

Appendix two – Legal opinions

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ADVICE



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OPERATION OF THE ANNUAL APPROPRIATION ACT FRAMEWORK AND THE GOVERNMENT SECTOR FINANCE ACT 2018

Executive summary

1. You seek my advice in respect of the legal ramifications of expenditure in excess of appropriations in a scenario involving a hypothetical administrative cluster.
2. My instructions contemplate the scenario giving rise to what are termed "breaches" of the annual *Appropriation Act* and the *Government Sector Finance Act 2018* ("the *GSF Act*") on account of an overspend within the cluster compared to amounts available by way of appropriation within the financial year. For the reasons set out in my advice, the correct legal characterisation of this overspend is that amounts were expended from the Consolidated Fund without the authority of an appropriation, and contrary to s. 4.6(1) of the *GSF Act*.
3. In circumstances where financial delegations made by Ministers A and B in the scenario did not set any caps on overall expenditure during the relevant financial year, and no relevant Budget control authorities were in place under s. 5.1 of the *GSF Act*, the agencies identified in your instructions (Department A, Agency B and Agency C) could – as a matter of legal principle – expend amounts appropriated to Minister A and their own respective deemed appropriations for so long as unexpended amounts available remained available under those appropriations. Expenditure could only be authorised where there was an available unspent appropriation.
4. When and by whom money was expended *without* the authority of an appropriation in the scenario would be a "point-in-time" analysis, requiring consideration of particular expenditure by agencies by reference to amounts remaining available under the respective appropriations. That analysis cannot be undertaken on the balance of annualised figures, and it is conceivable that expenditure without authority could have occurred within one or more of Department A, Agency B and/or Agency C in the course of the financial year.
5. Please also note my comments at [10]-[12] regarding the need to take into account any payments authorised under s. 4.10 of the *GSF Act* when considering the extent to which legislative authority for expenditure by the cluster arose.
6. Minister A will be responsible to Parliament for the use of the annual appropriation made to the Minister, for expenditure by Department A (jointly) and Agency B (individually) generally, and for the use of deemed appropriations for the services Department A (jointly) and Agency B (individually). Minister B will be responsible for expenditure by Department A (jointly) and Agency C (individually) generally, and the use of deemed appropriations for the services of Department A (jointly) and Agency C (individually).

Prepared for: AUD018 Audit Office of NSW
Client ref: Margaret Crawford
Author: Michael Granziera

Date: 18 October 2021

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202103101 D2021/809495

Background

7. Your instructions outline a scenario in respect of which several questions are asked. I have included this scenario in full as Annexure A to this advice.
8. The salient features of this scenario are as follows:
 - (a) The relevant administrative cluster ("Cluster A") consisted of Department A (responsible to Minister A and Minister B), Agency B (responsible to Minister A) and Agency C (responsible to Minister B).
 - (b) An *Appropriation Act* appropriated a sum of \$1,200,000,000 to Minister A for the services of Department A in the financial year. No supplementation of that appropriated amount occurred in the course of the financial year.
 - (c) Delegations and sub-delegations were in place enabling each agency to expend appropriated funds. These delegations imposed limits to the amount of individual transactions, but did not impose an overall annual spending limit on the agencies and their officers.
 - (d) In the course of the financial year, Agency B received \$400,000,000 in cluster grants and \$100,000,000 in deemed appropriations. It also "carried over" \$20,000,000 in deemed appropriations from the preceding financial year. On this basis, the scenario characterises Agency B's "total spending authority from parliamentary appropriations" as \$520,000,000.
 - (e) In the course of the financial year, Agency B expended \$700,000,000 "from parliamentary appropriations" – that is, an amount \$180,000,000 in excess of the figure for "total spending authority from parliamentary appropriations" for Agency B.
 - (f) The "total spending authority from parliamentary appropriations" for Cluster A as a whole (being amounts appropriated to Minister A and deemed appropriations for the services of the respective agencies) for the financial year was \$1,500,000,000.
 - (g) The "total expenditure from parliamentary appropriations" for Cluster A was \$1,615,000,000 – that is, an amount \$115,000,000 in excess of the figure for "total spending authority from parliamentary appropriations". For the totality the financial year, the overall variance was attributable to the overspend by Agency B against the "total spending authority from parliamentary appropriations", offset by underspends by Department A and Agency C.
9. I assume for the purposes of this advice that all expenditure detailed in the scenario was from monies forming part of the Consolidated Fund, and that none of the expenditure set out above was from an account in the Special Deposits Account or another statutory fund.
10. Furthermore, I note that an annual *Appropriation Act* may commence after 1 July in a given financial year (as was the case with the *Appropriation Act 2020*), and that in these circumstances, payments from the Consolidated Fund may be authorised by the Treasurer under s. 4.10 of the *GSF Act* in the period between 1 July of the financial year and the *Appropriation Act's* commencement.

