SUBMISSION TO SENATE COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

REFERENCE: TRANSPARENCY AND ACCOUNTABILITY OF COMMONWEALTH PUBLIC FUNDING AND EXPENDITURE

I. Introduction

The purpose of this brief submission is to raise serious concerns resulting from the recent *Combet* case [1] especially when that case is read together with the effect of accrual budgeting and other measures approved by Parliament which have undermined the effectiveness of Parliament's control of public expenditure as a means of ensuring Executive accountability to the Parliament. The submission also advances ways in which the Senate could alleviate those concerns in the future

2. My expertise in this area is derived from my former role as a university lecturer constitutional law including parliamentary law. Although I retired from full time teaching at the end of 2001 I have continued to write and research in the same and other areas of the law. I have had, and continue to have, a long standing interest in such matters, as is illustrated by the concerns I have voiced in the past about the misuse of the *Advance to the Minister for Finance and Administration* to fund the legal costs incurred by a Commonwealth Minister (Dr Lawrence) regarding her appearance before a State Royal Commission appointed to inquire into her conduct when she was the Premier of the same State; the pre-election funding of a proposal to introduce in the life of the next Parliament, a *Goods and Services Tax*; and, more recently, a public talk I delivered on the *Combet* case and its implications, to parliamentary staff on 14 December 2006. [2] This interest resulted in the provision of limited research assistance to the unsuccessful parties in the same case. I do not consider that that participation should debar me from making a submission to this Committee since it was based on the interest referred to above and was, in any event, relatively slight in nature.

3. The submission assumes that the Committee will have already received extensive advice about the details of the *Combet* case and the nature of accrual budgeting.

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[1] *Combet v Commonwealth* (2005) 80 ALJR 247. For other helpful writing on the case which also expresses similar concerns to those expressed in this submission see A Reilly, "*Combet v The Commonwealth* – Appropriations and Advertising", Paper delivered at the Constitutional Law Conference 2006 organized by the Gilbert + Tobin Centre of Public Law and held in Sydney on 24 February 2006; J Uhr, "Appropriations and the legislative process" (2006) 17 *Public Law Review* 173; L Ziegert, "Does the Public Purse have Strings Attached? *Combet & Anor v Commonwealth of Australia & Ors*" (2006) 28 *Sydney Law Review* 387.

[2] Evidence provided on request to the Senate Legal and Constitutional Reference Committee Inquiry into "The Payment of a Minister's Legal Costs" in 1995: see Report Part 1 (Sep 1995); G Lindell, "Parliamentary appropriations and the funding of the Federal Government's pre – election advertising in 1998" (1999) 2(2) *Constitutional Law & Policy Review*, 21 – 27; **"**The *Combet Case* and the appropriation of taxpayers' funds for political advertising - an erosion of fundamental principles?", 14 December 2006.

II. Summary of suggested solutions to the problems identified in this submission

4. The Senate should do the followings:

(a) Insist on the alteration in the words of s 7(2) in future appropriation bills which the Senate cannot legally amend under the Constitution ('*Appropriation Bills* No 1') in order to restore the need for any approved expenditure to be linked to and connected with specific purposes or, to use the current language used to reflect accrual budgeting, "outcomes".

(b) Refuse to approve appropriations in blank and also insist on a greater degree of specificity than exists at present before approving any appropriation of public funds

(c) In the interests of flexibility, and consistent with the need for greater specificity of purpose, it should be possible to draft of a category of departmental expenditure which describes running and regular expenditure that is incapable of being identified by reference to particular policies or purposes required to be implemented by any department or public body eg the acquisition of office furniture, stationery and salaries.

(d) But the same category should exclude departmental expenditure which can clearly be identified by reference to the nature of the policies promoted and implemented by a department or public body eg advertising.

(e) Consider whether the Compact of 1965 (as amended in 1999) needs to be re-defined and made more specific, as a condition of granting its approval to any Appropriation Bills in the future, to prevent the inclusion in future *Appropriation Bills* No 1 expenditure for the provision of new services.

