
Appendix two - Legal opinions

FINANCIAL ARRANGEMENTS & MANAGEMENT PRACTICES IN INTEGRITY AGENCIES

Executive summary

1. You seek advice on three questions relating to the funding and expenditure arrangements of four "integrity agencies": the Independent Commission Against Corruption, the Law Enforcement Conduct Commission, the Ombudsman's Office, and the NSW Electoral Commission.

Question 1 – the appropriation framework

2. Part 4 of the *Appropriation Act 2019* makes a separate appropriation, to the Premier, "for the services of" each of these agencies.
3. In my advice I review the nature of an appropriation and the relevant provisions of the *Constitution Act 1902* (at [13]-[28]); identify provisions in the *Appropriation Act 2019* and the *Government Sector Finance Act 2018* ("*GSF Act*") which permit variation or supplementation of appropriations (at [36]-[45]); and examine aspects of the appropriations given to these agencies (at [29]-[35]).

Question 2 – ministerial discretion and expenditure

4. I consider the operation of the provisions in the *GSF Act* relating to the delegation of appropriation functions (at [48]-[69]); and whether it would be open to a minister to "reduce" the appropriated funds available to an agency (at [70]-[73]).
5. I also consider whether there are other provisions in the *GSF Act*, or other Acts, which confer power on the Premier or another minister to exercise control over the expenditure of funds by these agencies (at [47] and at [74]-[88]).

Question 3 – legislative intention if an agency considers it is insufficiently funded

6. Finally, I consider how the relevant legislation anticipates the resolution of a situation where an integrity agency considers it is not sufficiently funded (at [89]-[93]).

Background

7. The Auditor-General, in response to a request under s 27B(3)(c) of the *Public Finance and Audit Act 1983* from the Hon. Mr Don Harwin MLC, Special Minister of State and Minister for the Public Service and Employee Relations, Aboriginal Affairs and the Arts, is conducting an audit of the effectiveness of the financial arrangements and management practices of four "integrity agencies". These agencies are the Independent Commission Against Corruption ("ICAC"), the

Law Enforcement Conduct Commission ("LECC"), the Ombudsman's Office, and the NSW Electoral Commission.

8. I also note that the Public Accountability Committee of the Legislative Council is currently conducting an inquiry into "the budget process for independent oversight bodies" and the Parliament, which includes these four agencies. I have read the written submissions made to that inquiry by the NSW Government and the four agencies.
9. In your letter of 26 February 2020 you have asked me three questions relating to the appropriation and funding arrangements for these agencies. I note that the first question, in particular, is of wide scope: it is only possible in this advice to outline what I understand to be the principal aspects of the appropriation framework as they apply, in practice, to the four agencies. I would of course be pleased to answer any more specific questions in a later advice.
10. I also note that your letter asks three further questions relating to the independence of these agencies. I will, as agreed, answer these questions separately.

Analysis

Question 1 – application of the appropriation framework to these agencies

11. Your first question asks how the appropriation framework enabled by the *Constitution Act*, the annual Appropriation Acts and the *GSF Act* applies to integrity agencies. In answering this question, I will focus primarily on the legal arrangements by which funds are appropriated for use by the agencies.
12. I will consider in my answer to Question 2 the extent to which the Appropriation Acts and the *GSF Act* confer discretions on the Treasurer and other ministers in relation to funds appropriated to these agencies.

Authority to withdraw money from the Consolidated Fund

13. The legal rule that "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself" has been described as a "foundational principle of representative and responsible government"¹.
14. This principle is reflected, in this State, in provisions in the *Constitution Act* and the *GSF Act*, and in the Annual Appropriation Acts.
15. Section 39(1) of the *Constitution Act* establishes the Consolidated Fund: except as otherwise provided by or in accordance with any Act, "all public moneys collected, received or held by any person for or on behalf of the State shall form one Consolidated Fund".

¹ *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40; at 15 [61]; (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). See also the authorities cited in note 80 in support of that proposition.

16. Section 45 of the *Constitution Act* provides that the Consolidated Fund "shall be subject to be appropriated to such specific purposes as may be prescribed by any Act in that behalf."
17. Section 4.6(1) of the *GSF Act* provides that money must not be paid out of the Consolidated Fund "except under the authority of an Act". This section confirms that the "distinct authorization from Parliament" (see at [13] above) must occur under an Act of the Legislature². The "Legislature" is defined in s. 3 of the *Constitution Act* as meaning the Sovereign ("His Majesty the King") "with the advice and consent of the Legislative Council and Legislative Assembly". This definition reflects the fact that for a Bill to become an Act it must ordinarily be passed by both Houses and assented to by the Governor: s. 8A, *Constitution Act*.
18. Section 5A of the *Constitution Act*, however, establishes an important exception to the general rule that for a Bill to become law it must be passed by both Houses before being assented to by the Governor. Section 5A applies to "any Bill *appropriating* revenue or moneys for the *ordinary annual services of the Government*". If the Legislative Council rejects or fails to pass such a Bill (or returns it "with a message suggesting any amendment to which the Legislative Assembly does not agree"), the Bill may be presented to the Governor and will become an act on royal assent "notwithstanding that the Legislative Council has not consented to the Bill".
19. The *Constitution Act* also provides that "all Bills *for appropriating any part of the public revenue* or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly": s. 5. Section 46 of the *Constitution Act* requires in general terms, that any money bills (including a Bill for the appropriation of the Consolidated Fund) be recommended by the Governor³. These provisions reflect the general principle that it is the Government of the day that initiates or moves to increase parliamentary appropriations and taxation. This constitutional and parliamentary principle has been described as embodying "the financial initiative of the Crown"⁴.

Nature of an appropriation

20. In a frequently cited passage, Mason J said that:⁵

"An Appropriation Act has a twofold purpose. It has a negative as well as a positive effect. Not only does it authorise the Crown to withdraw money from the Treasury, it 'restrict(s) the expenditure to the particular purpose'".
21. In *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23, Hayne and Kiefel JJ stated that: (238 CLR 1 at [296] 105; original emphasis)

² See also *Wilkie* at at 15 [61], noting that the effect of ss. 81 and 83 of the Commonwealth *Constitution* is to prescribe that the form of the requisite parliamentary appropriation must be "law".

³ Section 46(1) provides that it shall not be lawful for the Legislative Assembly "to originate or pass any vote, resolution, or Bill for the appropriation of any part of the Consolidated Fund, or of any other tax or impost to any purpose which has not been first recommended by a message of the Governor to the said Assembly during the Session in which such vote, resolution, or Bill shall be passed". Section 46(2), however, provides that a Governor's message is not required for a Bill introduced by, or a vote or resolution proposed by, a Minister of the Crown.

⁴ See generally *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23; at 105 [294] (Hayne and Kiefel JJ).

⁵ *Victoria v Commonwealth* (1975) 134 CLR 338 Mason J, at 392–393; quoting Isaacs and Rich JJ in *Commonwealth v Colonial Ammunition Co. Ltd* (1924) 34 CLR 198 at 224. This description by Mason J has been cited subsequently by the High Court, including in *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40; at 525–526 [70].

"Parliamentary appropriation is the process which *permits* application of the Consolidated Revenue Fund to identified purposes... The appropriation of funds, standing alone, does not and never has required application of the amounts appropriated. Any *obligation* to apply the funds to the permitted purpose must be found elsewhere than in the appropriation."

22. It appears clear that - whilst an appropriation provides authority, or permission, to withdraw money from the Consolidated Fund - it does not also provide legal authority for the actual expenditure of the appropriated funds⁶. Legal authority for that expenditure needs to be found elsewhere, either under authority provided by another Act; or under the non-statutory executive, or prerogative, powers of the Crown in right of New South Wales.
23. The "negative" effect of an appropriation – restricting the expenditure to the particular purpose – is reflected in s. 45 of the *Constitution Act*, which (as outlined above) provides that the Consolidated Fund shall be subject to be appropriated "to such specific purposes as may be prescribed by any Act".
24. It is not possible for there to be an appropriation "in blank", without any reference to purpose. On the other hand, it is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified.⁷
25. A distinction is often drawn between an **annual** appropriation, made in the annual Appropriation Acts which comprise the budget, and a **standing** appropriation made in other Acts. A standing appropriation is "permanent", in that it will (unless amended) continue to appropriate funds from time to time in the circumstances where it applies.⁸
26. The effect of s. 21A of the *Public Finance and Audit Act* ("PFA Act") was that a standing appropriation provision, which appropriated money from the Consolidated Fund for a specified purpose shown in the Estimates of the Consolidated Fund, operated only to the extent necessary to meet any shortfall in the costs of meeting that purpose "after the appropriation of money for that purpose under an Appropriation Act".
27. Section 21A of the *PFA Act* was repealed by the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*, on and from 1 July 2019, which is prior to the commencement of the *Appropriation Act 2019* on 25 June 2019. Part 4 Div. 2 of the *GSF Act* contains provisions relating to appropriations (as discussed further below). There is, however, no provision in the *GSF Act* in similar terms to the repealed s. 21A of the *PFA Act*, nor are there any provisions in the *GSF Act* which have an equivalent effect to s. 21A of the *PFA Act*.

⁶ See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23; especially at 55 [111] (French CJ); 73 [178] (Gummow, Crennan and Bell JJ); 113 [320] (Hayne and Kiefel JJ); 210-211 [601]-[602] (Heydon J). See also *Williams v Commonwealth [No. 1]* (2012) 248 CLR 156; [2012] HCA 23; at 179 [2] (French CJ), and 354 [531] (Crennan J).

⁷ See *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40; at 526 [71].

⁸ See the description of annual and special (or standing) appropriations by French CJ in *Pape v Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23; at 40 [64].

28. It is possible that the same provision might operate *both* as a standing appropriation (authorising withdrawal of the funds from the Consolidated Fund for the permitted purpose), and as a provision which authorises the actual expenditure of those funds⁹.

Appropriations to the agencies

29. I note that there are some standing appropriation provisions which may be relevant to funding of expenses relating to these agencies. These provisions are:
- (a) *Electoral Act 2017*: s. 265 ("Payment of expenses");
 - (b) *Electoral Funding Act 2018*: s. 134 ("Appropriation of Consolidated Fund for electoral funding"); and
 - (c) *Independent Commission Against Corruption Act 1988*: Sch. 1, cl. 6 (Remuneration of Commissioner or Assistant Commissioner).
30. Amounts appropriated under standing appropriation provisions can only be applied for the purposes specified in those provisions.
31. The amounts appropriated under these standing appropriation provisions would, *prima facie*, be in addition to amounts appropriated to the agencies under the annual Appropriation Acts – although it would be possible for future annual Appropriation Acts (or another Act) to overcome this by including a provision equivalent to the repealed s. 21A of the *PFA Act*.
32. I also note that s. 4.7 of the *GSF Act*, relating to "deemed appropriations", is also a standing appropriation. That provision applies to "deemed appropriation money", which is government money that a GSF agency receives or recovers of a kind prescribed by the regulations¹⁰, that forms part of the Consolidated Fund *and* is not appropriated under the authority of an Act. The responsible Minister for a GSF agency is "taken to have been given an appropriation out of the Consolidated Fund" at the time the agency receives or recovers any deemed appropriation money: s. 4.7(1). An appropriation under s. 4.7 is taken to have been given only for the services of the GSF agency that receives or recovers the deemed appropriation money.
33. Every unused appropriation for an "annual reporting period" for the NSW Government lapses and ceases to have effect for any purpose at the end of that period: s. 4.8(1), *GSF Act*. An unused "deemed appropriation" does not, however, lapse at the end of the annual reporting period unless the regulations provide differently: s. 4.8(3).
34. Appropriations to each of the four agencies were provided for in Part 4 (Special Offices) of the *Appropriation Act 2019*. The appropriation provisions are in similar form, and I will use s. 18, relating to the ICAC, as an example. Section 18 provides that: (emphasis added)

⁹ See eg *Williams v Commonwealth* [No. 1] (2012) 248 CLR 156; [2012] HCA 23; at 354 [531] (Crennan J).