11. It is not clear from the scenario whether any expenditure within Cluster A in the course of the financial year was authorised under s. 4.10 of the *GSF Act* prior to the commencement of the relevant *Appropriation Act*. I will assume for the purposes of this advice that it was not or that, alternatively, it was, but has been factored into the calculation of amounts appropriated to Minister A.
12. However, to the extent that neither of these propositions is correct, any expenditure authority available within Cluster A by virtue of s. 4.10 at different points in the year would need to be factored into consideration of whether any expenditure within the cluster occurred without Parliamentary authority.

Relevant principles

13. Before addressing the specific questions raised in your instructions, it is useful to set out the underlying principles which affect the answers to those questions generally.

Appropriations regime generally

14. The effect of the *Constitution Act 1902* is that, relevantly, (i) all public monies collected, received or held for or on behalf of the State form part of the Consolidated Fund, subject to contrary statutory provision (s. 39), and (ii) the Consolidated Fund so constituted is subject to appropriation to such specific purposes as are prescribed in any Act of Parliament (s. 45). Section 4.6(1) of the *GSF Act* complements s. 45 by providing that "money must not be paid out of the Consolidated Fund except under the authority of an Act".
15. Legislative appropriation from the Consolidated Fund may (in general terms) take the form of either an appropriation for a financial year made by an annual *Appropriation Act*, or a "special" or "standing" appropriation for a particular purpose or purposes under other legislation.¹ "Deemed appropriations" provided for by s. 4.7 of the *GSF Act* are a form of standing appropriation,² and certain provisions of the *GSF Act* may also provide lawful authority to expend funds beyond the scope of an annual appropriation.³
16. In *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338, Mason J characterised an appropriation by the Commonwealth Parliament as follows (at 392):

"An Appropriation Act has a twofold purpose. It has a negative as well as a positive effect. Not only does it authorize the Crown to withdraw moneys from the Treasury, it 'restrict(s) the expenditure to the particular purpose', as Isaacs and Rich JJ observed in *Commonwealth v Colonial Ammunition Co Ltd* [(1924) 334 CLR 198]."

¹ Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) at 541

² Section 4.7 operates on the basis that where a "GSF agency" receives defined "deemed appropriation money", and appropriation of an equivalent amount is made to the "responsible Minister (or Ministers) for the agency for the services of the agency. The effect of s. 4.8(3) of the Act is that deemed appropriations do not lapse at the end of the annual reporting period in which they arise, unless regulations made under the Act provide otherwise.

³ See, for example, ss. 4.10-4.11 and 4.13

Appropriations under the annual *Appropriation Act* have a further “negative” element, insofar as the authority they confer only enables the withdrawal of monies up to a particular amount in the relevant financial year.

17. The expenditure authority conferred on a given Minister by an annual appropriation may be delegated and subdelegated by that Minister to agencies and their officers in accordance with s. 9.9 of the *GSF Act*. These delegations and subdelegations may be subject to terms and conditions which limit the delegate or subdelegate’s authority to authorise expenditure, by reference to particular amounts and purposes, or other matters (per *GSF Act*, s. 5.2, and the *Interpretation Act 1987*, s. 49(3)).

Budget control authorities

18. Section 5.1 of the *GSF Act* empowers the Treasurer to issue Budget control authorities to regulate expenditure of money by GSF agencies that are part of the General Government Sector (per subs. (1)). Budget control authorities may include, relevantly, limits or caps on expenditure of money (per subs. (2)(a)).
19. Administrative controls within clusters may act as a further, practical restriction on agencies’ ability to expend money from the Consolidated Fund within the scope of authority available by way of one or more appropriations.

Cluster grants

20. The term “cluster grant” is generally used to describe transfers of Consolidated Fund money which are made by Departments to entities within the cluster, following the release of funds by the Treasury to the Department. The essential purpose of a cluster grant is to provide “actual” funds to cluster agencies which can be expended in reliance on the authority conferred by an applicable appropriation or appropriations.⁴

General propositions

21. Taking the foregoing into account, I note the following matters which are material to the questions raised:
 - (a) I do not think it is accurate to speak of a “breach” of the annual *Appropriation Act* (or any other form of appropriation). An appropriation is a positive – albeit limited – conferral of authority to expend money from the Consolidated Fund for particular purposes and up to a specified amount. It does not itself *prevent* expenditure of money from the Consolidated Fund that occurs beyond these limitations. It is not an obligation imposed on a particular entity.

