Does the Public Purse have Strings Attached? *Combet & Anor v Commonwealth of Australia & Ors*

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1. Introduction

This is a case involving money, power and politics. In *Combet v Commonwealth of Australia*,[1] a majority of the High Court found that the Commonwealth Government had validly appropriated public money to spend on a costly advertising campaign for its controversial industrial relations reforms. This decision was reached by construction of the relevant *Appropriation Act*. For the minority, this exercise had to recognise Parliament's constitutional role to oversee expenditure by the Executive. What was ultimately at stake in this case was how the 'Constitution assures to the people effective control of the public purse.'[2]

2. Background

In May 2005, Prime Minister John Howard outlined a broad but sweeping package of planned industrial relations reforms. In response, a month later, the Australian Council of Trade Unions (ACTU) instigated an advertising campaign against the proposed reforms. Shortly afterwards, from 9 July 2005, the Government embarked on a multi–million dollar campaign of its own.[3] The advertisements were clearly issued in the name of the Australian Government; they were funded entirely by the Australian taxpayer. A typical newspaper advertisement was headed, 'More Jobs, Higher Wages, A Stronger Economy', beneath which it claimed that workplace reforms were needed to keep employment rates and pay rising.[4] No details of the proposed legislation accompanied the advertisements; none had been released by the time the matter was taken to the High Court.

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1 (2005) 221 ALR 621 (hereafter *Combet*).

2 A phrase taken from Isaacs J in *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421 (hereafter *Wool Tops Case*) at 445, adapted in *Brown v West* (1990) 169 CLR 195 at 205.

3 No precise figure was calculated: see *Combet* at 674 (Kirby J). The plaintiffs estimated the cost to be a minimum of $3.84 million at 24 July 2005, from information obtained in a letter from the defendants' solicitors. McHugh J seems to accept this as a benchmark, at 632.

4 Described by McHugh & Kirby JJ in their judgments: id at 632–633 (McHugh J); at 673 (Kirby J).

3. *Arguments of the Parties*

The High Court challenge was mounted by the ACTU Secretary, Greg Combet, and Labor's Shadow Attorney-General, Nicola Roxon. Unlike previous government advertising campaigns, this one had not been documented in the Budget bills.[5] Therefore the plaintiffs alleged, the campaign had not been authorised by Parliament, contrary to s83 of the Constitution.[6] Ms Roxon explained the matter in simple terms to the public:

> This is not some mere constitutional technicality — it goes to the very heart of our parliamentary democracy. It is one of a handful of mechanisms which ensure that Mr Howard remains accountable to parliament, and through it, the community.[7]

According to the defendants, the campaign was legitimately funded through the Department of Employment and Workplace Relations (DEWR).[8] Parliament had authorised funding to DEWR to achieve a number of outcomes stated in the Budget papers, including Outcome 2, 'Higher pay, higher productivity.'[9] The advertising campaign, the defendants argued, was incidental to that aim. The defendants disputed the plaintiffs' capacity to obtain the relief they sought, being a declaration that the advertising was unlawful and/or an injunction to stop further advertising.[10]

4. *The Decision*

Essentially, this case required an exercise in statutory construction. Specifically, the issue was whether the Budget bills, more properly known as the *Appropriation Act No 1* of 2005–06 (hereafter *Appropriation Act*) authorised the expenditure on the campaign.[11] Nonetheless, the Constitution informed the reasoning of all the judges to varying degrees.[12] In a joint judgment, the majority, Gummow, Hayne, Callinan and Heydon JJ (hereafter, 'the joint judgment') found that the *Appropriation Act* covered the campaign. This was based on a close reading of the terms of the Act, rather than the arguments advanced by the parties. While he employed an approach closer to that of the parties and the dissentients, Gleeson CJ came to the same conclusion as the majority. McHugh and Kirby JJ dissented strongly. Both dissents examined various documents connected with the *Appropriation Act*, and considered precedent and constitutional principles. Because the decision hinged on the narrow issues, those will be examined first, followed by a consideration of the constitutional questions and broader implications of the decision.