(f) Insist on the imposition of riders as conditions which ensure that approvals granted in Appropriation Acts are not taken as authorizing expenditure for purposes identified as being contrary to the public interest whenever such expenditures has been brought to light in a former period ('negative appropriations'). For example future appropriations could incorporate as conditions to funding the guidelines recommended by the Auditor-General on government advertising. By way of illustration the conditions should make it clear that an appropriation is not intended to be construed as approving expenditure for advertising government policies when those policies have yet to be adopted by Parliament in relation to policies that can only be legally implemented by the enactment of legislation.

(g) Assign to an existing Standing Committee or establish a new Standing Committee to report to the Senate on whether any Appropriation Bills comply with guidelines drafted to give effect to the above suggestions – rather like the work performed

for different purposes by the Senate Standing Committees on the *Scrutiny of Bills* and *Regulations and Ordinances*.

III. Background

5. In *Brown v West* [3] a unanimous High Court remarked that:

> "the constitutional principle 'that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a *distinct authorization* from Parliament itself' … is entrenched in our Constitution" [4]

6. The principle involved can be in the provisions of ss 81 and 83 the Australian Constitution which, so far as they are relevant, state:

> "81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the *purposes* of the Commonwealth …
>
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by *law*." (emphasis supplied)

Those provisions enshrine the fundamental principle developed in English constitutional law which was established as a result of the historic struggles between the Stuart Kings and Parliament in the 17th Century. It has been said by certain noted English legal and constitutional historians:

> "that since the enactment of the Appropriation Act passed in 1665 in the reign of Charles II it became 'an undisputed principle, recognized by frequent and at length constant practice' that 'supplies granted by parliament are only to be expended for particular objects specified by itself.'" [5]

They also said:

> "The permanent establishment of the principle and practice of appropriation 'has given the House of Commons…so effectual a control over the executive power, or, more truly speaking, it has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence…'" [6]

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[3] (1990) 169 CLR 195.

[4] At 205 quoting from the Privy Council in *Auckland Harbour Board v The King* [1924] AC 318, 326.

[5] T Plucknett, *Taswell Langmead's English Constitutional History* (11th ed., 1960), 428 quoting from Hallam, *Constitutional History* vol ii, 357.

[6] T Plucknett above n 5, 428-9 quoting from Hallam, above n 5 vol iii, 117.

After emphasizing that the English Parliament had not and could not renounce its power to deal with particulars even though its main work was to enact legislation which framed general rules, another famous English legal and constitutional historian, said:

> "The most important instance of this is to be found in the appropriation of supplies. When a supply of money is granted to the King, parliament proceeds to appropriate that supply with great minuteness, to say, that is, how much of it may be spent for this purpose, how much for that ….(after giving examples) Now an act saying to the Queen, 'You may spend £1,000 in giving a gratuity to Lady A' is certainly not in the jurist's sense a law, it is no general rule, but this minute appropriation of supplies is a most important part of the work of every session, and is effected by statute…." [7]

As has been observed in relation to the Australian Constitution "s 83 emphasizes the constitutional rule of the control of Parliament over expenditure and the issue of public money." [8] The principle forms, obviously enough, a fundamental mechanism for holding the Executive accountable to the Parliament. It applies in Australia with one notable difference between the British and Australian Parliament and that is the equal financial powers enjoyed by both Houses of the Australian Parliament subject to one qualification regarding the Senate's power to amend and originate certain money legislation

7. Unfortunately the modern reality is that the Parliament is gradually losing control over the expenditure of public funds. Appropriations are increasingly permanent rather than annual and they are also framed in exceedingly broad terms in contrast to the practice referred to above about minuteness and particulars of appropriations. This has been accentuated by the adoption of accrual budgeting in 1997 under which the authority to spend is expressed in terms of "outcomes" that are framed with a high level of vagueness and generality. A good case in point is the item of the Appropriation Act under which the Government purported to charge its *Workchoice* advertising campaign. I understand its terms will have already been explained to the Committee.

