changes is really about tidying up as a result of that earlier legislation. So these are not massive changes from our point of view but very much more in the way of housekeeping changes.

CHAIRMAN—I understand that about this bill, but my question was more a general question.

Mr McPhee—Certainly removing the previous trust fund and the loan fund, for instance, allowed the efficient implementation of accrual accounting and budgeting, so we have a much more principle based approach which is not constrained by some of the prescriptive rules that were in legislation in the past. The job that we have in Finance is to make sure that in the changes that we make going forward we do not lose the things from the past that are important to parliament and the government. That is an issue that we as a department are working with at the moment.

We are keen to progress the financial management reforms, because of the more comprehensive financial information provided, but there are still some fairly significant issues to be dealt with—not so much in terms of legislation but in terms of harmonising accounting standards. As you would be aware, Mr Chairman, there are two sorts of accounting standards applied in the preparation of budget material: the government finance statistics, which is an IMF based set of standards, and the Australian accounting standards, which are based on a more commercial view of the world.

There are about 12 major differences in those areas which create problems when it comes to financial reporting, and I think it is very confusing for readers of the budget papers and financial reports produced by government. So one of our current priorities is to try and work, through the accounting bodies and the IMF, to eliminate those differences as quickly as we possibly can. That is the major change in terms of the government accounting. But the legislative framework, from our point of view, does not inhibit what we are seeking to achieve in those other reforms.

Senator CONROY—I understand from the second reading speech, on 10 February 1999, that the 1999 amendment would:

... globally change the effect of references in other acts to the repealed Loan Fund ... to mean the Consolidated Revenue Fund.

Is that right? I understand that at the time the minister said:

I propose, in due course, to introduce a consequential amendments bill that will ensure that terminology in other acts is consistent with the amended FMA Act.

Mr McPhee—That is correct.

Senator CONROY—And these are those amendments?

Mr McPhee—Yes.

Senator CONROY—It was about four years ago?

Mr McPhee—These are those. As you would be aware, this is a very substantial piece of legislation that has required the department to consult very widely, so it has taken a long time to get to this point.

Senator CONROY—It certainly has—four years to introduce a global change.

CHAIRMAN—This is the public sector, not the private sector!

Senator CONROY—I am not going to let you sledge the public sector like that!

Mr McPhee—Senator Conroy, it took a lot longer to get the FMA, AG and CAC acts up.

Senator CONROY—Can I just confirm that the global change introduced through the FLMA Act in 1999 means that these changes have no practical impact at all?

Mr McPhee—That is correct.

Senator CONROY—Someone is nodding down there.

Mr Mowbray-d'Arbela—That is correct.

Senator CONROY—They are just doing housekeeping; is that right?

Mr Mowbray-d'Arbela—Yes.

Senator CONROY—I have finished on this section, Chairman.

CHAIRMAN—Are there any further questions? Holy mackerel! Something has got to go wrong or we will be done by lunch at this rate—that is not good! Let us move to topic 2.

Topic 2—Replacement of references to payments to the reserved money fund with references to special accounts

CHAIRMAN—Part 2 of schedule 1 of the bill replaces references in 30 acts to the reserve money fund with references to special accounts. The RMF was abolished by the Financial Management Legislation Amendment Act 1999 and the balance of components of the fund subsumed in the consolidated revenue fund. The act provides that a reference in any instrument to a component of the RMF is to be read as a reference to a special account.

An issue worth exploring is whether particular special accounts established in legislation being amended by the bill are necessary. That is what we will try to come to grips with. I think it would be helpful to the committee, Mr McPhee, if you, one of your colleagues or anybody else could give us a good, clean, clear explanation as to why we need special accounts. I am an old private sector individual and I am, as you well know, not an accountant but a simple engineer. The companies that I ran had a chart of accounts. If money came in from a particular source, it went under a particular chart of accounts number and, if it went out, it was expended against another chart of accounts number, and we could account for that at the end of the year. If we had to balance a particular lot of incomings with outgoings, that was no problem because at any point in time we had a running tally of any variance between input and output. Why can't we make Commonwealth accounting a bit simpler? Firstly, what are special accounts; secondly, why do we have to have them; and, thirdly, couldn't we get rid of them?

Mr McPhee—The additional submission that we tabled earlier has a one-page summary explaining what a special account is, and I would refer you to that. Basically, they provide a useful method of delivering some government programs, particularly ones funded by, say, indirect taxes or other compulsory imposts, contributions by other governments or discretionary

contributions by members of the community. Special accounts allow money in the CRF to be set aside for particular spending purposes, and moneys in a special account can only be spent for the purposes nominated.

Your analogy of setting up a cost centre could be done, but the reason special accounts exist is to give confidence to external parties that moneys are used for the purposes for which they were nominated and not for any other purpose. So there is a very formal process for determining the purpose for which a special account will be set up and for which the money will be used. There are some additional reporting responsibilities to go with having a special account, and in some cases, where there is a business operation, a full set of financial statements is required in relation to that business operation or special account.

So, while government could operate in the same way as the private sector in the analogy that you used, I think that from an external stakeholder perspective it may not give the same level of confidence that the moneys are being used for the right purpose. You may not get the right level of financial reporting disclosure if you only had a cost centre, because there is no requirement to formally report on particular cost centres.

I think that special accounts are much misunderstood. We in the department are trying to improve the reporting around special accounts. We also intend to produce some guidelines—we have been working on them for some time—and issue a report along the lines of others that we have produced in the department to explain special accounts and what their purposes are, because we think that communication is part of the answer on special accounts.

CHAIRMAN—Is it true that a special account is not an account at all—it is not a jam tin or a bank account?

Mr McPhee—It may not be a bank account. I see it as a particular area of activity. It is a notional division of the consolidated revenue fund that is used to focus on a particular area of government activity. It is useful to see it as an account, but it may not be represented by a bank account and it is certainly not represented by anything special within the consolidated revenue fund. The balances of special accounts are just funds within the consolidated revenue fund.

CHAIRMAN—And a special account must not necessarily be hypothecated?

Mr McPhee—It often is—

CHAIRMAN—But not necessarily?

Mr McPhee—No. In fact, special accounts may be used for proper trustee type moneys where the Commonwealth is holding moneys on behalf of other parties, so genuine trustees' moneys can fit into the special account definition. There is a range of purposes for which they are used. I have mentioned business operations and trustee type moneys. Also, where we are holding moneys on behalf of the states and for other similar uses, special accounts are an appropriate vehicle as well.

CHAIRMAN—Do you have a view, Mr Kennedy?

Mr Kennedy—I do, indeed, Mr Chairman.

CHAIRMAN—I thought you might.

Mr Kennedy—Going back to your original question about the difference between the accounting systems you used in your private sector life, I believe that the Australian Constitution compels us to go down the track of ‘jam jar’ accounting, to use your term. The reason is that, on my reading of the Constitution and the conventions that led up to the adoption of the Constitution, the consolidated revenue fund was intended to result in an identifiable balance of surplus revenue that would be returned to the states. That is under a number of sections of the Constitution. It means that the consolidated revenue fund is in fact an accounting construct which is there so that you can identify from the accounting the level of surplus revenue.

With Federation in 1901, the Audit Act was enacted. It has to be viewed contemporaneously with the Constitution and as giving effect to the Constitution. The Audit Act constructed two other funds—the loan fund and the trust fund. It allowed moneys to be transferred from the consolidated revenue fund into those other funds according to the nature of the money and to be spent according to the nature of the appropriations of those funds. I think that doing away with the funds, as has happened, and constructing notional compartments in the consolidated revenue fund makes an absurdity of what the Constitution envisaged. It also means that, even though we have departed from the concept of surplus revenue and it is returned to the states, it is still on the constitutional books. So to make this notional compartmentalisation of the consolidated revenue fund flies in the face of those other constitutional provisions that talk about and envisage a surplus revenue amount.

Just on the loan fund, by the way—and this is only anecdotal—I remember people I worked for in Finance and in Treasury before that who had a long association with the Audit Act and its fund accounting mechanisms. They would say that the loan fund was really handy—and especially in the years not long after World War II—as it was easier to raise loans overseas. This was because the lenders would see that the money was not going into the consolidated revenue fund, which could be used for warlike purposes.

That is anecdotal, but the Audit Act provided for loan funds to be spent according to the purposes of the Loan Act. Some loan acts envisaged expenditure on defence but other specific loan acts compartmentalised money away from that. To answer your question about whether or not special accounts are necessary, I think special accounts are an absurdity, but at least one fund other than the consolidated revenue fund is necessary because the Constitution leads us towards it. As I said in my opening statement, that is water under the bridge. The funds have disappeared. Whether we will ever see a return to them, I do not know.

CHAIRMAN—Hasn’t the horse bolted?

Mr Kennedy—This committee is supposed to be one of the gatekeepers and you are standing here guarding the gate, but the fence is down.

Mr Evans—Unless you adopt the view that Mr Kennedy has just put to you, the framers of the Constitution were a lot of silly old duffers who put an enormous tautology in section 81 of the Constitution. Section 81 simply means the revenues of the Commonwealth accrue to the

Commonwealth. That is what is being told to you in the explanatory material accompanying this bill. In other words, section 81 is a tautology: Commonwealth revenue is Commonwealth revenue; it does not mean anything. As Mr Kennedy has put to you, I do not think they were silly old duffers. They intended that there be something called the consolidated revenue fund and that the revenues of the Commonwealth would go into that fund and the appropriations of the Commonwealth would come out of that fund. The system of special accounts and the whole financial framework that we have been led into by this legislation is unconstitutional in the broad sense at least.

CHAIRMAN—I would like to hear, if anybody has a view we should be going back to jam tins.

Mr Evans—I think the framers of the Constitution committed us to a big jam tin.

Mr McPhee—I want to give a slightly different perspective on the earlier comments. I worked in Finance in the days when there were three funds. We used to do a whole lot of journal entries at the end of year to shift money out of the then Audit Act CRF into the trust fund, believing that we could ensure that the Commonwealth did not pay back any money to the states. I think we were doing journal entries probably in October or November, backdated to 30 June to get the balancing transaction right. However, we did all those sorts of transactions to get comfortable about this surplus revenue situation. Subsequent advice that the department has taken in the context of the earlier changes to the legislation suggests that in fact that has been unnecessary. The advice indicates that the existence of a current appropriation of moneys standing to the credit of the CRF will be sufficient to prevent those moneys from being characterised as surplus revenue, irrespective of whether or not such moneys are transferred to another fund outside the CRF. We are working on legal advice we have which is quite clear-cut to say that, providing the parliament has appropriated amounts which are clear and are greater than any surplus of the CRF, there is no call by the states on the balance of the CRF.

CHAIRMAN—Is it not also true that once upon a time when it got near to 30 June the departments that still had a balance in some spending account would spend like crazy to make sure they got rid of the money before 30 June, because they could not carry it forward?

Mr McPhee—That certainly used to be the case. I would not suggest that it has completely changed at the moment, but certainly it is a lot less than it used to be.

Mr Kennedy—That end of year spending had less to do with the surplus revenue situation and more to do with the situation of, ‘Gee, if we don’t use up what has been appropriated to us, we’ll lose it next year.’

CHAIRMAN—I understand that.

Senator CONROY—The loan fund and reserve money have always traditionally been reported in the budget papers. Is that right?

Mr McPhee—They have certainly been recorded in the financial statements of the Commonwealth. I would need to check the level of disclosure in the budget papers.

Senator CONROY—I am informed it is Budget Paper No. 4.

Mr McPhee—Okay.

Senator CONROY—Special accounts are not reported in the budget papers, though, are they?

Mr McPhee—They have not been reported in the budget papers of late. We are looking at proposals to make a change to that effect.

Senator CONROY—Hopefully it will not take four years! The key issue here is about accountability and transparency to the parliament.

Mr McPhee—Indeed.

Senator CONROY—If you want to take something out that has been reported and insert a new definition that is not reported, you could understand that the parliament would be a bit concerned about what was going on.

Mr McPhee—That is correct. We are specifically seeking to enhance the disclosure and get more disclosure of special accounts in departmental reports.

Senator CONROY—But they are not the budget papers?

Mr McPhee—No. We are looking to enhance the budget papers; I am talking about particularly the PBSs. As I said, we are looking to put out some guidelines or guidance so that we can explain their purposes.

Senator CONROY—So they would not be consolidated? At the moment, Budget Paper No. 4 gives a consolidated situation. You are talking about spreading it across 30 different departmental papers.

Mr McPhee—Yes, that is the view at the moment.

Senator CONROY—Do you think that will increase the level of transparency?

Mr McPhee—It depends on whether anyone is interested in the special accounts as a bulk group or whether, when they are looking for information about special accounts, they will go to the AFFA financial statements or whatever and whether they are looking at the information in context. Under this devolved arrangement we have for financial reporting, the presumption is that a reader would generally go to the agency that looks after it to get the context.

Senator CONROY—The tragic situation is that I have to go into what is called the budget lockup, and I am sure you have been into a few. It is always easy to find one table in Budget Paper No. 4 to try to do some sort of analysis of what is happening in the budget, whereas if I have to start looking through 30 different papers I would have to go into the budget lockup two days in advance. Would you agree?

Mr McPhee—I appreciate that issue. The question is of balance: how many users like you are there and do we put in another six or eight pages—

Ms PLIBERSEK—There are so few of us parliamentarians!

Senator CONROY—Do not worry about us; we are just in charge of reporting to the public!

Mr McPhee—It is not a small table; it is quite a large table. We are conscious of the size of the budget papers, as it is. So it is a balancing act. I take on board your comments, but the current issue we are looking at is very much to do with getting the departments to report this information.

Senator CONROY—I appreciate that. The key here is that we have been asked to consider changes to the law that will facilitate all of this, and if the parliament thinks there is less transparency, accountability and capacity it may have a stronger view on it than it otherwise would. Relatively speaking, this is mostly a tidying up bill.

Mr McPhee—Certainly if the committee has a view on that and, at the end of the day, that is reflected in the committee's report, I am sure the government will take that into account.

Senator CONROY—The consolidated revenue fund was reported in the aggregate financial statements. It is not now, is it?

Mr McPhee—It is not now.

Senator CONROY—That is a substantial diminution of transparency. Previously it was audited but it is not now.

Mr McPhee—The consolidated revenue fund under the Audit Act was reported previously. At the moment we are looking at a possible note disclosure on the consolidated revenue fund under section 81 of the Constitution. We are looking at some sort of disclosure in the consolidated financial statements of the finance minister in future years to respond to the issues that you, Senator Conroy, and others have raised about the CRF. So we are looking at some disclosure about that.

Senator CONROY—I would be happy to convince all my colleagues on the committee that we want to see a complete financial picture—that is, that the CRF is annually published—including all the components, s20, s21, special accounts, s16, s31, national payments. I would be happy to convince my colleagues on this committee to make that recommendation. Do you think that is of some value to people in examining this?

Mr McPhee—As we have discussed before, the consolidated revenue fund, in a legal sense, is all revenues and moneys raised or received by the executive government. Some of that is in the bank accounts, and it is very easy to account for that. Some of it is not in the bank accounts. Some of it is held by officials but not yet banked; some of it is held by outsiders, which is not yet banked. That has always been the situation, and it is a mistake to think that the consolidated revenue fund previously reported had all the revenues ever received by the Commonwealth as at 30 June. It is a mistake to believe that. The same deficiency that existed then, in a legal sense, exists now. We will do the best we can to try and get the most comprehensive figure that matches the legal definition, but we will never get every dollar that is held by every official into the accounts at 30 June.

Senator CONROY—Could I go back to a question I asked earlier. I asked whether the global change introduced through the FMLA Act in 1999 means that the changes have no practical impact and they are just housekeeping. Do you agree with that? I know one of the other officers said that before, but I was probably asking that question more to you.

Mr McPhee—I would say they are largely housekeeping. Whether you see the shifting of the approval of the borrowing powers from the Treasury to the finance minister as housekeeping, I guess I was not comfortable in putting that in the same definition, but some might.

Senator CONROY—Are there any other areas you would not put in the housekeeping definition?

Mr McPhee—I do not think so.