¹⁰ See cl. 13 of the Government Sector Finance Regulation 2018, which prescribes the various kinds of "deemed appropriation money".

"18 Independent Commission Against Corruption

This Act appropriates the sum of \$24,899,000 **to the Premier** out of the Consolidated Fund **for the services of** the Independent Commission Against Corruption for the year 2019–20.

Note: The appropriation will fund services for the following State outcome:

	Expenses \$,000	Capital expenditure \$,000
01 Accountable and responsible government	25,765	800"

35. The Note to s. 18 is "budget related information" within the meaning of s. 29 of the *Appropriation Act 2019*, as are the Budget Papers tabled in Parliament in connection with the Bill for the *Appropriation 2019*¹¹. Section 29(2) of the *Appropriation Act 2019* provides that budget related information "does not form part of this Act", and "does not affect the application of any amount appropriated by this Act". Budget related information may, however, be taken into account, to some extent, if it is capable of assisting in ascertaining the meaning of the Act, in accordance with the ordinary principles which apply to the use of extrinsic materials in the interpretation of Acts¹². (Appropriation Acts are also interpreted having regard to the constitutional and parliamentary principles and practice relating to appropriation legislation¹³.)

Variation or supplementation of appropriated sums

36. There are several mechanisms by which funds appropriated under the *Appropriation Act 2019* may be supplemented or varied.
37. **First**, s. 25(1) of the *Appropriation Act* provides that payment of a sum appropriated by the Act for a purpose "may not be made in excess of the sum specified for the purpose", except as provided by that section or Pt 4 of the *GSF Act*.
38. Subsection (2) of s. 25 provides that: (emphasis added)
- "(2) If the **exigencies of government so require**, the Treasurer may authorise the payment of a sum appropriated for a purpose in excess of the sum specified for the purpose but only if an equivalent sum is not paid out for another purpose, whether the other purpose is specified in relation to the same or a different Minister."
39. Subsection (3) of s. 25 provides that: (emphasis added)
- "(3) If the Treasurer is satisfied that a sum appropriated for a purpose is insufficient to enable the purpose to be effectively and efficiently carried out, the Treasurer may authorise the payment of a sum in excess of the sum specified for the purpose, **but only if:**

¹¹ See also s. 4.1(3) of the *GSF Act*, which is to the same effect (unless an Annual Appropriation Act provides differently).

¹² See s. 34 of the *Interpretation Act 1987*.

¹³ See, for example, *Combet v Commonwealth* (2005) 224 CLR 494; [2005] HCA 61; and *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23.

- (a) an equivalent sum is identified as surplus to another purpose by the Minister in relation to whom the other purpose is specified, whether the other purpose is specified in relation to the same or a different Minister, and
 - (b) the equivalent sum is not paid out for the other purpose.”
- 40. Subsections (2) and (3) are each subject to subsections (5)-(8), which provide that the sums appropriated under Parts 2, 3 and 4, may only be paid out for any of the purposes specified in that Part. Most relevantly, s. 25(7) provides that the sums appropriated under Part 4 “may only be paid out for any of the purposes specified in Part 4”.
- 41. It follows that, if not all of the money appropriated to a “special office” under Part 4 had been “paid out” to that special office during a financial year, s. 25 would permit the Treasurer¹⁴ to authorise the payment of that unpaid sum for the services of a *different* special office under Part 4. Section 25(7) would, however, prevent that unpaid sum from being paid out for purposes other than those specified in Part 4.
- 42. **Secondly**, although it does not strictly involve a variation of an appropriation¹⁵, I note that s. 13 of the *Appropriation Act 2019* appropriates a sum of \$120 million to the Treasurer “for State contingencies for the year 2019-20”. This appropriation was previously described as the Advance to the Treasurer (see eg s. 15 of the *Appropriation Act 2018*). The Treasurer must cause details of the payments of sums from the Treasurer’s State contingencies appropriation to be included in the Budget Papers for the next annual reporting year for the NSW Government: s. 4.12, *GSF Act*.
- 43. **Thirdly**, s. 4.13 of the *GSF Act* authorises the Treasurer, with the approval of the Governor, to determine that additional money is to be paid out of the Consolidated Fund during the annual reporting period¹⁶ for the NSW Government “in anticipation of appropriation by Parliament” if it is “required to meet any exigencies of Government” during the current annual reporting period. Any money determined under s. 4.13 for an exigency must be no more than is necessary in the public interest to fund expenditure to meet the exigency: s. 4.13(3). The Treasurer must cause details of the payments of money under this section to be included in the Budget Papers for the next annual reporting year for the NSW Government: s. 4.13(4). Such “budget variations” are also included in the next year’s Annual Appropriation Act, in order (in general terms) to vary retrospectively the previous year’s appropriation so as to validate the expenditure¹⁷.
- 44. There is also a question whether it might be possible for the agencies (or other “Special Offices”) to receive a portion of funds appropriated to the services of a Department, in addition to the funds appropriated for the services of the agencies under Part 4 of the *Appropriation Act 2019*. The note to the appropriation for the Department of Premier and Cabinet in s. 8 of the *Appropriation Act 2019* includes “Cluster grants”, and the 2019-2020 Budget Paper No. 3 lists

¹⁴ The Treasurer would of course need to be satisfied that the necessary circumstances in s. 25 applied.

¹⁵ See *Wilkie v Commonwealth* (2017) 263 CLR 467; [2017] HCA 40 for consideration of a somewhat equivalent provision in an annual appropriation Act of the Commonwealth.

¹⁶ See ss. 2.10 (annual reporting period for a GSF agency), and 2.11 (annual reporting period for the NSW Government), *GSF Act*.

¹⁷ See, for example, ss. 31-32, and Sch. 1, of the *Appropriation Act 2019*.

each of the four agencies as being within the Department of Premier and Cabinet "cluster". Whilst the notes in the *Appropriation Act 2019* do not form part of the Act or affect the application of any amount appropriated by this Act, they may be taken into account as extrinsic materials where they are capable of assisting in the construction of the Act (see above at [35]). In my view an appropriation for "the services of" a principal department would ordinarily extend to making "grants" or otherwise distributing funds to other government departments or agencies which have been administratively grouped within the "cluster" headed by that principal department.

45. It is less clear, however, whether it would be within the purposes of an appropriation "for the services of" a principal department if those funds were applied to provide supplementary funding to assist an agency in the same "cluster" for which an appropriation had been made *in another part* of the *Appropriation Act*. (Appropriations for the services of Departments are made in Part 2 of the *Appropriation Act*, whilst appropriations for the services of the "Special Offices" are made in Part 4¹⁸.) It is not possible to answer this question in the abstract, because it would be likely to require consideration of the purposes of specific instances of proposed expenditure.

Question 2 – ministerial discretion and expenditure

46. Question 2 is in two parts. I have reversed the order for convenience:
- (a) Does a Minister (including the Premier) have the legal authority to apply an "efficiency dividend", or similar mechanism, to reduce the availability of funds appropriated to integrity agencies after the annual *Appropriation Act* has been passed by Parliament?
 - (b) Once funding has been appropriated in a way that complies with the *Constitution Act*, to what extent does a Minister (including the Premier) have the legal authority/discretion to exercise control over the expenditure of integrity agencies?

Other possible sources of power to direct agencies

47. In answering Question 2 I will primarily focus on the potential effect of the *GSF Act*. I note that Questions 5 and 6 (which I will address in the subsequent advice) ask whether these agencies are required to comply with government policy, including administrative requirements imposed by the cluster arrangements.

Delegation of appropriations under *GSF Act*

48. Because the *Appropriation Act 2019* appropriates funds for the services of each agency to the Premier, the agency has no authority to withdraw any of those funds from the Consolidated Fund. The *GSF Act*, however, permits a minister to delegate the authority granted by the *Appropriation Act*. The Premier is the minister who has (as outlined above) received the

¹⁸ Section 25 of the *Appropriation Act 2019* may form part of the legislative context within which this question would need to be considered.

appropriations for each of these agencies¹⁹, and who may therefore delegate the authority granted by the appropriations for the services of these agencies.

49. In order to understand these delegation provisions, it is necessary to outline first some of the contextual provisions of the *GSF Act*.

GSF agencies, separate GSF agencies, and accountable authorities

50. The *GSF Act* imposes a range of obligations and functions on "GSF agencies" (an expression that includes a "separate GSF agency"²⁰), and on the "accountable authorities" of those agencies.
51. The **LECC** is a "GSF agency" for the purposes of the *GSF Act*. The Chief Executive Officer of the LECC is the accountable authority. See ss. 2.4(1)(e), 2.7(2)(g), *GSF Act*.
52. The **ICAC**, the **Electoral Commission** and the **Ombudsman's Office** are each "separate GSF agencies": s. 2.5(1)(b), (d) and (e), *GSF Act*.
53. The accountable authority for the **ICAC** is the Chief Executive Officer of the ICAC: s. 2.7(2)(b), *GSF Act*.
54. The accountable authority for the **Ombudsman's Office** is the Ombudsman: s. 2.7(2)(c), *GSF Act*.
55. The accountable authority for the **Electoral Commission** is the "governing body", if the Commission has one: s. 2.7(2)(j)(i), *GSF Act*. The expression "governing body" is relevantly defined to mean a "board, council or other body comprised of individuals that are collectively responsible for managing the affairs of the agency" but not "any board, council or other body with merely advisory functions": s. 1.4, *GSF Act*. If the agency does not have a governing body, the "head of the agency"²¹ is the accountable authority: s. 2.7(2)(j)(ii), *GSF Act*. In my view, the Electoral Commission (not the Electoral Commissioner), consisting of the members specified in s. 9(1) of the *Electoral Act 2017*, is the "governing body" of the Commission for *GSF Act* purposes and is therefore the accountable authority for the Electoral Commission (see, especially, s. 9(3), Sch. 1 cl. 16, *Electoral Act*).
56. Section 5.5 of the *GSF Act* relevantly provides that:
- "(2) A government officer must ensure that the officer's expenditure of money for the State or a GSF agency is in a way that is authorised.
 - (3) Expenditure of money is in a way that is authorised if it is done:
 - (a) in accordance with a delegation or subdelegation from a person with power regarding the expenditure of the money, or
 - (b) under the authority of this Act or any other law."

¹⁹ Different ministers also receive appropriations for other "Special Offices" under Part 4 of the *Appropriation Act 2019*.

²⁰ Section 2.4(1)(a), *GSF Act*.

²¹ Relevantly defined to mean the person who is the chief executive officer (however described) of the agency or otherwise responsible for the agency's day to day management, but not its governing body (if any) s. 1.4, *GSF Act*.

57. The expression "government officer" is defined broadly, and includes the head of a GSF agency; a person employed in or by a GSF agency; a person who is a statutory officer and not a Public Service employee under the *Government Sector Employment Act 2013* but who is the head of, or exercises functions in relation to, a Public Service agency; and a person working for a GSF agency by way of secondment from another GSF agency: s. 2.9(1), paras (a)-(d). A government officer who has any of these relationships with a GSF agency (or who is prescribed by the regulations) is a "government officer for a GSF agency": s. 2.9(3).
58. A "government officer" is not, relevantly, either a Minister or Parliamentary Secretary, or a person who is a member of the governing body of a GSF agency but not employed in or by the agency or any other GSF agency: s. 2.9(2), paras (b) and (h).