⁴ See generally, the discussion of “cluster grants” in 202003994 Advice 1

- (b) An appropriation in an annual *Appropriation Act* may nonetheless be exhausted at a point in time in the relevant financial year, insofar as amounts equalling the total appropriation have been expended in reliance on it, and the appropriation has not otherwise been supplemented.
- (c) Where this occurs, the result is that unless further expenditure from the Consolidated Fund can be authorised under *another* appropriation – for example, a deemed appropriation – it will occur without the authority of an appropriation.
- (d) While the “exhaustion” of an appropriation may be precipitated within a particular cluster by one cluster agency’s level of expenditure in the financial year, the effect is that the relevant appropriation is exhausted for *all* agencies (and their officers) that may otherwise rely on it.
- (e) On the other hand, for so long as sufficient funds are available under the appropriation, expenditure of available money by agency-level delegates and subdelegates will be authorised by that appropriation, provided that (i) it is within the scope of the relevant delegation and subdelegation, and (ii) that expenditure does not exceed the terms of any applicable Budget control authority. An appropriation under an annual *Appropriation Act* for the services of a principal Department does not itself impose any limits on the amount that can be expended by or in respect of a *particular* cluster agency within the scope of its delegated authority.
- (f) Nor does the quantum of a cluster grant made to an agency impose a legal limitation on the ability to expend under the authority of an appropriation made by the annual *Appropriation Act*. That cluster grant merely *facilitates* expenditure under the appropriation by distributing Consolidated Fund money to the agency to expend in reliance on the appropriation and other appropriations. It does not qualify the authority that the appropriation confers for expenditure in respect of a particular agency, and an agency will also have authority to expend any other Consolidated Fund monies it has access to in reliance on an appropriation so long as the amount appropriated remains unspent, and its officers act within the scope of applicable delegations and any budget control authorities.

Analysis

Question 1(a) – Whether Agency B has exceeded its legally appropriated expenditure limit

- 22. I am asked whether, based on the scenario and associated information, Agency B has exceeded its legally appropriated expenditure limit.
- 23. As set out above, the scenario characterises Agency B’s “total spending authority from parliamentary appropriations” for the financial year as \$520,000,000, which reflects the aggregate of (i) cluster grants received by the agency for the financial year, and (ii) deemed appropriations available for the services of the agency in the course of the financial year. It has – as set out above – expended \$700,000,000 in the course of the financial year.
- 24. I do not think that the figure of \$520,000,000 can be said to represent the “total spending authority” or a “legally appropriated expenditure limit” for Agency B in the financial year.

25. Subject to expenditure of Consolidated Fund monies available to Agency B's officers being incurred within the scope of:

- (a) their respective financial delegations – which, per my instructions, are not subject to an overall expenditure limit; and
- (b) any applicable Budget control authorities – which are not referred to in my instructions;

it would have been lawfully authorised under an appropriation for so long as:

- (a) it was for a lawful purpose; and
- (b) sufficient unused spending authority remained under the \$1,200,000,000 appropriation to Minister A or the agency's own deemed appropriations.

In saying this, I note that, as set out above, the cluster grants made to Agency B did not limit the agency's authority to expend Consolidated Fund monies under the appropriation made to Minister A.

26. In circumstances where the actual expenditure for Cluster A as a whole across the financial year exceeded the total amounts appropriated (or taken to be appropriated) by Parliament for the year, whether Agency B's officers expended funds without appropriate authority will ultimately be a temporal question, in that:

- (a) to the extent that Agency B's expenditure occurred within the scope of applicable delegations, at points in time *prior* to either the appropriation to Minister A or its own deemed appropriations being exhausted – the expenditure would have been authorised under the authority of an appropriation; but
- (b) to the extent that expenditure occurred *after* these sources of authority had been exhausted – it would not have been.

27. Whether expenditure by Agency B occurred beyond the scope of its authority would accordingly require a progressive examination of the total amounts expended across Cluster A in the course of the financial year, with reference to the amounts remaining under the appropriation to Minister A and deemed appropriations available to Agency B at the relevant points in time. It cannot be addressed on the basis of the figures for total expenditure across the cluster in the course of that year.

28. Indeed, depending on these questions of timing, it is conceivable that expenditure lacking the authority of an appropriation occurred in some or all of Department A, Agency B and Agency C, assuming that:

- (a) expenditure continued to occur in those agencies after the point in time that the \$1,200,000,000 appropriation to Minister A was exhausted; and
- (b) that expenditure was not otherwise authorised from a remaining deemed appropriation in a particular case.

Question 1(b) – Whether legally appropriated spending limit rests in aggregate with Minister A

29. I am asked whether, because amounts have been appropriated to Minister A in the scenario, the legally appropriated spending limit rests, in aggregate, with Minister A.
30. Consistent with the points made at [21] above, the position of Minister A can be summarised as:
- (a) the appropriation under the annual *Appropriation Act* enabled Minister A to authorise expenditure of up to \$1,200,000,000 from the Consolidated Fund in the course of the financial year (either personally, or by duly authorised delegates);
 - (b) deemed appropriations in favour of Agency B enabled Minister A to authorise expenditure of a further \$120,000,000 for the services of Agency B (either personally, or by duly-authorised delegates);
 - (c) deemed appropriations in favour of Department A enabled Minister A (jointly with Minister B) to authorise the expenditure of a further \$180,000,000 for the services of Department A (either on their own account, or by duly-authorised delegates).
31. Minister A accordingly had “legally appropriated spending expenditure limits” insofar as (i) the total amount of expenditure that they or their delegates could authorise from the Consolidated Fund was \$1.32 billion, and (ii) the total amount of expenditure that they and Minister B jointly (or their delegates) could authorise was \$180,000,000.
32. Minister A was also responsible to Parliament for (i) the manner in which those appropriations were expended, and (ii) any “overspends” (that is, expenditure without authorities) by the agencies for which they were responsible (which in the scenario, includes Department A and Agency B, but not Agency C).
33. However, in circumstances where Agency C:
- (a) was responsible to Minister B; and
 - (b) any deemed appropriations arising in respect of that agency would have been made to Minister B (as the agency’s “responsible Minister” for the purposes of s. 4.7 of the *GSF Act*);
- Minister B would also have been responsible to Parliament (instead of Minister A) for expenditure that occurred in Agency C generally, and for the application of those deemed appropriations. This also means that there is difficulty in characterising Minister A as responsible for *all* matters in the cluster.
34. However, beyond these matters, I do not think that it can be said that a “legally appropriated spending limit” applied to Minister A.