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5 Nicola Roxon, 'Why We're Off to Court,' *Herald Sun* (28 Jul 2005).
6 *Combet*, above n1 at 622 (McHugh J), 645 (Gleeson CJ), 652 (Gummow, Hayne, Callinan & Heydon JJ) and 671 (Kirby J).
7 Roxon, above n5.
8 *Combet*, above n1 at 677 (Kirby J).
9 Id at 645 (McHugh J), 656 (Gummow, Hayne, Callinan & Heydon JJ) and 677 (Kirby J).
10 See id at 653 (Gummow, Hayne, Callinan & Heydon JJ) for the precise nature of the relief sought.
11 Id at 622 (Gleeson CJ); 633 (McHugh J), 652 (Gummow, Hayne, Callinan & Heydon JJ) and 657 and 660 (Kirby J).
12 Id at 622 (Gleeson CJ), 671 (McHugh J), 675 (Gummow, Hayne, Callinan & Heydon JJ) and 633 652 and 675 (Kirby J).

5. *Standing and Relief*

Before getting into the substance of the case, the questions of standing and relief should be briefly discussed. These were unnecessary to the outcome of the case, and so were not considered in any detail by the majority.[13] Both McHugh and Kirby JJ accepted that Ms Roxon had standing to bring the proceedings as she was a member of the House of Representatives.[14] This status was recognised in the Constitution; Ms Roxon could have voted for or against the Appropriation Bill and had a special interest in ensuring Parliament's oversight on expenditure. Relying on the decisions and dicta in *British Medical Association v Cth*[15] and *Real Estate Institute of NSW v Blair*,[16] in which neither of those bodies was considered to have standing, McHugh J suspected that the ACTU did not have a sufficient interest in the matter.[17] His Honour mused that these cases might possibly need reconsideration given subsequent developments in the general law of standing. This is exactly what Kirby J thought.[18] Cases such as *Onus v Alcoa*[19] and *Bateman's Bay*[20] had substantially altered legal doctrine on standing, he found.[21] McHugh and Kirby JJ also thought the Court had authority to fashion a broad injunction restraining DEWR from any drawing right in regard to further advertising in the same vein.[22] However, the joint judgment thought there would be practical difficulties with granting relief, as was identified by Jacobs J in the *Victoria v Commonwealth and Hayden* (hereafter *AAP Case*).[23] This was connected to the unique nature of the *Appropriations Act*.

6. *Construction of the Appropriation Act*

A. A Rare Bird

An Appropriation Act 'is something of a *rara avis* in the world of statutes,' Mason J memorably observed in the *AAP Case*.[24] Certainly they are not straightforward to construe, even if they are hardly rare. DEWR's annual expenditure is contained in Schedule 1 to the *Appropriation Act*. Since changes to the official accounting system in 1997, government expenses have been set out in terms of 'outputs' and

13 Gleeson CJ did not consider it necessary Id at 630, 654, 655 and 670 (Gummow, Hayne, Callinan & Heydon JJ).

14 Id at 650–651 (McHugh J), where he considers that her role as Shadow Attorney–General may also give her standing; 705 (Kirby J).

15 *British Medical Association v Commonwealth* (1949) 79 CLR 201.

16 *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213.

17 *Combet,* above n1 at 650 (McHugh J). His Honour did not reach a final conclusion.

18 Id at 706 (Kirby J).

19 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

20 *Bateman's Bay v Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247.

21 *Combet*, above n1 at 671, 706 (Kirby J). This approach was forecast by Geoffrey Lindell, 'Parliamentary Appropriations and the Funding of the Federal Government's Pre-Election Advertising in 1998' (1999) 2 CLPR 21 at 25.

22 *Combet*, above n1 at 651 (McHugh J).