Delegation of appropriation functions

59. Part 9 Div. 2 of the *GSF Act* relates to delegations. A "**delegable function**" includes "a function that is conferred or imposed on a person or other entity by or under this Act or any other legislation (including an annual Appropriation Act) regarding the expenditure of money (including out of the Consolidated Fund)": s. 9.7(1)(b), *GSF Act*. The note to s. 9.7(1) indicates that, for example, the authority given to a Minister by an Annual Appropriation Act to expend money forming part of the Consolidated Fund is a delegable function covered by paragraph (b).
60. A "**separate GSF agency delegable function**" of a Minister in relation to a separate GSF agency, similarly, includes a "function that is conferred or imposed on the Minister by or under this Act or any legislation (including an *Annual Appropriation Act*) regarding the expenditure of money (including out of the Consolidated Fund) for or in respect of the services of the agency": s. 9.7(2)(a), *GSF Act*. The note to s. 9.7(2) indicates that, for example, paragraph (a) covers both appropriations given to a Minister for the services of a specific separate GSF agency or appropriations given for the services of a cluster or other grouping of agencies to which a separate GSF agency belongs.
61. The list of persons to whom a Minister may delegate a "delegable function" (in relation to a GSF agency which is *not* a separate GSF agency) is longer than the list of persons to whom a Minister may delegate a "separate GSF agency delegable function" (in relation to a *separate GSF agency*).
62. As outlined above, the ICAC, the Electoral Commission and the Ombudsman's Office are each "separate GSF agencies". A Minister may delegate any of the Minister's *separate GSF agency delegable functions* in relation to a separate GSF agency to: (s. 9.9(3), *GSF Act*; emphasis added)
- "(a) the accountable authority for the agency or
(b) a government officer (or government officer of a kind) **of the agency.**"
63. The LECC is, as outlined above, a GSF agency, not a separate GSF agency. A Minister may delegate any of the Minister's delegable functions²² to:

²² Except separate GSF agency delegable functions, or information sharing functions under Div. 9.1.

- "(a) another Minister, or
- (b) the accountable authority for a GSF agency for which the Minister is the responsible Minister, or
- (c) a government officer (or a government officer of a kind) of a GSF agency for which the Minister is the responsible Minister, or
- (d) the Secretary of a Department, or
- (e) a GSF agency for which the Minister is the responsible Minister that is a person, or
- (f) any other entity (or an entity of a kind) prescribed by the regulations."²³

Terms and conditions on a delegated appropriation function

64. Where a Minister delegates a function regarding the expenditure of money out of the Consolidated Fund under the authority of an annual Appropriation Act, the Minister "may impose terms and conditions on the delegation", and also on any subdelegation, "so as to limit the amounts and purposes for which expenditures of money are permitted under the delegation" or subdelegation: ss. 5.2(1), (2), *GSF Act*.
65. Any such delegation must be in writing: see s. 49 of the *Interpretation Act 1987*, which includes a number of important provisions relating to the form of delegations.
66. Section 5.2(3) provides that: (emphasis added)
- "The Minister must ensure that the terms and conditions imposed are **not inconsistent** with the **purposes for which the appropriation was given**."
67. Section 5.2(4) provides that, to avoid doubt, the delegate or subdelegate is authorised to make expenditures of money, but only in accordance with the terms and conditions (if any) that the Minister has imposed.
68. Section 5.2 does not limit "any *other kinds* of terms or conditions" that can be imposed on the delegation or subdelegation²⁴ of appropriation expenditure functions under Div. 9.2 (including under s. 49 of the *Interpretation Act* in its application to delegations or subdelegations under Div. 9.2²⁵): s. 5.2(5). The restriction imposed by s. 5.2(3) would however, in my view, apply to terms and conditions on any delegation which have an effect "so as to limit the amounts and purposes for which expenditures" of the appropriated money are permitted under the delegation.
69. I also note that the fact that s. 5.2(3) requires the Minister to ensure that the terms and conditions imposed are "not inconsistent with the purposes for which the appropriation was given" aligns with the fact that s. 5.2 is not a "paramount" provision within the meaning of s. 1.8 of the *GSF Act*. As a result, s. 5.2 is to be construed on the basis that it is a provision which is "not intended to limit or exclude the operation of any other legislation": s. 1.8(1), *GSF Act*.

²³ None of the regulations made for the purposes of this provision are presently relevant.

²⁴ I will, for convenience, refer only to delegations at this point, but (unless indicated) the situation in relation to subdelegations would be the same.

²⁵ Section 49 of the *Interpretation Act* relates to delegation powers in any Act or instrument, and includes various facilitative provisions.

Question 2(a) – whether the Minister may reduce the funds available to an agency

70. I am asked whether it would be open for a minister (including the Premier) to apply an “efficiency dividend”, or similar mechanism, to *reduce* the availability of funds appropriated to the minister for the services of these Part 4 agencies under the annual Appropriation Acts.
71. In my view a minister to whom such funds had been appropriated would not ordinarily have any power to reduce the total sum of the appropriated sums available to the agency. The total sums have been appropriated by the Legislature in an Appropriation Act, and an express source of power would be required in order to reduce the amounts of those appropriated sums. (I have discussed the operation of s. 25 of the *Appropriation Act 2019* above which, in the circumstances in which it applies, enables money that has been “identified as surplus” to one purpose to be paid for another purpose. Sums appropriated for the purposes of Part 4, however, “may only be paid out for any of the purposes specified in Part 4”: s. 25(7).)
72. The minister could, however, impose terms and conditions on a delegation under s. 5.2 of the *GSF Act* which could, for example, limit the ability of certain officers to expend funds, and limit the circumstances in which those funds may be expended, on behalf of the agency. I have outlined above (at [62]–[63]) the persons to whom such a delegation may be made, which differ depending on whether the GSF agency is a “separate GSF agency”.
73. I discuss the potential limits on the scope of these terms and conditions in my answer to Question 2(b) below.

Question 2(b) – whether any other sources of control over expenditure of agencies

74. The second part of your question asks whether, after funding has been appropriated in a way that complies with the *Constitution Act*, a minister (including the Premier) has legal authority/discretion to exercise control over the expenditure of integrity agencies.

Section 5.2(3), GSF Act – terms and conditions of a delegation limiting expenditure

75. Section 5.3 of the *GSF Act* requires that the minister to whom funds have been appropriated ensures that any terms and conditions of a delegation, which may have the effect of limiting the amounts and purposes for which expenditures of moneys are permitted, “are not inconsistent with the purposes for which the appropriation was given”.
76. The “purposes for which the appropriation was given” would in my view (as outlined above) be assessed by reference to the substantive statutory functions of the agencies. The principal functions of the Ombudsman, the ICAC and the LECC, could, in very broad terms, be described as involving scrutiny of the activities of the Executive Government.
77. The principal functions of the Electoral Commission and the Electoral Commissioner involve, in equally broad terms, administering the electoral process and the funding of political parties (and other participants) under the *Electoral Funding Act*. The High Court has recognised that the contemporary operation of a system of responsible government in this State reflects the

significant role of modern political parties, one of which (or a coalition of which) ordinarily "controls" the Legislative Assembly: see *Egan v Willis* (1998) 195 CLR 424 at 449; [1998] HCA 71 at [38]. The Court also recognised the "conventional requirement" that Ministers are chosen from amongst the Members of either House (195 CLR 424 at 449; [1998] HCA 71 at [36]). As a result, the exercise of the functions of the Electoral Commissioner and Electoral Commissioner involves matters of interest to Ministers, as members of political parties.

78. It is plain from the legislation establishing each of the agencies, and the related statutory officers, that they are independent from ministerial control in the exercise of their statutory functions. I prefer the view, in the context outlined above, that the "purposes for which the appropriation was given" to these agencies not only include the exercise of the functions allocated to these agencies, but - subject to any relevant statutory exceptions - also include the exercise of those functions by these agencies *in a manner which is independent* of the Executive Government.
79. I therefore do not consider that a Minister could impose terms and conditions that operated in effect as terms and conditions on the *exercise* of a statutory function, in circumstances where the Minister has no power to direct or control the exercise of that function. A term or condition of a delegation could not, for example, purport to prevent expenditure on a particular investigation, or to require ministerial approval for expenditure on a particular investigation, when a statutory body has the power to initiate investigations on its own motion.
80. The requirement in s. 5.3 applies only a delegation made by a Minister under the *GSF Act* "so as to limit the amounts and purposes for which expenditures of money are permitted". It does not limit "any *other kinds of terms or conditions*" that can be imposed on the delegation of appropriation expenditure functions under Div. 9.2 of the *GSF Act*. It would also, of course, not apply to limit the exercise of other ministerial functions under the *GSF Act*, or under any other Act.

Section 2.5(2) GSF Act – whether separate GSF agencies required to comply with Treasurer's directions, etc

81. Section 2.5(2) of the *GSF Act* is, however, significant. That provision applies only to a *separate GSF agency* (and to the accountable authority for the agency and its government officers). The ICAC, the Electoral Commission, and the Ombudsman's Office are, as outlined above, each a separate GSF agency.
82. Section 2.5(2) provides that: (emphasis added)
"Despite any other provision of this Act, a separate GSF agency (and the accountable authority for the agency and its government officers) are each not required to comply with a **relevant Treasurer's requirement** or **Minister's information requirement** if the accountable authority considers that the requirement is **not consistent with the exercise of the statutory functions** of the agency."
83. A "relevant Treasurer's requirement" is defined in s. 2.5(3) of the *GSF Act* as meaning:

- "(a) a provision of the Treasurer's directions that a separate GSF agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section, or
- (b) any other direction, request or other requirement given or made by the Treasurer under this Act that a separate GSF agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section."
84. A "Minister's information requirement" means "any direction, request or other requirement given or made by a Minister under this Act for the provision of information about a separate GSF agency that the agency (or the accountable authority for the agency or its government officers) would be required to comply with but for this section": s. 2.5(4).
85. The accountable authority for a separate GSF agency must ensure that a written document (a "*non-compliance reasons statement*"), stating the reasons for any non-compliance with a relevant Treasurer's requirement or Minister's information requirement, is: (s. 2.5(5), *GSF Act*)
- "(a) given to the Treasurer or other Minister who gave or made the requirement as soon as practicable after it is decided not to comply, and
- (b) included in the annual reporting information for the separate GSF agency for the annual reporting period during which the non-compliance occurred or reported in any other way prescribed by the regulations."
86. The regulations may provide for or with respect to the tabling in Parliament of a "non-compliance reasons statement": s. 2.5(6).
87. Section 2.5(2) does not apply to the LECC, because it is not a separate GSF agency.
88. It is not possible, in the available time, to identify the various "relevant Treasurer's requirements", or "Minister's information requirements", or any other ministerial powers under the *GSF Act*, which might potentially have an impact on the expenditure of funds by the agencies. I would only add that all such functions must of course be exercised lawfully, having regard to the specific statutory requirements for each function, and in accordance with applicable administrative law principles.

Question 3 – legislative intention if agency considers it is not sufficiently funded

89. Your final question asks how the relevant legislation anticipates the resolution of a situation where an integrity agency considers it is not sufficiently funded.
90. I note that each of the four agencies is subject to parliamentary oversight by a committee. That is one parliamentary forum in which the adequacy of funding to these agencies could be considered. These matters could also of course be considered in Budget Estimates inquiries, or other committee inquiries, and in each House.
91. Each agency is also required to prepare an annual report, including audited financial reports, for tabling in Parliament. This is another significant mechanism for parliamentary consideration of the operations of these agencies.

92. I have attempted to outline in this advice the principal legal aspects of the present funding arrangements for these agencies. These arrangements, as a practical matter, will inevitably involve discussions between these agencies and the Executive Government in relation to appropriate funding for these agencies. It is not otherwise possible for me to comment on the current practices.
93. I note, however, that these existing arrangements are consistent with the general principle that it is the Government of the day that initiates or moves to increase parliamentary appropriations and taxation. This constitutional and parliamentary principle has been described as embodying "the financial initiative of the Crown", as discussed at [19] above.



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FINANCIAL ARRANGEMENTS & MANAGEMENT PRACTICES IN INTEGRITY AGENCIES ADVICE 2

Executive summary

1. In my first advice I answered three questions relating to the funding and expenditure arrangements of five "integrity agencies" and statutory officers: the Independent Commission Against Corruption ("ICAC"), the Law Enforcement Conduct Commission ("LECC"), the Ombudsman, and the Electoral Commissioner and the Electoral Commission. In this advice I answer three further questions relating to the extent of the independence of these agencies and officers.