IV. Effect and consequences of the *Combet* Case

(1) Need for departmental expenditure to satisfy budget outcomes

8. It is first necessary to consider the effects and consequences of the *Combet* case. The *first* of these effects is the surprising view adopted in the joint majority judgment of a view, namely, that s 7(2) the *Appropriation Act No 1 2005 – 2006* (Cth) ('*Appropriations Act No 1'*) authorized a category of *departmental expenditure* which did not have to satisfy any connection with the Budget outcomes stated in the relevant schedules to the

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[7] F Maitland, *The Constitutional History of England* (1911), 385.

[8] W Harrison Moore, *The Commonwealth of Australia* (2nd ed., 1910), 522.

same Act. [9] In effect it authorized expenditure *for any purpose* as long as the money was expended by the nominated government agency or department.

9. It is not an exaggeration to claim that the joint majority judgment view will have, as McHugh J claimed, surprised members of Parliament irrespective of party or ideology. [10] It is also a view which was rejected by the Chief Justice and the two dissenting judges. It was only raised from the bench during the course of oral arguments and was not properly tested by the exchange of written arguments since it was not advanced in those arguments by counsel for the Commonwealth.

10. The joint majority judgment view ignores the assumption that underlies the assertion made as early as 1902 by Alfred Deakin when he was Attorney-General that:

> "An Appropriation is a definite parliamentary authority to spend money for a specified purpose. Annual Appropriation Acts usually enact that certain sums 'are hereby appropriated, and shall be issued and applied' to the purpose specified"[11].

Regardless of whether the joint majority judgment was correct in its interpretation of s7(2) of the *Appropriation Act No 1* this interpretation has far reaching consequences which go well beyond the expenditure of public money for government advertising and it creates a large gap in the accountability of the Executive to the Parliament for the expenditure of public moneys

11. In reaching this view the same judgment placed some reliance on s 97 of the Constitution [12] as providing for a legislative regime which made the Auditor-General responsible to report to Parliament for dealing with complaints regarding the way in which public funds are expended. Whether or not this was a sufficient reason for abdicating judicial review in this area, it may be questioned as to what there is left for the Auditor-General to report to Parliament about, if the purpose of expenditure is no longer a *legally* essential aspect of the appropriation. In other words, if the purpose of expenditure does not condition authority to expend public money as a matter of *law* this substantially lessens the scope of the Auditor-General's reporting function. It is true that excluding from consideration the legality of the purpose for which money is spent would not prevent the Auditor-General from criticising the purpose of expenditure on *non- legal*

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[9] *Per* Gummow, Hayne, Callinan and Heydon JJ *contra*, on this point, Gleeson CJ who, along with the other judges in the majority dismissed the challenged item of expenditure but for different reasons, and McHugh and Kirby JJ in separate dissenting judgments which would have upheld the same challenge.

[10] *Combet* case (2005) 80 ALJR 247, 259 para 36.

[11] P Brazil and B Mitchell (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia* vol 1: 1901- 14, Opinion No 48, 59 dated 25 Feb 1902.

[12] *Combet* case (2005) 80 ALJR 247, 281 paras 139 – 140. Section 97 when read with s 51(xxxvi) authorizes Parliament to make provision for a regime of reviewing and auditing of the expenditure of Commonwealth public funds by an independent Auditor-General.

grounds but experience suggests that governments at both federal and State levels of government are proving adept at ignoring such criticism. If the purpose is not part of the legal authority to spend public funds the expenditure of the same, the expenditure however imperfect, will not attract the legal and criminal sanctions that exist for the expenditure of money without the parliamentary appropriation of funds. [13]