23 Id at 670 (Gummow, Hayne, Callinan & Heydon JJ); (1975) 134 CLR 338 at 412.

'outcomes'. DEWR's funding is set out as a table listing three outcomes, with two amounts given opposite each outcome. One of the figures is for 'Departmental outputs', the other 'Administered expenses.' Sections 7 and 8 of the *Appropriation Act* provide further explanation of these two terms, respectively. Further specific information about DEWR's activities is to be found in its Portfolio Budget Statement ('PBS'). Under s4 of the *Appropriation Act*, PBS are declared to be 'relevant documents for the purposes of the *Acts Interpretation Act 1901* (Cth)' (hereafter *Interpretation Act*). Because of the *Interpretation Act*, the Court could also draw on manifold budget papers, as well as notes appended to the *Appropriation Act*. Section 4(2) of the *Appropriation Act* provides that if activities are listed in the PBS under a particular outcome, expenditure on those activities is to be regarded as being spent on that outcome. Among the items included in the PBS as 'Outcome 2 activities' was 'providing policy advice and legislation services'.[25]

B. Gleeson CJ: Outcomes Flexible

Gleeson CJ, in a cautious judgment thought the expenditure authorised. His Honour's position on statutory construction was somewhere between that of the majority and the dissentients: 'Questions of construction of the *Appropriation Act* are to be resolved by reference to text and context.'[26] Although the text of s7(2) arguably supported the majority's conclusion that outcomes were not determinative for 'departmental items', Gleeson CJ found the context nonetheless suggested that outcomes were relevant.[27] But the range of items included in the PBS under each outcome indicated these were broad. Given that 'providing policy advice and legislation services' must have been accepted by Parliament as meeting Outcome 2, it would follow that informing the public and gaining their acceptance of such policy and legislation could also be covered by the outcome.[28]

C. The Joint Judgment (Gummow, Hayne, Callinan and Heydon JJ): Departmental Expenditure Not Restricted

In finding the expenditure appropriately authorised, the joint judgment relied chiefly on the contrast between s7(2) and s8(2) of the *Appropriation Act*.[29] While s7(2) provided that an 'amount issued out of the Consolidated Revenue Fund for a departmental item for an entity may only be applied for the departmental expenditure of the entity,' s8(2) said that an amount issued for an administered

24 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338 (hereafter *AAP Case)* at 393 (Mason J). There are, of course, at least two per year; but the remark arose in the context of whether an Appropriation Act serves normal legislative purposes, or merely indicates Parliament's authorisation of expenditure, an issue that did not arise in this case. See Cheryl Saunders, 'Parliamentary Appropriation' in Cheryl Saunders (ed), *Current Constitutional Problems in Australia* (1982) at 24, 31.

25 *Combet*, above n1 at 643 (McHugh J).

26 Id at 622 (Gleeson CJ).

27 Id at 628.

28 Id at 629–630 (Gleeson CJ).

29 Id at 658 (Gummow, Hayne, Callinan & Heydon JJ); also summary at 669.

item 'may only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome.' The joint judgment construed this as meaning that, succinctly, '[d]epartmental items are not tied to outcomes; administered items are.'[30] In addition, they relied on a note appended to the definition of 'departmental item.' The note read:

> The amounts set out opposite outcomes, under the heading "Departmental Outputs" are "notional". They are not part of the item, and they do not in any way restrict the scope of the expenditure authorised by the item. In the four justices' view, this meant that outcomes were of no relevance to an assessment of whether particular expenditure constituted "departmental expenditure."[31]

Similarly, s4(2), although it extended the range of activities that could contribute to outcomes, had no application to departmental items.[32] Moreover, the plaintiffs had not disputed that the spending was departmental expenditure, the joint judgment concluded.[33] This was a closely textual approach — possibly becoming something of a trend in recent High Court decisions, most notably in the *Al-Kateb* case.[34]

D. Some Objections: Notional Does Not Mean Nugatory

Both McHugh and Kirby JJ firmly declared that the joint judgment's view of departmental items contradicted accepted Parliamentary practice, as well as the arguments of both the parties to the case.[35] McHugh J put forward the evidence: DEWR's PBS for the previous year sets out the outputs spent for the previous year on outcomes.[36] Further, the Finance Minister's Orders, which are intended to guide government entities in the preparation of their financial statements, also require expenses to be tabulated alongside outcomes in this way.[37] Of course, both dissenting judges were emphatic that the decision rested with the courts — but both were equally insistent that the Court should support the parties' and especially Parliament's view if at all possible.[38] In addition, Kirby J thought the joint judgment's 'novel approach' had not given the parties an opportunity to make submissions regarding 'departmental items' with the result that the case was decided on a 'substantially unanalysed' point of law.[39] Although they conceded that the majority of the parties' submissions did not follow their approach, the joint judgment contended that the point was put in issue by junior counsel for the defendants.[40] With due respect, Kirby J has a point here, even if some might consider him not averse to occasionally employing a novel approach himself.