Question 1(c) – Whether appropriated spending limit applied to Agency B

35. I am asked whether, if the answer to Questions 1(a) and 1(b) is that the “appropriated spending limit” rests with Minister A, this means that, in effect Agency B had no legally appropriated spending limit imposed, despite any administrative budget controls that might have applied.
36. Consistent with my response to Question 1(a) at [25], the legal limits on Agency B’s expenditure were that:
 - (a) it occur within the scope of any applicable Budget control authority and financial delegations; and
 - (b) there be sufficient authority remaining under either (i) the \$1,200,000,000 appropriation to Minister A or (ii) deemed appropriations for the services of Agency B to support any particular amount of expenditure that occurred at a given point in time.

Questions 2(a) and (b) – Responsibility for breach of *Appropriation Act* and *GSF Act*

37. These questions are framed as follows:
 - “(a) If the answer to question 1(a) is ‘Yes’ then is it an officer of agency B, agency B or responsible Minister A that is taken to have breached the annual *Appropriation Act* and *GSF Act*?
 - (b) If the answer to question 1(b) is ‘Yes’ then is responsible Minister A taken to have breached the annual *Appropriation Act* and *GSF Act*? If it is not responsible Minister A then is it one or all of the Cluster A agencies and Department A or officers of these agencies and Department A?”
38. In circumstances where the total amount of funds available to Cluster A in the financial year by way of appropriation was \$1,500,000,000, and total expenditure was \$1,615,000,000, it is evident that \$115,000,000 in expenditure not authorised by an appropriation occurred within the cluster as a whole in the course of the financial year.
39. For the reasons adverted to previously, I do not think it apt to refer to a “breach” of an annual *Appropriation Act*. Instead, expenditure from the Consolidated Fund in excess of appropriations should be conceived of in terms of expenditure that occurred without authority, and therefore not in accordance with s. 4.6(1) of the *GSF Act*.
40. However, as adverted to in my answer to Question 1(a), identifying the specific payments made without authority as part of that \$115,000,000 excess is a point-in-time analysis which cannot be undertaken on the basis of annualised figures alone. It is mathematically plausible that that excess could have been occasioned by expenditure by officers within some or all of Department A, Agency B and/or Agency C.
41. As to the position of the relevant Ministers, as adverted to in my answer to Question 1(b), Minister A will be responsible to Parliament for expenditure authorised under the \$1,200,000,000 appropriation made to the Minister, and for expenditure by Department A and Agency B generally, as well as the use of deemed appropriations raised in respect of those agencies. Minister B will be

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responsible to Parliament for expenditure by Agency C generally, as well as expenditure of its deemed appropriations.



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Annexure A

Cluster A – Structure

GSF agency	Description	Responsible Minister(s) under the GSF Act
Department A	Principal Department	Minister A and Minister B
Agency B	Cluster agency	Minister A
Agency C	Cluster agency	Minister B

Appropriations received under the Appropriations Act and GSF Act

The *Annual Appropriation Act 2020* (the Appropriation Act) appropriated a sum of \$1,200,000,000 to Minister A for the services of Department A for the 2020-21 year. There have been no adjustments to the original appropriation.

Department A, Agency B and Agency C received deemed appropriations during the year appropriated to their responsible Minister(s) under section 4.7 of the *Government Sector Finance Act 2018* (GSF Act).

All agencies have appropriate instruments of delegation in place from their Minister or sub-delegates to expend appropriated funds. All delegations impose transactional limits on officers of the agencies, but none impose an annual spending limit on the agency or officers of the agency.

The table below details the total spending authority received during the year from parliamentary appropriations under the Appropriations Act and the amount spent for:

- Department A
- Agency A
- Agency C
- Responsible Minister A.

	Department A 2021 \$'000	Agency B 2021 \$'000	Agency C 2021 \$'000	Responsible Minister A 2021 \$'000
Original appropriation to Minister A per Appropriation Act for the services of Department A ¹	1,200,000	--	--	1,200,000
Cluster grant made by Department A to Agencies B and C ²	(600,000)	400,000	200,000	--
Total spending authority from parliamentary appropriations, other than deemed appropriations	600,000	400,000	200,000	1,200,000
Add: Deemed appropriations earned during the year and given to the responsible Minister for the services of the relevant GSF agency	150,000 ³	100,000 ⁴	15,000 ⁵	250,000 ⁶
Add: Deemed appropriations given to the responsible Minister for the services of the relevant GSF agency brought forward from prior years under section 4.8(3) of the GSF Act	30,000	20,000	5,000	50,000 ⁶
Total spending authority from parliamentary appropriations	780,000	520,000	220,000	1,500,000
Less: Total expenditure from parliamentary appropriations	(700,000)	(700,000)	(215,000)	(1,615,000) ⁷
Variance	80,000	(180,000)	5,000	(115,000)

