

MANAGING THE AUSTRALIAN GOVERNMENT'S INTELLECTUAL PROPERTY

The Management and Accrual Budgeting Frameworks for *FMA Act* Agencies

Charles Lawson*

The Auditor-General's performance audit report entitled *Intellectual Property Policies and Practices in Commonwealth Agencies* is the first dedicated audit of the Australian government's intellectual property policies and management practices. This article argues that, in conducting the performance audit, the Auditor-General failed to properly consider the management and accrual budgeting frameworks applying to parts of the Australian government under the financial framework set out in the *Financial Management and Accountability Act 1997* (Cth). The article concludes that the proper place for the Australian government's intellectual property policy and practice to be addressed is through the existing management framework, with the Chief Executive Instructions setting out the detailed policies and practices, and the existing accrual budgeting framework, where the Finance Minister's Orders already require the identifying, recording and valuing of intellectual property.

Introduction

The Auditor-General recently presented to parliament¹ a performance audit² report entitled *Intellectual Property Policies and Practices in Commonwealth Agencies*.³ The report represents the first dedicated audit of the Australian government's⁴ intellectual property⁵ policies and management practices.⁶

* Australian Centre for Intellectual Property in Agriculture (ACIPA), Griffith University. This work was supported by an Australian Research Council grant to research 'Gene Patents in Australia: Options for Reform'.

¹ Commonwealth Parliamentary Debates (2004a), p 19563 (Senate); Commonwealth Parliamentary Debates (2004b), p 24110 (House of Representatives).

² *Auditor-General Act 1997* (Cth), s 18: 'The Auditor-General may at any time conduct a review or examination of a particular aspect of the operations of the whole or part of the Commonwealth public sector, being a review or examination that is not limited to the operations of only one Agency, body or person' (s 18(1)).

³ Auditor-General (2004).

⁴ Noting that the term 'Australian government' is preferred to the term 'Commonwealth' in this article, although they are used synonymously.

⁵ Defined by the Australian National Audit Office as: 'Intellectual property includes all copyright (including rights in relation to sound recordings and broadcasts), all

Significantly, the Auditor-General identifies a common set of principles that, in his view, 'should underpin the management of intellectual property in any organisation',⁷ and provide 'guiding principles for consideration and implementation' in the public sector environment.⁸

The recommendations of the Auditor-General were:

The ANAO⁹ recommends that, in order to ensure the effective and efficient management of intellectual property, agencies develop an intellectual property policy appropriate for Agency circumstances and functions, and implement the required systems and procedures to support such a policy.¹⁰

In order to ensure that the Commonwealth's interests are protected, the ANAO recommends that the Attorney-General's Department, the Department of Communications, Information Technology and the Arts, and IP Australia (along with other relevant agencies), work together to develop a whole-of-government approach and guidance for the management of the Commonwealth's intellectual property, taking into account the different functions, circumstances and requirements of agencies across the Commonwealth, and the need for Agency guidance and advice on intellectual property management.¹¹

In undertaking the performance audit, the Auditor-General's objectives were to 'form an opinion on whether Commonwealth agencies have systems in place to efficiently, effectively and ethically manage their intellectual property assets' and 'identify areas for better practice in intellectual property management by those agencies'.¹² This was assessed against the 'principal' criteria of whether 'agencies have the necessary leadership and corporate or

rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trade marks (including service marks), registered designs, circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.' Australian National Audit Office (2003), p 26.

⁶ Previous performance audits have only dealt with intellectual property issues indirectly: see, for example, Auditor-General (2003); Auditor-General (2002); Auditor-General (1998b); Auditor-General (1998c).

⁷ Auditor-General (2004), p 18.

⁸ Auditor-General (2004), p 18.

⁹ Australian National Audit Office (ANAO); this is an office established under the *Auditor-General Act 1997* (Cth), s 38 consisting of the Auditor-General and the staff appointed under the *Public Service Act 1999* (Cth) to assist the Auditor-General, together being a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth), s 7.

¹⁰ Auditor-General (2004), pp 24 and 57 (Recommendation 1).

¹¹ Auditor-General (2004), pp 24 and 59 (Recommendation 2).

¹² Auditor-General (2004), p 27.

organisational structures to support management of intellectual property' and the extent to which 'these management systems reflect principles of good practice in intellectual property asset management'.¹³

In conducting the performance audit, various Australian government agencies were surveyed 'to examine the extent to which agencies have structures or systems to support the management of intellectual property',¹⁴ and then seven agencies were selected to 'examine' and 'showcase' their intellectual property management practices.¹⁵ The scope of the performance audit was confined to the 'approaches' and 'themes' of managing intellectual property, carefully acknowledging that the 'audit does not advocate a single solution for all intellectual property types and all Agency circumstances',¹⁶ and that the 'audit [does] not focus upon the appropriateness of an individual Agency's approach to intellectual property management'.¹⁷ Significantly, in defining the concept of 'intellectual property management' the Auditor-General considered:

Intellectual property management requires the implementation of measures which will ensure that an organisation identifies, adequately protects, and controls intellectual property assets and, where appropriate, facilitates exploitation of those assets for commercial, operational and public benefit.¹⁸

The Auditor-General's performance audit addressed agencies under the *Financial Management and Accountability Act 1997* (Cth) (the *FMA Act*), bodies under the *Commonwealth Authorities and Companies Act 1997* (Cth) (the *CAC Act*) and probably other bodies outside the realms of the *FMA Act* and *CAC Act*.¹⁹ This article, however, confines its analysis to the *FMA Act*. Under the *FMA Act*, intellectual property is a resource that must be properly

¹³ Auditor-General (2004), p 27.

¹⁴ Auditor-General (2004), p 28; 'Agencies ranged in size from fewer than 20 to over 50 000 employees, with functions ranging from policy development and regulation, to service delivery and research and development. Some agencies were based centrally in Canberra; while others had operations Australia-wide. Total annual revenue for these 74 agencies exceeded \$270 billion' (p 28); see also Australian National Audit Office (2003), p 4.

¹⁵ Auditor-General (2004), p 28; these were the Australian Bureau of Statistics, Airservices Australia, Department of Defence (including Defence Science and Technology Organisation), Australian Nuclear Science and Technology Organisation, Department of Employment and Workplace Relations, Commonwealth Scientific and Industrial Research Organisation and the Grains Research and Development Corporation (p 106).

¹⁶ Auditor-General (2004), p 29.

¹⁷ Auditor-General (2004), p 29.

¹⁸ Auditor-General (2004), p 33.

¹⁹ Such as the High Court of Australia administered under the *High Court Act 1979* (Cth).

used and properly managed.²⁰ The *FMA Act* proscribes a financial framework (comprising a management framework and an accrual budgeting framework) setting out particular management and accrual budgeting obligations and responsibilities for the proper use and management of these resources. The next section of this article broadly describes the umbrella financial framework, comprising the management and accrual budgeting frameworks. The following section specifically addresses the management framework and the special obligations of 'Chief Executives' of 'Agencies', and then specifically addresses the financial reporting requirements under the accrual budgeting framework. The final section sets out the conclusions that, while the performance audit set out by the Auditor-General is to be welcomed, in conducting the performance audit the Auditor-General failed to properly consider the broader financial framework applying to parts of the Australian government. As a consequence, the Auditor-General's recommendations fail to consider the existing policies and practices, and then fail to address the appropriate framework for implementing the proper policies and practices of managing and accounting for intellectual property in the Australian government.