Mr Mowbray-d'Arbela—There is one change. I am thinking about a change to section 20 of the FMA Act, which describes the requirements that would be tabled in a determination by the finance minister when describing a special account. There is a change there which, in my view, is a matter of housekeeping—that is, in particular, that the current section 20 allows for a determination to include all or any of three certain factors. The perspective in the department, shared with the Australian Government Solicitor and the Office of Parliamentary Counsel, is that there is a benefit in requiring such determinations to always include all factors in those determinations.

Senator CONROY—That would be the introduction of the word 'debit', right?

Mr Mowbray-d'Arbela—There are two changes in that section 20. One is the introduction of the word 'debit' and the other is that the determination must always include all the factors. If the bill were to be passed, there would no longer be a possibility for a determination to just pick some of those factors. I believe that is a housekeeping change, it is nothing dramatic. I think it is an improvement, but I suppose that is a judgement call.

Senator CONROY—I appreciate that you have added to your earlier evidence. Thank you for that, Mr McPhee. I would probably call it a renovation rather than a bit of house cleaning, but we will come to that later. I understand from the second reading speech on 10 February 1999 that the 1999 amendment would globally change the effect of references to other acts to the repealed reserve money fund to mean the consolidated revenue fund. Is that correct?

Mr Mowbray-d'Arbela—Correct.

Senator CONROY—As with the amendments to the loan fund, do these amendments have any practical effect?

Mr Mowbray-d'Arbela—No.

Senator CONROY—This is just another four-year consultation?

Mr Mowbray-d'Arbela—Yes.

Senator CONROY—In regard to the commercial activities fund, I understand from the second reading speech on 10 February 1999 that the 1999 amendment would also globally change the effect of references in other acts to the repealed commercial activities fund to mean the consolidated revenue fund. Is that right?

Mr Mowbray-d'Arbela—Yes.

Senator CONROY—Why aren't there any amendments in this legislation to amend references in other acts to commercial activities funds?

Mr Kennedy—Because the commercial activities fund was never established by any act other than the FMA Act. Such funds were essentially for departmental or agency commercial activities. To the best of my recollection, they were not established under any other act.

Senator CONROY—Thanks.

CHAIRMAN—Following up on one of Senator Conroy's questions, is every one of the special accounts individually administered by an individual department?

Mr McPhee—Yes, I think that is right.

Mr Mowbray-d'Arbela—I would have to check that to be absolutely certain.

CHAIRMAN—So there is no reason why the portfolio budget statement could not report special accounts?

Mr McPhee—There is no particular reason, no.

CHAIRMAN—There is no difficulty?

Mr McPhee—No, there is no difficulty at all. The only issue is whether, in current terminology, we were talking about departments and agencies administering special accounts. FMA bodies administer special accounts.

CHAIRMAN—Has either Finance or Treasury given any consideration to changing the name of special accounts to something else, since they are not necessarily accounts.

Mr McPhee—It has crossed our minds, but we have been feeling a little inadequate in coming up with something that explains that they are special but different. We are open to helpful suggestions in that area.

Senator CONROY—How about designated accounts?

CHAIRMAN—This is history being made. A Commonwealth public servant has told us he feels inadequate. We congratulate you!

Ms KING—Mr McPhee, I am trying to get across the notion of special accounts. How many are there?

Mr McPhee—There are some 260 special accounts. Probably half of those are trustee type moneys, in broad terms, but there is a range of others.

Ms KING—How much money is in them in total?

Mr Culhane—The balance was around \$3 billion at 30 June 2002.

Senator CONROY—If I can just jump in there, about how much money flows through them? This is a discussion we have had previously, and it is a little bit more than \$3 billion. I thought that might help you, Ms King. I think it is closer to \$19 or \$20 billion. It has been as high as \$24 billion, but I think it was \$9 billion last year.

Mr Culhane—Yes, it was around \$9 billion.

Ms KING—Thanks. That clarifies it. That is certainly far more than the \$3 billion that is currently in them. How is the allocation of the money in the special accounts determined? Does it vary from account to account?

Mr Culhane—Determined in what sense?

Ms KING—How are decisions made about where that money goes?

Mr Culhane—When a special account is established it is legally under section 20 of the FMA Act, and a ministerial determination specifies the purposes for which money can be expended from the account. Or it will be established under section 20(1) of the act, which is a separate part of the legislation that, again, sets out the purposes. It is then for an agency to make payments from the account, for want of a better word, which are consistent with the purposes of that.

Ms KING—How are those payments currently reported? For example, with this sugar levy that is being imposed, I assume a special account will be set up for something like that. If I wanted to find out where that money was going, how would I do that?

Mr Culhane—Do you mean specifically which organisations, which individuals, the money was going to?

Ms KING—Yes. Given that I have Mars Confectionery in my electorate and a substantial proportion of the sugar levy is coming from my electorate, I would like to know where it is going.

Mr Culhane—I could not comment on that individual case but, in general, the only way to ascertain specifically which individuals the payments were made to would be by direct inquiry to the agency in question.

Ms KING—Are you saying that I would have to put in an FOI request?

Mr McPhee—That is to find the individuals.

Mr Culhane—The individual names, yes.

Mr McPhee—In terms of the general operation, if there were a special account for this activity, it would be disclosed in the annual report of the administering agency. As from next June, the kind of receipts and expenditures will be disclosed in even greater detail than before.

Ms KING—How many departments have special accounts? Do they all have them?

Mr Hutson—Yes, all departments have special accounts.

Ms KING—Is there consistency between the departments in terms of the reporting? If I looked at one department's annual report, would I get the same sort of information as in another?

Mr McPhee—Yes, because the finance minister issues guidance for financial reporting. That suggests there is a minimum standard. Obviously, agencies can disclose greater information if they wish.

Ms KING—I am guessing—having not got a lot of the history of this—that there have been some problems with the administration of special accounts. Is that correct?

Mr McPhee—I think there is an issue about the level of disclosure around special accounts. As I say, we are seeking to address that.

Ms KING—Are there any issues in particular that you are concerned about?

Mr McPhee—No. I think the department have realised that, with the very substantial changes in reporting that have occurred in the last three to five years, we need to go back and see whether we need to improve some areas, and this is clearly one.

Ms KING—Thank you.

Senator LUNDY—To follow on from Ms King's questions, could I ask DCITA what special accounts are under their control?

Mr Barr—I am directly aware of at least two that we operate. One is for the Regional Telecommunications Infrastructure Fund and the other is for untimed local calls in extended zones.

Senator LUNDY—Did those special accounts appear in the last portfolio budget statement?

Mr Barr—Yes.

Senator LUNDY—Has there been or could there be any deviation from the determined purpose or use of those funds that differs from that original determination.

Mr Barr—No. For example, in the case of the untimed local calls, it is specified in legislation.

Senator LUNDY—What about the RTIF?

Mr Markus—It was initially established under the old Audit Act and, through various transformations, it has now become a special account. The purpose was specified by an instrument originally made by the relevant minister under the Audit Act, but that purpose has been expanded by statute through provisions made in part 9 of the Telstra Corporation Act—through some enhancements, as it were, of that special account.

Senator LUNDY—So, in effect, there is not a determination by the minister in relation to that special account? It has been done through another instrument.

Mr Markus—There is an instrument, which was made at the time of the commencement of the Financial Management and Accountability Act, that determined the purpose of that account to be for expenditure on financial assistance for telecommunications related projects in regional areas. That has been enhanced in some respects under division 4 of part 9 of the Telstra Corporation Act. It is dealt with in sections 58, 59 and 60. Section 58 covers:

- (a) the purpose of assisting in meeting the telecommunications needs of people in remote island communities, isolated island communities or the Australian Antarctic Territory;
- (b) a purpose incidental or ancillary to the above purpose ...

Section 59 covers:

- (a) the purpose of facilitating the provision of Internet access for people in rural or regional areas, being access at a reasonable cost and involving a reasonable bandwidth;
- (b) a purpose incidental or ancillary to the above purpose ...

Section 60 covers:

- (a) the purpose of facilitating mobile phone coverage along highways;
- (b) a purpose incidental or ancillary to the above purpose ...

Those are the statutory enhancements of that fund that was created for the purpose of providing telecommunications services in regional areas more generally.

Senator LUNDY—In terms of the morphing of the purpose of that particular special account, are there any specifications or restrictions within that special account on what proportion of the account can be spent on what program?

Mr Markus—The statutory enhancements, yes—they identify an amount which is credited to the account to be spent for those particular purposes for the enhancements, such as mobiles on highways or telecommunications for remote island communities. Within the other fund, the more general fund, there is no legal division of that kind.

Senator LUNDY—That is really what I am getting to. Can you confirm that there is almost a complete flexibility on what proportion of that fund is allocated to what program? There is

nothing in the original determination or subsequent specifications to bind certain amounts to certain programs within that fund, is there?

Mr Barr—The point that Mr Markus is making is that they are in fact determined, except for the initial \$250 million that came from the first sale of Telstra shares.

Senator LUNDY—What happens, either on an annual basis or when particular programs are due to wind up, to any unspent funds within the special account?

Mr Barr—In the event that there are unspent funds, they return to consolidated revenue.

Senator LUNDY—Is that within each program as it is identified? I am aware that there have been underspends in some programs and that that money has been allocated to other programs. Is it the case that, with that level of flexibility, there is no way of really identifying that or managing that because it is a special account?

Mr Barr—I think the instance that you are referring to is probably the Internet access fund, but when funds were redirected they had to be redirected within the purpose that was specified in the legislation. While the fund was set up initially with a particular intent in mind, there were commercial developments via a Telstra national offering. That, in effect, meant that the original defined policy purpose was no longer necessary, but other activities within the scope of the definition in the legislation then became possible and the funds were redirected in part to that. There were specific savings also from that fund which have been already returned to the consolidated revenue fund.

Senator LUNDY—Can you nominate that figure?

Mr Barr—It is \$8.9 million.

Senator LUNDY—The Telstra Corporation Act that Mr Markus mentioned provides for specific time limits on amounts being debited from these accounts. My understanding is that it is 30 June 2003 for both the local Coaxis account and the regional telecommunications infrastructure, and June 2005 for another that relates to the television fund account. Do you think that the Telstra Corporation Act should include sunset provisions because of those time limits?

Mr Markus—In a sense they operate as a sunset clause for that particular program. The funding provided for in the act cannot be applied beyond those dates provided for in the legislation.

Senator LUNDY—What happens if there is an underspend in that program and those dates pass by?

Mr Barr—The funds are returned to consolidated revenue.

Ms PLIBERSEK—I would like to clarify something that Senator Lundy asked about in relation to unspent funds being moved and used in other areas. We were talking earlier about the inclusion of the word 'debit'; is that to enable this moving from fund to fund?

Mr Mowbray-d'Arbela—Not specifically.

Ms PLIBERSEK—But could it have that effect?

Mr Mowbray-d'Arbela—The special accounts that we are dealing with in the bill are primarily those that are described in legislation. The change I was describing in section 20 concerns special accounts that relate to—

Ms PLIBERSEK—I am sorry; I did not hear that.

Mr Mowbray-d'Arbela—The section 20 issue regarding annual debit concerns special accounts created by determination of the finance minister. Adding the word 'debit' for determinations in section 20 provides more of a capacity to describe payments that may be made from a special account for an administrative extent—for example, managing the account. For instance, if you were to outsource the management of a program, within the broad purpose of that special account you might also enable a capacity for debits to be made to pay the contractor for the purpose of administering it.

The specific question about the transfers aspect is not what we envisaged, but it depends on whether that is necessary for that special account, to do transfers. Technically, a debit that relates to a payment of money from one special account to another special account in certain circumstances could be set out. But that does not take effect until it has been in parliament for five sitting days, so we are seeking more clarity on those sorts of aspects.

CHAIRMAN—Mr McPhee, could we have a comprehensive written answer to that question?

Mr McPhee—Of course.

CHAIRMAN—I think we would like to know whether money can be shifted around from one special account to another.

Mr Kennedy—Mr Chairman, the requirement for the minister's determination in setting up special accounts ought to specifically focus on what the expenditure from that special account is. It is that expenditure purpose—that in the five sitting days the parliament has the opportunity to consider and perhaps disallow—that allows or prevents the movement of money to whatever other destination you choose.

CHAIRMAN—Thank you, Mr Kennedy. I am sure we understand that, but what I would like to know is whether there are subclauses in some of these special accounts that allow money under certain circumstances to be moved from one account to another.

Mr Kennedy—We can give you a response on that. I suspect the answer is conceptually yes. Hypothetically, there could be two special accounts: one might be the Mint and the other might be Artbank. If Artbank wanted to buy some coins or something from the Mint, they conceivably could buy the coins from the Mint and pay the money out of the Artbank account. Providing the acquisition of coins was consistent with the purpose of the Artbank special account, that could be paid to the Mint.

CHAIRMAN—When we look at a PBS, we do not necessarily know that that happened.

Mr McPhee—We will give you a full answer on that.

Senator LUNDY—I am looking at the listing for special accounts for DCITA. In this report, there are 11: nine have closed. I can certainly identify the RTIF but not the extended zones. I want to give you the opportunity to provide greater clarity about the number of special accounts in DCITA.

Mr Markus—The annual report at pages 277 to 283 sets out the special accounts which are administered by the Department of Communications, Information Technology and the Arts. I think the extended zones one is described as the untimed local calls access account. That is the one for provision of untimed local calls.

Senator LUNDY—I cannot find that on the list I have here either.

Senator CONROY—Do you have the list that Senator Lundy is working from, where they compiled them all at our request on an earlier occasion and obviously must have consulted you about the preparation of the list?

Mr Markus—It is set out on page 281 of the department's annual report. It is established under section 52 of the Telstra Corporation Act, so it is not a special account established administratively by the department of finance; it is one of the categories established by legislation.

CHAIRMAN—Can I ask the Office of Financial Management: are amounts standing to the credit of the debt retirement reserve trust account invested?

Mr Rogers—No, those funds would be invested as part of the investment activities conducted for the official public account. That amount at 30 June 2002 was in the order of \$3 million. It is not specifically invested, other than being held effectively as cash at bank.

CHAIRMAN—Does the office invest amounts credited to special accounts administered by other agencies?

Mr Rogers—Not specifically. As I understand the process, all funds within special accounts effectively form part of the official public account, which is then invested as part of our management of the liquidity requirements of the Commonwealth.

Senator CONROY—I want to clarify something. I will pass you an answer that the department of finance gave us on notice. As you can see, it provides a list of all the special accounts. It is quite comprehensive and they took some months to prepare it to make sure it was right. If I can run through with you the ones that the department of finance forwarded as believing they were under DCITA: the Cultural Ministers Council account, which is listed now as closed; the Federation Fund account; the National Science and Technology Centre account; the regional telecommunication infrastructure account; the multimedia industry development account, listed as closed; the ScreenSound Australia account, formerly National Film and Sound Archive account; the Artbank account; other trust moneys account; services for other

governments and non-agency bodies account, listed as inactive; Standing Committee on Recreation and Sport consultant account; and national relay service account, Telecommunications (Consumer Protection and Service Standards) Act 1999.

That was supplied to us by DOFA—I think they have a copy. I see Mr Culhane has it over there. Does that match up with what you have in your annual report? And of course you have indicated a couple of others which DOFA have not listed for us.

Mr Markus—Yes. Perhaps it would be easier if I just read the list, as they appear in the annual report: the Artbank business operations account, the ScreenSound Australia account, the National Science and Technology Centre account, the Standing Committee on Recreation and Sport Consultant account, the regional telecommunications infrastructure account, the Federation Fund account, the other trust moneys account, the National Relay Service account—I believe that is the one that is referred to in section 102 of the Telecommunications (Consumer Protection and Service Standards) Act—the television fund account, the untimed local call access account and the universal service account, which is another one that operates under the Telecommunications (Consumer Protection Service Standards) Act.

Senator CONROY—There was the untimed—what?

Mr Markus—The untimed local call access account—that was established under section 52 and is the one Senator Lundy described as the extended zones account. It provides services in the extended zone, so it is often referred to as that.

Senator CONROY—Okay.

Ms PLIBERSEK—And what was the one you said before that—the television one?

Mr Markus—The television fund account. That was established under section 63 of the Telstra Corporation Act and is another of the Telstra social bonus accounts. Where were we?

