Australian Government
Department of Finance

PRACTICAL GUIDE
Breaches of section 83 of the Constitution

A breach of section 83 of the Commonwealth of Australia Constitution Act (the Constitution) occurs when an amount is paid out of the Consolidated Revenue Fund without, or in a way that is inconsistent with, a valid appropriation made by law.

There is no materiality threshold for breaches of section 83 (that is, a breach may occur even if the payment is for a very small amount). While the occurrence of a breach does not necessarily indicate financial mismanagement, a breach may indicate non-compliance with the finance law including a failure of internal controls or to ensure the proper use of public resources.

Identifying breaches of section 83

Breaches may arise in a number of circumstances:

- A breach may involve a small amount of money, such as a minor payment that causes total spending to exceed the appropriation.
- It can arise from a minor administrative error, such as making a duplicate payment – even if the overpayment can be recovered. However, not all such errors are breaches: for example, a duplicate payment from a generally worded special appropriation, for a purpose consistent with the Act containing the special appropriation provision, is unlikely to breach section 83.
- Fraudulent payments or payments made in bad faith may also constitute breaches, such as when someone provides false or misleading information to receive a payment.
- A breach can also occur when a payment is made in good faith, based on an administrative assessment using the best available information at the time, which later proves to be inaccurate or incomplete.
- A payment is made from a valid appropriation, however a delegation is incorrectly exercised in the making of the payment.

While section 83 breaches can occur in payments made from the annual Appropriation Acts, the likelihood of such breaches is generally considered lower for these appropriations.

Conversely, the risks for payments made from special appropriations, including special accounts, tend to be higher. In some cases, legislation recognises the practical challenges of using imperfect information to make payments. Such legislation may permit estimated payments and provide mechanisms for recovery or adjustment of overpayments, addressing situations where excess amounts paid in error. This demonstrates that Parliament intended to accommodate a degree of uncertainty in the payment process.

Entities must take steps to manage and monitor the risk of breaching section 83. These may include:

- working with the entity's audit committee to review and monitor internal controls
- conducting risk assessments of the rules for special appropriations and special accounts, along with a sampling program to identify potential breaches
- developing a risk profile for each special appropriation or special account payment process and reviewing how section 83 risks are managed
- requesting the internal audit team to assess current process controls and recommend changes to ensure compliance with constitutional and legal requirements.

Disclosure requirements

If a non-corporate Commonwealth entity (NCE) suspects that a payment may have been made in breach of section 83 of the Constitution, a risk assessment should be carried out.

If the risk assessment identifies a possible breach, the NCE should generally seek legal advice to assess and confirm the likelihood that a breach has occurred[1]. Consistent with the Legal Services Directions only the Australian Government Solicitor and the Office of Constitutional Law in the Attorney-General's Department can provide advice on Constitutional law issues.

Where legal advice confirms that it is **more likely than not** that a breach of section 83 has occurred, accountable authorities must consider whether they are required to disclose the issue to their responsible minister, the Finance Minister and in the entity annual report.

Under section 19 of the *Public Governance, Performance and Accountability Act 2013*, accountable authorities have a duty to keep their responsible minister informed of **significant issues** affecting the entity and inform the Finance Minister about (and disclose in entity annual reports) issues that involve **significant non-compliance with the finance law**.

In considering these duties, accountable authorities should note that:

- issues relating to appropriations are considered material by nature for the purposes of the *Public Governance, Performance and Accountability (Financial Reporting) Rule 2015*.
- breaches of section 83 may highlight failures of the entity's system of internal control, or a failure to ensure the proper use of public resources, contrary to the duties of officials and accountable authorities.

See RMG 200 Duties of Accountable Authorities, RMG 214 Notification of significant non-compliance with the finance law and RMG 135 Annual reports for non-corporate Commonwealth entities for more information.