The Financial Framework

The *FMA Act*²¹ applies to bodies that are 'agents of the Commonwealth'.²² These are bodies that 'function only as a financial and custodial agent for the legal entity that is the Commonwealth, without acquiring separate legal ownership of the ... assets it deals with on the Commonwealth's behalf'.²³ The *CAC Act* applies to the *only* other status that was considered at the time to be 'financially autonomous incorporated Commonwealth bodies that can acquire legal ownership in their own right'.²⁴ The original *FMA Act*²⁵ established the

²⁰ This article assumes that intellectual property under the custody and control of an *FMA Act* Agency is an Australian government resource (being 'public property' when in the form of a patent, copyright, circuit layout, and so on, and an 'other Commonwealth resource' when in a form outside the formal intellectual property schemes, such as know how, and so on) addressed by the *FMA Act*. Notably the long title of the *FMA Act* provides: 'An Act to provide for the proper use and management of public money, public property and other Commonwealth resources, and for related purposes'.

²¹ See Commonwealth Parliamentary Debates (1996), p 8344; although similar Bills had been introduced in 1994, which referred to a committee and lapsed when the parliament was prorogued in 1996: see Joint Committee of Public Accounts and Audit (1994); this was part of a package that included the Commonwealth Authorities and Companies Bill 1996 (Cth) and the Auditor-General Bill 1996 (Cth) that in part replaced the repealed *Audit Act 1901* (Cth): see *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth), Sch 1.

²² Commonwealth Parliamentary Debates (1996), p 8344.

²³ Commonwealth Parliamentary Debates (1996), p 8344.

²⁴ Commonwealth Parliamentary Debates (1996), p 8344.

²⁵ Assented on 24 October 1997 and commenced 1 January 1998 (Gazette 1997, No GN49); amended by *Financial Management Legislation Amendment Act 1999*

'regulatory/accounting/accountability framework for dealing with and managing the ... property of the Commonwealth', specified the 'responsibilities and powers necessary for the efficient, effective and ethical use of the resources lawfully available to the Commonwealth to carry out its program' and provided 'for appropriate mechanisms to ensure that the stewardship and management performance of those who are responsible for those resources can be made visible and, thereby, allow them to be held accountable'.²⁶ This was to 'provide a legislative framework for effective and accountable financial management that is not only matched to the public sector environment of today, but a framework that will also be flexible enough to meet the evolutionary changes to Commonwealth financial management practices that the future will inevitably bring'.²⁷ The key concepts establishing the 'boundaries'²⁸ of this financial framework were set out in the definitions in the *FMA Act*:

- 'Agency' — a department of state (including persons allocated to that department),²⁹ a department of the parliament (including persons allocated to that department),³⁰ and a 'prescribed Agency';³¹
- 'Chief Executive' — for a prescribed Agency, 'the person identified by the regulations as the Chief Executive of the Agency', and for any other Agency, 'the person who is the Secretary of the Agency for the purposes of the *Public Service Act 1999* (Cth)³² or the *Parliamentary Service Act 1999* (Cth)';³³

(Cth), *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth), *Financial Management and Accountability Amendment Act 2000* (Cth) and *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth).

²⁶ Commonwealth Parliamentary Debates (1996), pp 8344–45.

²⁷ Commonwealth Parliamentary Debates (1996), p 8345.

²⁸ Commonwealth Parliamentary Debates (1996), p 8345.

²⁹ See FMA Regulations, rr 4(a)-(d), (f) (FMA Regulations).

³⁰ See FMA Regulations, r 4(e).

³¹ See *FMA Act*, s 5: 'a body, organisation or group of persons prescribed by the regulations for the purpose of this definition'; for the purposes of this definition the Financial Management and Accountability Regulations 1997 (Cth), r 5 prescribed the 'body, organisation or group' set out in sch 1, and 'other persons who perform financial tasks in relation to a function of a person referred to in an item in sch 1'; it is notable that some of the 'prescribed agencies' in Sch 1 are subject to the *Commonwealth Authorities and Companies Act 1997* (Cth) for their handling of 'public money'.

³² *Public Service Act 1999* (Cth), s 7 provides that the 'Secretary' means 'the Secretary of a Department'; the term 'Department' is defined to mean 'a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency'; the term 'Agency Head' is defined to mean 'the Secretary of a Department', 'the Head of an Executive Agency' or 'the Head of a Statutory Agency'.

³³ *Parliamentary Service Act 1999* (Cth), s 7 provides that the 'Secretary' means 'the Secretary of a Department and includes the Clerk of the Senate and the Clerk of the House of Representatives' and that 'Secretary of a Department' means '(a) if the

- 'official' — 'a person who is an Agency or part of an Agency', including a person who performs a 'financial task',³⁴ for the Agency;³⁵ and
- 'public property' — 'property in the custody or under the control of the Commonwealth' or 'property in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the property', and these both include 'such property that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth'.³⁶

The developments reflected in the *FMA Act* were to set out overriding principles of management and devolve the detailed management practices to be implemented by Chief Executives, in contrast to the prescriptive procedural content applied under the previous *Audit Act 1901* (Cth).³⁷ This devolution is achieved under the *FMA Act* by requiring Chief Executives to be directly accountable and manage their resources 'efficiently, effectively and ethically'.³⁸ While there are some high-level proscriptions set out in Finance Minister's Orders (FMOs)³⁹ and Ministerial Guidelines,⁴⁰ to ensure consistency across the Australian government,⁴¹ the *FMA Act* expressly recognises that: 'The legislative framework will be completed by instructions which Chief Executives will be authorised to issue to officials of their

Department is the Department of the Senate — the Clerk of the Senate; or (b) if the Department is the Department of the House of Representatives — the Clerk of that House; or (c) if the Department is another Department — the Secretary of that Department'.

³⁴ See *FMA Regulations*, r 3: 'a task or procedure ... [other than an authorised arrangement for the receipt or custody of public money by an outsider] ... relating to: (a) the commitment or spending of public money; or (b) the management or control of public money'.

³⁵ For a Department of State and the Department of the Parliament (*FMA Regulations*, rr 4(d) and (e)) and for a prescribed Agency (r 5(1)(b)).

³⁶ See *FMA Act*, s 5; it is notable that 'special public money' is a subset of 'public money' (ss 5 and 16).

³⁷ See generally, Joint Committee of Public Accounts (1989).

³⁸ *FMA Act*, s 44.

³⁹ *FMA Act*, s 63; in particular, the accounting requirements to satisfy the role of the 'Finance Minister' in preparing an account of the Commonwealth for the parliament: see *FMA Act*, Pt 8.

⁴⁰ *FMA Act*, s 64; it is notable that these guidelines are not confined to the Minister for Finance; see, for example, the *Fraud Control Guidelines* issued by the Minister for Justice and Customs under *FMA Regulations*, r 19: see Attorney-General's Department (2002).