Senator CONROY—You had done the untimed account and you were going back to the universal service account.

Mr Markus—The universal service account was established under the Telecommunications (Consumer Protection Service Standards) Act. The national cultural heritage account is probably now the responsibility of the Department of the Environment and Heritage because it relates to the Protection of Moveable Cultural Heritage Act, which became the responsibility of that department under the last change to the administration arrangements orders.

Senator CONROY—I mentioned a couple of others there. Two of them are closed and one of them is inactive, which you did not mention. Is it possible—and I am happy for you to take this on notice—for you to give us advice as to why the Cultural Ministers Council account and the multimedia industry development account were closed, and why the services for other governments and non-agency bodies account is inactive—maybe because they had sunset clauses and all the rest? Perhaps you could take that on notice. I might then turn to DOFA. Mr Culhane, unfortunately I saw you flicking through a list. There seem to be about three, possibly four, accounts that have escaped DOFA. Does that seem right, just from what has been read out?

Mr Culhane—I did not pick up any additional ones that were read out.

Senator CONROY—The TV fund account?

Mr Culhane—No, I have that here on this list, under the regional telecommunications infrastructure account.

Senator CONROY—Gotcha. Could you get me the answer to why those accounts were closed?

Mr Culhane—I can provide an answer to why the government services account is noted as inactive there—basically, because it has had zero balances for the most recent few years.

Senator CONROY—Sure.

CHAIRMAN—Ms Hunting, what are the purposes of the common investment fund equalisation account?

Ms Hunting—The common investment fund was established under the Bankruptcy Act and holds the funds of the states that are being administered by the Insolvency and Trustee Service—so, bankruptcies that are being administered. Under the act that money can be invested, and the interest goes into the common investment fund equalisation account.

CHAIRMAN—But my understanding is that the Bankruptcy Act also has a common investment fund which is outside the consolidated revenue fund. Why do we need two—why do we need an equalisation account?

Ms Hunting—The common investment fund is actually the moneys from assets of bankrupts that have been sold that are to be distributed to creditors and used for costs. Those funds are not ITSA or Commonwealth funds; they belong to the creditors and they are seen as building trust.

CHAIRMAN—Okay. Treasury, is the superannuation protection account used?

Ms Harris—No, it has not been used.

CHAIRMAN—Could you tell us why not?

Ms Harris—As I understand it, payments made with respect to grants of financial assistance made by the minister under part 23 of the SI(S) Act have been paid out of the consolidated revenue fund, as per section 235(1)(a) of the SI(S) Act.

CHAIRMAN—Thank you.

Senator CONROY—Mr McPhee, you gave us an example before of Treasury and Artbank and the moneys passing between them. Those two particular ones would fall within the same program, wouldn't they?

Mr McPhee—They would not necessarily fall within the same program, because I think Artbank is run by DCITA and the Mint is run by Treasury. I have to say that it is a hypothetical question.

Senator CONROY—I understand that. Would you say that in this legislation there are any expanded powers to transfer moneys between special accounts?

Mr McPhee—No, not at all. Providing that expenditure meets the purpose of the trust's special account, it can be paid.

Ms KING—We have obviously recently looked at the final Audit Office report into DAS Fleet. I understand the \$32 million that was for settlement with Macquarie Fleet came out of a special account. Is that correct?

Mr Hutson—I am not an expert on that matter but I understand it is correct that that was paid out of the business services trust account.

Ms KING—What is the purpose of that account?

Mr Hutson—The purpose of that account is as I previously read into evidence at a Senate estimates hearing. It is actually quite long, so I am hesitant to—

Ms KING—I would be happy if we could look at that previous evidence in terms of the purpose of that account.

Mr Hutson—Sure.

Ms KING—Thank you.

CHAIRMAN—I have got a couple of questions for ATSIC. Could you tell us about the usefulness of the Condah land account, the Framlingham Forest account and the Aboriginal advancement account in delivering Commonwealth programs?

Mr Stacey—None of those accounts have been used. It is the Condah account and the Framlingham Forest account. They have never been used and are not used for the delivery of Commonwealth programs. The accounts were established under the Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987. That was legislation passed by the Commonwealth after it failed to pass in the Victorian parliament, and it was at the request of the Victorian government at that time. These accounts essentially were established on the same basis as the Aboriginals benefit account was established under the Northern Territory land rights act, and their purpose was to receive and distribute the equivalent of any mining royalties that might flow from mining interests on the relevant land that was granted under those acts. As it turns out, there have not been any mining projects on that land.

CHAIRMAN—Section 192X of the Aboriginal and Torres Strait Islander Commission Act 1989 specifies that the purpose of the ATSI land account is for making payments to ATSIC and the Indigenous Land Corporation. What arrangements does ATSIC have in place for assessing

the performance of the ILC—the Indigenous Land Corporation—in relation to expenditure of funds received from the ATSI land account?

Mr Barrett—We rely on the formulas that are built into the ATSIC Act to distribute the moneys to the Indigenous Land Corporation. It is a formula driven by government legislation, so we do not actually review any of the results of the expenditure of that money. We merely flow it through appropriation, in effect.

CHAIRMAN—Thank you.

Proceedings suspended from 10.55 a.m. to 11.07 a.m.

CHAIRMAN—Just before we move to the next session, Mr Barrett wanted to add to an answer to an earlier question.

Mr Barrett—Just to clarify, the Indigenous Land Corporation is actually a statutory authority in its own right. Therefore, the accountability mechanism is that it reports separately from ATSIC to the Minister for Immigration and Multicultural and Indigenous Affairs, who then tables those reports in parliament, as I understand it.

CHAIRMAN—Over the four years ended 2001-02, the balance of the Aboriginal and Torres Strait Islander land account has increased and it stood at over \$1 billion at the end of June 2002. Is that a bit of a hollow log? Can you tell us why the balance is so big?

Mr Barrett—The amount you are talking about is not actually related to the Indigenous Land Corporation. Those moneys are held in the consolidated revenue fund, if I have the term right. It is public money that ATSIC administers on behalf of the Commonwealth. The concept built into the ATSIC Act is that the account will be built up until 30 June 2004, at which time it is meant to have sufficient funds in it to actually self-perpetuate through its interest earnings. So, in answer to your question, it is not a hollow log.

CHAIRMAN—Thank you.

Topic 3—Replacement of references to payments to the consolidated revenue fund with references to payments to the Commonwealth

CHAIRMAN—Part 2 of schedule 1 of the bill replaces references to payments to the consolidated revenue fund with references to payments to the Commonwealth. These references occur in many of the 81 acts amended in part 2 of schedule 1. In cases where public money is collected by an entity that is not part of the legal entity of the Commonwealth—for example a body subject to the Commonwealth Authorities and Companies Act 1997—the amendments in the bill include provisions requiring the entity to pay the amount to the Commonwealth. This is done to ensure that the money is actually paid to the Commonwealth by the collecting entity.

Does anyone have any general statement they would like to make about those provisions? My understanding is that examples of cases where public money is collected by an entity that is not part of the legal entity ‘the Commonwealth’ include levies collected by the National Registration Authority for Agricultural and Veterinary Chemicals; levies collected by the Australian Prudential Regulation Authority; charges collected by the Great Barrier Reef Marine Park Authority; and amounts received by the slot manager, under section 27(1) of the Sydney Airport Demand Management Act. Good grief!

Ms PLIBERSEK—That is very important.

CHAIRMAN—I am certain it is, member for Sydney. Would the Audit Office please tell us whether you agree it is appropriate that the bill contain provisions requiring entities that are legally separate from the Commonwealth, but which collect public money, to pay the money to the Commonwealth?

Mr Crossley—We would not specifically have an opinion on that right now.

CHAIRMAN—Would you answer the question in writing, please?

Mr Crossley—We can do that.

Senator CONROY—What is the problem? Have you not considered it previously?

Mr Crossley—I have not considered that. I do not know whether Mr Caruana has.

Mr Caruana—I do not see any particular harm in having such a provision. If an entity that was not an FMA agency was actually collecting money on behalf of the Commonwealth, then presumably, by the definition that now applies for the consolidated revenue fund, that money is public money even in the hands of that entity. But I would stand corrected on that if there is some advice. Mr Mowbray-d'Arbela is nodding. It does not matter—

CHAIRMAN—Would they come under the Commonwealth Authorities and Companies Act?

Mr Caruana—They would do, but it is possible, I think—and again the Department of Finance will have a view—that even bodies that come under the CAC Act can hold public moneys. Once they are holding public moneys, those moneys are part of the consolidated revenue fund. Whether they actually need to deposit them anywhere, in the end, presumably they need to get—

Senator CONROY—Doesn't section 81 of the Constitution require all money to go to the Commonwealth?

Mr Kennedy—Section 81 comes into play when the money is actually in the hands of the Commonwealth—that is, the entity 'the Commonwealth'. But if money is collected, say, by a body covered by the CAC Act, it is usually collected under some statutory power. That statutory power will say that this money is being collected by this entity on behalf of the Commonwealth. This is the next step—in this proposed bill—to require that entity, having received money on behalf of the Commonwealth, to pay it to the Commonwealth.

CHAIRMAN—Does anybody have any idea who the slot manager is, and whether the Sydney Airport Demand Management Act 1997 involves an entity that falls under the CAC Act?

Mr Mowbray-d'Arbela—I do not have the details on the slot manager, but I would make the comment, in general terms, that section 12 of the FMA Act enables the receipt of public money by entities that are not the legal entity 'the Commonwealth', and section 12 describes those people as being an 'outsider'.

So it is not at all unusual for there to be a capacity for payments to be made to an entity other than the Commonwealth. A typical example would be the Australian Postal Corporation, which is a body under the Commonwealth Authorities and Companies Act, receiving taxation payments on behalf of the Australian Taxation Office. The bill does not change the way that any of the acts are currently structured but simply reflects the fact that when payments are made to

the Commonwealth through an agent—be that agent a CAC body, a contractor set up as an outsider or a statutory authority that may not come under the CAC Act—the money has already come into the consolidated revenue fund in a legal sense.

It is then appropriate and necessary to have some rigour behind the process by which that separate legal entity makes the payment to the legal entity of the Commonwealth—for example, Australia Post remitting money to the tax office. So, in our view, we are not actually changing anything. The bill, as you are aware, is clarifying some of the descriptions of acts so that it does not refer to things like the ‘reserve money fund’ when that payment is made on behalf of the Commonwealth.

CHAIRMAN—I assume that there are some entities that do not fall under either the FMA or the CAC Act who collect moneys on behalf of the Commonwealth?

Mr Mowbray-d’Arbela—That is correct.

CHAIRMAN—The question is: were those entities established by individual pieces of legislation, or does some other instrument require them to collect moneys on behalf of the Commonwealth? Also, this legislation clarifies the fact that, once they collect the moneys, the moneys belong to the Commonwealth—do you have a legal opinion that says that is enforceable? That was a long question, wasn’t it?

Mr Mowbray-d’Arbela—The changes that are picked up in this part of the bill relate to the fact that previously there might have been a reference to a payment into, say, the reserve money fund and the entity that had received that payment would then be asked to make a payment into the consolidated revenue fund. The bill clarifies that the payment is going to the legal entity of the Commonwealth, because once money is received on behalf of the Commonwealth it has already entered the consolidated revenue fund. The bill is just clarifying that sometimes when money has entered the CRF it is necessary to explain that a payment needs to go to the legal entity of the Commonwealth.

CHAIRMAN—The advice I have received is that that is a departure from the deeming provision in section 7.

Mr Mowbray-d’Arbela—Yes, that is correct. The explanatory memorandum to the bill describes the fact that when we looked at the wording in the Financial Management Legislation Amendment Act 1999, which deemed changes across the statute book, and then applied the deemed wording to specific instances on a case-by-case basis, it was appropriate—in this case, we were working with the Australian Government Solicitor and the Office of Parliamentary Counsel—to make it clear that the money has already been received into the consolidated revenue fund when it is received on behalf of the Commonwealth. Therefore, to actually say that a payment should be made into the CRF is not necessary; the issue is to state that the payment is to be transferred to the legal entity of the Commonwealth.

CHAIRMAN—Is an entity receiving moneys on behalf of the Commonwealth which is not covered by either the FMA or the CAC acts able to be audited by the Auditor-General?

Mr Mowbray-d’Arbela—It is my understanding that any body that is controlled by the Commonwealth is subject to audit by the Auditor-General.

CHAIRMAN—But you told me before that there could be bodies that are not subject to either the FMA Act or the CAC Act that collect moneys on behalf of the Commonwealth—that is, maybe this slot manager, whoever the slot manager is.

Mr Mowbray-d'Arbela—The slot manager was set up under the Sydney Airport Demand Management Act 1997—

CHAIRMAN—I said that.

Mr Mowbray-d'Arbela—Sorry. Because the slot manager is a statutory office holder, my expectation is that it would be within the purview of the ANAO under the Auditor-General Act.

Mr McPhee—I think you are raising a slightly different question, Mr Chairman—that of a private sector agent for the Commonwealth.

CHAIRMAN—Check. Are there any agencies not subject to the FMA Act or the CAC Act that collect moneys on behalf of the Commonwealth? Does this cover them? If so, are those agencies able to be audited by the Auditor-General?

Mr McPhee—In terms of the first question it would be public moneys held by someone outside the system. As Marc said, in a legal sense this is within the Commonwealth revenue fund because they are Commonwealth moneys. The second question about the audit I should perhaps refer to the Audit Office.

Mr Crossley—Firstly, let us clarify that the Auditor-General only audits bodies under the CAC Act or under the FMA Act. I am not aware that we audit bodies that you would be referring to outside of that legislation.

CHAIRMAN—Would you check that and get back to us? That would probably be appropriate.

Senator CONROY—Just quickly, for my clarification I want to go over a couple of things that I think we have established. It might be a bit of repetition. As Mr Charles has just mentioned, section 7 of the FMLA Act 1999 contains the deeming provision, which I think you have referred to. Section 7 states:

In any instrument, a reference to payment of an amount into the Consolidated Revenue Fund is to be read as a reference to payment of the amount to the Commonwealth (unless the amount is already public money).

Is that right?

Mr Crossley—Yes.

Senator CONROY—Given that the money paid into the CRF is already deemed to be a payment to the Commonwealth, what is the legal impact of amendments in this draft legislation that replace references to 'payments to CRF' with 'payments to the Commonwealth'?

Mr Mowbray-d'Arbela—Section 7 mainly deals with the situation where there has been a requirement in legislation to make a payment to the Commonwealth. The previous wording said

that a payment should be made into the consolidated revenue fund. The section also says that this deeming provision is not to apply where the money is public money. Because payments that are paid to entities separate from the Commonwealth are payments that actually enter into the CRF, those payments equate to public money. On a strict reading of section 7, you might not apply it to situations like Australia Post receiving money and being required to pay it to the Commonwealth. So, effectively, we do need to describe the need to transfer the payment to the Commonwealth in those circumstances.

Senator CONROY—So is there a legal impact?

Mr Mowbray-d'Arbela—No, there is not.

Senator CONROY—I understand that public moneys, as we have discussed, are collected by entities that are not part of the legal entity of the Commonwealth. That is right; we have discussed that. I understand, for example, that CAC bodies are not part of the legal entity of the Commonwealth.

Mr Mowbray-d'Arbela—That is correct.

Senator CONROY—I understand that the current draft bill includes provisions that require such entities to pay any public moneys they receive to the Commonwealth. Is that the purpose?

Mr Mowbray-d'Arbela—Yes.

Senator CONROY—That is what we are really trying to do. Has any CAC agency or any other entity in the past collected public moneys that it has not in turn paid to the Commonwealth?

Mr Mowbray-d'Arbela—I do not have those details.

Senator CONROY—Someone must know. If we now require that the payment be made, surely someone must know whether that has actually happened or not?

Mr Mowbray-d'Arbela—The usual practice on the statute book is to deal with the step from the body outside the Commonwealth to remit that money to the Commonwealth. I am not aware of there being any exception to that.

Senator CONROY—You are 'not aware'—does that mean you want to take it on notice and check?

Mr Mowbray-d'Arbela—Yes.

Mr Hutson—The question as it was framed was quite broad. I took the question to be whether there has been an example of a body outside the Commonwealth which has failed to pay public money to the Commonwealth. The answer is that if we knew of one we would go after them to get it, because it would be public money properly belonging to the Commonwealth.