Question 4: Current legal mechanisms to ensure independence of integrity agencies from executive direction or control

2. The Acts which constitute these agencies and officers confirm that they are not subject to the direction and control of any minister in the exercise of their statutory functions. A minister (or other member of the executive, such as an employee of a public service agency) would require clear statutory authority in order to "direct" or "control" these officers and agencies in relation to the exercise of any particular statutory function.
3. I have identified four additional legal mechanisms which help ensure these agencies and officers are able to carry out their statutory functions without undue influence from the executive.
4. First, each statutory officer has security of tenure for the term of his or her appointment, subject to removal from office by the Governor; either on an address of both Houses of Parliament, or for incapacity, incompetence or misbehaviour of the statutory officer. Secondly, these agencies and officers are subject to oversight by parliamentary committees. Thirdly, statutory decisions made by these agencies and officers would generally be subject to judicial review (unless the decisions are not justiciable or if a privative clause applies), including on a ground that a ministerial direction to the agency or officer was invalid. Fourthly, an agency or statutory officer would also be able to obtain independent legal advice from the Solicitor General, or from me, if concerned about the proper exercise of any of their statutory functions.

Question 5: extent to which agencies required to comply with government policy

5. Government policy may be reflected in Acts and delegated legislation; and in lawful directions, orders, etc, made under them. In these cases the government policy is binding and has the force of law. Whether these agencies and officers are required to comply with a "government policy", in this sense, will involve construction of the applicable Act, regulation, direction or order.
6. Staff are employed under the *Government Sector Employment Act 2013* ("the *GSE Act*") in separate Public Service agencies to enable the Electoral Commissioner and the Electoral

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Commission; the Ombudsman; and the LECC; to exercise their functions. Sections 30 and 84 of the *GSE Act* may, to some extent, support ministerial directions to the heads of these separate Public Service agencies in relation to staffing and employment matters. In my view, however, there is nothing in the staffing arrangements under the *GSE Act* which confers any power on the relevant ministers to direct staff *in the conduct of their work* in enabling the Ombudsman, the Electoral Commission and Commissioner, and the LECC, to exercise their functions.

7. I also do not think that general principles of ministerial responsibility – arising from the fact ministers have been allocated the administration of the Acts which constitute these statutory agencies and officers and confer functions on them – provide a source of power to direct these agencies and officers in the exercise of their functions. This conclusion applies equally to the ICAC, which is not generally subject to the *GSE Act*.

Question 6 – effect of the cluster arrangements

8. Your final question asks (to the extent not covered by my answer to Question 5) whether the agencies and statutory officers are required to comply with administrative requirements imposed by the cluster arrangements.
9. In my view, a “cluster” is a term of reference with no established legal meaning or effect. I am not aware of any legal basis by which the concept of a “cluster” could be said to have any relevant legal significance, except to the extent these arrangements are reflected in the annual Appropriation Acts. (I considered the legal significance of the operation of the “cluster” arrangements as reflected in the Appropriation Acts and the annual budget process in my first advice).

Analysis

Question 4: Current legal mechanisms to ensure independence of integrity agencies from executive direction or control

10. You ask what legal mechanisms are currently in place to protect the ability of these agencies and officers to carry out their statutory functions without unlawful *direction or control* from a minister or public service agency.

Independence of these agencies and officers

11. The Acts which constitute these agencies and officers confirm that they are not subject to the direction and control of any minister in the exercise of their statutory functions:
 - (a) ss. 10(4) and 12(4) of the *Electoral Act 2017* confirm that the Electoral Commission and the Electoral Commissioner are not subject to the control or direction of the Minister in the exercise of their functions under the *Electoral Act* or any other Act;
 - (b) the independence of the ICAC is confirmed in the objects provision in s. 2A of the *Independent Commission Against Corruption Act 1988*, which refers to the constitution of the ICAC “as an independent and accountable body”;

- (c) s. 22 of the *Law Enforcement Conduct Commission Act 2016* provides that the LECC and its Commissioners are not subject to the control or direction of the Minister in the exercise of their functions; and
- (d) whilst there are no equivalent specific provisions in the *Ombudsman Act 1974*, it is plain from the Act as a whole (and from the provisions relating to the appointment and removal of the Ombudsman by the Governor) that the Ombudsman is not subject to the direction and control of any minister.
12. A minister (or other member of the executive, such as an employee of a public service agency) would therefore require clear statutory authority in order to “direct” or “control” these officers and agencies in relation to the exercise of any particular statutory function. I discuss this, and related issues about the application of government policy, further in my answers to Questions 5 and 6.
13. I also note, as another aspect of their independence, that the ICAC, the LECC and the Ombudsman do not depend upon any referral from a minister or government agency before being able to exercise their investigative powers¹.
14. Another important manifestation of the independence of these bodies and officers is their capacity to report directly to Parliament on the exercise of their functions².
15. I outline below four additional legal mechanisms which help ensure these agencies and officers are able to carry out their statutory functions without undue influence from the executive.

Removal and remuneration of heads of integrity agencies from office

16. Each statutory officer has security of tenure for the term of his or her appointment, subject to removal from office by the Governor:
- (a) *upon the address of both Houses of Parliament*, in respect of the Ombudsman, the Chief Commissioner and the two other Commissioners of the ICAC, and a member of the Electoral Commission (including the Electoral Commissioner);³ or
- (b) *for incapacity, incompetence or misbehaviour*, in respect of the members (the Chief Commissioner and the two other Commissioners), Assistant Commissioners and alternate Commissioners of the LECC; and an Assistant Commissioner of the ICAC.⁴

¹ I also note that both s. 20(1) of the *ICAC Act*, and s. 51(2)(b) of the *LECC Act* expressly provide that these agencies may commence investigations on their own initiative.

² See, for example, *ICAC Act* ss. 74; 75-77; *LECC Act* ss. 132-133; *Ombudsman Act* s. 31; *Electoral Act* s. 271.

³ See s. 6(5) of the *Ombudsman Act 1974*, cl. 7(2) of Sch. 1 to the *Independent Commission Against Corruption Act 1988*, cl. 8 of Sch. 1, and cl. 4 of Sch. 2, to the *Electoral Act 2017*.

⁴ See s. 18(1), cl. 1(7) of Sch. 1 to the *Law Enforcement Conduct Commission Act 2016*; cl. 7(3) of Sch. 1 to the *Independent Commission Against Corruption Act 1988*.

Parliamentary oversight

17. These agencies and officers are subject to oversight by various parliamentary committees, including:
 - (a) the non-statutory Joint Standing Committee on Electoral Matters, which inquires into and reports on matters referred to it that relate to electoral laws (including the Electoral Commission);⁵
 - (b) the statutory Committee on the ICAC, which monitors, reviews, reports and inquires into the functions of, and matters appertaining to, the ICAC;⁶ and
 - (c) the statutory Committee on the Ombudsman, the LECC and the Crime Commission, which monitors, reviews, reports and inquires into the functions of, and matters appertaining to, the Ombudsman and the LECC.⁷
18. I think that an agency or officer could raise any concerns about the independent exercise of their functions during the inquiry process with the relevant parliamentary committee.
19. I note that both the ICAC and the LECC are also overseen by an independent Inspector.

Judicial review of administrative decisions made by integrity agencies

20. Statutory decisions made by these agencies and officers would generally be subject to judicial review (unless the decisions are not justiciable or a privative clause applies). A court may, for example, declare a decision invalid and set it aside if agencies or officers exercised statutory powers in the following circumstances:
 - (a) if the statutory precondition to the exercise of the agency's power had not been enlivened prior to its purported exercise to comply with a direction from the minister or a public sector agency: see for example *Bosnjak Bus Service v Commissioner of Motor Transport* (1970) 92 WN (NSW) 1003 at 1014-1015. If, for example, the Electoral Commissioner were not "satisfied on reasonable grounds" that one of the circumstances set out in s. 68(2)(a)-(d) of the *Electoral Act 2017* applied, the Electoral Commissioner could not purport to cancel the registration of a party under s. 68(2) on a ministerial direction alone; or
 - (b) if the minister or public sector agency did not have the power to require the agency to exercise its statutory power in a particular way, and the agency exercised its power in that way to comply with the direction without turning its own mind to the exercise of that power: see for example *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 429-430. Without express statutory authority,⁸ whether or not a minister can direct an agency in

⁵ See NSW, Legislative Assembly, *Resolution passed 18 June 2019*, 57th Parliament, Votes and Proceedings No.10, Item 13; and NSW, Legislative Council, *Resolution passed 19 June 2019*, 57th Parliament, Minutes No. 10, Items 11 and 18.

⁶ See ss. 63-64 of the *Independent Commission Against Corruption Act 1988*.

⁷ See ss. 31A-31B of the *Ombudsman Act 1974*, and ss. 130-131 of the *Law Enforcement Conduct Commission Act 2016*.

⁸ I note that none of the Acts constituting the ICAC, the LECC, the Ombudsman or the Electoral Commission and Commissioner expressly confer a power of direction or control on a minister. An example of such a provision in another Act is s. 13 of the *Protection of the Environment Administration Act 1991*.

the exercise of a statutory discretion depends upon a variety of considerations including the particular statutory function, the nature of the question to be decided, the character of the decision-maker and the way in which the statutory provisions may bear upon the relationship between the minister and the decision maker⁹. If, for example, the relevant minister purported to direct the LECC to assemble evidence under s. 28(1)(a) of the *Law Enforcement Conduct Commission Act 2016* and the LECC did so at the minister's behest, such an action by LECC would arguably be invalid by operation of s. 22, which expressly provides that the LECC is not "subject to the control or direction of the Minister in the exercise of ... [its] functions".

Independent legal advice

21. An agency or statutory officer would also be able to obtain independent legal advice from the Solicitor General, from me, or from an external lawyer, if concerned about the proper exercise of their statutory functions. It may in some circumstances be appropriate for the agency to seek legal advice jointly with the relevant minister or Public Service agency¹⁰.

Question 5: extent to which agencies required to comply with government policy

22. You ask to what extent these agencies and officers are required to comply with government policy.

Introduction

23. There may, of course, be instances in which these agencies and officers will *voluntarily* comply with government policy, where there are no legal impediments to doing so. I would simply note that when an agency or officer, in exercising a statutory power, voluntarily proposes to take into account a government policy, it would always be necessary to consider whether the statute would permit the policy to be taken into account: see above at [20]. It is beyond the scope of this advice to consider further the nature of these administrative law limits. It is also not a matter for me to comment on the appropriateness of these agencies and officers choosing to apply government policy in circumstances where it is legally open (but not mandatory) to do so.
24. Your question instead asks me to consider the extent to which these agencies and officers can legally be *required*, or *compelled*, to comply with government policy.
25. The nature of "government policy" may vary greatly in the level of generality with which it is expressed¹¹. In some instances a policy may confer significant discretion on the person required to comply with it. In other instances a policy may effectively dictate the outcome in a particular

⁹ See *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; [2015] HCA 1; at 537, [37] (French CJ).

¹⁰ I note that public sector agencies to whom Premier's Memoranda apply are expected to defer to my opinion; I in turn defer to the opinion of the Solicitor General. See *NSW Government Core Legal Work Guidelines* attached to Premier's Memorandum M2016-04.

¹¹ See *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* ("PSA Case") [2012] HCA 58; (2012) 250 CLR 343; at [39]-[40], 363-364 (French CJ).

case (where a particular case comes within a class or category to which the policy applies). In this advice, for convenience, I will focus on whether these agencies are subject to ministerial direction. This approach should, however, be understood on the basis that the extent to which a requirement to apply a government policy may influence or dictate the outcome in any particular case will vary.