⁴¹ For example, Australian government credit cards (being 'a credit card issued to the Commonwealth to enable the Commonwealth to obtain cash, goods or services on credit': *FMA Act*, s 60) may be used for some coincidental private expenditure subject to repaying that amount: FMO 1997, o 2.5.1; estimates must be prepared in the form specified and provided as required by the Secretary to the Department of Finance and Administration: FMO 1997, o 2.4.2.

agencies.⁴² Thus the underlying policy objective of the *FMA Act*'s approach was to make the management performance and stewardship of the Australian government's resources more efficient, effective, visible and accountable by leaving their management to Chief Executives and then making those Chief Executives accountable for their activities.⁴³

Integral to the devolved responsibility to Chief Executives is the requirement for accountability through proper accounting for the resources under the Chief Executive's custody and control. The *Financial Management Legislation Amendment Act 1999* (Cth)⁴⁴ modified the financial framework to change from the cash accounting framework of the original *FMA Act* to the new accrual budgeting framework.⁴⁵

The purpose of this Bill is to amend the Commonwealth's financial legislation to facilitate the introduction of a full accrual financial framework from 1 July 1999. Under an accrual financial framework the government will budget, manage and report on all of the Commonwealth's revenues and expenses, including those that have accrued, its assets and liabilities and its cash flows. This contrasts with the present framework, where the accounting focus has been on cash transactions and cash balances with minimal emphasis on the transparency of other resource transactions and their underlying assets and liabilities.

At a macro level, accrual information will make more transparent whether, over time, the Commonwealth is operating at a sustainable level, how its financial position is changing and how it is financing its operations. Greater transparency of government financial operations has been an important and continuing commitment of this government ... a full accrual accounting framework is an essential complement to the structural and cultural change the government is seeking by way of a more competitive, efficient and effective public sector. It is also essential if the accountability requirements of the parliament and the taxpayer, and the government's commitment to a charter of budget honesty, are to be met.⁴⁶

The FMOs are the central instrument setting out the accrual budgeting requirements for Agencies. The FMOs establish 'a consistent basis for preparing financial reports and budgets by [Agencies]' to assist 'users in assessing and comparing financial performance of individual [Agencies], including performance against budgets', 'the Government in presenting the

⁴² Commonwealth Parliamentary Debates (1996), p 8344.

⁴³ See Commonwealth Parliamentary Debates (1996), pp 8344–45.

⁴⁴ See Commonwealth Parliamentary Debates (1999), p 2283.

⁴⁵ 'Accrual accounting is a basis of accounting whereby the financial effects of transactions and events are recognised when they occur (and not as cash is received or paid) and included in financial statements for the reporting periods to which they relate': Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) p 3.

⁴⁶ Commonwealth Parliamentary Debates (1999), p 2283.

Budget on a full accrual basis' and 'the Finance Minister in preparing reliable consolidated financial statements'.⁴⁷ The *FMA Act* also requires Chief Executives to keep records required by the FMOs,⁴⁸ to prepare financial statements required by the FMOs,⁴⁹ provide financial statements and information to the Minister for Finance⁵⁰ and present annual financial statements to the Auditor-General.⁵¹ The Auditor-General is then required to independently⁵² audit these statements and report to the minister,⁵³ stating whether the annual financial statements 'have been prepared in accordance with the [FMOs]' and 'give a true and fair view of the matters required by those [FMOs]'.⁵⁴ Based on this information, the Minister for Finance publishes monthly financial statements⁵⁵ and prepares annual statements⁵⁶ that are then independently audited by the Auditor-General.⁵⁷

In accordance with the *Charter of Budget Honesty Act 1998* (Cth), the financial information provided by Chief Executives is compiled. This information assists the Treasurer to make public a mid-year economic and fiscal outlook report by the end of January in each year, or within six months after the last budget, whichever is later;⁵⁸ a budget economic and fiscal outlook report with each budget;⁵⁹ and a final budget outcome report within three months of the end of each financial year.⁶⁰ The outcome of these various reporting requirements is to provide parliament with information in the form of cash balances of moneys actually held by the Commonwealth,⁶¹ information about the true costs and liabilities incurred by the Commonwealth,⁶² and some transparency to the other resource transactions and their underlying assets and liabilities.⁶³

⁴⁷ Department of Finance and Administration (2003a), p 5.

⁴⁸ *FMA Act*, s 48(1).

⁴⁹ *FMA Act*, s 49(2).

⁵⁰ *FMA Act*, s 50.

⁵¹ *FMA Act*, s 49(1).

⁵² See *Auditor-General Act 1997* (Cth) s 8; 'The Auditor-General is an independent officer of the Parliament' (s 8(1)).

⁵³ *FMA Act*, s 57(1).

⁵⁴ *FMA Act*, s 57(2).

⁵⁵ *FMA Act*, s 54.

⁵⁶ *FMA Act*, s 55; *FMA Regulations*, r 22A.

⁵⁷ *FMA Act*, s 56; *FMA Regulations*, r 22B.

⁵⁸ *CBH Act*, s 14(1).

⁵⁹ *CBH Act*, s 10.

⁶⁰ *CBH Act*, s 18.

⁶¹ See, for example, Treasury (2003), pp 1–5; Department of Finance and Administration (2003b), pp 44–45.

⁶² See, for example, Treasury (2003), pp 17–25; Department of Finance and Administration (2003b), p 41.

⁶³ See, for example, Treasury (2003), pp 37–50; Department of Finance and Administration (2003b), p 42.

Thus, under the *FMA Act* financial framework,⁶⁴ there is a management framework devolving responsibility to Chief Executives to use and manage the resources under their control and an accrual budgeting framework by imposing reporting and audit requirements on Chief Executives to account for the resources under their custody and control. For intellectual property matters, the *FMA Act*'s management framework requires Chief Executives to use and manage the intellectual property in the same way as any other public property under their custody and control.⁶⁵ The seriousness of these endeavours is the imposing of criminal penalties (including imprisonment) for the misapplication or improper use of public property⁶⁶ and unauthorised gifting of public property,⁶⁷ and liability for the loss of public property.⁶⁸ The *FMA Act* accrual budgeting framework requires Chief Executives to maintain adequate records about their intellectual property holdings and comply with the FMO reporting standards and requirements. The next section of this paper addresses the details about the management framework applying to Chief Executives and the following section addresses details about the accrual budgeting framework.

The Management Framework

The *FMA Act* provides that: 'A Chief Executive must manage the affairs of the Agency in a way that promotes [the efficient, effective and ethical use]⁶⁹ of the Commonwealth resources for which the Chief Executive is responsible.'⁷⁰ This is then confined 'to the greatest extent practicable'⁷¹ by the regulations⁷² (including guidelines),⁷³ FMOs,⁷⁴ Special Instructions⁷⁵ and other applicable laws.⁷⁶ The *FMA Act* further provides that: 'The regulations may authorise Chief Executives to give instructions to officials in their Agencies on any

⁶⁴ Noting that special provisions are set out in the regulations for modifying (including additions, omissions and substitutions) the application of the *FMA Act* for security and intelligence agencies: see *FMA Act*, s 58; FMA Regulations, Sch 2.