Senator CONROY—Some would suggest that under this legislation you are doing just that.

Mr Hutson—No, not at all.

Senator CONROY—I said, ‘Some would suggest.’

Mr Hutson—This legislation is purely housekeeping legislation. Your question was whether there has ever been an example of someone who has had public money which they have failed to pay to the Commonwealth. I suspect the answer is probably yes, but I also suspect that as soon as we know about it—and we have a lot of audit systems in place to ensure that it does not occur—we go after it.

Senator CONROY—So you will take it on notice to come back and let us know which entities and CACs have not passed it on?

Mr Hutson—I do not think there are any.

Mr McPhee—It is a very difficult question to respond to. I will answer it this way. The legislative provision is not responding to a problem of the sort that you are referring to. It is making responsibilities and obligations clear, rather than addressing a problem we have with bodies not paying moneys to the Commonwealth.

Senator CONROY—But you will take it on notice?

Mr McPhee—We can take it on notice, but the response is going to be broad, because we cannot trawl through all bodies to find out whether—

Senator CONROY—You are the Department of Finance and Administration.

Mr McPhee—We could, but I just do not think it is cost effective. We are not dealing with an immediate problem here. There may have been an issue five years ago; I do not know. But would we ask agencies, every body that collects Commonwealth moneys, to go back and trawl through their records to see whether there have been any instances of this?

Senator CONROY—Wouldn’t you have those records? As the Department of Finance and Administration, I assume you would know whether or not moneys have been paid in to you.

Mr McPhee—Individual agencies have a responsibility to ensure that collections are received into the consolidated revenue fund. We would need to check with all agencies, who in turn would have to check with all of their agents. Because we are not responding to a particular problem, it does not seem to me to be cost effective to do that level of investigation.

Senator CONROY—I appreciate your opinion on whether or not it is cost effective. I am asking whether you will take it on notice and do it.

Mr McPhee—I have given you an answer. I am happy to think about it.

Senator CONROY—You have answered that you do not know the answer. I am asking, given that you do not know the answer, whether it is possible for the parliament to be informed? We appreciate your opinion that it is not cost effective, but this committee on behalf of the parliament is asking the question.

Mr McPhee—I will take it on notice, Senator Conroy.

Senator CONROY—Thank you. Have you received any legal advice on the collection of public moneys by CAC authorities?

Mr Mowbray-d'Arbela—Yes, those aspects have been considered in the sense that the drafting of this bill has been conducted by the Department of Finance and Administration with assistance from the Australian Government Solicitor.

Senator CONROY—How did the problem emerge? Four years down the track, I am trying to work out what happened to make the department decide to go down this path. Did you get any legal advice, and is it available for the committee?

Mr Mowbray-d'Arbela—I am not aware of obtaining legal advice specifically on this aspect. It really is a quite procedural issue. When we track through what the deeming provision did in 1999 and compare it to every single aspect of the Commonwealth, some payments were not being made to entities that equated to the legal entity of the Commonwealth itself. Accordingly, applying section 7 in its own terms required some adjustment so that we made it clear payment would be made to the Commonwealth.

Senator CONROY—So you did notice that some entities were not paying?

Mr Mowbray-d'Arbela—No, it is not related to practice at all. It is just clarifying the wording—that is, whether there is a statement of ‘pay to the consolidated revenue fund’ or ‘pay to the Commonwealth’. If a body has received money on behalf of the Commonwealth, it has already entered the CRF. Rather than deeming that it must then make a payment to the CRF, the appropriate wording is that that body must make a payment to the Commonwealth.

Senator CONROY—I would like to turn to page 3 of the draft legislation. Part 4, titled ‘Saving of matters in Part 2 of Schedule 1’, states:

Any decision, action or other thing made, given or done under a provision of an Act (*Part 2 Act*) that is amended by an item in Part 2 of Schedule 1 that had effect immediately before the commencement of this Act, has the corresponding effect, for the purposes of the Part 2 Act as amended by this Act, as if it had been made, given or done under the Part 2 Act as so amended.

Can someone explain that to me?

Mr Mowbray-d'Arbela—Senator Conroy—

Mr Kennedy—It looks like a grandfather clause.

Senator CONROY—Is this a grandfather clause?

Mr Mowbray-d'Arbela—I draw your attention to the heading 'Saving of matters in Part 2 of Schedule 1'. The effect of this paragraph is to ensure that where we are clarifying words in acts we are not intending to change the legal situation. In these areas, this bill is dealing with consequential textual changes. It is intending to neither affect the law nor change the legal status of any decisions that have occurred before.

Senator CONROY—So in your view, there is no impact at all from this. Mr Kennedy, would you agree?

Mr Kennedy—Yes.

Senator CONROY—Do any parts of the bill apply retrospectively? If so, which parts?

Mr Mowbray-d'Arbela—I understand that for legislation to apply retrospectively there needs to be an express statement to that effect. This is the kind of aspect which is considered by the Senate legal and constitutional committee. There is no express statement in this bill that it applies retrospectively.

Senator CONROY—Mr Evans?

Mr Evans—That refers to explicit retrospectivity, where something in a bill is explicitly backdated to a date before the commencement of the bill. But I think Senator Conroy is using the term 'retrospectivity' in a broader sense—namely, something that in some sense affects the way something operated before. When an explanatory memorandum says, 'We're clarifying something,' or 'We're making something clear,' you immediately think that is a form of retrospectivity, because it is affecting the way things operated before the act came into effect. It is saying that things which have operated in the past should really be regarded as having operated in this way. It is retrospective in that sense. Some of the provisions of the bill appear to do that—and I say 'appear' because that is subject to explanations such as we have just had as to what they actually mean.

CHAIRMAN—Perhaps I am unclear but, since this is largely a machinery bill dealing with how we treat the consolidated revenue fund, the loan fund and special accounts, these changes were basically made by the amendment to the FMA Act. Can you really see that any retrospectivity actually takes place, because the accounts were already filed and lodged and budget portfolio statements and all that are in the past now?

Mr Evans—But, as bills often do, where you say, 'The previous enactment operates in this fashion in relation to this particular matter,' you are saying that something that has happened in the past is to be taken to have operated in this way. That is retrospectivity in the broad sense.

CHAIRMAN—Does ANAO have a view?

Mr Caruana—I am afraid it is a legal issue.

Senator CONROY—I took the DOFA officer to have specifically used the word 'explicit'. I accept the way that Mr Evans has defined that it is not explicit. It is this question of past practice to which Mr Evans is referring that I am trying to get to. I agree with Mr Evans's

interpretation that things that have happened in the past will now be deemed to have happened in accordance with this; I am probably sympathetic to his view. Would you like to respond?

Mr Mowbray-d'Arbela—That would not be the effect of this bill if it were passed in the same form as the draft, because the commencement section effectively states that the parts of it take effect on royal assent. So the textual changes to acts that we are dealing with will only be changed from that date. Part of the reason why we believe that referring a draft bill is useful is getting agreement between the executive and the parliament on what this extremely complex act is attempting to achieve, which is to clarify the statute book.

Senator CONROY—Do you accept or understand the point that Mr Evans is making in terms of this? His point is that by saying, 'This how it will be deemed to have operated in the past,' there is a retrospective qualification, to use a different phrase.

Mr Mowbray-d'Arbela—In my view, the bill does not deem there to have been anything occurring in the past.

Mr Evans—As I said before, you get these provisions in bills all the time; they say 'this clarifies the operation' of section whatever of the act. It is a very fine question as to whether, by clarifying the operation of the original act, you are saying that these past events are now to be interpreted as having occurred in accordance with the act you are passing now. In that sense, all bills that say something is clarified or which clear up the operation of the original act are retrospective because, as they say, they are clarifying something which has happened in the past. It is retrospectivity in the broad sense.

Senator CONROY—You mentioned that, in your view, there were a few relevant clauses. Could you mention one of those for us?

Mr Evans—There is the one which you were just talking about, clause 4. Anybody reading that would think that, as was said before, there was a problem and we were going after the problem. This looks as if there are bodies collecting money on behalf of the Commonwealth that have not paid it and we have suddenly discovered that they have not been paying it and we are now going to say, 'You are and always were obliged to pay it, and when we have got this thing on the statute book we will then go after you and get that money from you.' The evidence is that this is not directed to any particular problem and therefore it is not retrospective in that effect; that is not the effect of it. With provisions that are worded like that you always have to ask the question: what operation are they intended to have and what operation do they actually have?

CHAIRMAN—I think we have done that.

Senator CONROY—Mr Kennedy, do you have a view?

Mr Kennedy—Yes. Another way of looking at it is that if this was not a bill then what was done under these various acts would still be done and would stand. This bill changes some words for clarification. This—as I described it—grandfather clause is simply to flag that what was done under these other acts being amended is not affected by the change in these couple of words.

Senator CONROY—I would like to confirm some things.

CHAIRMAN—We are getting way behind.

Senator CONROY—That is because it is a detailed bill. I would like to confirm that—and we heard this before in an answer from Mr Culhane—\$1.1 billion of the total \$3.1 billion closing balance and special accounts as at 30 June 2002 was held in the ATSIIC land account.

Mr Culhane—I do not think I gave that advice, but I can check whether or not that is the case.

Senator CONROY—I understand from page 10, lines 9 to 15, of the draft bill that there is an amendment that all income received from investments from the land account are credited to the land account. Is that correct?

Mr Barrett—From the investments, yes.

Senator CONROY—Can I confirm that, in the past, the income from all money invested from the account was being credited to the account?

Mr Barrett—Yes.

Senator CONROY—Have amounts of moneys determined by regulations, as referred to on page 12, always been credited to the Condah land account?

Mr Stacey—No moneys have been accredited to that account as yet.

Senator CONROY—No moneys have been accredited as yet?

Mr Stacey—No, unless—

Senator CONROY—Are you aware of any that might be?

Mr Stacey—No, I am not.

Senator CONROY—I want to quickly go through the Aboriginal advancement account. According to the answer from DOFA to a question on notice, the balance of this account at 30 June 2002 was \$76.7 million. Does that ring a bell?

Mr Barrett—No, it does not at all. Do you mean the Aboriginals benefit account?

Senator CONROY—I mean the Aboriginal advancement account. The balance, according to an answer DOFA provided to a question they took on notice, was \$76.6 million.

Mr Barrett—As far as I am aware, the balance of that account is zero.

Senator CONROY—Zero?

Mr Barrett—Yes.

Senator CONROY—I might come back to that in a second.

Mr Culhane—Senator, I have that answer for you, if you like.

Senator CONROY—Great.

Mr Culhane—There was \$1.1 billion in the Aboriginal and Torres Strait Islander land fund account as at 30 June 2002. We have the Aboriginal advancement account recorded as zero.

Senator CONROY—I am sorry, I had that around the wrong way: it is the Aboriginals benefit account, so you were right there. Can you confirm that funds referred to in paragraphs (7)(b) and (9)(b) on page 13 have, as public moneys, been correctly credited to the benefits account?

Mr Stacey—Yes.

Senator CONROY—And all moneys in the past?

Mr Stacey—Yes, to the best of my knowledge.

Mr Barrett—Senator, I will add that the Aboriginals benefit account is separately audited by the Australian National Audit Office every year, so we would rely on that.

Senator CONROY—I appreciate that the chair has said that we are running a bit behind. I have a couple of other accounts that I want to ask about to do with ATSIC. Do we have a practice of putting them on notice, Chair?

CHAIRMAN—Absolutely.

Senator CONROY—So I can hopefully put those on notice to speed—

CHAIRMAN—When we finish today I will ask whether people are happy, if we have further questions, for us to submit those questions to them in writing and for them to respond in writing—and everybody will then say yes! I do not mean to be pre-emptive, but nobody has ever said no.

Ms PLIBERSEK—Much as they have tried!

Senator CONROY—I also have questions about the Australia-Japan account—which I suspect is not to do with ATSIC—and the meat and livestock industry account. I will happily put all those on notice to speed things up today.

Topic 4—Replacement of the Treasurer with the finance minister for approving money raising, investments and guarantees by, or for, specific entities that are legally separate from the Commonwealth

CHAIRMAN—Schedule 2 of the bill amends 22 acts to transfer from the Treasurer to the finance minister the power of approving money raising, investments and guarantees by, or for, specific entities that are legally separate from the Commonwealth. The issue is whether this is an improvement in financial administration within the Commonwealth. I ask Finance: what are the benefits of the transfer of the approval powers to the Commonwealth public sector?

Mr Hutson—The benefits of transferring the approval powers are really in putting all of the approval powers essentially—in respect of borrowings as, indeed, of loan guarantees—with the same minister. There are a number of acts where the finance minister already has this power, such as the Sydney Harbour Federation Trust Act 2001. The finance minister already has the power with respect to the giving of loan guarantees, and this merely puts borrowing authority and loan guarantees essentially in the same portfolio.

CHAIRMAN—Ms Harris, do you have a view?

Ms Harris—I think I said earlier that we are supportive of the transfer of the powers of approval over provision of borrowing guarantees and money raising from the Treasurer to the minister for finance.

Senator CONROY—The DOFA submission explains the transfer of powers from the Treasurer to the finance minister, and approved money raising transfers mostly refer to CAC entities. Whom else does it refer to?

Mr Mowbray-d'Arbela—I do not have the specific details with me of the entity that is outside the CAC Act, but as a general rule not all bodies that are separate from the Commonwealth are under the Commonwealth Authorities and Companies Act. If I may, I will take the question on notice and get back to you.

Senator CONROY—Yes. Under current legislation which entities, if any, do not require approval from the Treasurer to raise money or to invest surplus money? You can take that question on notice if you need to.

Mr Mowbray-d'Arbela—In general terms, the borrowing by authorities and the investment capacities of Commonwealth authorities are not treated as powers they inherently have. Where such a power is provided, the approach is to have an approval of that by the Treasurer, as has been the case in the statute book. But the statute has also included the finance minister regarding the Health Insurance Commission Act and the Sydney Harbour Federation Trust Act. It is my understanding that, wherever there is a borrowing, there is an approval power.

Senator CONROY—So you are not really aware of anyone who does not?

Mr Mowbray-d'Arbela—No.

Senator CONROY—Under current legislation which entities, if any, do not require approval from the Treasurer to issue a guarantee? Is the answer to that the same as your previous answer?

Mr Mowbray-d'Arbela—Yes.

Senator CONROY—The last paragraph of the Treasury evidence says, ‘It should be noted that the Treasurer’s power to provide guarantees for borrowings undertaken by the Commonwealth entities is subject to the government’s clear policy of not issuing further formal Commonwealth guarantees for commercial entities.’ Why was that brought in? I know it has happened in the past.

Mr Sturgiss—It is simply to reinforce the notion of the current policy, and to be alert to the fact that these foreign guarantees probably are not used very often. While they may be on the statute book, in practice they have not been used; they have to be used consistent with the competitive neutrality principles.

Senator CONROY—Have guarantees been granted in the past without the approval of the Treasurer?

Ms Harris—I will have to take that on notice.

CHAIRMAN—Would ANAO have a view on that?

Mr Crossley—Only to the extent that any guarantees given by any entities that we audited, or that we became aware of over the course of the audit, would have been reflected in the annual report of that entity. To the extent that they would have required a special approval, we probably would have looked at that.

CHAIRMAN—I would have thought that it would be legally impossible for an entity to offer a Commonwealth guarantee without the approval of the Treasurer.

Mr Crossley—Exactly. There would only be a few entities that we would be aware of that have that in their annual report.

Senator CONROY—Was any consideration given during the drafting of this legislation to establishing accountability requirements for the approval of guarantees to clients and reporting such guarantees to this committee, for instance, and to parliament, or is it considered to be enough that it is in the annual reports? I was thinking of enhancing the opportunities for the committee.

Mr Hutson—I think that is a question for us. The question was: has any consideration been given to separately reporting them to this committee? The answer is no. They are, of course, picked up in the contingent liabilities, the consolidated financial statements and the statement of risks which is published.

CHAIRMAN—And audited?

Mr Hutson—Yes.

Mr Caruana—The financial statement is not a statement of risks per se.

CHAIRMAN—Could you explain that.