Notes:

- The annual Appropriation Act appropriated a sum of \$1,200,000,000 to Minister A for the services of Department A.
- These represent cluster grants paid by Department A to Agency B and Agency C. Based on the CSO advice provided to NSW Treasury titled 'Deemed Appropriations – Cluster Grants and Cash' these cluster grants are already the subject of an authority to expend money that has been conferred by Parliament by the annual Appropriation Act. The Budget Papers estimate the quantum of cluster grants to be paid to each cluster agency, but this can be re-prioritised by the Minister or delegate.
- Deemed appropriations appropriated jointly to Minister A and Minister B (responsible Ministers for Department A) under section 4.7 of the GSF Act for the services of Department A.
- Deemed appropriations appropriated to Minister A (responsible Minister for Agency B) under section 4.7 of the GSF Act for the services of Agency B.
- Deemed appropriations appropriated to Minister B (responsible Ministers for Agency C) under section 4.7 of the GSF Act for the services of Agency C.
- The total 'Deemed appropriations earned during the year' and 'Deemed appropriations balance brought forward from prior years' for Responsible Minister A excludes the deemed appropriation amounts for Agency C, as the deemed appropriations were appropriated to Minister B, and not Minister A.
- Includes spending from appropriations received under the Appropriations Act and section 4.7 of the GSF Act. The source of this spending from any particular appropriation authority cannot be identified.

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OPERATION OF THE ANNUAL APPROPRIATION ACT FRAMEWORK AND THE GOVERNMENT SECTOR FINANCE ACT 2018 (ADVICE 2)

Executive summary

1. You seek my advice in respect of the legal ramifications of payments from the Consolidated Fund in excess of appropriations in two hypothetical administrative scenarios. The requested advice follows from advice I have previously provided respect of another, conceptually-similar administrative scenario ("my First Advice").¹

Question 3

2. As a matter of principle, I prefer the view that deemed appropriations made for the services of Department A under s. 4.7(1) of the *Government Sector Finance Act 2018* ("the *GSF Act*") were available to support payments by Agency B in this scenario.
3. However, I doubt that the authority conferred by those deemed appropriations could be relied upon to retroactively authorise payments from the Consolidated Fund by Agency B. Unless some or all of Agency B's \$8,000,000 "overspend" was authorised by Minister A or their delegate from those deemed appropriations at or prior to the time it occurred, it could not be taken to have occurred under the authority of those deemed appropriations for the purposes of s. 4.6(1) of the *GSF Act*. Whether this occurred will depend, in part, on the specific delegation arrangements with the hypothetical cluster.

Question 4

4. The "underspend" of the appropriation for the services of Special Office B could not be applied to authorise payments from the Consolidated Fund constituting the "overspend" by Special Office C, either prospectively or retroactively.
5. The annual appropriation for the services of Department A could not be relied upon to retroactively authorise the "overspend" by Special Office C. Department A's appropriation could only have been relied upon to authorise some or all of Special Office C's "overspend" for the purposes of s. 4.6 of the *GSF Act* if:
 - (a) particular payments for Special Office C were properly characterisable as being "for the services of" Department A within the meaning of the annual *Appropriation Act*; and
 - (b) if so – Minister A or their duly authorised delegate authorised the payments from that source, at or prior to the time the payments were made.

¹ CSO ref: 202103101 Advice 1, dated 18 October 2021

Prepared for: AUD018 Audit Office of New South Wales
Client ref: Margaret Crawford
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Date: 17 November 2021

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Paragraph (a) would require a close analysis of specific payments by Special Office C, and is not possible to address in the abstract. Paragraph (b) is a question of fact which depends, again, on the delegation arrangements within the hypothetical cluster.