⁶⁵ This assumes that intellectual property is a species of 'public property' for the purposes of the *FMA Act*; see, for an example of intellectual property being characterised as 'public property' by an *FMA Act* Agency, IP Australia (2003b).

⁶⁶ *FMA Act*, s 41.

⁶⁷ *FMA Act*, s 43.

⁶⁸ *FMA Act*, s 42.

⁶⁹ See *FMA Act*, s 44(3).

⁷⁰ *FMA Act*, s 44(1).

⁷¹ *FMA Act*, s 44(2).

⁷² See *FMA Act*, s 65.

⁷³ See *FMA Act*, s 64.

⁷⁴ See *FMA Act*, s 63.

⁷⁵ Noting that this is confined to 'special public money' and may only be indirectly related to intellectual property, such as an agency receiving a royalty payment for intellectual property it holds in trust for another: see *FMA Act*, ss 5 and 16.

⁷⁶ See generally *FMA Act*, s 44(2).

matter on which regulations may be made under this Act⁷⁷ and sets out a delegation power,⁷⁸ including the power to delegate giving instructions.⁷⁹ The FMA Regulations then set out the matters that may be addressed by the Chief Executive's Instructions (CEIs),⁸⁰ subject to being consistent with the *FMA Act*, regulations and FMOs:⁸¹

The Chief Executive of an Agency is authorised to give instructions ... to officials in that Agency on any matter necessary or convenient for carrying out or giving effect to the Act or these Regulations, and, in particular:

- (a) on any of the following matters:
 - (i) handling, spending and accounting for public money;
 - (ii) making commitments to spend public money;
 - (iii) recovering amounts owing to the Commonwealth;
 - (iv) using, or disposing of, public property;
 - (v) acquiring property that is to be public property; and
- (b) for ensuring or promoting:
 - (i) the proper use and management of public money, public property and other resources of the Commonwealth; and
 - (ii) proper accountability for the use and management of public money, public property and other resources of the Commonwealth.⁸²

Other obligations imposed by the FMA Regulations which may affect dealings with intellectual property⁸³ include obligations on procurement,⁸⁴

⁷⁷ *FMA Act*, s 52 (1).

⁷⁸ This includes a power to sub-delegate in some circumstances: see *FMA Act*, s 53(1A).

⁷⁹ *FMA Act* s 53(1)(b).

⁸⁰ It is presumed that CEIs are legislative instruments addressed by the *Legislative Instruments Act 2003* (Cth), ss 5 and 6, although it is certainly not clear whether the instructions chief executives give to their agency must only be in the form of CEIs (FMA Regulations, r 6(1)), potentially allowing chief executives to direct the management and control of their agency outside the ambit of the *Legislative Instruments Act 2003* (Cth); the 'Procedural Rules' in IP Australia (see Department of Industry, Tourism and Resources (2003), p 130) may be an example of instructions equivalent to CEIs detailing management specific procedures, but outside the ambit of the *Legislative Instruments Act 2003* (Cth); there is currently no publicly available policy on the proper content of CEIs, although 'model CEIs' were originally provided by the Department of Finance: see Auditor-General (1998a) — 'The Department of Finance and Administration ... developed and released to agencies model instructions intended to assist agencies in the development of their own CEIs' (p 4).

⁸¹ FMA Regulations, r 6(2).

⁸² FMA Regulations, r 6(1).

⁸³ Noting that the *FMA Act* scheme also makes specific provision for tangible property (see for example FMA Regulations, r 23 dealing with the disposal of

fraud,⁸⁵ spending proposals,⁸⁶ the recovery of debts⁸⁷ and future commitments of public money.⁸⁸ There is also a requirement for a Fraud Control Plan⁸⁹ and an Audit Committee⁹⁰ that might also address intellectual property matters.

The *FMA Act*'s underlying policy is that an Agency's Chief Executive is best placed to determine the particular approach to using and managing intellectual property in ways that are consistent with the functions and objectives of the Agency and appropriate to the Agency's circumstances. This is especially important for intellectual property, as the ANAO recognised:

Intellectual property management is not just about registering and managing patents or the results of scientific endeavour. Nor should it be seen as solely a means to generate revenue through commercialisation. Intellectual property management should be regarded as a normal part of executive management. It should be seen as analogous to other corporate and management tasks. Intellectual property management should be integrated with the Agency's normal internal operating environment. It should be accorded the attention commensurate with its importance to the Agency's functions and objectives, as well as the scale of any risks associated with the uptake, non-uptake or infringement of intellectual property created or used by the Agency.⁹¹

The procurement process illustrates the distinctions between the high-level binding requirements on Chief Executives and articulations of policy that are instructive and of assistance to Chief Executives in determining a particular approach to using and managing intellectual property. The high-level FMA Regulations prescribe that, in entering into any 'contract, agreement or arrangement' for which 'public money' is or may become payable,⁹² there must be an approved spending proposal,⁹³ that has taken into account 'the

property found on Commonwealth premises) and 'bonds, debentures or other securities' (see *FMA Act*, s 40; FMA Orders 1997, o 5.1).

⁸⁴ FMA Regulations, rr 7 and 8.

⁸⁵ FMA Regulations, rr 19 and 20; see also FMA Orders 1997, oo 2.2.1–2.2.3.

⁸⁶ FMA Regulations, rr 9 and 13; noting that specific provisions apply to loan guarantees: FMA Regulations, r 14.

⁸⁷ *FMA Act*, s 47.

⁸⁸ FMA Regulations, rr 9, 10 and 13.

⁸⁹ *FMA Act*, s 45.

⁹⁰ *FMA Act*, s 46.

⁹¹ Auditor-General (2004), p 102.

⁹² Noting that this process has been modified for some security and intelligence agencies: FMA Regulations, Sch 2.

⁹³ FMA Regulations, r 13; this includes 'notional payments' see *FMA Act*, s 6; the 'approver' must be 'authorised' (FMA Regulations, r 11) and record the approval in writing or document the reasons for giving the approval (FMA Regulations, r 12).

policies of the Commonwealth⁹⁴ and 'efficient and effective use of the public money',⁹⁵ and that there is an appropriation.⁹⁶ In addition, the Minister for Finance has issued the *Commonwealth Procurement Guidelines & Best Practice Guidance* (CPGs)⁹⁷ under the Regulations,⁹⁸ to which an 'official' must 'have regard' and make a written record of 'action that is not consistent' with the CPGs.⁹⁹ The CPGs deal with the procurement of 'property and services', including 'matters affecting Commonwealth contracts or Agency agreements' and the 'disposal of public property'.¹⁰⁰ The core principle of the CPGs in procuring 'property and services'¹⁰¹ is 'value for money' that is 'underpinned' by 'efficiency and effectiveness', 'accountability and transparency', 'ethics' and 'industry development'.¹⁰² However, in dealing with intellectual property, the CPGs merely set out non-binding best-practice procurement guidance, recognising that the major instruction and guidance on these matters falls to the Chief Executive. Thus the CPGs provide, in part:

To facilitate the business of Government and protect the public interest, the Commonwealth may need to use, reproduce, enhance, adapt, modify, alter or control use of intellectual property, including the right to sub-licence for these purposes. Each Agency should identify, at an early stage, the intellectual property likely to be developed during a project and carefully consider the ownership requirements for that property.