Mr Caruana—The financial statements are audited and that would be picked up in our audit of the financial statements.

CHAIRMAN—And you have had performance audits on—

Mr Caruana—We have had performance audits ongoing.

CHAIRMAN—guarantees, indemnities and letters of comfort, whatever the hell they are. I never have sorted that out.

Mr Kennedy—I will send you one!

CHAIRMAN—Thanks very much.

Topic 5—Delegation powers from the finance minister for approving money raising, investments and guarantees

CHAIRMAN—Schedule 2 of the bill provides a delegations power for the finance minister in relation to the powers transferred from the Treasurer to the finance minister for approving money raising, investments and guarantees by, or for, specific entities that are separate from the legal entity of the Commonwealth and the borrowing approval powers the finance minister has in the Health Insurance Commission Act 1973 and the Sydney Harbour Federation Trust Act 2001. In each case the delegation is to an official within the meaning of the FMA Act—that is, a person who is in an FMA agency or is part of an FMA agency. Finance, could you tell us what the benefits are to the Commonwealth public sector of the finance minister being given delegation powers?

Mr Mowbray-d'Arbela—It is a process whereby—having examined the approval powers that have already been provided to the Treasurer in the acts that we are looking at, and in most cases there is a delegation capacity for the Treasurer in those acts—we are clarifying the situation that, as a general rule, there will be a delegation capacity for the finance minister for all of these entities.

CHAIRMAN—You said ‘in general’ and ‘generally’. How about 100 per cent of the time—no?

Mr Mowbray-d'Arbela—Yes. One hundred per cent of the time there will now be a delegation power.

CHAIRMAN—That is different from generally.

Mr Mowbray-d'Arbela—I beg your pardon. Not all acts currently have a delegation capacity for the Treasurer. Our view was that there was no strong rationale for that inconsistency. Accordingly, now that we are co-locating the powers to the finance minister, there will also always be a delegation capacity for the finance minister.

CHAIRMAN—So we are breaking new ground with this measure in this set of amendments?

Mr Hutson—In some respects, Senator, yes.

CHAIRMAN—I am not a Senator. Good grief! I represent the people!

Mr Hutson—My mistake. My apologies, Mr Chairman.

Senator CONROY—It just sounds like Minchin's mugged Costello, that's all.

Mr Mowbray-d'Arbela—Mr Chairman, you said 'breaking new ground'. It is my analysis, when we have been looking at the statute book and seeing inconsistencies, that it is appropriate for us to advance approaches that actually have clarity rather than exigencies that we do not have or we do not have a strong rationale for.

CHAIRMAN—I do not question your well meaning. What I question is this: I think we had a statement at the beginning of this public hearing today to the effect that—perhaps it is wrong—this was largely just a machinery act and there was very little in the way of anything new. I do not recall hearing about this delegation power being an addition to the act or an addition to acts.

Mr Hutson—In most cases it is not. In most cases it is machinery—

CHAIRMAN—Here we go back to 'generally' again.

Mr Hutson—but in some cases the act did not have a delegation power. This bill proposes that all borrowing powers will be subject to a delegation power.

Mr Mowbray-d'Arbela—The submission from Finance includes an explanation of that, so we did not wish to hide it, by any means.

CHAIRMAN—Does ANAO have a view?

Mr Crossley—Not specifically.

CHAIRMAN—Do you want to take that on notice too?

Mr Crossley—Yes, we can do that.

CHAIRMAN—Ask the auditor if he has a view about the additional delegation of powers.

Mr Kennedy—As a matter of law it would probably have been open to the Treasurer to authorise officers of his department to exercise this power on his behalf. In exercising that power, they would be doing it for and on behalf of the Treasurer. The delegation power, which is included now with the substitution of the finance minister, allows the conferral of power to be done more formally and to include specific conditions.

CHAIRMAN—Thank you, Mr Kennedy. I have a question for ATSIIC. What is your view about relying on a delegate in the Department of Finance and Administration or in the Department of Immigration and Multicultural and Indigenous Affairs for placing financial limits

on ATSIIC providing guarantees to third parties under section 15 of the Aboriginal and Torres Strait Islander Commission Act 1989?

Mr Barrett—Could I take that on notice?

CHAIRMAN—Yes.

Topic 6—information to be included in determinations of the finance minister, under the Financial Management and Accountability Act 1997, that establish special accounts

CHAIRMAN—The Financial Management and Accountability Act 1997, section 20(1), authorises the finance minister to make a written determination that does all or any of the following: (a) establishes a special account; (b) allows or requires amounts to be credited to the special account; and (c) specifies the purpose of the special account. Item 127(a) of schedule 2 of the bill amends the provision so that the finance minister's determinations are required to include all of the above information as well as information about amounts that may be debited from the special account. The amended provision authorises the finance minister to make a written determination that does all of the following: establishes a special account; specifies the purpose of special accounts; and allows or requires amounts to be credited to and debited from the special account. Could Finance tell us, please, how the amendment will improve the financial framework, with special accounts established by the finance minister.

Mr Mowbray-d'Arbela—Could you repeat the last part of the question, please?

CHAIRMAN—How will the amendments—that is, amending section 20(1) of the act and including section 127(a) of schedule 2 of the proposed bill, doing four things in each case—improve the financial framework for special accounts established by the finance minister in the future?

Mr Mowbray-d'Arbela—Yes. This relates to aspects that we touched on this morning in answering Senator Conroy's questions. I explained that we do not see a compelling reason for a determination under section 20 to be able to only identify certain aspects of the requirements for that determination. We stated that all those requirements should be stated. Secondly, the focus on the accounting of the Commonwealth being within one consolidated revenue fund means that greater significance applies to the concept of a notional payment. I will not go into that issue. The aspects that are added in section 20(1) are that the determination must do all of the following: (a) establish a special account, (b) specify the purpose of the special account and (c) allow or require amounts to be credited to and debited from the special account. As we discussed this morning, the two aspects are changing the words 'all or any' to the word 'all' and adding the ability to set out amounts that may be or are required to be debited from special accounts.

CHAIRMAN—This is clearly not just to tidy things up; this is clearly a new provision.

Mr Hutson—I think it is actually tidying up. We are not aware of any determination that does not include (a), (b) and (c).

CHAIRMAN—But we are now formally requiring it. This goes back to Senator Evans's contention that there is language in the bill that would indicate some degree of retrospectivity. Can you assure the committee that this is not meant to be retrospective?

Mr Hutson—Indeed.

Ms PLIBERSEK—Part (c) allows or requires amounts to be credited to and debited from the special account. It confuses me a little. I do not see why we should have budget appropriations at all if you can just set up accounts here and there and move money in and out of them virtually at will. What ability do we have to scrutinise the movement of money if these provisions are introduced?

Mr Hutson—For section 20 special accounts, determinations are of course subject to the scrutiny of parliament.

Ms PLIBERSEK—For five days.

Mr Hutson—Determinations have to be laid before the parliament, and they are subject to disallowance.

Ms PLIBERSEK—A disallowable instrument is different to a budgetary appropriation in its level of scrutiny though, isn't it?

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

Ms PLIBERSEK—I would like to ask Mr Evans and Mr Kennedy for their views on this.

Mr Evans—This draws attention to the fact that these disallowance provisions are different from the normal disallowance provisions. In some respects they are weaker than the normal disallowance provisions. If this ever went before a court, there could be some great arguments about what these disallowance provisions mean and whether or not something has been validly disallowed. There has been an attempt by a government agency and government advisers to say that something was not validly disallowed by the Senate on one occasion. I can imagine a lot of questions arising from this. Admittedly, the instrument does not come into operation until after the time for disallowance has passed. On one hand, that is a stronger provision.

Ms PLIBERSEK—So why do you say that, in another way, it is weaker?

Mr Evans—There is no time limit on tabling of the instruments. There is no sanction on non-tabling of the instruments. You can say, 'Well, they can't come into effect until the time for disallowance has passed,' but the normal disallowance provisions have a sanction on non-

tabling and a time limit for tabling. They also give a much longer period for giving notice and for resolving a notice of motion for disallowance.

Ms PLIBERSEK—What is the time period for giving notice of these?

Mr Evans—Normally it is 15 sitting days. In this one you have to pass your motion within five sitting days after the tabling.

Ms PLIBERSEK—Or what happens?

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

Ms PLIBERSEK—Thank you. Mr Kennedy, did you want to make a comment?

Mr Kennedy—Yes. Previously under the Audit Act the finance minister could determine the purpose of the trust accounts. They were not disallowable instruments. In replacing the Audit Act with the FMA Act, we took the view that a determination was clearly an appropriation of the trust fund. In setting up the FMA Act, we said that parliament needs to be involved in this, and that is why we successfully argued that these determinations should be disallowable instruments. Because they are appropriations, and sometimes there is some urgency about the need to spend, we were also successful in arguing that it should have a five-day disallowance period rather than the norm of 15 days. The quid pro quo of that was that it was not able to be acted upon until after the period of disallowance.

As I said, the purpose clause determined ‘is an appropriation’, and this provision here in the draft bill needs to be tightened up slightly in one respect. The draft provision under clause 1B says ‘specifies the purposes of the special account’. That could be anything. What it needs to say is ‘specifies the purposes for which the special account can be debited’, which puts the gate around spending out of the special account only for purposes that comply with what was determined and what parliament then endorses.

Ms PLIBERSEK—I see what you mean.

CHAIRMAN—Does Finance have a problem with that?

Mr McPhee—I do not think so. I think that was the full intention.

CHAIRMAN—Would Treasury have a problem with that?

Ms Harris—I am sorry I am not sure.

CHAIRMAN—Would ANAO have a problem with that?

Mr Crossley—No.

Mr Kennedy—I might mention that that was the effect of the original section 20 of the FMA Act. It talks about ‘the minister allowing amounts to be debited from the component’—of the reserve moneys fund—‘for specified purposes connected with the activity’. Linking the debiting and the purposes in the one section was an essential control mechanism.

Mr Mowbray-d’Arbela—Perhaps I could make one comment. I accept the comment made by Mr Kennedy. Section 20(1) of the FMA Act actually is worth while reading together with subsections (4) and (5). I am not sure whether the specific drafting that has been suggested necessarily clarifies the matter, because subsection (4) states:

The CRF is hereby appropriated for expenditure for the purposes of a Special Account—

so the word ‘purposes’ there is clearly relating to the word ‘purposes’ in subsection (1)—

established under subsection (1), up to the balance for the time being of the Special Account.

Then subsection (5) says:

5) Whenever an amount is debited against the appropriation in subsection (4), the amount is taken to be also debited from the Special Account.

The reason why it is stepped out in that way is that we are dealing with about three distinct concepts here: firstly, that there shall be purposes; secondly, that those purposes have an appropriation behind them; and, thirdly, that, to the extent that there is a debit against that appropriation, that is taken to be a debit from the special account. The drafting analysis was that it is best to step those three separately.

CHAIRMAN—I hear you, but it seems to me that what Mr Kennedy is saying, if I got it right, is that there should not be any reason to establish a special account if you cannot debit it.

Mr Mowbray-d’Arbela—I am not sure that Mr Kennedy is actually attempting to change that.

CHAIRMAN—Does that make sense? Is that what you were saying, Maurice?

Mr Kennedy—In plain English, you want the purposes as an appropriation clause for that special account.

CHAIRMAN—We will take that into account.

Mr Hutson—Can I make a suggestion?

CHAIRMAN—Yes.

Mr Hutson—The alteration which Mr Kennedy has suggested may prove to be useful, but it also seems to me that it would be appropriate for us to take some fairly significant legal advice

as to whether or not it is an appropriate sort of amendment and then come back to the committee when we have had an opportunity to do that.

CHAIRMAN—We would appreciate that. Thank you.

Mr Mowbray-d'Arbela—I think the Office of Parliamentary Counsel would have a view because they are ultimately the drafters.

CHAIRMAN—Yes. You had already asked if you could get back to us on your view and I had said yes. I thought that clarified it.

Senator CONROY—I think we have already covered these issues, but I want to go over them again to get them clear in my mind. So if you could just bear with me, that would be appreciated. As we have already said, appropriation to a special account must be spent on the designated purpose of a special account. Section 20(1) of the FMA Act 1997 authorises the finance minister to make a written determination that allows or requires amounts to be credited to the special account. Does this mean that the finance minister decides what amounts are transferred into a special account?

Mr Mowbray-d'Arbela—Yes.

Mr Hutson—It is more than a transfer, it is any credit to the account.

Senator CONROY—As we have discussed, section 127A under schedule 1 of the bill amends the FMA Act. It authorises the finance minister to make a written determination that allows or requires amounts to be credited to and debited from the special account. So the change—which I think DOFA previously suggested was just housekeeping and which I suggested was more of a renovation—means that the finance minister can decide what amounts are transferred into and out of a special account.

Mr Mowbray-d'Arbela—The point to that is taking on board some concerns about the clarity of special accounts. It seems that if a determination for those special accounts actually specifies more detail and clarity for the people who are administering it and supervising it in an accountability sense then that would be helpful.

Senator CONROY—Let us be clear: previously there was no power to debit.

Mr Mowbray-d'Arbela—There is a power to debit, and that relates to the purposes of the special account. It just might be that it is appropriate, rather than setting out some aspects as broad purposes of the special account, to actually describe some specific requirements to make debits. That is not just debits that are allowed; some debits might be required. One I am familiar with relates to the Lands Acquisition Act. In that case, if a person has not received a payment for land that has been compulsorily acquired and the reason for that non-receipt is solved, then there is an obligation to make that payment. So you do not really need a strong purpose statement in that realm; it is effectively just a requirement to set out when something shall be debited.

Senator CONROY—We asked in the November estimates whether money could be transferred between special accounts and, if so, what the legal mechanism was. Are you familiar with that discussion?

Mr Mowbray-d'Arbela—I am.

Senator CONROY—Did you obtain any legal advice on the issue? If so, could you summarise the advice and provide a copy to the committee.

Mr Mowbray-d'Arbela—I am not aware that we did. I think we took that on notice and gave an answer, which concerned the requirement for all debits to be related to the purpose of a special account. Sometimes the termination of a special account may refer to a transfer and so, yes, in those cases a transfer may be available. In other cases, such as the explanation that Mr McPhee gave, there may be a valid debit from a special account that ultimately is a notional payment to another special account—and the word ‘transfer’ in a loose sense or in a generic sense could relate to that scenario. It is not a complex legal matter.

Senator CONROY—Sorry—it is or it is not a complex legal matter?

Mr Mowbray-d'Arbela—It is not a complex legal matter. Any debit from a special account must relate to the purpose of that special account.

Mr Kennedy—Which I think puts the onus on both the finance minister and the parliament in its disallowance phase to make sure that the purpose of a special account is unambiguous and does not allow, even accidentally, that sort of money shuffling.

Senator CONROY—I am confused. I am trying to clarify this in my head. We now have the capacity to debit the account where the purpose is other than the designated purpose—that is my concern, and I want to make sure that I have it absolutely tied down—and also to transfer the money to other accounts. If each account is for a different purpose and money can be transferred between accounts, it seems to me that, by definition, money is being transferred to an account that is not for the original designated purpose.

Mr Mowbray-d'Arbela—Money can only leave one special account—say, special account A—as we all acknowledge, if it relates to the purpose of special account A.

Senator CONROY—But that means that the definitions of the two special accounts must have been identical.

Mr Mowbray-d'Arbela—If the destination of that payment, which in this case is a notional payment because it is within the CRF, is another special account—we had the example of the Mint and Artbank—then receipt of that payment by that second special account means that the notional payment is also supported by a second appropriation. In that case, the money that is within that second special account, special account B, can also only leave that account if it is a debit that relates to the purpose of that second special account. Accordingly, to generically say that transfers of payments can be made from one special account to another where a mix of purposes is occurring is in my view not accurate. All that is occurring is that one payment is being made from one special account. If the destination of that happens to be a Commonwealth

activity that is supported by another special account, then the money received is locked into the purpose of that second special account.

Senator CONROY—Yes, but that purpose would not be the original purpose of special account A.

Mr Mowbray-d'Arbela—No—and indeed it ought not be, because the original purpose has been met by that initial debit being supported by that original appropriation. That matter is closed. Then we look at the second appropriation, which relates to the second special account, and we consider that situation and seek an appropriation supporting that debit.

