

## Fact sheet: Government sector finance

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### Overview

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The expenditure of public money in NSW is governed by the underlying constitutional principle that the executive government's expenditure of public funds must be authorised by Parliament.<sup>1</sup>

The *Constitution Act 1902*, the *Government Sector Finance Act 2018* (GSF Act), the annual *Appropriation Acts*, and the operation of other legislation and conventions provide for Parliamentary oversight of the purpose and amount of government expenditure, and regulate the use and management of public resources by government sector agencies.

### Consolidated Fund

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Under s. 39(1) of the *Constitution Act 1902*, all public monies collected, received or held by any person for or on behalf of the State form part of one Consolidated Fund, except as provided by or under any other Act.<sup>2</sup>

Acts of Parliament may provide for public monies to be held in other forms of statutory fund – for example, accounts in the Special Deposits account – created under the GSF Act or other legislation.<sup>3</sup>

The Consolidated Fund and other statutory funds are 'ledger' accounts, not bank accounts – money attributed to them is, in practice, held in different

bank accounts maintained by or on behalf of various government sector agencies.

The essential purpose of such funds is to impose legislative control over money legally attributed to a fund, by prohibiting its expenditure without legislative authority.<sup>4</sup>

### Authorisation by Parliament

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Appropriations by Parliament authorise the expenditure of money from the Consolidated Fund, by authorising the withdrawal of money for particular purposes and up to a particular amount.<sup>5</sup> An appropriation simultaneously authorises expenditure and limits its scope.<sup>6</sup>

Appropriations may be by way of:

- annual appropriations – under an annual *Appropriation Act*
- 'standing' appropriations – appropriations made under other Acts for specified purposes, in specified circumstances.

### Appropriation Act

By convention, annual *Appropriation Acts* are made for each 'annual reporting period' (financial year) commencing on 1 July, and lapse at the end of that 12-month period (this is the annual State budget).<sup>7</sup>

Under current NSW fiscal convention, appropriations in these Acts are made to specified ministers, for the services of departments of the

<sup>1</sup> Parliamentary convention limits the powers of the Legislative Council with respect to 'money' bills.

<sup>2</sup> Note subs. (2): 'all territorial, casual and other revenues of the Crown (including all royalties), from whatever source arising, within New South Wales' also form part of the Consolidated Fund.

<sup>3</sup> The Restart NSW Fund, established under Pt 2 of the *Restart NSW Fund Act 2011*, is an example of an SDA account.

<sup>4</sup> Reflected, for example, in s. 4.6 of the GSF Act, and s. 45 of the *Constitution Act*

<sup>5</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [296] per Hayne and Kiefel JJ.

<sup>6</sup> *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 392-393 per Mason J.

<sup>7</sup> See GSF Act, s. 4.8(1). Appropriations under annual *Appropriation Acts* are also generally expressed as being for a particular financial year – see, for example, Pt 2 of the *Appropriation Act 2022*.

Public Service and particular ‘Special Offices’. Appropriations may also be made to ministers under an annual *Appropriation Act* for more specific purposes.<sup>8</sup>

## Deemed appropriations

Section 4.7 of the GSF Act (‘deemed appropriations’) is an example of a provision creating a ‘standing’ appropriation.<sup>9</sup> Section 4.7 provides for additional appropriations to ministers on an *ad hoc* basis when ‘GSF agencies’<sup>10</sup> receive categories of money referred to in that section.

## Delegations

Authority to withdraw funds is devolved with the government sector through financial delegations. As the majority of expenditure in the NSW government sector is sourced from the Consolidated Fund under an annual *Appropriation Act* and deemed appropriations, the most common form of financial delegation is made under s. 9.9 of the GSF Act by Ministers who receive appropriations.

Financial delegations made under s. 9.9 may be made subject to conditions,<sup>11</sup> and may enable a delegate to sub-delegate authority within an agency.<sup>12</sup>

Where money is held in a statutory fund, legislation governing the fund will generally confer authority to expend it on particular offices or bodies and specify the purposes for which it may be paid out. Delegations to expend money held in statutory funds may be made by the officers and bodies authorised to expend fund monies, under either Division 9.2 of the GSF Act or legislation constituting the particular fund.

## Machinery of Government changes

Machinery of Government (MoG) changes in a financial year may affect both the overall allocation of appropriations within the government

sector and the operation of existing financial delegations. MoG changes can involve:

- Administrative Arrangements Orders (AAOs) under Part 7 of the *Constitution Act*, affecting the way that references to Ministers and agencies are to be construed, including references in the annual *Appropriation Act*
- transfers of responsibility for services, functions or programs, which may involve determinations by the Treasurer as to how existing appropriations are to be applied<sup>13</sup>
- changes in lines of responsibility within government which impact existing chains of authority under Ministerial and agency delegation instruments.