Background

6. In my First Advice, I addressed the ramifications of payments from the Consolidated Fund in excess of appropriations in a scenario involving a hypothetical administrative cluster as Questions 1 and 2. You have now raised two further questions (Questions 3 and 4) addressed to further scenarios specific to those questions.
7. I have set out these further questions and the associated scenarios in full in Annexure 1 to this advice. The scenario outlined in Question 3 can be summarised as follows:
 - (a) The relevant administrative cluster ("Cluster A") consisted of Department A (responsible to Minister A), Agency B (responsible to Minister A), and Agency C (responsible to Minister B).
(In each case, the reference to an agency's "responsible Minister" is to the agency's "responsible Minister" within the meaning of s. 2.6 of the *GSF Act*.)
 - (b) The appropriation to Minister A for the services of Department A under the annual *Appropriation Act* was exhausted at the end of the financial year.
 - (c) In the course of the financial year, Department A received "deemed appropriation money" which gave rise to deemed appropriations to Minister A. At the end of the financial year, \$8,000,000 remained unspent under those deemed appropriations.
 - (d) Agency B recorded an "overspend" of \$8,000,000 in the course of the financial year, in the sense that \$8,000,000, in that payments made by the agency from the Consolidated Fund were not supported by either (i) the appropriation made for the services of Department A, or (ii) deemed appropriations available for the services of Agency B.
8. The scenario outlined in Question 4 can be summarised as follows:
 - (a) The relevant administrative cluster ("Cluster A") consistent of Department A, Special Office B and Special Office C. Minister A was the "responsible Minister" for each agency within the meaning of s. 2.6 the *GSF Act*.
 - (b) \$120,000,000 was appropriated to Minister A for the services of Department A in the 2021 financial year under Pt 2 ("Appropriations – Departments") of the annual *Appropriation Act*.
 - (c) Under the same *Appropriation Act*, appropriations were made under Pt 4 ("Appropriations – Special Offices") for the services of Special Offices B and C (\$30 million each).
 - (d) In the 2021 financial year, Special Office C received \$8,000,000 in deemed appropriation money. No deemed appropriations for the services of Special Office C were brought forward from the previous financial year.
 - (e) Expenditure from the Consolidated Fund by Special Office C in the financial year totalled \$40,000,000 – that is, \$2,000,000 in excess of the combined total of (i) the appropriation

made for its services under Pt 4 of the annual *Appropriation Act*, and (ii) deemed appropriations made for its services in the course of the financial year.

- (f) At the end of the financial year, \$5,000,000 remained unspent under the annual appropriation made for the services of Department A, and \$3,000,000 under the annual appropriation for Special Office B.

Analysis

General comments

9. As discussed in my previous advice, s. 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. For a given payment from the Consolidated Fund that occurs in an agency context, compliance with this requirement is achieved by:
 - (a) money being available under an appropriation that payment for the services of the agency or purpose in question; and
 - (b) the person to whom the funds are appropriated (generally, a Minister), or an officer who has been delegated authority by that person, authorising payment of the relevant funds.

This position is reinforced by s. 5.5 of the *GSF Act*, which requires that expenditure of money by a GSF officer for the State or a GSF agency – including the incurring of expenditure and payments – be “authorised”, in the sense of being done in accordance with a delegation or subdelegation from a person with power regarding the expenditure of the money, or otherwise under the authority of the *GSF Act* or any other law.

10. For the purposes of assessing compliance with s. 4.6(1), this means that an “overspend” by an agency from the Consolidated Fund cannot be merely offset against an “underspend” of appropriated funds by another agency. Compliance will ultimately turn on the availability of particular appropriations to support particular payments, and the manner in which the authority to approve payments under those appropriations was exercised.

Question 3

11. I am asked whether, in the identified scenario, deemed appropriations made for the services of Department A may be “offset” against the overspend in Agency B, such that the overspend would still have been made in compliance with s. 4.6(1).
12. Applying the first of the two propositions identified at [9] to this scenario, a question arises as to whether deemed appropriations made to Minister A for the services of Department A are also available to support payments made for the services of Agency B. Section 4.7 of the *GSF Act* (“Deemed appropriations of certain money received by GSF agencies”) relevantly provides:
 - “(1) The responsible Minister for a GSF agency is taken to have been given an appropriation out of the Consolidated Fund under the authority of this section, at the time the agency receives or recovers any deemed appropriation money, for an amount equivalent to the money that is received or recovered by the agency.

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- (2) An appropriation under this section is taken to have been given only for the services of the GSF agency that receives or recovers the deemed appropriation money.

(my emphasis)

13. The current convention under Pt 2 of each annual *Appropriation Acts* is for appropriations to be made to Ministers “for the services of” principal departments. As I have previously observed, the authority conferred by such an appropriation ordinarily extends to making “grants” or otherwise distributing funds to other government agencies which have been administratively “grouped” within the “cluster” headed by that principal department.²
14. In the context of annual *Appropriation Acts*, this conclusion is fortified by extrinsic materials associated with each Act – namely, the specific provision in the applicable Budget papers for “cluster grants”, and by the associated notes to the respective Acts which identify “cluster grants” as a matter for which monies are allocated under these appropriations. I note in this context that “cluster grant funding” or similar has been identified in notes accompanying appropriations for the services of principal departments since the *Appropriation Act 2012*, although the notes included in the Act relating to expenses and capital expenditure do not generally form part of the Act (see, for example, s. 41 of the *Appropriation Act 2021*.)
15. The “deemed appropriations” provided for by s. 4.7 are not themselves accompanied by a similar body of extrinsic material to assist in identifying the boundaries of what constitutes “the services of the GSF agency that receives or recovers the deemed appropriation money” for the purposes of s. 4.7(2) where the GSF agency in question is a principal department. However, I am mindful that s. 4.7 of the *GSF Act* was enacted against the background of financial conventions contained in the annual *Appropriation Acts* and, more specifically, those regarding the role of principal departments in funding their broader administrative clusters.
16. I accordingly prefer the view that a deemed appropriation made for the services of a principal department such as Department A would ordinarily be available for the services of other cluster agencies, such as (in this case) Agency B.
17. Applying the second proposition to the scenario, the use of deemed appropriations made for the services of Department A to support payments by Agency B would require either Minister A or his or her duly authorised delegate to authorise Consolidated Fund payments by Agency B from that source of funds. There is a threshold question of fact as to how this might occur.
18. To the extent that:
- (a) officers of Agency B held a delegation from Minister A that enabled them to expend deemed appropriations raised for the services of Department A;
 - (b) funds remained available under those deemed appropriations; and
 - (c) those officers (or Minister A) authorised particular payments of Agency B within the scope of their respective delegations from that source of funds;