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30 Id at 658.
31 Id at 659; but compare Kirby J at 669.
32 Id at 660, 669.
33 Id at 660–661, 669.
34 *Al-Kateb v Godwin* (2004) 219 CLR 562. See for example, Juliet Curtin, 'Never Say Never: Al-Kateb v Godwin' (2005) 27 *Syd LR* 355 at 359
35 *Combet*, above n1 at 631, 645–646 (McHugh J).
36 Id at 647.
37 Id at 648.
38 Id at 648 and 689 (Kirby J).
39 Id at 698 and 701 (Kirby J).
40 Id at 658–659 (Gummow, Hayne, Callinan & Heydon JJ).

Similarly, both Kirby and McHugh JJ dissented regarding the joint judgment's use of the note. According to the joint judgment, the terms of the note clearly indicated that 'the scope' was a different matter from the quantum.[41] In the submissions of both the parties, though, McHugh and Kirby JJ pointed out, there was no conception that the outcomes themselves were notional, only the amounts allocated to each.[42] In reply to questions from the bench, the Solicitor-General, for the defendants, said that the outcomes did not limit departmental expenditure '[e]xcept to the extent that one must be within one of them.'[43] Even in this case, McHugh J argued, this could not mean there were no restrictions at all, as it would mean that a 'capricious' department could elect to avoid a particular outcome by spending nothing on it: this could not have been intended if the outcomes had the force of law.[44] Likewise, Kirby J agreed that the note indicated flexibility, but only in regard to amounts; were the outcomes to be ignored, the authority of Parliament would become 'nugatory or meaningless.'[45]

E. McHugh J: Rational Connection Required

In McHugh J's opinion, the case rested on the legal significance of Outcome 2.[46] To determine this, his Honour carefully studied a number of documents relating to the *Appropriation Act*, including the Schedule, the PBS, a budget paper, correspondence between the Minister for Finance and Administration to the President of the Senate, and advice from the Department of Finance and Administration intended to assist departments with their PBS.[47] McHugh J accepted the defendants' argument that the PBS was not exhaustive: the fact that the advertising campaign was not mentioned specifically in it was not decisive. Instead, all that was needed was 'a rational connection' between the expenditure and the outcome.[48] As long as there was such a connection, a department needed no specific authority to advertise. In this case, however, there was not. 'The advertisements provide no information, instruction, encouragement or exhortation that could lead to higher productivity or higher pay.'[49]

F. Kirby J: Not in the PBS

For Kirby J, the question was whether Ministers of Parliament (MPs) and Senators examining the Appropriations Bill could have contemplated and approved its funding the advertising campaign. Policy advice and legislation development did not normally entail a publicity campaign prior to the appearance of any legislation, so this would not be enough to provide an indication to parliamentarians.[50] To the contrary, Kirby J pointed out, other 'promotions of initiatives' or 'communications

41 Id at 659–660.
42 Id at 647 (McHugh J) and 698 (Kirby J).
43 Quoted in id at 645 (McHugh J).
44 Id at 647.
45 Id at 679, 700 (Kirby J).
46 Id at 636 ((McHugh J).
47 Id at 636–644
48 Id at 649, 650 (McHugh J).
49 Id at 631; his Honour picks up this point again in 649–650.
50 Id at 680, 694 (Kirby J).

strategies' in relation to topics such as the ageing workforce and Welfare to Work are detailed in the PBS.[51] So it would follow that the same could be expected for this campaign.[52] The majority rejected this approach when they commented that construction required 'close attention to the statutory text rather than secondary materials.'[53] Noticing this observation, Kirby J countered that s4 of the *Appropriation Act* expressly authorised use of the PBS.[54] Not surprisingly, Kirby J's approach to the construction of the Act encompassed more than the other judges'. As shall be seen, Kirby J insisted most strongly upon the doctrine of precedent, while the other judgments were not so greatly concerned with constitutional case law.