26. It is also convenient in this advice to focus on the extent to which these agencies are subject to *ministerial* direction (including a requirement to apply a policy, in the sense outlined above). My use of the expression “ministerial direction” in this advice does not necessarily assume that ministers would personally give any such direction. Ministers are not of course expected to exercise all their functions personally, and the functions of a minister may *devolve* (under what is commonly referred to as the *Carltona* doctrine) to public servants in a department or other agency responsible to a minister. Ministers may also, where there is power to do so, delegate the exercise of powers.

Government policy reflected in legislation

27. In many instances “government policy” is reflected in Acts, or in delegated legislation such as regulations. As French CJ has observed, all legislation “reflects policies attributable to the legislature but, in many if not most cases, they are policies originating with the executive government as the proponent of most statutes enacted by the parliament”¹². Justice Heydon has also noted that, in a system of responsible government, all legislation enacted substantially in conformity with a Bill presented to the legislature by the Executive may be said to “give effect to ... government policy dictated by the executive”¹³.
28. Justice Heydon also observed, in relation to regulations, that:
- “[W]hen legislation enacted in conformity with the will of the Executive contains regulation-making power, the regulations, which are themselves a form of legislation and which are subject to parliamentary scrutiny and the power of disallowance, may equally be said to ‘give effect to ... government policy dictated by the executive’”¹⁴.
29. Once a “policy” is reflected in statutes and regulations, “it is binding as a matter of law”¹⁵.
30. The exercise of discretionary powers conferred on a person or body *by or under an Act* may also constitute giving effect to government policy.
31. Agencies and statutory officers are, of course, required to comply with any government policy reflected in statutes or regulations, or in lawful directions, orders, etc, made under them. Whether these agencies are subject to such directions in any particular case will be a question of statutory construction. In my first advice, for example, I considered (at [81]-[88]) the extent to

¹² *PSA Case* [2012] HCA 58; (2012) 250 CLR 343; at [44], 365.

¹³ *PSA Case* at [69], 372. The expression “give effect to ... government policy dictated by the executive” reflected a submission made in that case.

¹⁴ *PSA Case* at [69], 372, references omitted.

¹⁵ *PSA Case* at [69], 372. See also at [58], 368 (Hayne, Crennan, Kiefel and Bell JJ); and at [43], 365 (French CJ).

which these agencies and officers could be required to comply with Treasurer's directions issued under the *Government Sector Finance Act 2018* ("the *GSF Act*").

32. You have not asked me to address any specific legislative provisions, or any specific government policies, although I would of course be pleased to do so if required in a subsequent advice. I will, however, consider two examples of specific legislative provisions.

NSW Procurement Board directions

33. The NSW Procurement Board may issue directions to "government agencies" regarding the procurement of goods and services by and for government agencies: *Public Works and Procurement Act 1912* ("the *PWP Act*"), s. 175(1).
34. The expression "government agency" is defined broadly in s. 162 of the *PWP Act*, to mean any of the following:
- "(a) a government sector agency (within the meaning of the *Government Sector Employment Act 2013*),
 - (b) a NSW Government agency,
 - (c) any other public authority that is constituted by or under an Act or that exercises public functions (other than a State owned corporation),
 - (d) .."
35. A direction or policy may apply to government agencies generally, or to a particular government agency: s. 175(2). A government agency is required to exercise its functions in relation to the procurement of goods and services in accordance with any policies and directions of the Board that apply to that agency: s. 176(1)(a).
36. In my view each of the following is a "government agency" within the meaning of s. 162 of the *PWP Act*, and is therefore generally required to comply with any applicable policies and directions of the Board:
- (a) the Electoral Commission - because it is a statutory body representing the Crown, and therefore a "NSW Government agency"¹⁶;
 - (b) the ICAC and the LECC - because each is a "public authority that is constituted by or under an Act"; and
 - (c) the Ombudsman's Office, the Office of the LECC, and the Electoral Commission Staff Agency – because each is a "government sector agency" within the meaning of the *GSE Act*.

Public administration and ministerial responsibility

37. I will also address the extent to which the *GSE Act* may require these agencies and officers to comply with government policy. I also consider, more generally, the extent to which agencies and officers may be required to comply with government policy without specific statutory

¹⁶ *Electoral Act* s. 8(2); and s. 13A(4).

authority. This requires consideration of the nature of ministerial responsibility and public administration in this State.

38. There is a helpful history of public administration set out in the *Laws of Australia*, in discussing the nature of a “public office”¹⁷. The authors define a public office as a position or post that continues without regard to the identity of the holder from time to time, and in which the public is interested, particularly if paid out of public funds. They then state that:¹⁸

“Before the 19th century, government administration was performed through ‘public officers’. Persons were appointed to public office by the Monarch exercising prerogative power. The office was associated with various powers, duties and emoluments which were strictly defined. The individual was not an employee and was subject to little, if any, direction. Public office was often treated as a property right.

This system was greatly altered in the nineteenth century primarily due to the inefficiency of the previous system, and due to the development of the concept of Ministerial responsibility. Instead, a system of public administration was developed involving officials working in a hierarchical departmental system, ultimately answerable to a Minister. The pre-nineteenth century public officer was not an employee of the Crown. The holder of an office within a hierarchical bureaucracy is an employee, although it remains unclear whether the employer-employee relationship is contractual in nature.

There remain some public officers whose position is either the same as or similar to those existing prior to the nineteenth century. These office-holders are not employees. The most obvious are Ministers of the Crown and judges. The class is not limited to these, although it is not clear what other office-holders (and, in particular, holders of statutory offices) might fall within the category.”

39. Ministerial responsibility (as outlined further below) forms part of the constitution of this State. The concepts of ministerial responsibility and responsible government are not fixed, and have evolved over time, due to developments in legal and constitutional principle and as a result of historical practice.
40. Although it cannot be defined precisely, a system of responsible government traditionally has been considered to encompass “the means by which Parliament brings the Executive to account”¹⁹. Although there is no express reference to responsible government in the *Constitution Act 1902*, the principle operates as part of the “Constitution of NSW”²⁰. Responsible government is derived from “a combination of law, convention and political practice”²¹.
41. One of the principles of responsible government is that a minister is responsible and accountable to Parliament for the conduct of his or her department²². Further, the relationship between a minister and his or her subordinate agencies must countenance the minister having the capacity

¹⁷ This history appears to be based primarily on the comprehensive historical and legal analysis in Selway, B., “Of Kings and Officers: The Judicial Development of Public Law” (2005) 33 *Federal Law Review* 187, especially at 189-196; 224.

¹⁸ *The Laws of Australia*, Thomson Reuters Professional (Australia) Ltd, at [19.3.34] (footnotes and internal references omitted): accessed online on 26 March 2020.

¹⁹ *Egan v Willis* (1998) 195 CLR 424 at 451, [42] (Gaudron, Gummow and Hayne JJ).

²⁰ *Egan v Chadwick* (1999) 46 NSWLR 563 at 568 (Spigelman CJ).

²¹ *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 660 (Gleeson CJ).

²² *Egan v Chadwick* (1999) 46 NSWLR 563 at 570 (Spigelman CJ); *Egan v Willis* (1999) 195 CLR 424 at 452 (Gaudron, Gummow and Hayne JJ).

to direct the affairs of the department; and the department having a corresponding obligation to obey. A minister conventionally enjoys a broad latitude to issue directions concerning the activities of a department responsible to the minister, such as to require access to certain documents held by the department, for the purposes of exercising the minister's functions and portfolio responsibilities.

42. These aspects of ministerial responsibility are of course subject to any contrary legislative provision. A minister may not generally, for example, have power to direct the head of a department in the exercise of a statutory function conferred upon that officer (as discussed further above at [20]).
43. The concept of ministerial responsibility²³ has generally developed, as indicated above, in a context of a system of public administration traditionally organised in hierarchical departments.

"Integrity agencies"

44. As indicated in my first advice (at [76]-[78]), the principal functions of the Ombudsman, the ICAC and the LECC, could, in very broad terms, be described as involving scrutiny of the activities of the executive government. The principal functions of the Electoral Commission and the Electoral Commissioner are different, in that they involve, in equally broad terms, administering the electoral process and the funding of political parties (and other participants) under the *Electoral Funding Act*. The exercise of the functions of the Electoral Commissioner and Electoral Commissioner involves matters of interest to ministers, as members of political parties. It is plain from the legislation establishing each of the agencies, and the related statutory officers, that they are independent from ministerial control in the exercise of their statutory functions. I have also noted aspects of the institutional independence of these agencies and officers at [11], [16] and [20] above.
45. It is not necessary to express a view on the extent to which it is legally appropriate to label any or all of these agencies and officers as "integrity" or "oversight" agencies". On any view, however, there are some significant differences between the roles of the ICAC, the LECC and the Ombudsman on the one hand; and the roles of the Electoral Commissioner and the Electoral Commission on the other.
46. I note, in any case, that the relationship of "oversight" or "integrity" bodies" to the traditional branches of government is complex and unsettled. In a recent speech²⁴, Bathurst CJ discussed the rise and continuing expansion of "independent institutions that explicitly embody this

²³ The relevant aspect for present purposes is *individual* ministerial responsible. Collective ministerial responsibility refers either to the collective responsibility of the ministerial government to maintain the confidence of the Legislative Assembly; or to the related sense of collective ministerial responsibility for the decisions of Cabinet. See generally the judgment of Spigelman CJ in *Egan v Chadwick* (1999) 46 NSWLR 563.

²⁴ The Hon T Bathurst AC, Chief Justice of NSW, "New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies", The James Spigelman Oration 2017, 26 October 2017; available at: <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst20171026.pdf>.

integrity function”, noting that, since the 1970s, Australia has seen a proliferation of statutory oversight bodies.

47. Bathurst CJ noted (at [4]) that Professor John McMillan had identified the primary characteristics of such bodies as being that they:
 - (a) are established by statute;
 - (b) are independent and not subject to government direction;
 - (c) possess extensive statutory powers to conduct investigations, either upon complaint or as an own motion investigation; and
 - (d) have the power to produce reports which are often published, either by the body themselves, through a minister, or through Parliament.
48. Bathurst CJ noted that, of the examples of such institutions cited by Professor McMillan, with the exception of royal commissions and auditor-generals, none existed before 1974, when the office of the NSW Ombudsman was established.
49. Bathurst CJ stated that, “[w]ithout a doubt”, the rise of these new integrity bodies “represents a disruption to the traditional constitutional framework”. Whilst there are arguments for placing these oversight bodies in any of the three traditional branches of government (legislative, executive and judicial), they are most commonly placed in the executive branch. The Chief Justice noted, however, several arguments against placing these bodies in the executive branch²⁵.
50. Bathurst CJ also noted (at [13]) arguments against regarding these bodies as forming a “fourth branch” of government, including the fear that a fourth branch would stand outside the traditional separation of powers, and therefore outside the system of mutual accountability contained in our constitution.

Public administration under the GSE Act

51. Section 47A of the *Constitution Act* provides that persons employed by the Government of New South Wales in the service of the Crown are to be employed in the Public Service of New South Wales under the *GSE Act* or in any other service of the Crown established by legislation.
52. The Public Service consists of those persons who are employed under Part 4 of the *GSE Act* by the Government of New South Wales in the service of the Crown: s. 20, *GSE Act*.
53. Section 21(2) of the *GSE Act* provides that persons may be employed in the Public Service: (emphasis added)
 - (a) to enable ministers to exercise their functions,
 - (b) to **enable** statutory bodies or statutory officers to **exercise their functions**,

²⁵ At [10]-[11]. His Honour also noted difficulties in placing these agencies within the legislative branch (at [12]).