(2) Appropriations in blank

12. The *second* effect of the *Combet* case, which leads on from the first, is that the case appears to have by a majority implicitly accepted the legal ability of the Parliament to appropriate money in blank – contrary to what had been thought to have been the position before. [14] This comes about because of the surprising interpretation accorded to s 7 already discussed. It is true that the joint majority judgment does not in so many words reject the inability of the Parliament to appropriate money in blank but if still thinks the principle remains, it failed to explain why the appropriation as construed by those judges did not violate that principle or how it will operate in the future [15]

13. It has been suggested to the writer that the appropriation to departments under s 7 of the *Appropriation Act No 1* without having to specify a particular purposes is not an appropriation in blank because the purposes for which departments can spend money are in effect limited to the activities and responsibilities assigned to them by the Administrative Arrangements Order ('AAO'). However that document is issued by the Governor- General in Council under s 64 of the Constitution which of course means the government of the day and it is open to the government to change those activities and responsibilities at any time. This result can be avoided if the Appropriation Act is to be read as being read with that instrument as at the date the Act was enacted or took effect – a most unlikely contingency. To accept that the existence of the AAO constitutes sufficient compliance with the rule against blank appropriations undermines its very purpose which is to ensure that Parliament – and not the government - determines the purpose of the expenditure.

14. It also needs to be borne in mind that if a purpose does not have to be specified this may well raise questions about the necessity to specify the *amount* which departments are authorised to spend.

15. If the foregoing analysis is correct, this development in the *Combet* case marks an erosion of a most important and fundamental principle of English and Australian

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[13] See Lindell above n 2 (1999) 2(2) *Constitutional Law & Policy Review* 21, 25 text and notes accompanying n 36.

[14] *Brown v West* (1990) 169 CLR 195, 208 which unanimously endorsed the view of Latham CJ to that effect in *Attorney –General (Vic) v Commonwealth* (1945) 71 CLR 237, 253 cf *Northern Suburbs Cemetry Trust v The Commonwealth* (1993) 176 CLR 555, 600-1 per McHugh J and E Campbell, "Parliamentary Appropriations" (1971) 4 *Adelaide Law Review* 145, 156-7

[15] As observed in O'Reilly above n 1, 3.

constitutional law. However the mere fact that such appropriations may be now thought to be legally possible is not meant to suggest that Parliament is legally obliged to follow that course. In fact all the indications in the majority judgments are to the effect that the remedy for preventing the abuse of the appropriations process lies in the hands of the Parliament. The majority has emphasised that it is for the Parliament to define the degree of specificity with which the purposes of an appropriation are expressed. The development does however mean that if the erosion of accountability is to be arrested, the onus for arresting and reversing that erosion now lies *solely* in the hands of the Parliament. [16]

(3) The Compact of 1965

16. The *third* effect of the *Combet* case relates to the *Compact of 1965* (as amended in 1999) between the Senate and the government which regulates the content of the *Appropriation Bill No 1*. As is well known, this is the Act which cannot be amended by the Senate and provides for the "ordinary annual services of the Government" by reason of s 53 of the Constitution. The introduction of accrual budgeting was not meant to prevent its continued operation. The Compact seeks to deal with compliance with the provisions of ss 53 and 54 of the Constitution which restricts the kinds of money bills which cannot originate in, or be amended by, the Senate even though the Senate retains to right to reject all bills including the all money bills. Compliance with the provisions in question is not a ground for invalidating legislation [17] and are therefore not normally susceptible to judicial review.

17. Despite the conclusion reached in the majority judgment that the Compact failed to throw light on the construction of s 7 of the *Appropriation Act No 1*, [18] at least one of the dissenting judges in *Combet* decided that the challenged expenditure in that case constituted expenditure for a new policy which under the Compact should not have been included in the *Appropriation Act No 1*. [19] The Compact was, on that view, significant as a means of *construing* the Act as an expression of the likely intention of the Senate in passing the same Act – as had occurred in *Brown v West.* [20]

18. This gives rise to the question whether the Senate should reconsider the wording of the Compact if it feels that it has been broken by the construction attributed to s7(2) of the *Appropriation Act No 1*. The writer does not wish to be taken as expressing any

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[16] See also in that regard Uhr above n 1, who has, correctly in the view of this writer, urged the Parliament to discharge that onus.