² CSO ref: 202000630 Advice 1 at [44]

payments by Agency B would be authorised under the authority of an Act for the purposes of s. 4.6(1) of the *GSF Act*. Whether this situation applied will depend on the administrative arrangements within the cluster, including the construction of the instrument(s) of delegation made by Minister A to officers of Agency B.

19. Were some or all of Agency B's "overspend" to have in fact been expended on this basis, then, in my view, the relevant payments would have been made from the Consolidated Fund in compliance with s. 4.6 of the *GSF Act* and would not be an "overspend" in a material sense.
20. However, to that extent that these "overspend" payments were not made under a delegation in the manner set out above, they would not have occurred under the authority of Department A's deemed appropriation at the time they were made. This raises a further issue as to whether, in circumstances where:
 - (a) sufficient authority remains under the deemed appropriations for the services of Department A;³ and
 - (b) that appropriation could otherwise be applied to authorise payments from the Consolidated Fund for the services of Agency B,
 the authority can then be exercised by Minister A or a delegate to retrospectively authorise payments from the Consolidated Fund that have previously been made by Agency B without the authority of an appropriation.
21. There is a common law rule that a statutory provision is not to be construed as operating retrospectively, absent clear words or necessary intendment (*Maxwell v Murphy* (1957) 96 CLR 261 at 267). I doubt a deemed appropriation made to a Minister under s. 4.7 of the *GSF Act* could be relied upon to retroactively authorise past payments from the Consolidated Fund. Nothing in s. 4.7 or the *GSF Act* displaces the aforementioned presumption and, more generally, ss 4.6 and 5.5 of the Act reflect an assumption that appropriations such as those made under s. 4.7 will be used to authorise expenditure from the Consolidated Fund at or prior to the time to the time it is paid out.
22. Consequently, unless some or all of Agency B's \$8,000,000 "overspend" was supported by appropriate delegations or Ministerial authorisation at the time it was incurred, it could not have been authorised under deemed appropriations made for the services of Department A. In the absence of support from any other appropriation, it would have occurred contrary to s. 4.6(1) of the *GSF Act*.

Question 4

23. I am asked whether, in the outlined scenario:

³ Noting that, per s. 4.8(3) of the *GSF Act*, deemed appropriations do not lapse at the end of an annual reporting period unless regulations made under the Act provide otherwise.

- (a) the “underspend” in Department A may be used to offset the “overspend” in Special Office C, such that the \$2,000,000 “overspend” by Special Office B would still have been authorised for the purposes of s. 4.6(1) of the *GSF Act*; and
 - (b) the underspend in Special Office B may be applied in the same manner.
24. It is important to observe at the outset that the “underspends” by Department A and Special Office B are of monies appropriated for the services of those respective agencies under the annual *Appropriation Act*. The effect of s. 4.8 of the *GSF Act* is that each of those appropriations lapsed upon the end of the annual reporting period in which they were made.
25. As a consequence, even if it were possible to retroactively authorise payments from the Consolidated Fund by an agency using either of these underspends, neither Minister A nor their delegates would be able to do so. The ability to authorise use of those underspends was spent at the end of that annual reporting period. In any event, for the reasons set out above, I doubt retroactive authorisation of payments by a Minister or their delegate under an appropriation is possible.
26. As a result, the “underspends” by Department A and Special Office B under their respective appropriations could only have been relied upon to authorise excess payments by Special Office C if, at or prior to the time the “excess” expenditure occurred, Minister A or their delegate authorised those payments under one of the respective appropriations.
27. The “underspend” by Special Office B was of the amount appropriated specifically for the services of that agency under Pt 4 of the annual *Appropriation Act*. Funds were only available under that appropriation for the services of Special Office B. In circumstances where there was no adjustment transferring part of the appropriation for the services of Special Office B to the appropriation for the services of Special Office C,⁴ I cannot see a basis on which that payments from the Consolidated Fund by Special Office C could have been authorised from Special Office B’s appropriation at the time it was incurred.
28. With respect to the use of the “underspend” of Department A’s appropriation, I have previously advised that it is unclear whether it would be for 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 same *Appropriation Act*. The question would likely require consideration of specific instances of proposed expenditure.⁵
29. Whether particular payments by Special Office B *could* have been authorised from Department A’s appropriation at the time they were incurred would therefore depend, in the first instance, of a close analysis of the specific instances of expenditure. The question cannot be addressed in the

⁴ As would be possible under s. 32 of the *Appropriation Act 2021*, for example.

