Government advertising — funding and the financial system[1]

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Following my note of 29 July 2005, you have indicated that the committee would be interested in material in support of the point that the financial system now in place makes it extremely easy for government to find large amounts of money for virtually any purpose, including new advertising campaigns for new projects.

It may be most helpful to the committee if I summarise some points taken from submissions which have been made to other committees on this issue.

Such is the current financial system that the Parliament does not effectively control either the amount of money available to government or the purposes on which it may be expended. This is due to:

- the variety of sources of money available for expenditure apart from appropriations, and the undermining of sections 81 and 83 of the Constitution
- the form of the annual appropriations
- the undermining of section 54 of the Constitution in relation to the ordinary annual services of the government.

Appropriations and sources of money

The annual appropriations made by Parliament for departmental expenditure now amount to something less than 20 percent of all government expenditure. Special appropriations, most of which are of indefinite duration and indefinite amount, now account for most government expenditure. In addition, departments have available to them other sources of expenditure:

- advances to the Minister for Finance and Administration, which are limited to urgent and unforeseen or overlooked expenditure, and which potentially amount to $390 million in the two appropriation acts for the current financial year
- departments are able to carry over surpluses from their annual appropriations, providing them with cash to add to their appropriations in the future
- revenue which may be retained by agreement of the Minister for Finance and Administration under section 31 of the *Financial Management and Accountability Act* 1997 (FMA Act) (departments are able to raise revenue from each other, as well as other persons and bodies)
- special accounts created by the Minister for Finance and Administration under sections 20 and 21 of the FMA Act, in 2002-03 amounting to $3.4 billion

[1] This article was first published in *Parliament Matters* (No.15, February 2006).

- GST appropriations under section 30A of the FMA Act.

The Minister for Finance and Administration may increase the annual appropriations of departments within specified ceilings, totalling $40 million in the appropriation acts for the current financial year.

Section 81 of the Constitution provides that all money raised or received by the government shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth.

This provision is now interpreted by government to mean nothing more than that money raised by the Commonwealth belongs to the Commonwealth, and does not require that revenue be actually credited to an identifiable fund. Thus the money flowing to departments does not actually appear in any consolidated account.

Section 83 of the Constitution provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

Government advisers would no doubt say that all of the money expended by government is authorised by something in some act of Parliament which is interpreted as an appropriation. These appropriations, however, are so scattered through the statute book and in such a variety of forms that it is very difficult to attain a comprehensive view of them. Recently an estimates question on notice asked for figures for all of the sources of appropriations since 1998, but complete figures were not provided.

The Australian National Audit Office, in two recent reports, has pointed out illegalities and serious problems in the management of special appropriations and special accounts. These problems are not the product of poor management alone, but of a financial system which by its nature leads to loose dealings with money. The Department of Finance and Administration has promised better management, but the Parliament is still not in the position properly belonging to a legislature, of actually approving the expenditure.

Form of annual appropriations

The annual appropriations are now in such a form that there is very little limitation on the purposes for which the money may be spent. Money is appropriated within departments for outcomes, and the outcomes are so nebulous and vaguely expressed that the purposes of expenditure are unknown until the expenditure occurs. For example, the Department of Employment and Workplace Relations has only three outcomes:

1 Efficient and effective labor market assistance

2 Higher productivity, higher pay workplaces

3 Increased workforce participation.

These are vague aspirations vaguely expressed, not purposes for which money is appropriated.

The appropriation acts provide that the Portfolio Budget Statements (PBS) may be consulted for determining the purposes on which appropriations may be expended, but the PBS are similarly vaguely expressed. For example, in the PBS of the Department of Employment and Workplace Relations, the information about the outcomes of the department consists of a series of further aspirations which the department is to support.

The result of this is that many questions at estimates hearings are directed towards locating particular projects and subjects of expenditure in the outcomes of departments. It is almost never obvious to which outcome a particular project or subject of expenditure belongs.

This situation virtually allows government to expend money on any project which comes to mind at any time.

Ordinary annual services

Under section 54 of the Constitution, the bill which appropriates money for the ordinary annual services of the government must deal only with such appropriations and all other appropriations must be in the second appropriation bill. The definition of ordinary annual services of the government, and the delineation of those items which are ordinary annual services items and those items which are non-ordinary annual services items, is the subject of an agreement between the Senate and the government, known as the Compact of 1965. The content of the Compact has been modified from time to time by agreement between the Senate, represented by its Appropriations and Staffing Committee, and the Minister for Finance and Administration.

The purpose of the distinction in section 54 is to identify the bills which the Senate may amend directly under section 53 and those to which it must request amendments, but the distinction is also a useful tool for parliamentary scrutiny and control of expenditure, in that it separates normal ongoing expenditure from other projects.

Thus, under the Compact, new policies are regarded as not part of the ordinary annual services of the government. This distinction, however, has been violated by government in recent times. Taking advantage of the nebulous nature of departmental outcomes, government has been able to start up new policies by using ordinary annual services money.

A glaring example of this came to notice with the appropriation bills for assistance to the victims of the Asian tsunami. The form of the bills disclosed that ordinary annual services money appropriated to departments had been expended on tsunami relief, which cannot possibly be an ordinary annual service of the government. In its passage through the Senate, the bill to replenish the ordinary annual services money already expended was

treated as a non-ordinary annual services bill, but as the bills were passed without amendment this had no practical consequence.