An Agency should obtain the rights it needs, for least cost and effort, to support its business needs. Contracts should clearly reflect the

⁹⁴ This includes significant parts of the CPGs that are stated not to be part of the CPGs (Department of Finance and Administration (2002a), pp 15, 18), the Department of Finance and Administration's Procurement Circulars (for example, Department of Finance and Administration (2003d)) and Procurement Guidance (for example, Department of Finance and Administration (2003c)), broader government policies (for example, Department of Finance and Administration (2002b); Commonwealth Competitive Neutrality Complaints Office (1998)), and particular guidance from other part of the Australian Government, including guidance related to intellectual property matters (see, for example, Department of Communications, Information Technology and the Arts, 2000).

⁹⁵ FMA Regulations, r 9.

⁹⁶ If there is no appropriation, the Minister for Finance, or their delegate, must give written authorisation: see FMA Regulations, r 10.

⁹⁷ Department of Finance and Administration (2002a).

⁹⁸ See *FMA Act*, s 64; FMA Regulations, r 7.

⁹⁹ FMA Regulations, r 8.

¹⁰⁰ FMA Regulations, r 7; Department of Finance and Administration (2002a).

¹⁰¹ These terms include consultancies and professional services of all types, real property activities, construction and related services (including works), financial and operating leases for equipment and real property, individual and collective training programs, services obtained from public utilities suppliers and outsourcing or contracting out activities (such as program delivery and program support): see Department of Finance and Administration (2002a), p 6.

¹⁰² Department of Finance and Administration (2002a), p 6.

arrangements and contract managers should actively track and report intellectual property outcomes.¹⁰³

In applying the CPGs, there is express recognition that the particular circumstances in which a procurement is undertaken reflects the many and varied circumstances of the Australian government's business, and that Chief Executives are best placed to manage the process: the 'CEIs are a vehicle for informing staff of the practices and procedures within their Agency, including procurement'.¹⁰⁴ Thus, by way of example, IP Australia¹⁰⁵ expressly recognises in its CEIs that intellectual property can be a form of 'public property' under its custody and control and identifies a grouping within its internal structures to administer that responsibility.¹⁰⁶ The CEIs also identify individuals responsible for the control and management of public property,¹⁰⁷ including the disposal of public property.¹⁰⁸ In procurement — and presumably this includes purchasing intellectual property — the CEIs require the purchase to be classed either as an 'expense item' or an 'asset',¹⁰⁹ and specifies the internal process for complex and high-value purchases.¹¹⁰ Presumably intellectual property would be an asset, whereupon the CEIs require that it must be purchased through the Procurement and Financial Operations, Finance Operations and Systems Section within IP Australia.¹¹¹ The CEIs set out 'obligations' on those officials that the procurement comply with the CPGs, be ethical, be efficient and effective, be accountable and transparent, support industry development and represent value for money.¹¹² The CEIs also set out 'principles' that procurement 'promotes efficient, effective and ethical use of IP Australia resources', is 'in accordance with particular CEIs', 'meets all legal requirements' and occurs in 'an environment of open and effective competition and best value for money'.¹¹³ These CEIs do not, however, set out how competing policy objectives are to be taken into account in procurement

¹⁰³ Department of Finance and Administration (2002a), p 16.

¹⁰⁴ Department of Finance and Administration (2002a), p 16.

¹⁰⁵ This example is informative as it is claimed that: 'The Chief Executive Instructions provide detailed procedures to achieve compliant and efficient purchasing practices': Department of Industry, Tourism and Resources (2003), p 130; note that IP Australia is a 'prescribed Agency' (*FMA Act*, s 5; *FMA Regulations*, r 5(1)(a) and Sch 1) in the Industry, Tourism and Resources portfolio (AAO (2003), p 25).

¹⁰⁶ IP Australia (2003b), cl 2.4.

¹⁰⁷ For example, the Deputy Director General, Information Technology Services is responsible for 'Ensuring the safeguarding of IP Australia's computer software and installations': IP Australia (2003b), cl 3.1.

¹⁰⁸ IP Australia (2003b), cl 3.1.

¹⁰⁹ IP Australia (2003a), cl 3.4.

¹¹⁰ IP Australia (2003a), cl 3.6.

¹¹¹ IP Australia (2003a), cl 3.4.

¹¹² IP Australia (2003a), cl 2.2.

¹¹³ IP Australia (2003a), cl 3.3.

decisions or how intellectual property might be managed once it has been procured.¹¹⁴ Given the expansive scope of CEIs for instruction about acquiring and using and disposing of public property,¹¹⁵ and ensuring and promoting the proper use, management and accountability for public property,¹¹⁶ the CEIs might be expected to set out how agencies use and manage their intellectual property resources.

The Auditor-General states that intellectual property was rated by a significant portion of agencies as an important part of their operations;¹¹⁷ many agencies have intellectual property registers;¹¹⁸ intellectual property was a common element of contractual agreements;¹¹⁹ many agencies commercialise intellectual property;¹²⁰ and there was some reporting within agencies about the management of the Agency's intellectual property.¹²¹ However, in surveying agencies to assess the Australian government's intellectual property practices, the Auditor-General's questions were directed to an 'IP Management Plan'.¹²² There were no questions specifically directed to the CEIs¹²³ and no report of agencies having intellectual property-related policy or directions in their CEIs,¹²⁴ even though some agencies do address aspects of intellectual property management in their CEIs,¹²⁵ and might be expected to set out their particular policies and practices under the *FMA Act* management framework.

The Accrual Budgeting Framework

The 'special responsibilities' of Chief Executives require the keeping of 'accounts and records' required by the FMOs,¹²⁶ and preparing annual and other financial statements required by the FMOs.¹²⁷ The purpose of the FMOs is to establish a consistent basis for preparing financial reports across the

¹¹⁴ This may, in part, reflect the particular approach of IP Australia in supplementing its CEIs with so-called 'Procedural Rules': 'IP Australia's asset management principles and procedures are contained in the Chief Executive Instructions and associated Procedural Rules': Department of Industry, Tourism and Resources (2003), p 130.

¹¹⁵ See FMA Regulations, r 6(a).

¹¹⁶ See FMA Regulations, r 6(b).

¹¹⁷ The Auditor-General (2004) says of the 30 per cent of agencies having a policy addressing intellectual property, '90 per cent rated intellectual property as of medium to high importance to their business' (p 19).

¹¹⁸ Auditor-General (2004), p 20.

¹¹⁹ Auditor-General (2004), pp 20–21.

¹²⁰ Auditor-General (2004), p 21.

¹²¹ Auditor-General (2004), p 22.

¹²² Australian National Audit Office (2003), pp 7–8.

¹²³ See Australian National Audit Office (2003).

¹²⁴ See Auditor-General (2004).

¹²⁵ See, for example, IP Australia (2003a).

¹²⁶ *FMA Act*, s 48; see FMA Orders 1997, o 2.3.

¹²⁷ *FMA Act*, ss 49 and 50.