Some consequences of these changes may be addressed in AAOs – for example, by requiring references in instruments (including instruments of delegation) to be read in a way that reflects new administrative arrangements.

When there is a MoG change, agencies should review their existing delegation arrangements to ensure that these align with both the revised allocation of appropriations between ministers, and any structural changes resulting from the MoG change.

Where new senior office holders have been elected or appointed, it is prudent for departments and agencies to consider refreshing delegation instruments or to seek confirmation that senior office holders are content for existing instruments to continue in effect.

## Lawful expenditure by agencies

Section 5.5(2) of the GSF Act requires ‘government officers’<sup>14</sup> to ensure that their expenditure of money for the state or a GSF agency is done in a way that is authorised, meaning in accordance with a relevant delegation or subdelegation, or otherwise in accordance with law.<sup>15</sup>

‘Expenditure’ for this purpose includes the ‘commitment of money for expenditure’, the ‘incurring of expenditure’, and the making of

<sup>8</sup> See generally, for example, Pts 2-4 of the *Appropriation Act 2022*.

<sup>9</sup> Deemed appropriations are sometimes treated as a distinct, third category of appropriation within government.

<sup>10</sup> The concept of a ‘GSF agency’ is defined in s. 2.4 of the *GSF Act*.

<sup>11</sup> *GSF Act*, s. 5.2, see also *Interpretation Act 1987*, s. 49.

<sup>12</sup> See ss 9.9(4) of the *GSF Act*.

<sup>13</sup> See ss 4.9 and 4.9A of the *GSF Act*.

<sup>14</sup> Section 2.9(1) of the *GSF Act* provides that a “government officer” includes the head of a GSF agency, a person employed in or by a GSF agency, a statutory officer who is the head of or exercises functions in relation to a GSF agency, a person on secondment from another GSF agency and any other person (or person of a kind) prescribed by the regulations.

<sup>15</sup> Section 5.5(3) specifies when expenditure is ‘authorised’ for the purposes of s. 5.5(2).

payments.<sup>16</sup> ‘Committing’ expenditure generally encompasses creating a legally binding commitment to expend money (including in the future), while ‘incurring’ expenditure generally arises when obligation to pay crystallises.

Precisely when expenditure is ‘committed’ or ‘incurred’ is a fact-dependent question and can give rise to complexities. For example, when entering into and managing an ongoing contract for service provision, there may be multiple points at which an agency and its officers are either ‘committing’ or ‘incurring’ expenditure. Different sources of authority may be required at different points, including powers to contract, or to withdraw and expend money from particular sources.

When considering what kind of authority is required in a given expenditure situation, it is important to be aware that an appropriation from the Consolidated Fund does not itself confer a power to pay money for particular purposes.<sup>17</sup> While authority sourced from an appropriation is essential when Consolidated Fund money is used, the power to make a payment must come from either statutory or non-statutory executive power applicable to the particular payment scenario.

## Guidance

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In any expenditure scenario, government sector agencies should carefully consider:

- the source of money to be expended – for example, is the money sourced from the Consolidated Fund, a statutory fund or a deemed appropriation?
- the types of authority required to support the actual expenditure and any associated steps.

## Relevant government policies

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Treasurer’s Directions made under the GSF Act are binding on persons and entities to whom they apply. The Treasurer’s Directions are published on the NSW legislation website<sup>18</sup> and can be accessed in consolidated form on the Treasury website.<sup>19</sup>

Treasury issues Policy Papers, guidelines, and Treasury Circulars concerning government sector finance, which are available on the NSW Treasury website.

Advice on the interpretation of provisions of the *Constitution Act*, GSF Act or annual *Appropriations Act* will generally be [core legal work](#) that must be referred to the Crown Solicitor, unless the matter does not have precedential implications and/or will not impact multiple agencies.

Advice on the powers and privileges of Parliament and its Committees is also core legal work that must be referred to the Crown Solicitor.

## Key contacts

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<sup>16</sup> GSF Act, s. 1.4.

<sup>17</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55, 73, 113, and 210-211

<sup>18</sup> Search As made > Statutory Instruments > T > Treasurer’s Direction

<sup>19</sup> <https://www.treasury.nsw.gov.au/documents-resources/documents-library>; filter for “Treasurer’s Directions”