In 1999 the Appropriations and Staffing Committee agreed that appropriations for 'continuing activities for which appropriations have been made in the past' could be classified as ordinary annual services appropriations. This seems to have been taken by government, deliberately or through lack of understanding, to mean that anything falling within the statements of outcomes is an ordinary annual service, an assumption quite contrary to section 54 of the Constitution and the Compact of 1965.

Illustration: the IR advertising campaign

These problems, which vitally affect parliamentary control of government expenditure, are well illustrated by the advertising campaign in relation to the government's proposed industrial relations legislation.

According to material so far submitted to the High Court, this expenditure is being charged to Outcome 2 of the Department of Employment and Workplace Relations. Clearly, the government feels that that outcome is so all-embracing that it authorises expenditure on a completely new advertising campaign for legislation which has not yet been disclosed. If that is so, then Parliament, in making appropriations, is giving government a blank cheque to spend money for any purpose.

Outcome 2 occurs in the appropriation act for the ordinary annual services of the government. So a new advertising campaign for legislation not yet disclosed is also apparently regarded as an ordinary annual service of the government. This is clearly in violation of section 54 of the Constitution and the Compact of 1965.

It may be that the High Court will determine that the appropriation for Outcome 2 does not authorise expenditure on the advertising campaign. If that occurs, the Court will have struck a blow for parliamentary control of public expenditure. If not, the Court's decision will confirm the virtual absence of parliamentary control of government expenditure.

Government advertising — judgment of the High Court

The High Court has now provided the reasons for its judgment in *Combet v Commonwealth*[2] on the question of whether the government's industrial relations advertising campaign is an authorised purpose of expenditure under the appropriations made by the Parliament for the Department of Employment and Workplace Relations.

The judgment reinforces points which I made in the submission of 5 August 2005. That submission said 'The annual appropriations are now in such a form that there is very little limitation on the purposes for which the money may be spent. Money is appropriated

[2] [2005] HCA 61, reasons for judgment 21 October 2005

within departments for outcomes, and the outcomes are so nebulous and vaguely expressed that the purposes of expenditure are unknown until the expenditure occurs'.

The majority judgment has confirmed that this is precisely the situation. The effect of the judgment is that the Court will not correct this situation. It is Parliament's responsibility to ensure that expenditure is appropriate.

The joint judgment of the majority is accurately characterised by Justice McHugh as authorising an agency 'to spend money on whatever outputs it pleases.[3] In so holding, the joint judgment, as indicated by Justices McHugh and Kirby, has effectively repudiated the principles on which earlier relevant judgments of the Court were based.[4]

The separate judgment of Chief Justice Gleeson explicitly puts the responsibility for control of expenditure back on to the Parliament: 'If Parliament formulates the purposes of appropriation in broad, general terms, then those terms must be applied with the breadth and generality they bear'.[5] The problem to which the submission of 5 August 2005 drew attention is Parliament's problem, not the Court's.

That submission also said 'It may be that the High Court will determine that the appropriation for Outcome 2 does not authorise expenditure on the advertising campaign. If that occurs, the Court will have struck a blow for parliamentary control of public expenditure. If not, the Court's decision will confirm the virtual absence of parliamentary control of government expenditure.'

The Court has chosen the second course. It is now clear that control of expenditure must be undertaken by Parliament or it will not be undertaken at all.

Parliament could undertake that control by winding back outcomes budgeting and returning to greater specification of the purposes of appropriations in appropriation acts. That would be difficult to achieve and is not likely to occur. The alternative is for Parliament to insist on greater explanation and scrutiny of government expenditure. Chief Justice Gleeson has helpfully indicated what must be done: 'The higher the level of abstraction, or the greater the scope for political interpretation, involved in a proposed outcome appropriation, the greater may be the detail required by Parliament before appropriating a sum to such a purpose; and the greater may be the scrutiny involved in a review of such expenditure after it has occurred'.[6]

The Parliament, which effectively means the Senate, must diligently pursue and enhance its scrutiny of expenditure, both pre-expenditure scrutiny, principally through the estimates process, and post-expenditure scrutiny, to which the estimates process is also adapted.

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[3] at 89.
[4] *Attorney-General (Victoria) v Commonwealth*, (1945) 71 CLR 237; *Brown v West* (1990) 169 CLR 195. Referred to at 89, 233, 234.
[5] at 27
[6] at 7

Effective scrutiny, however, depends on transparency of government activities and the provision of adequate information. The Senate must insist that transparency is applied and that adequate information is provided.

This reinforces the recommendations I made in earlier submissions for transparency in the processes and the results of government advertising. The fact that the High Court has, by a majority, vacated the field makes the requirement for parliamentary accountability mechanisms more pressing.

In the submission of 5 August 2005, I also referred to the matter of expenditure from the appropriation bills for the ordinary annual services of the government. It is clear that the question of what are the ordinary annual services of the government is a non-justiciable question for the Senate alone to determine. The point that the expenditure on the advertising campaign cannot be expenditure for the ordinary annual services of the government was referred to before the Court and appears in the judgments. This appearance does not indicate that the Court has decided that the question is justiciable. The argument advanced to the Court was that the Parliament could not have intended that the appropriations which have been used for the advertising campaign should be so used because, if the Parliament had so intended, it would not have included the money in the ordinary annual services bill. It was a question of interpreting the Parliament's intention in making the appropriation! , not of judicially determining what are the ordinary annual services. The responsibility for making that determination still clearly rests with the Senate.

The question of interpretation to which I referred in the submission of 5 August 2005 was considered by the Appropriations and Staffing Committee in the context of discussions between the Department of the Senate, the Australian National Audit Office and the Department of Finance and Administration. It is expected that the matter will come back before that committee and then the Senate in the near future.