Australian government.¹²⁸ There are FMOs generally addressing matters under the *FMA Act*,¹²⁹ and FMOs dealing specifically with the annual financial statements prepared by the Chief Executive.¹³⁰ The account and record-keeping requirements in the FMOs provide:

For the purposes of section 48 of the Act, a Chief Executive must ensure that the accounts and records of the Agency properly record and explain the Agency's transactions and financial position and that, without limiting the generality of this obligation, must ensure that the accounts and records are kept in a way that:

- a records the receipt and expenditure of public money on a daily basis; and
- b enables information to be provided to the Finance Chief Executive¹³¹ when required by the Finance Chief Executive:
 - i on Commonwealth financial affairs to be included in budget and related documentation; and
 - ii on the financial affairs of the Agency for the preparation of aggregate reporting for the Commonwealth; and
- c enables the preparation of financial statements in accordance with section 49 of the Act; and
- d allows those financial statements to be conveniently and properly audited in accordance with the Act; and
- e ensures that moneys are only expended for the purpose for which they are appropriated; and
- f ensures the limit on any appropriation is not exceeded.¹³²

The FMOs generally deal with intellectual property as an intangible non-current asset, setting out how it is to be valued¹³³ and reported.¹³⁴ In meeting

¹²⁸ This includes entities within the 'general government sector', being entities predominantly funded by taxpayers and covers both *FMA Act* Agencies and *CAC Act* bodies: 'The primary function of this sector is to provide public services, which are mainly non-market in nature, and for the collective consumption of the community, or involve the transfer or redistribution of income. These services are largely financed through taxes and other compulsory levies.' see Department of Finance and Administration (2003a), p 131.

¹²⁹ See FMA Orders 1997.

¹³⁰ See Financial Management and Accountability (Financial Statements 2000–2001) Orders; Financial Management and Accountability (Financial Statements 2001–2002) Orders; FMA Financial Statement Orders 2003.

¹³¹ This is the Secretary to the Department of Finance and Administration: FMA Orders, o 1.3; see also FMA Regulations, r 3.

¹³² FMA Orders 1997, o 2.3.

¹³³ FMA Financial Statement Orders 2003, o 3C.2; see also Department of Finance and Administration (2003a), pp 43, 152; this provides that intellectual property is to be measured on a 'costs basis' unless it is software that is an integral part of hardware and then it is valued on a 'fair basis' (p 152).

these requirements, there must be compliance with accounting standards,¹³⁵ consensus accounting views,¹³⁶ and a Chief Executive/Agency must 'have regard' to FMO explanatory materials¹³⁷ and other guidance materials issued by the Department of Finance and Administration.¹³⁸ Of the range of intangible non-current assets, special provision is made for 'software held for internal entity use, whether internally developed or externally acquired' which is initially capitalised at the cost of development or acquisition and then carried at its cost less accumulated amortisation and any accumulated write-downs.¹³⁹ The Statement of Financial Position forming part of the primary financial statements¹⁴⁰ is required to report the value of the intangible asset on the face of the statements or record the amounts and particulars of the classes of assets in a note.¹⁴¹ In addition, there is also provision for reporting on administered items on behalf of the government.¹⁴² These statements are required to comply, 'to the extent that they are applicable',¹⁴³ with the primary financial statements,¹⁴⁴ including the disclosure of material and immaterial classes of intangible assets.¹⁴⁵

However, as with all accounting, there are threshold, definitional and application problems. These are addressed in part by the accounting

¹³⁴ FMA Financial Statement Orders 2003, o 1B.2; see also Department of Finance and Administration (2003a), pp 86–98 (Commercial Reporting Entities) and 100–112 (Non-Commercial Reporting Entities).

¹³⁵ FMA Financial Statement Orders 2003, o 1B.2(c); these are the accounting standards that apply for the reporting period and accounting interpretations issued by the Australian Accounting Standards Board and the former Public Sector Accounting Standards Board (unless superseded by standards and interpretations of the Australian Accounting Standards Board).

¹³⁶ FMA Financial Statement Orders 2003, o 1B.2(d); these are the views of the Consensus Views of the Urgent Issues Group (UIG) that apply for the reporting period: see Urgent Issues Group (2002).

¹³⁷ FMA Financial Statement Orders 2003, o 1B.2(e); this is the guidance materials set out by the Department of Finance and Administration (2003a).

¹³⁸ FMA Financial Statement Orders 2003, o 1B.2(f); these include Finance Briefs, Finance Circulars and other guidance notes.

¹³⁹ FMA Financial Statement Orders 2003, o 3B; Department of Finance and Administration (2003a), pp 40–41.

¹⁴⁰ FMA Financial Statement Orders 2003, o 1B.2(a).

¹⁴¹ Department of Finance and Administration (2003a), pp 93 (Commercial Reporting Entities) and 108 (Non-Commercial Reporting Entities); note also FMA Financial Statement Orders 2003, o 1B.2(b).

¹⁴² FMA Financial Statement Orders 2003, o 6A.1; see also Department of Finance and Administration (2003a), pp 114–26.

¹⁴³ FMA Financial Statement Orders 2003, o 6A.2(a) with the other primary financial statement and notes required by FMA Financial Statement Orders 2003, oo 1B.2(c), (c), (d), (e) and (f).

¹⁴⁴ See FMA Financial Statement Orders 2003, oo 1B.2(c), (c), (d), (e) and (f).

¹⁴⁵ FMA Financial Statement Orders 2003, oo 6A.2(d) and (e).

standards,¹⁴⁶ although the accounting standards dealing with intellectual property remain uncertain.¹⁴⁷ To address this, there is guidance material prepared by the Department of Finance and Administration to which a Chief Executive/Agency must 'have regard' when preparing its financial statements.¹⁴⁸ This guidance material expressly recognises that the 'efficient and effective management of non-current assets [like intellectual property] is essential to the delivery of outputs and outcomes to the Government and the community' and that Chief Executives are responsible for these assets under the *FMA Act*.¹⁴⁹ Thus the guidance materials provides, in part:

A prerequisite of efficient and effective management of non-current assets is relevant, reliable and timely information. This information is necessary to:

- (a) assess whether particular assets are being utilised in the manner that most effectively meets the goals and objectives of the organisation;
- (b) assess whether assets controlled by the organisation are properly maintained, enabling the entity to meet its current and future requirements;
- (c) plan for the future replacement of assets;
- (d) identify and plan for the disposal of surplus or under-utilised assets;
- (e) effectively manage the risks associated with asset control;
- (f) determine the cost of the products and services provided by the entity; and
- (g) assess, where appropriate, the commercial competitiveness of the entity.¹⁵⁰

The non-binding guidance material sets out financial reporting suggestions for including non-current intangible assets (except goodwill) in a Statement of Financial Position.¹⁵¹ There are specific guidance materials

¹⁴⁶ Such as AAS 29 *Financial Reporting by Government Departments*; AASB 1010 *Recoverable Amount of Non-Current Assets*; AASB 1011 *Accounting for Research and Development Costs*; AASB 1021 *Depreciation*; AASB 1041 *Revaluation of Non-Current Assets*.