Senator CONROY—But if you are seeking a second appropriation, isn't that doing so after the fact?

Mr Mowbray-d'Arbela—The moneys are not identical in the sense that there are coins moving from one special account to another and they can be tracked from the first to the second. There are distinct legal phases occurring. One debit occurs from the first special account, and the purpose of that account must be met. The notional payment can go to a number of places. For example, firstly, it could go to a department that has no capacity to retain that money, in which case it stays in the CRF—there are no appropriations supporting it. Secondly, it could be received by an agency and come within its appropriation under section 31 of the appropriation agreement, and then that appropriation would support another payment by that agency of the equivalent sum. Thirdly, that notional payment could be made to an activity supported by a special account, and then that new appropriation has to be examined to support any further payments of that equivalent sum. They are equivalent sums; they are not actual dollars that you can track. I think that is a distinction that is worth while making.

Senator CONROY—So, to top up fund B, you might be able to move money from special account A to fund B if it is within the designated purpose—

Mr Mowbray-d'Arbela—Of special account A.

Senator CONROY—Yes.

Mr Mowbray-d'Arbela—And then you are locked into special account B.

Senator CONROY—Yes, so other moneys could then be spent off on a purpose that was not originally intended for fund A. You may have brought money in to top up the fund to replace money that has maybe gone off on a different purpose. Does that logically make sense?

Mr Hutson—Can I perhaps return to the earlier example of Artbank and the Mint and try to track that concept through a bit so that we then have a concrete example. Artbank and the Mint might effectively form a partnership. Artbank has a special account. I do not know whether it does or, indeed, what its purpose is but, broadly, you would expect it to have some sort of purpose in connection with the promotion of art. It then forms a partnership with the Mint. The Mint's special account could have a purpose, for example, along the lines of the production of coins. The money could come out of the Artbank account, provided that the deal with the Mint was about producing artistic coins. Once it is in the Mint's hands, they have to produce coins, but they are still subject to the deal they have done with Artbank. In one sense, yes, it has

moved from one to the other, but the expenditure then effectively ends up being constrained by two lots of purposes—they have to be artistic coins, not just coins or art.

Senator CONROY—What are they up to down at the Mint? What have you uncovered down there!

Mr Hutson—I really have to add at this point that this is an entirely hypothetical example. I do not know whether either of those two even have special accounts, much less what the purposes are.

Mr Kennedy—The purpose clause of the Mint trust account under the Audit Act frightened the hell out of us when we read it in our research, because it included the phrase, ‘or any other purpose that the Treasurer may deem necessary’.

Senator CONROY—That is fairly broad.

Mr Kennedy—Yes. While you are worrying about swapping money between special accounts, you should also give at least some consideration to the section in the appropriation act that allows amounts to be credited to a special account from any item, so long as the trust account purpose is covered by that item. As you know, appropriation items these days are expressed in very wide terms indeed. Transferring money from appropriations to special accounts rather than between special accounts is a larger threat, I think.

Mr Mowbray-d’Arbela—Could I perhaps comment on that. I understand that there is a question of examination of the role of the appropriation act and the special account. Where that scenario occurs, there has actually been a narrowing of the purpose for which the money could ultimately leave the consolidated revenue fund. The outcome of that agency is quite broad and it must be more than the outcome of the special account to which a notional payment would be made. The consequence of that is that the original capacity of the agency under its broad outcome would actually be constrained one step further to the purposes of the special account. So, if that scenario were to occur, the agency would actually reduce their capacity to ultimately make a payment that leaves the CRF, because the broad outcome must be broader than the specific purpose of the special account. I just wanted to make that comment because, when such situations occur, while I do not think it is a danger and it is just the way the system works, in fact it represents a further restriction on the ability of the executive ultimately to make a payment.

Mr McPhee—I would just add that the finance minister has agreed to the inclusion in the finance minister’s orders this year for departmental reporting a requirement that all appropriations accredited to special accounts be disclosed in the notes to the financial statements. You will be able to track credits to special accounts through appropriations by that means, so the transparency is being enhanced on that issue.

Senator CONROY—My next questions are on that very issue. Can you confirm that under the proposed new arrangements money appropriated to a special account within an agency—I think you may have just been covering this—can be transferred to another of the agency’s special accounts, even though the second account has a different designated purpose? Would you agree that that is possible now?

Mr Mowbray-d'Arbela—Were you comparing two special accounts or an outcome of an agency?

Senator CONROY—An agency. Can money from a special account within an agency be transferred to another of the agency's special accounts—

Mr Mowbray-d'Arbela—It does not make any difference.

Senator CONROY—even though the second account has a different designated purpose? It goes into an agency, it is in a more general pool and can then go into a second special account, which has no relation to the original purpose the money was appropriated for in that first special account.

Mr Mowbray-d'Arbela—There are only two situations to consider: the first situation is the one which we were discussing before, whereby there has been a valid debit from special account A and the destination of that notional payment happens to be special account B.

Senator CONROY—I am going through an agency here, though.

Mr Mowbray-d'Arbela—The other scenario might be where there is an agency with an outcome, and the outcome of the agency must be broader than the special account to which it would then be credited. I think in your question you were raising the prospect that there would be no link between this agency's outcome and the special account. It is not available to the agency to make that notional payment, because the appropriation act only allows for a crediting to a special account to occur when the purpose of the special account is within the relevant outcome.

Senator CONROY—You mentioned that there were two situations. Your briefing notes or the draft notes suggest there are four: money from a special account can be paid to an FMA agency; money can be transferred to the agency administering the special account; money can be transferred from one special account to another special account; and the amount is not to be spent without further appropriation.

Mr Mowbray-d'Arbela—In broader terms, there is the question of the relationship between two appropriations. The four scenarios, which are established as described there, relate to clarifying what is a notional payment. If there is a payment made from one special account and the destination of that is another special account, that is a notional payment. That list does not go to the issue that I was addressing before, which is that such a payment could only occur, if it is originally a debit related to the purpose of that first special account.

Senator CONROY—Given that parliament appropriates moneys to special accounts based on their designated purposes—Mr McPhee, you may have started answering this question—how would parliament be informed when moneys are transferred between accounts within agencies that have different designated purposes?

Mr McPhee—I did not exactly address that question. For clarity, I addressed the question about where funds flow from appropriations to a special account and the intention is to get disclosure around that. Your question, I think, was: is there disclosure around transfers between one special account and the other? No, not in specific terms. There will be disclosure around

receipts and expenditure of each special account but, subject to being corrected, there are no particular disclosures that require information to be presented on transfers from one special account to another.

Senator CONROY—It may be a policy question and you may not be able to answer it. Do you think that is something that should be disclosed? Is that something that good transparency and public policy should see disclosed?

Mr McPhee—I do not immediately jump to that conclusion, because at the aggregate level we are trying to get disclosure around the purposes of special accounts and a breakdown of the receipts and expenditures within each one. To start to then get a handle and an accounting system around particular flows within special accounts is a level of detail that we have not seen the benefit of in the past. We have a few people from departments here who might have some experience to be able to comment on whether that happens very often.

CHAIRMAN—I am sorry for interrupting you, but I think that is the nexus of the questions, and I am just as interested as Senator Conroy is. How often in the course of events do we transfer money from one special account to another? Once a year?

Mr Kennedy—It can be ongoing.

Senator CONROY—Very regularly!

Mr Kennedy—For example, take the business services trust account. That was the working account for the then Department of Administrative Services and, subsequently, DOFA. Departments were hiring vehicles and so on through that, so there was money flowing all the time. It was in fact a business operation. To try to keep track of transfers from departmental accounts into that business services trust account would have been horrendous.

CHAIRMAN—Yes, but we do not have that any more.

Mr Hutson—Actually, we do have those sorts of examples continuing. An example within the finance portfolio is the property trust account and the Comcover trust account. Our property branch owns buildings and rents them out, mostly to Commonwealth agencies. Those agencies pay rent, which goes into the account. The property account buys insurance, effectively, from the Comcover special account. So money comes out of the property account and into the Comcover account in respect of insurance of those buildings. That is an example of something that continues to this day that is like the example Mr Kennedy gave from the past.

Senator CONROY—I have another example, one that Mr Charles has had a particular interest in and that this committee has examined at length—that is, the payment of Dasfleet settlements out of the very account, I think, that Mr Kennedy was talking about. How easy did you find it to get to the bottom of the money trail there, Mr Charles? How easy did you find tracking the payments of the Dasfleet settlements through that account?

CHAIRMAN—I would have to take advice.

Senator CONROY—The committee talked about it at some length, I thought.

CHAIRMAN—Did we?

Ms KING—Yes; \$32 million to Macquarie Fleet.

Senator CONROY—That passed through the account.

CHAIRMAN—I do not recall that we actually asked anybody what account the money came from. The Commonwealth came to an agreement with Macquarie Fleet and paid the \$32 million.

Senator CONROY—It was not listed anywhere, though. Part of the problem of getting to the bottom of what happened is that it was not listed anywhere.

CHAIRMAN—We did not have any trouble whatsoever in getting to the bottom of what happened. We simply asked the questions and got the answers. In fact, we had an earlier inquiry set up and we were prevented from continuing with it because it became sub judice. The issue was subject to arbitration, and it was only after arbitration was complete, ANAO did another performance audit and OASITO was gone that we had a public hearing, combined both former audit reports, asked the questions and got to the bottom of everything that happened—we think. But we did not try chasing the money trail.

Senator CONROY—In relation to the fourth scenario mentioned earlier, what is meant by:

The amount is not to be spent without further appropriation.

Does this mean that if parliament appropriates money to a special account for a designated purpose that money could be frozen until a further appropriation is granted?

Mr Mowbray-d'Arbela—I do not understand the context of your question.

Senator CONROY—I was reading from the four scenarios you gave in your explanation of the draft legislation. The fourth one says:

The amount is not to be spent without further appropriation.

What does that actually mean?

Mr Mowbray-d'Arbela—That is just clarifying the point that if a notional payment is made—and there must be an appropriation that supports that initial payment—the destination of that payment has two fundamental characteristics. It could be a destination that is itself supported by appropriation, whereupon another notional payment or actual payment outside the CRF can occur, or it could be a destination that is not supported by an appropriation, in which case—and this goes without saying, but we just wrote it there to ensure everyone was clear—there is no capacity for a further payment to be made.

Senator CONROY—We have introduced the concept of debiting; you made the point that you thought there were some powers previously where debiting could occur.

Mr Mowbray-d'Arbela—Debiting occurs whenever there is a reduction in the balance of a special account, and that debit must relate to the purposes of that special account.

Senator CONROY—But we have specifically introduced the word 'debit' into it now.

Mr Mowbray-d'Arbela—So that there will be the capacity in the determination to describe some debits in specific detail.

Senator CONROY—And you would argue that there has been power to debit previously?

Mr Mowbray-d'Arbela—Yes.

Senator CONROY—In your view, do any of these changes apply retrospectively?

Mr Mowbray-d'Arbela—No.

Senator CONROY—Mr Evans, do you have concerns similar to those you had previously?

Mr Evans—The only way you can ascertain that is to ask what is the effective operation of this provision.

Mr Mowbray-d'Arbela—The effect of this change to the FMA Act is that it would to some extent constrain the scope of determinations made for new special accounts by the finance minister under section 20. Accordingly, you can only apply—

CHAIRMAN—Just to be absolutely sure: the act does not relate to current special accounts; it relates only to new special accounts.

Mr Mowbray-d'Arbela—That is correct.

Senator CONROY—Has any money been transferred between special accounts within an agency or between agencies that are outside the powers granted under the existing legislation? You would argue that every single debit that has taken place on the existing special accounts is within the existing debiting powers?

Mr Mowbray-d'Arbela—Senator, that is the law.

Senator CONROY—And there is no evidence that you are aware of that transfers have taken place that do not fall within that? Do you have legal advice? Have you had to take legal advice on any transfers?

Mr Mowbray-d'Arbela—No. It might just be the context. We are looking at the framework of legislation here and at trying to make sure that it is as rigorous as parliament would want. That is our attention, rather than attempting to react to any particular cases.

Senator CONROY—I would like to discuss the Australian land transport development account and the amendments impacting on it, starting on page 28 of the draft legislation. Would you explain the rationale for introducing flexibility for expenditure switching between arterial

and local or national roads, and vice versa. I think that is on page 28, lines 4 to 16; between local and arterial and vice versa, at lines 17 to 22; between states and organisations, at page 28, lines 23 to 29; between road and rail projects and vice versa, at page 29, lines 12 to 29; and arterial roads and urban land transport, at page 30, lines 3 to 19.

Mr Mowbray-d'Arbela—To give a proper answer to the question you have asked—that is, to have regard to the Australian Land Development Act as it currently is set out, and then compare that with the changes that we propose in this bill—the changes are aimed at textual clarification not changing the policy of the acts. So, in some cases, if you made a textual change—that is, changing a word here and a word there—the bill would be even more incomprehensible—

Senator CONROY—'Even more incomprehensible'—we will not quote you too widely on that.

Mr Mowbray-d'Arbela—Thank you. In the sense that this is amending a whole raft of other laws, it only really makes sense when you are comparing it to the laws that are being amended. In some cases the drafting task is so large that it is better just to rewrite the clauses in text. So my expectation would be that no policy changes have occurred in those changes to that act.

Senator CONROY—I am interested in that. On my reading of this amendment, money appropriated by parliament—and announced by the Treasurer or the minister for transport—for a state road in Victoria could end up being expended on a rail project in New South Wales.

Mr Mowbray-d'Arbela—I could not comment on the detail of the operation of the act.

Senator CONROY—But that is what we are talking about—the reallocation of funds between road and rail projects and vice versa, as detailed on page 29.

Mr Hutson—I think the substance of Mr Mowbray-d'Arbela's comments earlier was that section 20 of the Australian Land Transport Development Act would already effectively have the same title and the same effect; all we are doing here is amending the language so that it matches the Financial Management and Accountability Act.

Senator CONROY—So it matches what has actually gone on?

Mr Hutson—No, so it matches the language which is in the act. We are picking up, in this sense, the deeming provisions in sections 7 and 9 of the FMLA Act 1999.

Senator CONROY—Have moneys been switched between national, arterial or local roads projects in the past?

Mr Hutson—We do not know that. We would have to take that on notice or perhaps ask the Department of Transport and Regional Services.

Senator CONROY—I am happy for you to take it on notice.

Mr Evans—Again, Mr Chairman, this is one of those sections where you have to be assured that you are not, in a sense, validating something that has been going on in the past and was not properly authorised.

Mr Mowbray-d'Arbela—That is certainly not the intention of the bill.

Senator CONROY—It is just the effect.

Mr Mowbray-d'Arbela—And indeed, in our legal view, it is not the effect of it.

Senator CONROY—I am happy for you to take these questions on notice. As I said, have moneys been switched between national, arterial or local roads in the past? If so, how much? Mr McPhee, did you want jump in?

Mr McPhee—I was going to suggest that we might do a marked-up version showing what exists in legislation at the moment and what has changed in this bill, so that you can see the extent of the amendments and how we are saying the extent of the amendments really relates back to the 1999 FMLA legislation not addressing policy issues. We will do that exercise for you.

CHAIRMAN—If they are willing to do that, why don't you just put your questions on notice to them?

Senator CONROY—I am happy to do that. I will just read them out so they can have them on notice.

CHAIRMAN—Why don't you put them on the *Notice Paper* in the Senate?

Senator CONROY—Because I wanted to ask the department—

CHAIRMAN—Let them do what they just said. That is my suggestion. They are offering to give us the information about how they transferred the words from the current act to this bill.

Senator CONROY—Yes. I am happy for them to do that but I am particularly conscious of Mr Evans's concern about this clarification. I suspect the words are incomprehensible—I think that was the word used earlier—and this is possibly clarifying them. It is this question of incomprehensibility previously, that Mr Evans has flagged, that I am particularly concerned about. I am happy for them to take it on notice and do that, because that may help the debate.

Mr McPhee—In relation to the questions you are asking, the issues you raise are obviously not the finance department's responsibility. I am happy in turn to ask the Department of Transport and Regional Services.