- (c) for any other purpose.
54. Section 104 of the *ICAC Act*, which provides that the Chief Commissioner of the ICAC may appoint the Chief Executive Officer and such other staff as may be necessary to enable the Commission to exercise its functions. The *GSE Act* does **not apply** to such staff (see s. 5(1)(d), *GSE Act*, although they are “taken” under the *ICAC Act* to be employed by the Government of NSW in the service of the Crown: s. 104, *ICAC Act*.
55. By contrast, staff are employed in the Public Service to enable the Electoral Commissioner and the Electoral Commission; the Ombudsman; and the LECC; to exercise their functions²⁶. Each of the following is a “separate Public Service agency”, within the meaning of s. 22(1)(c), listed in Pt 3 of Sch. 1 of the *GSE Act*:
- (a) the “Office of the Law Enforcement Conduct Commission”;
 - (b) the “New South Wales Electoral Commission Staff Agency”; and
 - (c) the “Ombudsman’s Office”.
56. The **head** of each agency, also listed in Pt 3 of Sch. 1 of the *GSE Act*, is, respectively:
- (a) the Chief Executive Officer of the LECC;
 - (b) the Electoral Commissioner; and
 - (c) the Ombudsman.
57. The office of head of a Public Service agency (other than a Department) is established by s. 28 of the *GSE Act*, unless it is a statutory office created by another provision of the *GSE Act* or by any other Act. The Electoral Commissioner and the Ombudsman are each treated as a “statutory office” created by another Act (as indicated by an asterisk in Pt 3 of Sch. 1). By contrast, the Chief Executive Officer of the LECC is not a statutory office: the Chief Commissioner of the LECC is to exercise the employer of the Government in relation to the Chief Executive Officer. The head of a Public Service agency (other than a Department) may, subject to the *GSE Act* and any other Act or law, exercise on behalf of the Government the “employer functions” of the Government in relation to the employees of the agency: s. 31(1), *GSE Act*. The “employer functions” of the Government are all the functions of an employer in respect of employees, including (without limitation) the power to employ persons, to assign their roles and to terminate their employment: s. 31(2), *GSE Act*.
58. Section 50C of the *Constitution Act* authorises the Governor, by administrative arrangements orders, to specify the minister to whom a Public Service agency is responsible. The current Administrative Arrangements orders identify the particular ministers to whom Departments, and executive agencies related to a Department, are responsible²⁷. In the case of a Public Service

²⁶ See also s. 15(1) of the *Electoral Act 2017*, which specifically requires that the staff employed in the Public Service to enable the Commission and the Commissioner to exercise their functions be employed “in a separate Public Service agency”. Section 21(1) of the *LECC Act* imposes a similar requirement. There is no equivalent requirement in s. 32(1) of the *Ombudsman Act*.

²⁷ See the Administrative Arrangements (Administrative Changes—Public Service Agencies) Order 2019, cls. 5(1)-(2).

agency (other than a Department or executive agency related to a Department) comprising Public Service employees who are employed to enable a statutory body or statutory officer to exercise functions, the minister to whom the agency is responsible is the minister administering the Act under which the statutory body is constituted or the statutory officer is appointed²⁸.

59. Section 30 of the *GSE Act* provides that: (emphasis added)

"30 General responsibility of heads of agencies (other than Departments)

- (1) The head of a Public Service agency (other than a Department) is **responsible to the Minister** or Ministers to whom the agency is responsible for the general conduct and management of the **functions** and **activities of the agency** in accordance with government sector core values under Part 2.
- (2) Any action taken in the exercise of a responsibility under this section is not to be inconsistent with the functions conferred by this Act of a Minister administering this Act or the Public Service Commissioner.

Note. The head of any such agency is also responsible for workforce diversity under Part 5."

60. Section 84 of the *GSE Act* provides that: (emphasis added)

"84 Minister's departmental authority with respect to control and direction of staff and work not affected

The **ordinary** and **necessary departmental** authority of a Minister with respect to the control and direction of staff and work is **not limited** by anything in this Act."

61. Sections 30 and 84 of the *GSE Act* reflect the conventional principles of a system of public administration outlined above, involving officials working in a hierarchical departmental system, ultimately answerable to a minister. Section 30 generally reflects the fact that the head of a Public Service agency is responsible to the minister, who in turn is responsible to Parliament for the conduct of agencies within his or her portfolio responsibilities. Section 84 *preserves* (by providing that the *GSE Act* "*does not limit*") the "ordinary and necessary departmental authority" of a minister which arises as a consequence of the hierarchical system of public administration in a system of responsible government.

62. It is not, however, easy to apply ss. 30 and 84 in relation to the work, and staffing arrangements, of independent statutory agencies and officers such as those the subject of this advice. The independence of these agencies and officers is, at least in part, conferred because these agencies either have the function of scrutinising the conduct of the executive government (including by exercising significant investigative and coercive powers), or because they have functions of administering elections and election funding arrangements, in which ministers (as active members of political parties) have an interest²⁹.

63. It is undoubtedly the case that the minister³⁰ who is allocated the administration of the Acts which constitute these agencies and officers is responsible to Parliament. The nature of that responsibility, however, may differ to some extent from the responsibility of a minister in relation

²⁸ Administrative Arrangements (Administrative Changes—Public Service Agencies) Order 2019, cl. 5(3).

²⁹ See my first advice at [76]–[78].

³⁰ Or ministers, where joint ministerial responsibility is allocated. I will use the singular for convenience.

to a department or other public service agency which is ultimately subject to the direction and control of a minister.

64. Conventions and legal principles relating to ministerial responsibility have primarily developed, as outlined above, in relation to the hierarchical departmental model of public administration. The ultimate capacity of a minister to direct a department or public service agency within the minister's portfolio responsibility underpins the sense in which a minister is responsible, or accountable, to Parliament for decisions taken by those agencies (whether or not the minister had any personal involvement in the decision). That link is missing in relation to decisions taken by statutory agencies and officers of the kind considered here which are not subject to ministerial direction or control. Indeed, decisions taken by these agencies and officers might, for example, involve confidential investigations into the activities of senior officials within the executive government. I am not aware of any significant discussion of the nature of ministerial responsibility in relation to independent agencies and officers of this kind (except that, as noted at [50] above, concern about a departure from constitutional principles of ministerial responsibility has been expressed as a reason against recognising "integrity agencies" as a fourth branch of government).
65. There are, in my view, two important considerations which affect the application of ss. 30 and 84 of the *GSE Act* to the "staff and work" of these statutory agencies and officers.
66. First, it is significant that neither of these provisions expressly confer power on the responsible minister to direct these agencies and statutory officers. By contrast, s. 13(1) of the *GSE Act* confers power on the Public Service Commissioner (for the purposes of exercising his or her functions or ensuring compliance with the *GSE Act*) to give a written direction to the head of a government sector agency on a specific matter in relation to the employees of that agency. The head of a "separate Public Service agency", however, is not required to comply with the direction if the agency head "considers that the direction is not consistent with the independent exercise of statutory functions by the head and the agency". The head is required to report to any Parliamentary Committee that oversees the exercise of those functions on the reasons for any non-compliance with the substantive employment outcomes sought by the direction: s. 13(4).
67. Secondly, s. 30(1) is directed to "the functions and activities of **the agency**". It is important to appreciate, in the present context, that "the agency" does *not* refer to the relevant statutory agency (the Electoral Commission and the LECC³¹) or statutory officer (the Electoral Commissioner and the Ombudsman). Instead, the "agency" referred to is the "separate Public Service agency" – the "Office of the Law Enforcement Conduct Commission", the "New South Wales Electoral Commission Staff Agency"; and the "Ombudsman's Office", which are all established for the purpose of enabling the corresponding statutory agencies and officers to exercise their functions.
68. The language of "Staff Agency" and "Office" reflects the fact each of these "separate Public Service agencies" is simply an administrative arrangement of persons who do not have any

³¹ The *GSE Act* does not apply to the ICAC, as noted above at [54].

substantive functions in their own right, but who are employed by the Government for the purpose of enabling the principal statutory agencies and officers to exercise their functions. The head of each separate Public Service agency may exercise, on behalf of the Government, the “employer functions” of the Government in relation to the employees of the “agency” (s. 31 of the *GSE Act*; and see above at [58]).

69. In my view, in this context, the expression “functions and activities of the agency” in s. 30(1) of the *GSE Act* does not refer to the functions and activities of the principal statutory agency or officer. Instead, it refers to the functions and activities of these subsidiary separate Public Service “agencies” in *providing staff* so as to enable the principal statutory agencies or officers to exercise *their functions*³².
70. This construction is consistent with the fact that the current Administrative Arrangements Orders distinguish, on the one hand, between the separate Public Service agency comprising Public Service employees who are employed to enable a statutory body or statutory officer to exercise functions; and the corresponding statutory body and statutory officer on the other. It is only the separate Public Service agency which is identified as being responsible to the relevant minister.³³
71. This construction is also consistent with the fact that the *GSE Act* is, as indicated in its title, primarily concerned with the employment and management of staff.
72. The head of the separate Public Service staff agencies for the Ombudsman, the LECC and the Electoral Commissioner and Electoral Commission, are therefore in my view responsible to the relevant minister only for the functions and activities of employing staff, so as to enable the corresponding principal statutory agencies and officers to exercise their functions. Similarly, the Ombudsman, the LECC, the Electoral Commissioner and Commission, are not responsible to a minister for the exercise of their statutory functions.
73. I note that the Department of Premier and Cabinet Circular C2020-01 *Employment Arrangements during COVID-19*, issued on 12 March 2020, outlines arrangements for the effective and efficient management of the New South Wales government sector during the COVID-19 response. This is an example of a policy, issued without any express statutory authority, that goes directly to matters concerned with the employment of staff.
74. This is in my view a policy with which the separate Public Service staff agencies for the Ombudsman, the LECC, the Electoral Commissioner and Electoral Commission, would be expected to comply – subject (without necessarily being exhaustive) to there being no inconsistency with any applicable awards or other legally binding employment arrangements

³² See also *The Ombudsman v Laughton* [2005] NSWCA 339 at [25]-[26]; (2005) 64 NSWLR 114 at 119 (Spigelman CJ); where the Court of Appeal determined that an immunity provision (s. 35A of the *Ombudsman Act*) was concerned with the exercise by the Ombudsman of his or her statutory powers and functions with external effect. Section 32 of the *Ombudsman Act* (which referred to “[s]uch staff as may be necessary to enable the Ombudsman to exercise the Ombudsman’s functions” being employed under and subject to the then *Public Sector Management Act 1988*”), was “not of that character”. Section 32 was instead “concerned with the employment of staff, an internal matter not arising in the course of an investigation or report or any other such function”. The employment of staff was also described as a matter of “internal administration”.

³³ See above at [59].

relating to these staff. The separate Public Service agencies may also not be required to comply with a policy such as this if, in any particular instance, compliance would be inconsistent with the exercise of the statutory functions of the Ombudsman, the LECC and the Electoral Commissioner and Electoral Commission.

Conclusions – GSE Act and ministerial responsibility

75. Sections 30 and 84 of the *GSE Act* may, to some extent, support ministerial directions to the heads of these separate Public Service agencies in relation to staffing and employment matters. It may be, for example, that the minister would have power to require the agency head to provide information relating to staffing and employment matters, at least where that would not involve any inconsistency with the exercise of the substantive functions of the principal statutory agencies and officers.
76. On the other hand, the fact that s. 13 of the *GSE Act* expressly confers directions powers on the Public Service Commissioner “on a specific matter in relation to the employees of that agency” - and then exempts *separate Public Service agencies* from complying if the head “considers that the direction is not consistent with the independent exercise of statutory functions by the head and the agency” - provides reason to be cautious about the scope of a ministerial direction power derived from the more general and indirect terms of ss. 30 and 84 of the *GSE Act*.
77. In my view there is nothing in the staffing arrangements for the Ombudsman, the Electoral Commission and Commissioner, and the LECC, reflected in the *GSE Act* which confers any power on the responsible minister to direct staff *in the conduct of their work* in enabling the Ombudsman, the Electoral Commission and Commissioner, and the LECC to exercise their functions.
78. Similarly, I do not think that general principles of ministerial responsibility – arising from the fact ministers have been allocated the administration of the Acts which constitute these statutory agencies and officers and confer functions on them – provide a source of power to direct these agencies and officers in the exercise of their functions. This conclusion applies equally to the ICAC, which is not generally subject to the *GSE Act*.
79. It follows that, subject to the qualifications above, these agencies and statutory officers cannot be directed or required to comply with government policy, except where that is authorised by statute.