⁵ CSO ref: 202000630 Advice 1 at [45]. Similar reservations would, in my view, apply where a question of expending “deemed appropriations” of a principal department on the activities of a special office arise.

abstract merely by reference to an unparticularised quantum of expenditure incurred by Special Office B.

30. Assuming that particular payments from the Consolidated Fund by Agency B *could* have been supported by Department A's appropriation, it would then be a question of considering whether, at or prior to the time it was incurred, those payments were in fact authorised from that source by either Minister A or a duly authorised delegate. This will be a question of fact in a specific case.



Karen Smith
Crown Solicitor



Michael Granziera
Director

Annexure A

Question 3 – Deemed appropriations

Based on the information and scenario below, as the deemed appropriations for Department A and Agency B are both appropriated to Minister A, can Department A's unused spending authority relating to their deemed appropriations of \$8,000,000 be offset against the overspend in Agency B?

Background

Cluster A – Structure

GSF agency	Description	Responsible Minister(s) under the GSF Act
Department A	Principal Department	Minister A
Agency B	Cluster agency	Minister A
Agency C	Cluster agency	Minister B

In the cluster above, at the end of the financial year:

- all spending authority associated with appropriations given under the annual Appropriation Act are exhausted
- Minister A received deemed appropriations during the year under section 4.7 of the GSF Act for the services of Department A. Department A has an unused deemed appropriation spending authority of \$8 million at the end of the financial year.
- Minister A received deemed appropriations during the year under section 4.7 of the GSF Act for the services of Agency B. Agency B has an overspend of \$8 million at the end of the financial year.
- Agency C has a different Responsible Minister. It had exhausted all of its deemed appropriation authority.

Question 4 – Special Offices

- (a) Based on the information and scenario below, because appropriations for Department A and Special Office C are both appropriated to Minister A, can the underspend in Department A be used to offset an overspend in Special Office C, such that the overspend of \$2 million in Special Office C would still have been made in accordance with section 4.6(1) of the GSF Act?

Similarly:

- (b) Based on the information and scenario below, because appropriations for Special Office B and Special Office C are both appropriated to Minister A, is it possible for the underspend in Special Office B to be used to offset an overspend in Special Office C, such that the overspend of \$2 million in Special Office C would still have been made in accordance with section 4.6(1) of the GSF Act?

Background

CSO Advice on Financial Arrangements and Management Practices in Integrity Agencies

The Audit Office received CSO advice on 13 March 2020 'Financial Arrangements and Management Practices in Integrity Agencies'. Paragraph 44 and 45 (extracted below) of the advice considered whether Integrity Agencies or other 'Special Offices' could receive a portion of funds appropriated to

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the services of the Department in addition to the funds appropriated to the agencies under Part 4 of the Appropriations Act.

Paragraph 45 of the advice stated that it is less clear on whether it would be within the purpose of an appropriation 'for the services' of a principal department to provide supplementary funding to an agency in the same 'cluster'; for which an appropriation is made in another part of the Appropriation Act. The Advice was not able to answer the question in abstract because it would likely require consideration of the purpose of specific instances of proposed expenditure.

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

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.

Example scenario

Cluster A – Structure

GSF agency	Description	Responsible Minister(s) under the GSF Act
Department A	Principal Department	Minister A
Special Office B	Special Office	Minister A
Special Office C	Special Office	Minister A

Appropriations received under the Appropriations Act and GSF Act

Under the Appropriation Act, Minister A was appropriated a sum under:

- Part 2 'Appropriations – Departments' of \$120,000,000 for the services of Department A for the 2020-21 year
- Part 4 'Appropriations – Special Offices' of \$30,000,000 for the services of Special Office B for the 2020-21 year

- Part 4 'Appropriations – Special Offices' of \$30,000,000 for the services of Special Office C for the 2020-21 year

The Appropriation Act commenced on 1 July 2020 and no payments were authorised by the Treasurer under section 4.10 of the GSF Act. There have been no adjustments to the original appropriation.

All agencies have appropriate instruments of delegation in place from their Minister or sub-delegates to expend appropriated funds. All delegations impose transactional limits on officers of the agencies, but none impose an annual spending limit on the agency or officers of the agency.

Cluster A has an unused spending authority of \$5,000,000 of the \$120,000,000 originally appropriated to Minister A for the Services of Department A at the end of the financial year. Special Office B has an unused spending authority of \$3,000,000 of the \$30,000,000 originally appropriated to Minister A for the Services of Special Office B.

The table below details the total spending authority received by Special Office C during the year from parliamentary appropriations and the amount spent.

	Special Office C 2021 \$'000
Original appropriation to Minister A per Appropriation Act for the services of Special Office C	30,000
Total spending authority from parliamentary appropriations, other than deemed appropriations	30,000
Add: Deemed appropriations earned during the year and appropriated to Minister A for the services of Special Office C	8,000
Add: Deemed appropriations brought forward from prior years under section 4.8(3) of the GSF Act	0
Total spending authority from parliamentary appropriations	38,000
Less: Total expenditure from parliamentary appropriations	40,000
Variance	(2,000)