[17] See *eg Western Australia v Commonwealth* (1995) 183 CLR 373, 482. This did not prevent a unanimous High Court taking into account those provisions and how they are understood in determining the *construction* of an Appropriation Act in *Brown v West* (1990) 169 CLR 195.

[18] *Combet* case (2005) 80 ALJR 247, 285 para 156.

[19] *Combet* case (2005) 80 ALJR 247, 302-3 paras 251-2 per Kirby J.

[20] (1990) 169 CLR 195, 211. See *Combet* case (2005) 80 ALJR 247, 302-3 paras 249-250 per Kirby J.

opinion on whether the Senate should undertake this reconsideration except to say that the view which commended itself to the member of the Court mentioned above also commends itself to the writer.

(4) Parliamentary responsibility for specifically *preventing* rather than *authorizing* controversial expenditure

19. The *fourth and last* effect of the *Combet* case dealt with in this submission is to reverse the onus which was previously recognized under which it was for the Parliament to *specifically authorize*, rather than to *prevent,* controversial expenditure of the kind that was challenged in that case. In *Brown v West* a unanimous High Court construed the relevant appropriation provisions, despite their width, as not *authorizing* the provision to members of parliament of postal allowances over and above those they were entitled to receive under specific separate legislation which dealt with such matters.

20. By contrast, in *Combet* the approach of the majority leaves it to Parliament to *specifically prevent,* rather than *specifically authorise*, *c*ontroversial expenditure which was in that case expenditure for advertising of government policies yet to be adopted by Parliament when legislation was needed for their adoption. Moreover the *Appropriation Act No 1* was construed as sanctioning such expenditure even though the Act was passed at a time when the Senate, as then composed, may have rejected the challenged item of expenditure – if only it had had its attention drawn to the possibility which eventuated. [21] The Senate's attention would have had to have been drawn to the possibility which eventuated if the Parliament had been required to *specifically authorize* the expenditure in question. The last point underlines the different results that can emerge by transferring the onus referred to above.

21. In short, it remains for Parliament to guard against abuses involving the expenditure of public funds by devising safeguards to prevent those abuses. Admittedly this makes it difficult for Parliament to foresee all contingencies but at least it can enact specific provisions – and in my respectful opinion it should enact specific provisions - to prevent those abuses that it can foresee and has been made aware of as a result of past experience.

V. Suggested solutions

22. The point made in the last paragraph casts grave doubt as to whether any of the major political parties has an interest in disturbing the present position since if nothing is done opposition parties may desire to engage in the same activities when in government. The writer raised in his recent talk raised grave doubts as to whether there will be sufficient political will power to resolve the problems identified in this submission. Nevertheless, I have put forward below some suggested solutions to the problems identified in this submission in the hope that those doubts prove to be unfounded.

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[21] As was observed by Kirby J in the *Combet* case (2005) 80 ALJR 247, 295 para 213.

23. The solutions will involve the Senate exercising its powers to make suggestions for the alteration of money bills and, failing the acceptance of those suggestions, withholding if necessary its approval to a money bill unless the suggested solutions are accepted.

24. The solutions advanced are as follows:

(i) The Senate should seek the reversal of the interpretation accorded in the joint majority judgment to s 7(2) of the *Appropriation Act No 1*. This can, and in the respectful opinion of the writer, should be done by the Senate insisting on the alteration in the words of s 7(2) in future *Approriation Bills No 1* so as to restore the need for any approved expenditure to be legally linked to, and connected with, a specific purpose or, to use the current language employed to reflect accrual budgeting, a specific "outcome". It hardly needs to be emphasised that the need to link expenditure with a defined purpose forms an essential part of the accountability for expenditure of public funds.