Disclosures to ministers and in annual reports should include details about the number and total value of the breaches, where possible. Each category of breach should be reported separately, along with the actions taken to reduce the risk of the breach reoccurring. If a likely breach from a previous reporting period is found and has not been disclosed previously, it should be disclosed to relevant ministers as soon as practicable and reflected in the next annual report. Matters assessed as not likely to involve a section 83 breach, (that is, less likely

[1] If the NCE has previously sought advice on the area under assessment, new advice may not be needed. NCE's will need to assess this on a case-by-case basis.

than not) do not need to be disclosed unless the accountable authority otherwise considers them to be a significant issue or to involve other significant non-compliance.

From the 2025–26 reporting period onwards, disclosures relating to breaches of section 83 will no longer be included in the financial statements. Instead, these matters will be disclosed in the 'Management and Accountability' section of the annual report (see RMG 135 for more detail). Disclosures remain subject to review by the Australian National Audit Office.

Scenario – identifying and disclosing section 83 breaches in practice

The department assesses that there is a high risk that overpayments are occurring because decisions have to be made with incomplete, inaccurate or late information from recipients. It commissions an internal audit to assess the risk of breaches of section 83. The audit confirms that overpayments are occurring regularly (for small individual amounts) and that some of them may involve breaches of the conditions set out in the legislation and therefore possibly breach section 83. The department seeks legal advice that confirms that some of the overpayments are likely to involve breaches of section 83.

The audit confirms that while overpayments occur regularly, they are for small amounts, do not involve systemic failures of internal controls and are identified and managed appropriately consistent with the mechanisms set out in the legislation for recovery.

The Accountable Authority considers whether it is necessary to disclose the breaches to their minister and Finance Minister as a significant issue and/or significant non-compliance with finance law. The Accountable Authority considers that matters relating to the Constitution are generally significant, and that appropriations issues are considered material by nature. However, the legislation recognises the practical challenges of using imperfect information to make payments and allows for the department to take steps to recover or adjust for overpayments. information provided by recipients. The Accountable Authority is also satisfied that appropriate internal controls are in place.

On balance, the Accountable Authority determines that it is appropriate to alert the responsible minister and the Finance Minister to the practical challenges in administering the legislation, the risk of ongoing breaches of section 83 and the steps the department is taking to manage, identify and remediate breaches. The same details are disclosed in the entity's annual report.

Below are some examples of breaches of section 83 that have been previously disclosed.

Example 1 – administrative errors

For 20xx–xx, the department identified that 4 payments totalling $132,474.02 were incorrectly paid from the xyz special account that may not be consistent with section 83 of the Constitution. The amounts should have been paid from departmental appropriation and, upon realising the error, funds were recovered from the departmental *Appropriation Act (No. 1) 20xx-xx*.

There was also one payment of $10,250.00 in respect of long service leave paid without legislative authority under *the Long Service Leave (Commonwealth Employees) Act 1976*

from the departmental *Annual Appropriation Act (No. 1) 20xx-xx*. These funds were recovered.

Both instances resulted from an administrative error. There is no evidence of systemic failures in internal controls, and additional quality assurance steps were introduced to prevent recurrence of these errors.

Example 2 – unreliable information informing decisions

The department makes payments from a special account to eligible recipients, with eligibility determined by reference to requirements set out in legislation. It is important to note that it is not possible in all instances to fully remove the potential for section 83 breaches under existing legislation. The department relies on information provided by payment recipients to calculate and pay appropriate entitlements and this information is not always timely or accurate.

For 20xx–xx, the department identified that payments from a special appropriation with statutory conditions for payments involved likely breaches of section 83 of the Constitution. Payments made under the <*legislation title*> of $11.007 million were made during the year. As at 30 June 20xx, $1.002 million worth of overpayments were recorded as debts and within this the department determined it was likely that there may be amounts that relate to likely breaches. The department continues to monitor controls and implement measures to reduce the risk of avoidable breaches of section 83.