Question 6: effect of the cluster arrangements

80. Your final question asks, to the extent not covered by my answer to Question 5, whether the agencies and statutory officers are required to comply with administrative requirements imposed by the cluster arrangements.
81. The analysis in my answer to Question 5 is not affected by what can be described as the current “cluster arrangements”.

82. Premier's Memorandum M2013-03 *NSW Public Sector Governance and Accountability* dated 16 May 2013 refers to "clusters". (While I note that this memorandum is no longer current, it has some ongoing usefulness in outlining the intended roles of what were then called Coordinating Ministers.) My understanding is that the cluster concept as an organisational tool for government is particularly relevant at the ministerial level, where Coordinating or Lead ministers of a cluster have particular responsibilities in the Cabinet, budget and appropriation processes in relation to a cluster. This relates to the Government's strategic plan *NSW 2021: A Plan to Make NSW Number One* and the Commission of Audit *Interim Report: Public Sector Management*.
83. The Memorandum notes that the Coordinating Minister will allocate the cluster budget appropriation to entities within the cluster in consultation with relevant Portfolio Ministers and the Director General (now Secretary) of the principal Department of the cluster. I discussed aspects of these arrangements, in relation to budget appropriations and expenditure, in my first advice. The word "cluster" is used in a note to s. 9.7(2) of the *GSF Act* ("Delegable functions"), which refers to appropriations "given for the services of a cluster or other grouping of agencies to which a separate GSF agency belong"³⁴.
84. There are very few references with any substantive effect in any Acts or regulations to a "cluster"³⁵. The word "cluster" does not, in particular, appear in the *Constitution Act*, the *GSE Act*, the Government Sector Employment Regulation 2014, or the Government Sector Employment (General) Rules 2014.
85. In my view, a "cluster" is a term of reference with no established legal meaning or effect. I am, therefore, not aware of any legal basis by which the concept of a "cluster" could be said to have any relevant legal significance, except to the extent these arrangements are reflected in the annual Appropriation Acts.



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³⁴ See my first advice at [60].

³⁵ The expression "cluster Minister" was used in the Administrative Arrangements (Administrative Changes—Ministers) Order (No 2) 2019, to refer to Ministers to whom responsibility for Public Service agencies had been allocated on an interim basis by an earlier Administrative Arrangements Order which had applied during the period between 2 April 2019 and 1 May 2019 (see cl. 5(1)). I also note, for example, the term "Cluster" was used in the title of the *Trade and Investment Cluster Governance (Amendment and Repeal) Act 2014* which dissolved certain statutory bodies such as the Chipping Norton Lake Authority.

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COUNCIL USE OF LOCAL INFRASTRUCTURE CONTRIBUTIONS

Executive summary

1. You seek my advice regarding the use of local infrastructure contributions collected by local councils under the *Environmental Planning and Assessment Act 1979* ("the *EPA Act*").

Question 1 – application of monies collected under ss. 7.11 and 7.12 of the EPA Act

2. Contributions received by a council under s. 7.11 of the *EPA Act* and levies imposed under s. 7.12 (collectively, "ss. 7.11 and 7.12 monies") must only be expended for the purpose for which the payment was required, subject to the ability to pool monies under s. 7.3(2).
3. These monies may nonetheless be invested pending expenditure. However, the following practices do not amount to an "investment":
 - (a) expenditure on general operations, with a later, notional "return" to the pool of ss. 7.11 and 7.12 monies; and
 - (b) "internal loans" within a council.

Question 2 – use of pooled contribution funds

4. While it is attended by considerable doubt, I prefer the view that:
 - (a) section 7.11 and 7.12 funds which are "pooled" under s. 7.3(3) may only be expended on items identified in the works schedule in a relevant contributions plan;
 - (b) where a contributions plan is silent as to whether pooled s. 7.11 and 7.12 monies may be pooled and applied progressively, such pooling is precluded;
 - (c) where a contributions plan permits the pooling of ss. 7.11 and 7.12 monies, those monies may not be used to fund works under another contributions plan, unless this is permitted by a Ministerial direction made under s. 7.17 of the *EPA Act*.

Note

5. My advice on questions 1, 2(a) and 2(c) was previously provided on 16 July 2020. This advice consolidates that previous advice, along with my answer to the subsequently-raised question 2(c).

Analysis

Question 1 – Whether councils permitted to use money collected under ss. 7.11 and 7.12 for purpose other than that for which it collected

6. The financial management of local councils is addressed in Pt 3 of Ch.13 of the *Local Government Act 1993* ("the *LG Act*"). Relevantly, for present purposes:
 - (a) All money and property received by a council must be held in the council's consolidated fund, unless it is required to be held in the council's trust fund under s. 411 (s. 409(1)).
 - (b) Money and property held in the council's consolidated fund may be applied towards any purpose allowed by the *LG Act* or any other Act (s. 409(2)). However, money "that is subject to the provision of [the *LG Act*] or any other Act (being provisions that state that the money may be used only for a specific purpose) may only be used for that purpose" (s. 409(3)(b)).
 - (c) A council may invest money that is not, for the time being, required by the council for any other purpose, but only in a form of investment notified by order of the Minister administering the *LG Act* published in the Gazette (s. 625(1) and (2)).
7. Division 7.1 of the *EPA Act* provides for the imposition of development contributions in connection with development consents. A consent authority, including a local council,¹ may impose a condition on a development consent requiring, relevantly:
 - (a) under s. 7.11(1)(b) – the payment of a monetary contribution, where the consent authority is satisfied that development for which consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area. That contribution may be imposed to require "a reasonable... contribution for the provision, extension or augmentation of the public amenities and public services concerned" (per s. 7.11(2));
 - (b) under s. 7.11(3) – the payment of a monetary contribution towards recoupment of the cost of providing public amenities or public services, where the development will benefit from the provision of those amenities and services, and they were provided by the consent authority within the area in preparation for, or to facilitate the carrying out of development in the area; or
 - (c) under s. 7.12(1) – a levy of the percentage (authorised by a contributions plan) of the proposed cost of carrying out the development.

Money paid under s. 7.12(1) is, subject to any relevant provisions of the applicable contributions plan, "to be applied towards the provision, extension or augmentation of public amenities or public services (or towards recouping the cost of their provision, extension or augmentation)" (per s. 7.12(3)).

8. Section 7.3 provides:

¹ See generally, s. 4.5 of the *EPA Act*

- "7.3 Provisions relating to money etc contributed under this Division (other than Subdivision 4)** (cf previous s 93E)
- (1) A consent authority or planning authority is to hold any monetary contribution or levy that is paid under this Division (other than Subdivision 4) in accordance with the conditions of a development consent or with a planning agreement for the purpose for which the payment was required, and apply the money towards that purpose within a reasonable time.
 - (2) However, money paid under this Division (other than Subdivision 4) for different purposes in accordance with the conditions of development consents may be pooled and applied progressively for those purposes, subject to the requirements of any relevant contributions plan or ministerial direction under this Division (other than Subdivision 4).
 - ...
 - (4) A reference in this section to a monetary contribution or levy includes a reference to any additional amount earned from its investment."
9. The effect of s. 7.3 is that monetary contributions made under ss. 7.11 and 7.12 must be held and applied by a council for a public purpose, as required by the relevant provisions of the *EPA Act* (*Frevcourt v Wingecarribee Shore Council* (2005) 139 LGERA 140 at 150 per Beazley JA, Ipp and McColl JJA agreeing, considering the predecessor to ss. 7.13 and 93E). Such monies must therefore be spent for the purpose for which payment was required, subject to the provision for pooling in s. 7.3(2).
 10. While these monies might be characterised as being held subject to what is sometimes termed a "trust for statutory purposes" (*Toadolla Co Pty Ltd v Dumaresq Shire Council* (1992) 78 LGERA 261 at 267 per Pearlman J; *Engadine Area Traffic v Sutherland County Council* (2004) 134 LGERA 75 at 83 per Pain J), they are not held subject to a trust as it is understood at general law (*Frevcourt* at 150). Moreover, even if the monies are held subject to the former species of "trust", I do not think that they are monies which must be held in a council's trust fund under s. 411 of the *LG Act*. Amongst other matters, and as observed in *Frevcourt* (at 148-150) and *Engadine* (at 82, 83), the *Environmental Planning and Assessment (Contributions Plans) Amendment Act 1991* expressly amended s. 94(3) of the *EPA Act*, predecessor to s. 7.3(2), to remove the qualification that such monies are held "in trust", for the purpose (disclosed in the second reading speech for the relevant Bill) of enabling councils to hold these monetary contributions in their general fund rather than in a separate trust.
 11. It follows that a local council must hold ss. 7.11 and 7.12 monies in its consolidated fund subject to the limitations imposed by s. 7.3 of the *EPA Act*. The effect of these limitations is reflected in s. 409(3)(b) of the *LG Act*, which acknowledges that such money may only be "used" for those purposes, as opposed to any other purpose permitted by the *LG Act*.
 12. It is nonetheless open to a local council to invest ss. 7.11 and 7.12 monies pending their application for a permitted purpose in accordance with s. 625 of the *LG Act*. The possibility of such investment is expressly acknowledged by s. 7.3(4) of the *EPA Act* (quoted above).
 13. Each of the *LG Act* and the *EPA Act* draws a distinction between the "use" or "application" of funds, on the one hand, and "investment", on the other, without specifically defining the latter

concept. The term "invest" and related parts of speech in each relevant provision will therefore bear its ordinary and natural meaning, having regard to the context in which it appears and the purpose of those provisions (*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384). In this regard, I can see no reason to treat the term as having different meanings in the *LG Act* and *EPA Act*, respectively.

14. The ordinary meaning of the terms "invest" and "investment" have been considered in a number of decided cases, typically concerning investments of trust monies. For example, in the oft-quoted decision *In re Wragg* [1919] 2 Ch 58, Lawrence J approached the meaning of those terms as follows (at 64-65):

"Without attempting to give an exhaustive definition of the words 'invest' and 'investment', I think that the verb 'to invest' when used in an investment clause may safely be said to include as one of its meanings 'to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of income which it will yield...'"

15. Similarly, *In the Will of Sheriff, In the Will of Lawson* (1971) 2 NSWLR 438, Helsham J indicated (at 442) that:

"Investment of trust funds will ordinarily mean the laying out of trust moneys in acquisition of property with the object or purpose of obtaining some return by way of income or pecuniary return for the benefit of those ultimately entitled. In its dictionary meaning the word "invest" in relation to its monetary context is, in the revised third edition of the Shorter Oxford Dictionary, given a primary meaning as follows: 'To employ (money) in the purchase of anything from which interest or profit is expected.' There is added a colloquial meaning: 'to lay out money.'"