(ii) The Senate should refuse to approve appropriations in blank and also insist on a greater degree of specificity than exists at present before approving any appropriation of public funds. The need to follow this course is prompted even without the virtual judicial legitimation of appropriations in blank which occurred in the *Combet* case. As will be appreciated the adoption of accrual budget has resulted in a low level of specificity since the statement of outcomes can frequently be so open ended as to cease to be a meaningful description of the purpose of any expenditure.

(iii) The need for greater specificity of purposes is not inconsistent with the need for flexibility especially having regard to the vast expansion of governmental expenditure and increased complexity of governmental activities. With that in mind the Senate could require the drafting of a category of departmental expenditure which describes running and regular expenditure for items of expenditure that are not thought to require detailed itemization. Examples of such items include the acquisition of office furniture and stationery and the payment of salaries. Characteristically these are the kind of items that are incurred regardless of the policies or purposes required to be implemented by any department or public body.

At the same time, this category should not include departmental expenditure which is capable of being identified by reference to the nature of the policies promoted and implemented by a department or public body. An illustration in point relates to government advertising where it is possible to separate advertising to explain and promote existing policies approved by Parliament from advertising new policies yet to be so approved.

(iv) The Senate should insist on imposing riders or conditions which ensure that approvals granted in Appropriation Acts are not taken as authorizing expenditure for purposes that are identified, from time to time, to be contrary to the public

interest whenever such expenditures are brought to light in a former period. (I understand these are described in the United States as 'negative appropriations'.)

For example, if it was accepted, as the writer believes it should, that curbs need to be placed on government advertising, future appropriations could incorporate as conditions to funding compliance with the guidelines with respect to government advertising that have been recommended by the Auditor-General and other bodies. By way of illustration, the conditions could make it clear that an appropriation is not intended to be construed as approving expenditure for advertising government policies when those policies have yet to be adopted by Parliament if those policies can only be legally implemented by the enactment of legislation. [22]

The writer is not in a position to indicate whether the Parliament has favoured the use of negative appropriations in the past. But he is aware of at least one occasion when the Senate withheld its approval to legislation until the legislation was altered to introduce a ban on the spending of money by the Commonwealth for a particular purpose – in that case the expenditure by the Commonwealth of money to present arguments in support or against proposed laws for the alteration of the Constitution (apart from the distribution of the "Yes / No" Cases). [23]

(v) The Senate should assign to an existing Standing Committee, or establish a new Standing Committee, to report to the Senate on whether any Appropriation Bills comply with guidelines drafted to give effect to the above suggestions. The key task of such a committee would be to check and monitor financial legislation and report to the Senate on whether any such legislation is expressed in such a form as to comply with the suggestions made in this submission. It would not be to review or pass upon the policy merits of the legislation. This would mirror the kind of work done different purposes by the Senate Standing Committees on *Scrutiny of Bills* and *Regulations and Ordinances*.

(vi) The writer has refrained from making any suggestions concerning the Compact of 1965 except to observe that the Senate may wish to consider whether the wording of that document should be altered to strengthen the restriction which seeks to ensure that capital expenditure and expenditure for new services are not dealt in the *Appropriation Acts No 1*.

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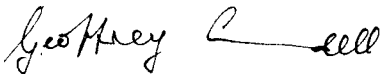
[22] Senate Finance and Public Administration References Committee Report (majority): *Government advertising and accountability* (Dec 2005) Recommendation 4(a) (para 6.72, 84-5) The same report adopted with some changes the guidelines recommended by the Joint Committee of Public Accounts and Audit in its Report: *Guidelines for Government Advertising* (Sep 2000). See also for the guidelines recommended by the Auditor-General, *Performance Audit Report No 12 1998-99: Taxation Reform – Community Education and Information Programme* (dated 29 October 1998).

[23] *Referendum (Constitution Alteration) Amendment Act* 1983 (Cth) s 5A as to which see Commonwealth, *Parliamentary Debates*, 15 December 1983, 3916 – 3928 for the closing stages of the debate which took place in the Senate on this provision. The ban can now be found in the *Referendum (Machinery Provisions) 1984* (Cth) sub-s 11(4).



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