¹⁴⁷ See, for example, Pending AASB *Intangible Assets*; at the time of the report, there was no Australian accounting standard that comprehensively addressed the accounting treatment of intangible assets, the treatment being set out in various standards such as AASB 1010 *Recoverable Amount of Non-Current Assets*; AASB 1011 *Accounting for Research and Development Costs*; AASB 1013 *Accounting for Goodwill*; AASB 1015 *Acquisitions of Assets*; AASB 1021 *Depreciation* and AASB 1041 *Revaluation of Non-Current Assets*; more recently, the accounting standards applying to intellectual property have been clarified — see, for example, Department of Finance and Administration (2004).

¹⁴⁸ FMA Financial Statement Orders 2003, oo 1B.2(e) and 6A.2(a).

¹⁴⁹ Department of Finance and Administration (2003a), p 137.

¹⁵⁰ Department of Finance and Administration (2003a), p 137.

¹⁵¹ See FMA Financial Statement Orders 2003, o 1B.2(a); see also Department of Finance and Administration (2003a), pp 88–89 (Commercial Reporting Entities) and 102–03 (Non-Commercial Reporting Entities).

dealing with 'Intangible Assets' as a 'Specific Asset Issue'¹⁵² that provide, in part:

Intangible assets are any assets without physical substance. This includes software, (whether purchased or internally created) and patents.

Intangible assets are required by Finance Minister's Orders to be measured on the cost basis, except where the software is an integral part of hardware that is measured at fair value.

The principles for non-current assets set out elsewhere in this document apply equally to intangible assets such as software. However, the following points are relevant to the application of these principles. Intangible assets are more likely to:

- (a) have an unlimited useful life and hence not be subject to amortisation;
- (b) be excluded from the Statement of Financial Position because their future economic benefits cannot be reliably measured or are not probable;
- (c) be generated within an entity and hence more likely to be difficult to assign an initial value or even be missed altogether; and
- (d) be subject to impairment losses, eg as a result of rapid technological change.

Accurate recording of intangibles therefore requires close monitoring by entities. Intangible asset values and useful lives should be regularly reviewed to ensure that their carrying amounts and rates of amortisation are still appropriate.¹⁵³

The Auditor-General expressly recognised that: 'The treatment of intellectual property assets in an Agency's financial statement is complex and uncertain ... the difficulties associated with valuing and identifying intellectual property mean that much of an Agency's intellectual property is not recognised within the Agency financial statements.'¹⁵⁴ In assessing the various accounting standards, the Auditor-General considered that the recognition criteria did not 'allow all intellectual property to be included on the balance sheet' so there was 'not a complete picture of the value of intellectual property assets in agencies nor for the Commonwealth as a whole'.¹⁵⁵ In surveying the various agencies (including *FMA Act* agencies), the Auditor-General did ask questions about reporting on the management of intellectual property, including external reporting 'under financial statements or annual report requirements',¹⁵⁶

¹⁵² Department of Finance and Administration (2003a), pp 152–55; other 'Specific Asset Issues' are Heritage and Cultural Assets, Leased Assets, Capitalising or Expensing Maintenance, Restricted Assets, Revaluation of Assets Measured on the Cost Basis and Land.

¹⁵³ Department of Finance and Administration (2003a), p 153.

¹⁵⁴ Auditor-General (2004), p 19.

¹⁵⁵ Auditor-General (2004), p 46.

¹⁵⁶ Australian National Audit Office (2003), p 21.

although the report of the survey results does not set out how much intellectual property was reported in the financial statements.¹⁵⁷

However, the threshold, definitional and application problems are about recognising whether intellectual property as an asset is to be included on the face of the financial statements or in a note. Before these problems arise, there is a requirement that the Agency be aware of the intellectual property itself so that it may be identified, recorded and valued as an asset that may or may not then be reported, depending on whether the threshold definitions are satisfied. Unfortunately the Auditor-General did not address this issue from the perspective of keeping accounts and records required by the *FMA Act*, although the survey of various agencies (including *FMA Act* agencies) did provide some insight into the matter suggesting the identifying and record keeping required by the *FMA Act* may not be satisfactory. The survey asked entities (including *FMA Act* agencies) whether they had an 'IP management plan', being a 'formal plan or plans, procedures or practices by which an Agency will manage its IP'.¹⁵⁸ Further questions addressed identifying intellectual property,¹⁵⁹ audits and reviews to identify intellectual property,¹⁶⁰ registers,¹⁶¹ valuing intellectual property,¹⁶² monitoring intellectual property¹⁶³ and protecting intellectual property.¹⁶⁴ The Auditor-General reported that approximately half the surveyed entities (including *FMA Act* agencies) had a mechanism for identifying intellectual property from which the Auditor-General concluded 'a significant portion of agencies do not have systems in place in order to know what assets they own, use or control'.¹⁶⁵ The Auditor-General also reported approximately one-third of the entities (including *FMA Act* agencies) maintained registers¹⁶⁶ and 55 per cent had mechanisms to decide 'the appropriate level of ownership' of the intellectual property.¹⁶⁷ The Auditor-General's conclusions were that reporting on an Agency's intellectual property management was important so that agencies were accountable for the assets under their control.¹⁶⁸ But the Auditor-General merely accepted that reporting intellectual property in the financial statements was 'complex and

¹⁵⁷ Auditor-General (2004) refers to the *Consolidated Financial Statements 2002–03* (see Department of Finance and Administration (2003b)) reporting \$3.4 billion for computer software and \$3.3 billion for all other intangible assets that includes non-computer software intellectual property (p 95).

¹⁵⁸ Australian National Audit Office (2003), p 7.

¹⁵⁹ Australian National Audit Office (2003), pp 8, 10–11 and 14–15.

¹⁶⁰ Australian National Audit Office (2003), p 11.

¹⁶¹ Australian National Audit Office (2003), p 12.

¹⁶² Australian National Audit Office (2003), p 13; this included qualitative and quantitative valuations.

¹⁶³ Australian National Audit Office (2003), pp 16–17.

¹⁶⁴ Australian National Audit Office (2003), p 17.

¹⁶⁵ Auditor-General (2004), p 20.

¹⁶⁶ Auditor-General (2004), p 20.

¹⁶⁷ Auditor-General (2004), p 21.

¹⁶⁸ Auditor-General (2004), p 96.

uncertain' because of 'the difficulties associated with valuing and identifying intellectual property'.¹⁶⁹ This does not address the initial requirement that the Agency must identify and record its intellectual property assets before they can then be valued as part of the process of deciding what intellectual property forms part of the intangible assets in the financial statements as required by the *FMA Act*, and in particular the FMOs.

Conclusions

After assessing the practices of a broad range of *FMA Act* agencies¹⁷⁰ and case studies of some *FMA Act* agencies,¹⁷¹ the Auditor-General recommended that agencies should develop intellectual property policies suited to their particular circumstances (Recommendation 1)¹⁷² and that a 'whole-of-government policy approach' be developed by 'the Attorney-General's Department, the Department of Communications, Information Technology and the Arts and IP Australia (along with other relevant entities)' (Recommendation 2). While the Auditor-General's performance audit is a welcome assessment of the Australian government's intellectual property policies and practices, this article argues that the audit failed to address the important financial framework issues for Agencies under the *FMA Act*.