Senator CONROY—I appreciate that.

Mr Evans—Mr Chairman, when you start rewriting things, the question is: have you changed the meaning by rewriting the thing?

Senator CONROY—That is absolutely right.

CHAIRMAN—You might also need some degree of credulity to suggest that all of a sudden a minister is going to take money for an arterial road and put it on a rail line now because the act changed.

Senator CONROY—But it talks clearly on page 29 about the reallocation of funds between road and rail projects and vice versa.

CHAIRMAN—All I am saying is that I find it incomprehensible that, the day the act changes, all of a sudden he is going to take some road money and put it on a rail line. That is conspiracy theory gone mad.

Senator CONROY—That is what they say they can do now in the amendment, Mr Charles. It might seem like conspiracy theories to you, but—

CHAIRMAN—We will see if it is an amendment or if it is a faithful representation of what the act already is.

Mr Evans—The people who administer the act might read this and suddenly discover that they have powers that they did not have before—or think they have.

CHAIRMAN—Good grief!

Senator CONROY—Just coming back to what I would like to have taken on notice and passed on: have moneys been switched between national, arterial or local roads in the past? If so, how much and between which projects? Was this transfer ultra vires if there was not a legal underpinning for it previously? How was parliament informed that these transfers had taken place? Have moneys been switched between states and organisations? If so, how much, and which states and organisations—

CHAIRMAN—Senator Conroy, can you put that on notice in the Senate to the department, rather than through here?

Senator CONROY—I am accepting Mr McPhee's kind offer.

CHAIRMAN—His offer was to clarify the bill versus the existing legislation, not to go into detail with the department of transport.

Senator CONROY—The key question is whether DOFA think there has been a change. DOFA are arguing that there has not been a change. If DOFA then ask the department and find that this has been going on, then the issue that Mr Evans raises, as to whether or not there has been a change, is very valid and DOFA may then want to amend their answer.

Mr McPhee—I do not immediately jump to that conclusion.

Senator CONROY—I appreciate that, but I am trying to get to the bottom of it. I am almost finished, Mr Chairman, so I am happy to quickly finish with the following questions. Which

states and organisations? In DOFA's opinion were any of those transfers ultra vires? How was parliament informed? Has money been switched between road and rail and, if so, how much? Whether money has been switched between road and rail in the past is a key question. This clarification now has impact and says, 'Yes, it was okay'—not just 'It is ongoingly okay' but 'It was okay previously.' You may disagree with that, but—

Mr Mowbray-d'Arbela—It is certainly not the intention of this bill to have a retrospective effect.

Senator CONROY—I appreciate you are saying that in good faith. Under the proposed amendment 19(3), can you please explain why it is that, even though expenditure has been switched between states or organisations:

... the amount is to be taken to have been expended by the State or organisation to which it was originally paid on the purpose for which it was so paid.

That seems to mean that, if money was to be expended on a road in Victoria but was switched to New South Wales, it would not be recorded as such in annual reports or any other statistics. It will keep being recorded as a Victorian expenditure even though it has now been expended in New South Wales. That is how I read it. Would you like to comment?

Mr Mowbray-d'Arbela—I do not think it is safe for me to be opining on the operation of that legislation as a program matter. It is not the effect of this legislation.

Senator CONROY—I am quoting from 19(3).

Mr Mowbray-d'Arbela—In general terms, I think the answer already given by Mr McPhee relates to your question, which is effectively: 'Is the current act being changed in any way?' Given that this draft bill is not even in the parliament, the questions you are asking relate to the operation of the act as it currently works.

Senator CONROY—This is how it would operate under the bill if it were passed. I am specifically referring to the amendments. I am not talking about the existing act. This is an inquiry into the proposed amendments to the act.

Mr Mowbray-d'Arbela—I understand that you are effectively asking, 'Will this bill change the way that that act operates in detail?' That is not the intention of this bill, but we are happy to take that on notice and check.

Senator CONROY—Amendment 19(3) at the top of page 29 reads:

An amount debited from the Account and paid by the Commonwealth to a State or an approved organisation, being an amount to which an authorisation under subsection (1) or (2) relates, may be spent in accordance with the authorisation but, for the purposes of section 16 or 17 (whichever is applicable), the amount is to be taken to have been expended by the State or organisation to which it was originally paid on the purpose for which it was so paid.

That to me reads that you can appropriate for a road in New South Wales and spend the money in Victoria, and it would still be recorded as having been spent in New South Wales.

Mr Hutson—I suspect that when we do our mark-up we might find that the only word changed in that whole section is the word ‘account’. I am speculating, I would have to admit. Perhaps I could get confirmation on that.

Senator CONROY—That is a significant change. Putting the word ‘account’ in there justifies the operation of what has previously been going on out of accounts.

Mr Mowbray-d’Arbela—We have available to us the legislation as it currently is, and the effect of this. I do not seem to have it with me right now but we probably can get it to you today.

Senator CONROY—Can I just confirm—on both your reading and mine, whether it is previous words or not—that you are able to appropriate money in New South Wales, spend it in Victoria and still have it recorded as New South Wales money? Is that how it works now, as well as how it will work in the future?

Mr Hutson—As Mr Mowbray-d’Arbela said—and I support him—this is not our act and it would be unsafe for us to comment on the particular question that you have raised.

Senator CONROY—It is not your act, did you say?

Mr Hutson—That is right—the Australian Land Transport Development Act.

Senator CONROY—But this is your amendment to it; it has application to the act.

Mr Hutson—Yes, but our amendment is very small. I think our amendment is merely adding the word ‘account’ in the first line.

Senator CONROY—Yes, but they were operating out of an account previously. Now you are putting in the word ‘account’, which comes to the very thing Mr Evans is talking about: what were they doing it out of before? They were doing it out of the account.

Mr Mowbray-d’Arbela—I probably would say out of the reserve, because it was linked to the reserved money fund.

Senator CONROY—Would this be like the case for transfers between special accounts—is that what is happening?

Mr McPhee—I do not think that is occurring in this case. I think we are saying that, because the department of transport have policy responsibility, we will need to communicate with them to get an answer.

Senator CONROY—This is a very subtle change, just putting the one word in. To me it looks like this has been going on with the account already and all of a sudden you have gone, ‘Uh-oh, we don’t actually mention the account.’ So we put the word ‘account’ in—and that comes to Mr Evans’s very point.

Mr Hutson—The point that I want to make is about the operation of this particular part of the amendment bill. There is a deeming provision in the FMLA Act 1999 that essentially says that, where the word ‘reserve’ appears in another act, you should read the word ‘account’—or words to that effect. What we are intending to do here is to clean up the statute book so that you will not come along to the statute any longer and read the word ‘reserve’ and then have to go back to this deeming provision to see what that word ‘reserve’ has now been deemed to have changed to. You will be able to get a clean read through the statute. That is the fundamental issue in what we are doing here.

Mr Mowbray-d’Arbela—We now have the text in front of us. Section 19(3) of the Australian Land Transport Development Act 1988 currently says:

Money paid out of the Reserve to a State or approved organisation, being money to which an authorisation under subsection (1) or (2) relates ... shall be taken to have been expended by the State or organisation to which it was originally paid out of the Reserve on the purpose for which it was so paid.

The change put forward in the bill is that ‘money paid out of the Reserve’ be amended to ‘an amount debited from the account’. The rationale there is that a special account does not equate to a bank account, so we are not talking about money being paid from a bank account called a reserve but about an amount being debited from a special account. The next amendment is at the end of that section so that ‘the money shall be taken to have been expended’ is changed to ‘the amount shall be taken to have been expended’.

Finally, where there is currently a reference to money being paid out of the reserve, we have not repeated the reference to money being debited out of the account, because the drafter was of the view that repeating the reference to the account was unnecessary—it was already clear enough. I am trying to explain that nothing in the current act will be changed in practice or in law through this bill other than the text so that the amended act, once this bill goes through, can be read and will reflect the legal position that is currently deemed to be occurring through the operation of the 1999 legislation. As long as these textual changes are not made, it can be difficult to read the current laws and understand what is occurring. That is why we are hoping this procedural bill can come before the parliament and we can tidy up the statute book.

Mr Hutson—Senator, I think if we—

Senator CONROY—Sorry, I was just going to give Mr Evans an opportunity to comment.

Mr Evans—The only comment I can make, Mr Chairman, is that until you have that sort of explanation you do not know what is going on here.

CHAIRMAN—We are having a hearing, with the greatest respect, Mr Evans—and before the bill has come before either the House or the Senate.

Mr Evans—Indeed, but looking at that sort of provision—

CHAIRMAN—This is a pretty open process, Mr Evans.

Ms PLIBERSEK—But he is saying that you cannot read it from the legislation.

Mr Evans—That is right. You need to get that sort of explanation to find out what these things are doing.

Senator CONROY—I would like to ask the Audit Office witnesses: do you often find situations where an amount can be taken to have been expended by a state or organisation to which it has been paid for purposes other than that for which it was paid? In other words, can an amount be appropriated here and then transferred over to another place and recorded, for example, as a road in Victoria as opposed to a road in New South Wales without amendment? How does ANAO deal with those sorts of things? How does that pass muster?

Mr Crossley—I cannot answer that specifically in terms of road versus rail transport. In terms of—and I guess I have said this before—expenditures out of either special accounts or funds earmarked for specific purposes, if we were looking at that as part of the audit then we would check that that amount related to that purpose or specific requirement.

Senator CONROY—If the law says that it is okay for it to be recorded in that fashion then that says to me that you could not say anything about it.

Mr Crossley—We would not comment on it.

Senator CONROY—It would actually comply with the law and therefore comply with what you would test it for, even though the money was not being spent where it was recorded as being spent. The Audit Office would say, ‘The legislation says that they can record it that way.’

Mr Crossley—Correct.

Senator CONROY—You would not make a comment and say that even though \$10 million is recorded as being spent on roads in New South Wales in actual fact it has been spent on roads in Victoria?

Mr Caruana—The audited financial statements, where this might be picked up, probably would not go down to the level of detail as to which particular state it was spent in, irrespective of what the legislation said. So if the line item that you were auditing said, ‘Payments for roads’ then which state it was paid in would not be an issue. In terms of looking at the validity of the payment against the appropriation, if the act allows that particular thing to happen then we are satisfied.

Senator CONROY—I appreciate that you are constrained by the act but as an auditor would you actually then feel compelled, if you drilled down and found that Victorian road funding was actually being spent in New South Wales, although it is legal—

Ms PLIBERSEK—Normally it is the other way around.

Senator CONROY—Yes, that is right. Would you feel compelled to mention that? It does seem that part of the job of the auditor is not just to ensure compliance with the letter of the law but also to draw to attention an anomaly. If I was being kind, I would call this an anomaly; if I was being unkind, I would probably call it something else.

CHAIRMAN—I thought we got rid of hypothecation.

Senator CONROY—Would that be a function that the auditors should mention under your broader ‘the money has to be spent where it was said that it would be spent’ type function?

Mr Crossley—Again, without being specific, if we had a concern then we would probably raise that with management. If it accorded with the legislation but there was some obscure anomaly in that, I think, as a generalisation, the Audit Office would point that out to management. It would not be a control issue, it would not be a legislative breach, but it may be something that we would want to clarify with management to make sure that they had put it into that account intentionally. If they said, ‘Yes, we did,’ then I am unsure what further explanation the ANAO would seek.

Senator CONROY—I can only encourage you to have a good look at the land transport development account. Can you imagine the government announcing that it was going to spend money on a road in Ms King’s electorate, and getting all the kudos from that, but then deciding to spend it in Mr Charles’s electorate instead and not telling anyone that it had actually done that?

CHAIRMAN—You will probably find that the original legislation was drafted by Robert Ray.

Senator CONROY—That is an unkind thing to suggest, Mr Charles.

CHAIRMAN—Why would it be unkind?

Senator CONROY—Anyway, you might want to have a good look at this one, because it sounds like there is plenty to have a look at in there.

CHAIRMAN—I thought we had largely discontinued hypothecation with respect to the funding of transport to the states.

Mr Mowbray-d’Arbela—I can give a general reply. The word ‘hypothecation’ does not have a formal legal meaning. I cannot comment on whether it has a formal accounting meaning. But, in relation to special accounts, we do in general terms use the term ‘hypothecation’ to mean that a special account equates to a hypothecation of money from the CRF that is set aside for a specified purpose. So the word ‘hypothecation’ is certainly something in my vernacular.

CHAIRMAN—I recall a major audit on that issue in respect of transport two or three years ago.

Mr McPhee—Yes.

Senator CONROY—Can you confirm that, under proposed clause 31(2), if money has not been spent or has not been spent in accordance with this act by a state rail authority or organisation, the minister may demand its return? This is at lines 29-31 on page 32 and lines 1-6 on page 33.

Mr Kennedy—This may come under the heading of section 96 of the Constitution, whereby grants can be made to the states on terms and conditions. Presumably this act allows those sorts of payments and presumably, without having read the act, it allows the minister for transport to impose terms and conditions. If they are not met, then the act would allow the minister to pursue the state for the return of the money.

Senator CONROY—That would seem reasonable. Would you agree, Mr Mowbray-d'Arbela?

Mr Mowbray-d'Arbela—Yes.

Senator CONROY—Would that apply retrospectively?

Mr Mowbray-d'Arbela—This bill is not intended to apply retrospectively.

Senator CONROY—Mr Evans, that is a chuckle—I do not know whether *Hansard* can record a chuckle.

Mr Evans—Yes.

Senator CONROY—DOFA's submission notes that the amendment seeks to clarify that debits from a special account can include notional payments. Can you explain what that means?

Mr Mowbray-d'Arbela—That is the issue I was addressing earlier. The rationale behind this, as much as anything, is to attempt to ensure consistency between the legal fraternity and the accounting fraternity so that there should be no doubt that, should there be a debit from a special account and if that debit relates to a notional payment only, that has to be accounted for in accounting terms as if it were a real payment.

Senator CONROY—I understand that, under the current arrangements, amounts debited to a special account may include notional receipts. Could you explain what a notional receipt is?

Mr Mowbray-d'Arbela—I can deal with the last part of your question—I did not catch the full question. Maybe I can cover it by saying that a notional receipt is where an FMA agency receives money from another FMA agency—so it is occurring within the consolidated revenue fund—and it is to be accounted for by that receiving agency on the same basis as if it were a payment it had received from outside the consolidated revenue fund.

Senator CONROY—So is a notional payment a transfer of an appropriation?

Mr Mowbray-d'Arbela—No.

Senator CONROY—Can I just confirm that, under this amendment, notional moneys can be transferred from one special account to another?

Mr Mowbray-d'Arbela—We are not using the word 'money'. This bill actually gets across the statute books with a clarity of language—the concepts are that there be a debit from a special account of an amount and that it can equate to what is called a notional payment. Then

the receipt of that notional payment is accounted for specifically. So it is not notional money. These are payments occurring within the—

CHAIRMAN—Do we use the term ‘notional receipts’ in the act?

Mr Mowbray-d’Arbela—Section 6 deals with the concept of notional payments.

CHAIRMAN—Can you do something for us then?

Mr McPhee—I can perhaps explain it broadly. That might help. Because money from all of the Commonwealth bodies forms part of the consolidated revenue fund, when they make payments the consolidated revenue fund does not change at all.

Senator CONROY—Sure.

Mr McPhee—In a legal sense, they are notional payments. But for accounting and appropriation purposes, they are treated as real receipts and payments.

Senator CONROY—They are real receipts.

CHAIRMAN—Okay.

Senator CONROY—Can these be transferred from one special account to another?

Mr Mowbray-d’Arbela—Yes, if it is within the purpose of the special account from which the initial debit is being made.

Mr Kennedy—Through you, Mr Chairman, the question is: why can’t these two provisions be covered by section 6?

Mr Mowbray-d’Arbela—Perhaps I could address that.

Senator CONROY—I certainly cannot answer it, so I am hoping you can.

Mr Mowbray-d’Arbela—The point raised by Mr Kennedy is a valid point. This bill is attempting to clarify any areas of uncertainty. If an agency is administering a special account, the special account is debited and there is no destination for that debit—that is, the special account is reduced in balance—the question is whether that is a transaction which should be reflected in accounting terms. The notional payment concept, which is described in section 6 of the FMA Act, explains:

This Act applies to a notional payment by an Agency (or part of an Agency) as if it were a real payment by the Commonwealth.