16. Notwithstanding that ss. 7.11 and 7.12 monies are not held subject to a trust at general law, they are analogous in the sense of being held subject to a requirement for their disposition for particular purposes. As is the case with trusts, the holder's power of investment enables monies not required for the time being to be applied in way that both preserves those monies (the capital) on the account of the holder, while also generating a financial return to the pool of funds, which is itself referable to that application of money. The discussion of the ordinary meaning of that term in the cited cases is therefore instructive as to the meaning of the terms "invest" and "investment" as they appear in the *EPA Act* and the *LG Act*.
17. These cases do also suggest that investment does not have a fixed meaning, and may be more or less expansive depending on the context in which it is used. In terms of the meaning that the word "invest" may bear, the *Macquarie Dictionary* defines the term to mean, relevantly, "to put (money) to use, by purchase or expenditure, in something offering profitable returns", suggesting that "investments" may not be limited to the purchase of property and securities, but may also extend to the application of money for other income-baring purposes (such as deposit in an interest-bearing bank account).
18. Taking these matters into account, there appear to me to be four important features of "investing" and "investments" of money, for present purposes:

- (a) Investment of money within the meaning of the *EPA Act* and the *LG Act* contemplates the application of capital for a purpose which generates a return in the form of income or some other increase in value of the amount.
 - (b) It involves the investor (that is, the council) holding some form of asset referable to the monies so invested. This distinguishes it from ordinary expenditure (in the sense of “use” or “application”, as referred to in s. 7.3 of the *EPA Act* and s. 409 of the *LG Act*).
 - (c) The increase in value or income is referable to that asset.
 - (d) Investment is *by* the local council holding the money. It must therefore involve a return to the local council as the investor.
19. I now turn to the two specific examples of “investment” identified in your instructions:
- (a) “Self-investment” in general operations earning a return**
20. I understand that there are (or have been) several practices amongst local councils involving the “self-investment” of s. 7.11 and 7.12 funds. In general terms, I understand these to involve:
- (a) expenditure of those funds on general council operations, such that monies are “temporarily” expended out of the pool of s. 7.11 and 7.12 funds held by the council in question, followed by
 - (b) a subsequent repayment of an equivalent amount of money to the pool of ss. 7.11 and 7.12 funds, along with an additional amount or amounts paid by the council in question as a “return” on the “self-investment”.
21. I do not regard these practices as involving an “investment” of funds for the purposes of either the *LG Act* or the *EPA Act*. Relevantly:
- (a) The council has expended the money, and does not retain the money or any asset referable to it.
 - (b) On my instructions, there is no income or increase in value that is directly referable to application of the money.
 - (c) There is no return to council in the form of income or profit generated by that capital. The “return” instead appears to be a mere accounting allocation of the council’s money from one body of funds it holds to another (namely, the pool of ss. 7.11 and 7.12 monies which it holds under statute).
- I do not think that it matters that, from an accounting or perspective, this arrangement might result in an increase in hypothecated ss. 7.11 and 7.12 monies. Investment involves a return to the investor – in this case, the council – and not merely a notional “return” to one particular set of accounts amongst several that the “investor” holds.
22. Assuming that the expenditure of funds is not for a purpose permitted by s. 7.3 of the *EPA Act*, such a practice instead involves an impermissible expenditure of funds which is precluded by that section.

23. For completeness, I note that I have reviewed the Ministerial Investment Order of 12 January 2011 ("the Order") made under s. 625 of the *LG Act*. These practices do not fall within any of the five categories of investment that a council is able to undertake by virtue of that order.

(b) *Internal loans for works and services*

24. The concept of a council "lending" money to itself creates a conceptual difficulty, as a monetary loan ordinarily involves the provision of money by one person to another, with the possibility of a financial return to the lender. An "internal loan" of this kind by a council would instead appear to involve providing money from one body of council funds (ss. 7.11 and 7.12 monies) to a second for expenditure on works and services, on the premise that the "loan" would be repaid to the first body of funds (potentially with interest).
25. There is therefore no relevant return to the council from the application of the funds, such that it amounts to an investment of ss. 7.11 and 7.12 monies for the purposes of either the *EPA Act* or the *LG Act*. It is instead an expenditure of those funds, and impermissible unless done for a purpose identified in s. 7.3.
26. I nonetheless note that the Order permits councils to invest in "any debentures or securities issued by a council" (at para. (d)). I do not think that this addresses loans of the present kind. Relevantly:
- (a) I doubt, in principle, that an entity may issue a security or debenture to itself; and
 - (b) in any event, I take para. (d) to refer to debentures and securities issued by *other* councils, consistent with the proposition that under s. 625 of the *LG Act*, an investment must involve a return to the investing party (which could not be the case with any "self-issued" securities or debentures).

Question 2 – Permitted use of pooled funds

27. It is convenient for me to answer sub-question (b) first.

(b) *Position where council's contributions plan does not specifically authorise pooling of funds*

28. Section 7.3(2) of the *EPA Act* (cited at [8] above) permits the pooling by a consent authority of ss. 7.11 contributions and 7.12 levies imposed for different purposes, and their "progressive application" for those purposes. Such pooling is "*subject to* the requirements of any relevant contributions plan or Ministerial direction [under Div.7.1]".
29. The term "subject to" is commonly used in legislative drafting to indicate which provision takes precedence in the event of a conflict (*C&J Clark Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905 at 911 per Megarry J; see also, *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513 at 580-1 per Gaudron J; and *Macleay Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430 at 433). On this orthodox construction, to say that a thing which may be done under one provision ("Provision A") is "subject to" another ("Provision B") does not

automatically mean that that thing may only be done under Provision A where Provision B permits or authorises it to be done. That requirement would need to arise elsewhere – for example, under the Division, the regulations, or a relevant contributions plan itself.

30. Neither Div. 7.1, nor regulations made under the *EPA Act*, expressly provide that a council (as a consent authority) may only pool ss. 7.11 or 7.12 funds when authorised to do so by a contributions plan. The Division nonetheless contemplates a contributions plan regulating Council collection and use of such contributions in several respects:
 - (a) Per s. 7.13(1), a council may only impose a condition requiring a contribution under ss. 7.11 or 7.12 where it is of a kind “allowed by, and is determined in accordance with, a contributions plan”.
 - (b) In the case of s. 7.11, the contribution must be “a reasonable... contribution for the provision, extension or augmentation of the public amenities and public services concerned” (per subs. (2)). There is therefore an implied connection between the purpose of collection of funds, which may only occur, in the case of a council, under a contributions plan, and their application.
 - (c) In the case of s. 7.12, the application of money levied under that section is expressly “subject to any relevant provisions of the contributions plan” (subs. (3)).
31. Division 7.1 therefore makes it clear that the ability of a council to impose contributions and levies will depend on what is permissible under a contributions plan, and that a contributions plan may affect their subsequent application by the council (including with respect to pooling). However, I do not think that these matters themselves rise, by implication, to making the authority of a contributions plan a prerequisite to subsequent pooling of those funds.
32. However, cl. 27 of the *Environmental Planning and Assessment Regulation 2000* (“the *EPA Regulation*”) relevantly provides:

“27 What particulars must a contributions plan contain?” (cf clause 26 of EP&A Regulation 1994)

 - (1) A contributions plan must include particulars of the following—

...

 - (h) a map showing the specific public amenities and services proposed to be provided by the council, supported by a works schedule that contains an estimate of their cost and staging (whether by reference to dates or thresholds),
 - (i) if the plan authorises monetary section 7.11 contributions or section 7.12 levies paid for different purposes to be pooled and applied progressively for those purposes, the priorities for the expenditure of the contributions or levies, particularised by reference to the works schedule.

...
 - (3) A contributions plan must not contain a provision that authorises monetary section 7.11 contributions or section 7.12 levies paid for different purposes to be pooled and applied progressively for those purposes unless the council is satisfied that the pooling and progressive application of the money paid will not unreasonably

prejudice the carrying into effect, within a reasonable time, of the purposes for which the money was originally paid..."

(My emphasis)

33. The underlined passages of cl. 27 accordingly assume that a contributions plan will address whether the pooling of levies and contributions is "authorised". In circumstances where:
- (a) a contributions plan is a prerequisite to a council requiring payment of contributions or levies in the first place,
 - (b) the plan is to be prepared and approved "subject to an in accordance with the regulations" (s. 7.18(1)), and those regulations may make provision for and with respect to their subject matter (s. 7.18(3)), and
 - (c) the regulations contemplate that a plan will provide that a plan "must" contain express reference to expenditure priorities for pooled funds, where authorised, and that a council will actively turn its mind to whether pooling is permitted before authorising it in the plan,

it seems to me that a given plan would need to be interpreted in light of these requirements, on the basis that it is presumed to comply with them. Accordingly, were the plan to be silent as to whether pooling is permitted, the better interpretation would be that it impliedly prohibits pooling.

34. This view is nonetheless subject to considerable doubt, resting as it does on implications drawn from the way in which the regulations contemplate that a valid contributions plan will be drafted.

(a) Whether pooled funds restricted to financing items identified in the council's contributions plan

35. Nothing in Div. 7.1 expressly limits the expenditure of pooled funds to items identified in the council's contributions plan. Clause 27(1) of the *EPA Regulation* nonetheless requires a contributions plan to:
- (a) identify the specific amenities and services proposed by a council, supported by a works schedule that contains an estimate of their cost and staging (para. (h)); and
 - (b) identify the "priorities" for expenditure of pooled ss. 7.11 and 7.12 monies, those priorities being particularised by reference to the works schedule (para. (i)).
36. It should be borne in mind that cl. 27 specifies the contents of a contribution plan, which would in turn regulate expenditure of pooled funds, rather than directly regulating the use of those funds. The paragraphs cited above do not expressly provide that a contributions plan must be drafted as an exhaustive statement of the works on which pooled monies may be spent or, more broadly, that pooled monies may only be expended on works identified in the plan. Furthermore, while a contributions plan must identify "priorities" for the expenditure of pooled funds, this language has an aspirational, rather than a directory, flavour.

37. Against this, the Regulation requires a degree of particularisation of works in a contributions plan, and, in turn, ties priorities to the application of funds to particular works. This is against a background whereby (for the reasons stated previously) the authority to pool funds must derive from a contributions plan itself, and pooling is an exception which allows ss. 7.11 and 7.12 monies to be used for purposes other than those for which they were received. These matters suggest that it may nonetheless be appropriate to read a contributions plan as an exhaustive statement of the matters on which pooled funds may be expended, on the basis that:

- (a) it is intended to closely regulate this practice, such that
- (b) "priorities" for expenditure of pooled funds tied to particular items in a works schedule connotes an exhaustive set of priorities.

38. These matters are finely balanced. However, in light of the need for expenditure of pooled funds to be particularised by reference to a works schedule, I lean towards the view a contributions plan should be construed on the basis that it limits expenditure of pooled funds to items particularised in the works schedule. This view is, again, subject to considerable doubt.

(c) Whether councils may pool funds across multiple contributions plans

39. You ask whether, where a council has more than one contributions plan in place, funds may be pooled such that they can be spent under different contributions plans. You have identified the example of a council which has different contributions plans for different geographical parts of a local government area.

40. The pooling of ss. 7.11 and 7.12 monies is subject to the requirements of "any relevant contributions plan" (per s. 7.3(2)). While for the reasons stated previously, a contributions plan is not a prerequisite to pooling of these monies, the fact that:

- (a) these monies cannot be levied in the absence of an applicable contributions plan;
- (b) that contributions plan should be read as then precluding their pooling, unless pooling is specifically authorised; and
- (c) where pooling is authorised, expenditure of pooled funds is limited to items particularised in the works schedule;

does not appear to leave any room under a given contributions plan for pooled funds which it regulates to be spent under a second plan. This view is nonetheless attended by same caveats expressed in respect of questions 2(a) and (b).

41. The Minister administering the *EPA Act* may nonetheless direct a consent authority (including a council) as to "how money paid under [Div. 7.1] for different purposes in accordance with the conditions of development consents is to be pooled and applied progressively for those purposes" (s. 7.17(1)(g)). A consent authority must comply with the direction in accordance with its terms (s. 7.17(2)).

42. Pooling of ss. 7.11 and 7.12 monies is subject to any relevant contributions plan *or* ministerial direction (per s. 7.3(2)). While the Division does not establish an express hierarchy in respect of the regulation of pooling, I nonetheless think it clear that as a contributions plan emanates from a council,² and the council must itself comply with a direction concerning pooling, the terms of a direction concerning pooling would prevail over the contributions plan to the extent of any inconsistency.
43. Accordingly, were a direction given under s. 7.17 to require or authorise pooling of ss. 7.11 and 7.12 monies across contributions plans, such pooling would be permissible, notwithstanding the restrictions that would otherwise apply by virtue of the applicable contributions plan.



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² Or councils - see s. 7.18(1).