An integral part of the *FMA Act*'s financial framework has been the introduction of accrual budgeting so that: 'At a macro level, accrual information will make more transparent whether, over time, the Commonwealth is operating at a sustainable level, how its financial position is changing and how it is financing its operations.'¹⁷³ Central to the effectiveness of the accrual budgeting is keeping appropriate records to prepare the financial statements that ensure appropriate accountability under the devolved management framework for the resources under a Chief Executive's control. This has been specifically addressed under the *FMA Act* by imposing standardised reporting requirements through the FMOs that apply a consistent structure for reporting and consistent accounting standards with some guidance materials about how those standards are to be applied. These reporting

¹⁶⁹ Auditor-General (2004), p 95.

¹⁷⁰ A list is set out in Auditor-General (2004), pp 105–06.

¹⁷¹ See Auditor-General (2004), p 106; the *FMA Act* agencies were the Australian Bureau of Statistics (a prescribed agency; see *FMA Regulations*, Sch 1), Department of Defence (*FMA Act*, s 5 and AAO 2003, Pt 4) and Department of Employment and Workplace Relations (*FMA Act*, s 5 and AAO 2003, Pt 6); Airservices Australia (see *Air Services Act 1995* (Cth), s 7), Australian Nuclear Science and Technology Organisation (see *Australian Nuclear Science and Technology Organisation Act 1987* (Cth), s 4), Commonwealth Scientific and Industrial Research Organisation (see *Science and Industry Research Act 1949* (Cth), s 8) and the Grains Research and Development Corporation (see *Primary Industries and Energy Research and Development Act 1989* (Cth), s 10 and *Grains Research and Development Corporation Regulations 1990* (Cth), r 4) are *CAC Act* bodies.

¹⁷² See Auditor-General (2004), p 57.

¹⁷³ Commonwealth Parliamentary Debates (1999), p 2283.

requirements deal with intellectual property as an intangible asset and recognise some of the complexities relating to how these resources might be valued and reported.

Perhaps the major limitation on including intellectual property in the financial reporting of agencies has been the interpretation of the limiting definition of an 'asset'. The guidance materials suggest that intellectual property may be excluded from the face of the financial statement because it is unlikely 'the future economic benefits represented by the asset will eventuate' and that 'future economic benefits can be reliably measured',¹⁷⁴ and the threshold value may be minor or immaterial.¹⁷⁵ However, notes to the statements might be expected to include considerable details about valuable intellectual property holdings, as: 'In determining whether a resource or right needs to be accounted for as an asset, the potential to contribute to the objectives of the entity should be the prime consideration' and 'These objectives can be commercial or non-commercial'.¹⁷⁶ Further, in making decisions about whether the value of a particular intellectual property asset should be included on the face of a financial statement or identified in the notes, agencies would presumably have identified that asset, assessed their value and then decided whether to include it in its financial statements according to the FMOs. As the guidance materials provided by the Department of Finance and Administration say:

Accurate recording of intangibles therefore requires close monitoring by entities. Intangible asset values and useful lives should be regularly reviewed to ensure that their carrying amounts and rates of amortisation are still appropriate.¹⁷⁷

¹⁷⁴ Department of Finance and Administration (2003a), p 140; see SAC 4 *Definition and Recognition of the Elements of Financial Statements*, p 13; noting that the SAC 4 definition is that 'it is probable that the future economic benefits embodied in the asset will eventuate' and 'the asset possesses a cost or other value that can be measured reliably' (p 19).

¹⁷⁵ Although the asset recognition threshold of each agency should be disclosed in the accounting policy notes of its financial statements: see Department of Finance and Administration (2003a), p 142.

¹⁷⁶ Department of Finance and Administration (2003a), p 139; see also AAS 29 *Financial Reporting by Government Departments* that states: 'Government departments are created to provide goods and services consistent with government policies. The objective of general purpose financial reporting is to disclose information for economic decision making, including information which will assist in the discharge of accountability obligations. For these purposes users are likely to require information about the resources controlled by the government department, changes in those resources as a result of the reporting period's operations and the government department's performance in using those resources for the achievement of its objectives.' (p 19).

¹⁷⁷ Department of Finance and Administration (2003a), p 153.

The effect of the FMOs and the other obligations in the *FMA Act* to maintain records and provide additional financial statements to the Minister for Finance when requested in effect requires agencies to properly identify and record *all* their intellectual property. Without being aware of and identifying an Agency's intellectual property, that Agency is in no position to then make decisions and judgments about including relevant information in its financial statements or to report financial information requested by the Minister for Finance. Unfortunately the Auditor-General failed to consider the implications of the *FMA Act*'s accrual budgeting framework and, as a consequence, the existing obligations on Chief Executives to identify and record all intellectual property under their control.

Central to identifying and recording an Agency's intellectual property is the proper use and management of that intellectual property that requires each Agency to devise its own approach, suited to its particular objectives, functions and circumstances. The CEIs might be expected to set out the detailed policy and practice satisfying the Agency's accrual budgeting framework for records and financial statements and the management framework for the proper use and management of a resource according to its objectives, functions and circumstances. Unfortunately the Auditor-General did not address these issues by expressly asking about agencies' CEIs or reviewing the content of Agencies' CEIs. As the analysis in this article shows, some agencies do address intellectual property in their CEIs, including IP Australia. As a consequence of failing to consider the CEIs and their role under the *FMA Act*'s management framework, the Auditor-General's recommendation for a 'whole-of-government policy approach' overlooks the policy objective of devolving management responsibility to Chief Executives. A response to the Auditor-General perhaps captures the appropriate approach under the *FMA Act*: 'A whole-of-government approach would be useful provided any such approach was not mandated and took the form of guidance and advice only, to enable each Agency to adopt the approach to suit its own functions, circumstances and requirements'.¹⁷⁸ The Agency's CEIs might then be expected to set out the particular approach of an Agency, taking into account its objectives, functions and circumstances.

The Auditor-General does address in some detail some general principles about better managing intellectual property.¹⁷⁹ These are useful and informative and should assist Chief Executives developing CEIs to use and manage the intellectual property under their control 'efficiently, effectively and ethically'. However, these principles themselves are at best policy considerations that need to be tailored, as the Auditor-General acknowledges, to 'an intellectual property management approach that is consistent with [the Agency's] core functions and objectives, and which is appropriate to the Agency's circumstances'.¹⁸⁰ This article shows that, in conducting the performance audit, the Auditor-General failed to properly consider the broader

¹⁷⁸ Auditor-General (2004), p 59.

¹⁷⁹ Auditor-General (2004), pp 97–102 and App 3.

¹⁸⁰ Auditor-General (2004), p 29.

financial framework applying to parts of the Australian government under the *FMA Act*. As a consequence, the Auditor-General's recommendations fail to consider the existing policies and practices, and then fail to address the appropriate framework for implementing the proper policies and practices of managing and accounting for intellectual property in the Australian government. With respect, the proper place for intellectual policy and practice to be addressed is through the existing management framework, with the CEIs setting out the detailed policies and practices for the Agency. Further, the existing accrual budgeting framework already addresses intellectual property with the FMOs in effect requiring the identifying, recording and valuing of all an Agency's intellectual property, even if only some is reported on the face of the financial statements.

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