There is an argument that a transaction which relates to a special account and a departmental outcome is not a payment from one part of an agency to another part of an agency, because a special account is not a part of an agency. It is a hypothecated amount of the CRF. To make sure this technical legal point is clear to everybody and to avoid doubt, we are making the process such that, if you are doing any transaction with a special account, it should be dealt with as if it

were a transaction in accounting terms. Section 6 is therefore clarified. That is why the amendments have been done to the sections on special accounts, as opposed to section 6.

Senator CONROY—Mr Kennedy, does that answer your question?

Mr Kennedy—It provides an answer.

Senator CONROY—Mr McPhee, you seem to be saying that, because it is all still within CRF and it does not really change the total of the CRF, there is no real reason to be concerned. I am not trying to verbal you there, but I am concerned about parliament trying to keep track of the money.

Mr McPhee—Absolutely.

Senator CONROY—To me, that is the critical issue.

Mr McPhee—It is.

Senator CONROY—It does not seem that we are getting a chance to keep track of it.

Mr McPhee—The intention is to treat these notional payments and receipts as real payments and receipts to allow them to be recorded against appropriation as expenditure and receipts. The intention is to gross up these transactions and to be clear. They will be shown against appropriation spends or against special accounts, receipts and payments.

Senator CONROY—That is the intent of this legislation, but that is not what has been happening.

Mr McPhee—No, that has been happening, as far as I am aware.

Senator CONROY—In a consolidated way. But you are talking about grossing it up.

Mr McPhee—Earlier, section 6, which is about notional payments and receipts by agencies, was mentioned. That has been in for a long time. Subsection (1) says:

This Act applies to a notional payment by an Agency ... as if it were a real payment by the Commonwealth.

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

CHAIRMAN—I have to try and go through topics 7 and 8 in less than five minutes flat.

Topic 7—Amendments to the CAC Act to harmonise offence provisions with the Criminal Code Act 1995

CHAIRMAN—Parts of the Commonwealth Authorities and Companies Act 1997 require amendment to harmonise offence provisions with chapter 2 of the Criminal Code Act 1995.

Chapter 2 of the Criminal Code commenced on 15 December 2001. These amendments are effected by items 84, 87, 87A and 89 of schedule 2 of the bill. The main amendment is contained in item 87. Finance, can you tell us why the CAC Act was not amended to harmonise with chapter 2 of the Criminal Code before chapter 2 of the Criminal Code commenced on 15 December 2001?

Mr Hutson—The reason is that the CAC Act is aligned with the Corporations Law, and at that time the Corporations Law was not aligned. Now it is, and we are taking the opportunity to update the act as well.

CHAIRMAN—Thank you.

Topic 8—Other matters

CHAIRMAN—We now turn to other matters—for example, section 61 of the Aboriginal and Torres Strait Islander Commission Act 1989 covering preparation of budget estimates, section 59 of the FMA Act specifying membership of Advisory Committees for large waivers and section 206 of the Native Title Act 1993 specifying examination of annual reports of the Indigenous Land Corporation by the parliamentary joint committee on native title and the land fund. The subject of this session covers other amendments not addressed so far. For example, items 5 to 9 of schedule 2 make amendments so that ATSIC is required to prepare budget estimates on an accrual basis. Under the amendments to section 61 of the Aboriginal and Torres Strait Islander Commission Act 1989, ATSIC will be required to prepare budget estimates on an accrual basis. ATSIC, can you tell me how that is going to affect you?

Mr Barrett—That will affect us positively, because we have been under a regime where it has been a cash based ministerial estimates system with our minister. We have sought this change in order to go to our minister on an accrual basis so as to show expenditure incurred rather than money spent.

Proceedings suspended from 1.12 p.m. to 2.05 p.m.

Detailed consideration of the bill—identification of technical errors, inconsistencies et cetera

CHAIRMAN—Welcome back to the afternoon session. We had a couple of other topics we were going to go to, including one the committee secretary has tentatively called ‘Detailed consideration of the bill—identification of technical errors, inconsistencies et cetera’. Does anyone have any issues in relation to that?

Ms Harris—I think we advised in my earlier statement and in a statement we subsequently submitted to the secretariat that we had found one minor technical inconsistency. We have already provided advice to the department of finance with some detail on that.

CHAIRMAN—If there are no further issues with that, there is no point going through that topic. Mr McPhee, I am terribly sorry. I promised Mr McPhee he could clarify an earlier answer. Please go ahead, and then I will move to the next topic.

Mr McPhee—Thank you, Chairman. I wish to correct some evidence I gave this morning, where I indicated that only departments and agencies under the FMA Act administer special accounts. I am now aware that there are two instances set out in legislation where CAC bodies do or may administer special accounts, so I wanted to correct the record.

CHAIRMAN—I always thought that that was possible.

General discussion of issues

CHAIRMAN—The last topic is a general discussion of issues; basically, if there is anything else that anyone wishes to discuss about the bill, or any item that someone thinks should have been included in this bill—outside a revision of the Constitution, Mr Kennedy!

Mr Kennedy—No, the Constitution is all right; it is what hangs off it that is a bit of a miss!

CHAIRMAN—In order to make the bill legal, are there any other issues that anyone would like to raise or items that they believe ought to be in the act? Speak now or forever hold your peace!

Senator CONROY—Mr Kennedy?

Mr Kennedy—I am holding my peace there, Senator.

Senator CONROY—I would like to raise a couple of issues. In additional estimates in February 2003, DOFA officials admitted they were unable to respond to a question on notice from November to provide the receipts, payments and balance of the consolidated revenue fund for each financial year since 1997-98. The memo from DOFA—it might have been from you, Mr McPhee; February was not that long ago—said, ‘The department do not hold that information, but going forward we are trying to ensure that we can collect better information in this regard.’ Can anyone at DOFA explain what steps have been taken to ensure that, going forward, the department will be able to furnish data on the consolidated revenue fund as defined in section 81 of the Constitution?

Mr McPhee—Currently we have information on the official public account balances—no problems at all. What we do not have information on is money held by officials or outsiders which in a legal sense also comprises the consolidated revenue fund. We are currently exploring whether we can use information we receive from agencies and departments about cash on hand which would complement the information we have on the official public account and report on that. I think I said at the time, though, that there will still be a small difference in the legal concept and the actual dollars we can put together. But we are certainly working on that at the moment.

Senator CONROY—In the November estimates hearing—Mr McPhee, I think you were in a different capacity at that stage—we discussed with departmental officials the rephrasing of public expenditure. I understand that administered expenditure—that is, program expenditure—lapses at the end of the financial year. However, the Minister for Finance and Administration is able to rephrase such expenditure to subsequent years without the approval of parliament. As a consequence, administered expenditure can become effectively non-lapsing. Has any

consideration been given to ending such rephasing and requiring a new appropriation or any alternative?

Mr McPhee—I can give a broad answer. A lot of the administered expenditure would be under legislation which has appropriations within it. So there would be many cases of special or standing appropriations. The rephasing is only an administrative action, because the parliament has already given the authority for the appropriation of the funds under existing legislation. The rephasing would just be a re-estimation of the expected spend. That is my understanding of it.

Senator CONROY—Try to understand it from this side of the table. Government have announced X amount of dollars to be spent in a year. Then in the next year, without people understanding that there has been a rephasing—because it has not been advertised—they are able to announce what looks like an increased amount of money when, in actual fact, all that has happened is that money has slipped through to the next year. Is there any consideration of a schedule of rephased expenditure so that people can compare apples with apples? I understand that for 2003 rephasing has totalled over \$600 million, which is a lot of money.

Mr McPhee—Yes.

Senator CONROY—Is there a capacity for the parliament to have a look at it and say, ‘Well, look, clearly that money has been rephased from one year to the next year’? Do you think that would be a reasonable proposition?

Mr McPhee—I am not aware of any work going on in that area, but let me take it on notice. I will provide the committee with a response to that.

Senator CONROY—In November, DOFA distributed a memo introducing 20 substantial changes to the financial framework and its operation. These included improving the quality of the flow of information to DOFA, reviewing the outcomes and outputs of agencies, scrapping agency banking and many other changes. I know you were not there at the time, but are you familiar with that?

Mr McPhee—Yes.

Senator CONROY—Will parliament be provided with any additional information as a result of the additional information that DOFA will receive under those changes that were made?

Mr McPhee—Certainly, it will be more timely information. That is the most significant aspect.

Senator CONROY—It is certainly more timely for the department. Is there a commitment that the department will be able to give it to us on a more timely basis?

Mr McPhee—As you would be aware, the minister publishes monthly statements on the budget. The intention is to get that reporting in a more timely fashion, as well as the end of year results. The intention is also to collect information by programs, under the outcomes levels. I would need to take on notice the expected level of reporting of those.

Senator CONROY—Can DOFA provide the committee with an update on the progress of the review of outputs and outcomes? That is one of the issues that Mr Kennedy referred to in regard to the tightness of definitions. I think that is one of the most critical areas from our perspective of trying to keep track of where the money goes. How is that going? We have all joked about the fact that Defence has one output. Every dollar in the department is technically within program because there is only the one output.

Mr McPhee—Let me take that on notice as well, Senator Conroy.

Senator CONROY—Sure. Would you anticipate that any legislative change is required from any of those changes?

Mr McPhee—My understanding is they were all done administratively. If legislative change were required, we would have tried to get it into this bill. There is no expectation of that.

Senator CONROY—Is there any reason why the consolidated revenue fund and all its components—in particular, special accounts under section 20 and section 20(1)—cannot be published as part of the budget papers?

Mr McPhee—I referred earlier to the issue of the bulk and the judgment about the extent of the demand for that sort of information in the budget papers as opposed to in departmental budget papers and reports.

Senator CONROY—But it is part of the Constitution. It is reasonable for the parliament to want to look at something that is essentially part of the fabric of the Constitution.

Mr McPhee—The special accounts are part of the fabric of the FMA Act but not the Constitution, subject to amendments.

Senator CONROY—Mr Evans might want to give us advice on that.

Mr Evans—I can only reiterate what I said before, Chairman.

Senator CONROY—Is there any reason why the cash budget balance could not be reconciled to the consolidated revenue fund and its components?

Mr McPhee—I think we had a similar question at Senate estimates and we are working on that now!

Senator CONROY—We were not sure if you were going to be here, Mr McPhee.

Mr McPhee—We are working on that. The budget papers are presented showing the government sector, which is a broader sector than just the CRF, so there are issues of breadth and depth here. I think it would be best if we took that on notice and provided the committee with a similar response to the one we will provide to you at Senate estimates, Senator Conroy.

CHAIRMAN—You are going to be busy little vegemites, aren't you?

Mr McPhee—Very busy.

Senator CONROY—I could probably ask ANAO, but I am sure, Mr McPhee, you know the answer. Could either of you confirm that the Audit Office does not audit the final budget outcome?

CHAIRMAN—I can confirm that.

Senator CONROY—The chairman is willing to confirm that!

Ms Harris—We do not.

Senator CONROY—You do not. I understand that the chairman, in response to—

CHAIRMAN—I can guarantee that, because we made a recommendation—

Senator CONROY—I was just about to raise that very issue. In response to a recommendation from this very committee and its chairman, the Audit Office confirmed in their report No. 25, in December 2002, that they were willing to audit the final budget outcome. Is that correct?

Mr Crossley—I think it is.

Senator CONROY—Is there any reason why the final budget outcome could not be audited, in your view?

Mr Crossley—The simple answer is no, but that audit would merely reflect an audit of what had been presented to us.

Senator CONROY—I would hope you would do a genuine audit.

Mr Crossley—We would do a genuine audit. I am suggesting that if the final budget outcome were presented in its entirety then, yes, we would be auditing that. If we were not presented with the final complete picture, as it were, then we would be auditing something less than that.

Senator CONROY—I understand the point you are making.

Mr Crossley—It is dependent on the quality of the information.

Senator CONROY—I am more interested in the accounting standards that you would be applying than in whether or not you had the full information. Mr McPhee, or anyone from DOFA, is there a reason other than those described why we cannot have the final budget outcome audited? Are you aware of a reason?

Mr McPhee—I think the government is yet to respond to the committee's report on that.

Senator CONROY—Chairman, how are you going chasing them up on this proposal?

CHAIRMAN—I was just about to ask; you had the floor, but I had it in my mind to ask the question. I think it has been almost a year since we tabled report No. 389 on reporting. I am advised by the secretariat that we have not had a response, and I am not asking you to respond to that. But I am certain there were a number of recommendations that were administrative in nature, for which DOFA and the minister are responsible, and there would have been some policy recommendations too, off the top of my head. There were not a lot. Is this a reasonable question: would it be reasonable, considering we have been asked to examine this bill before it comes before parliament, to ask you, Mr McPhee, how you are going with our recommendations on reporting, since that is part of the terms of reference of our inquiry?

Mr McPhee—It would be reasonable, and I will take it on notice.

CHAIRMAN—That would be very good. We thank you, Mr McPhee.

Mr Kennedy—On the question of auditing the final budget outcome, I wonder whether that would require an amendment to the Auditor-General Act to provide that as an extension to the mandate of the Auditor-General as it currently stands.

CHAIRMAN—I do not have a clue—

Mr Kennedy—I do not know either.

CHAIRMAN—I do not have the report in front of me. It has been a while now, so I do not remember the absolute detail. The biggest thing that we wanted was more detail in outcomes reporting—for example, the infamous defence department outcome: ‘to defend the nation’.

Mr Kennedy—That is better than the original one, which said, ‘Bang!’

CHAIRMAN—We wanted more detail but, at the same time, we wanted them to quit changing their minds every year about what it was they reported on. We want more performance information—which we think is reasonable, the parliament thinks is reasonable and the opposition certainly thinks is reasonable—in a more timely manner. Along the way, we also thought that the ANAO might have a look at the final budget outcome, but I cannot remember whether that went to amending the Audit Act or not. If it required it, we would have put it in—I am sure of that; our staff are very competent.

Mr McPhee—If it were to be done, I think it would be prudent to legislate for it.

CHAIRMAN—Yes.

Senator CONROY—Does it need to be in the Auditor-General Act or could it be an amendment to this bill?

Mr Kennedy—It would probably need to be in the Auditor-General Act, because that act describes the mandate that the Auditor-General has.

CHAIRMAN—Yes.

Senator CONROY—I appreciate that, but I am not sure that the Auditor-General Act is going to sneak up to parliament in the near future, Mr Kennedy.

CHAIRMAN—Actually, we have four standing recommendations on the Auditor-General Act which the government accepted.

Senator CONROY—Okay. Then hopefully we will see something.

CHAIRMAN—They must be in the process of being implemented. We made four recommendations, and the government accepted all four. That was a recent thing, in report 390.

Senator CONROY—Would it be a problem if the FMA Act were amended to say that the final budget outcome should be audited?

Mr Mowbray-d'Arbela—I think the documentation you are talking about is required under the Charter of Budget Honesty Act. Accounts under the FMA Act are already required to be audited—

Senator CONROY—But we have just agreed that the final budget outcome is not.

Mr Mowbray-d'Arbela—But I believe that is required through the Charter of Budget Honesty.

Senator CONROY—Don't hold your breath.

Mr Mowbray-d'Arbela—In any case, the Auditor-General Act is the responsibility of the Department of the Prime Minister and Cabinet.

Senator CONROY—But there is nothing stopping parliament from amending the FMA Act to direct that it take place or to make it mandatory that it take place. I appreciate that it may be more appropriate in a different bill. Anyway, that is a matter for the parliament, not something for us to postulate on.

CHAIRMAN—As there are no further questions, I thank you for your attendance. Is it the wish of the committee that the additional submission by Mr John Lovett, dated 6 March 2003, and the additional submission by Mr Richard Murray, dated 7 March 2003, be accepted as evidence and authorised for publication? There being no objection, it is so ordered. Is it the wish of the committee that a document entitled 'CRF and special accounts' and presented by DOFA be taken as evidence and included in the committee's records as exhibit No. 1? There being no objection, it is so ordered.

Resolved (on motion by **Ms Plibersek**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 2.23 p.m.