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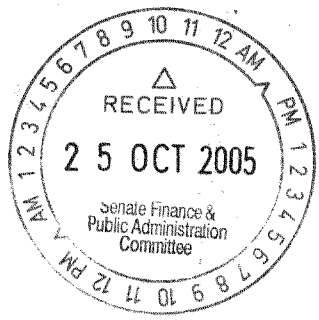

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25 October 2005

Mr Alistair Sands
Secretary
Finance and Public Administration
References Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

GOVERNMENT ADVERTISING — JUDGMENT OF THE HIGH COURT

The High Court has now provided the reasons for its judgment in *Combet v Commonwealth*[1] 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 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".[2] In so holding, the

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1 [2005] HCA 61, reasons for judgment 21 October 2005.

2 at 89.

joint judgment, as indicated by Justices McHugh and Kirby, has effectively repudiated the principles on which earlier relevant judgments of the Court were based.[3]

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.[4]

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.[5]

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.

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.

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

4 at 27.

5 at 7.

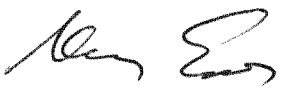
This reinforces the recommendations I made in earlier submissions for transparency in the processes and the results of government advertising. The fact that the High Court has, by a majority, vacated the field makes the requirement for parliamentary accountability mechanisms more pressing.

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.

Please let me know if the committee requires any amplification of these matters.

Yours sincerely



(Harry Evans)