7. Constitutional Questions

A. A Distinct Authorisation

Broadly, the case raises a principle long predating that of responsible government: that the Executive cannot spend public money without Parliament's authority in the form of an Act. This rule dates back to seventeenth century England.[55] By the terms of the *Bill of Rights* of 1688, no taxes could be levied without the consent of Parliament. As a necessary corollary, Parliament also wanted to know what the money raised would be spent on.[56] The rule developed, as was said by Viscount Haldane in *Auckland Harbour Board v The King,* 'that no money can be taken out of the consolidated fund into which the revenues of that State have been paid, excepting under a distinct authorisation from Parliament itself.'[57] Past High Court judgments on related matters have been informed by this principle, for example, that of Isaacs J in the *Wool Tops Case.* Isaacs J found that executive contracts needed statutory authorisation; to find otherwise 'would be seriously weakening the control of Parliament over the public Treasury.'[58]

In *Brown v West*, the High Court confirmed that this principle had been entrenched in Australia by ss81 and 83 of the Constitution.[59] Section 81 provides that:

> 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 in the manner and subject to the charges and liabilities imposed by this Constitution.

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51 Id at 680.

52 Id at 693.

53 Id at 660 (Gummow, Hayne, Callinan & Heydon JJ).

54 Id at 695 (Kirby J).

55 Enid Campbell, 'Parliamentary Appropriations' (1971) 4 *Adel LR* 145 at 145; Saunders, above n24 at 1–4; *Brown v West*, above n2 at 208. Some of this is repeated in the judgment at 633 (McHugh J), and 684 (Kirby J).

56 John Waugh, 'Evading Control of Parliamentary Spending: Some Early Case Studies' (1998) 9 *PLR* 28.

57 *Auckland Harbour Board v R* [1924] AC 318 at 326.

58 The *Wool Tops Case*, above n2 at 450 (Isaacs J); see Saunders, above n24 at 25. This case is no longer an authority on the validity of executive contracts.

59 *Brown v West*, above n2 at 205; Waugh, above n56 at 28.

In *Combet*, as in *Brown v West*, there was no issue as to whether the expenditure could meet the 'purposes of the Commonwealth.'[60] Rather, the basis of the plaintiffs' argument rested on s83: 'No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.'

Kirby J held that *Brown v West* was a recent and firm decision; it upheld a fundamental principle, was analogous to this case and should have been followed.[61] *Brown v West* endorsed *Auckland Harbour Board* which was emphatic that payment without clear Parliamentary authority would be 'simply illegal and ultra vires.'[62] And this, Kirby J observed, was applied to the far vaguer constitutional arrangements of the United Kingdom and New Zealand.[63] 'By law' meant distinct authorisation by Parliament. Neither expressly (not listed in the PBS) nor by implication (the outcome, 'higher pay, higher productivity') was there such an authorisation for this campaign.[64] Parliament could not be taken 'merely by general language in the *Appropriation Act* and its associated documents,' to approve the appropriation, Kirby J found.[65] Purely on the facts, *Brown v West* was not entirely similar. Rather, the impugned expenditure in that case had been taken from a general standing appropriation when a specific, but more restrictive, provision existed.[66] Nonetheless, it appears to be good authority for the general principle — but there is then the question of how distinct the authorisation must be.

B. A Designated Purpose?

Part of the principle does seem to be that the purpose of the appropriation must be described. Although he considered it up to Parliament to decide whether there was a Commonwealth purpose, Latham CJ said in *Attorney-General (Victoria) v Commonwealth* that:

> there cannot be appropriations in blank … for no designated purpose. An Act which merely provided that a minister or some other person could spend a sum of money, no purpose of the expenditure being stated, would not be a valid appropriation Act.[67]

Latham CJ's doctrine was accepted in *Combet*, although past commentators have questioned it.[68] Presumably such doubts have been dispelled by *Brown v West,* where Latham CJ's judgment was quoted with approval, and it was said that '[a]n appropriation, whether annual or standing, must designate the purpose or purposes for which the moneys appropriated might be expended.'[69] Kirby J declared it

60 *Combet*, above n1 at 654 (Gummow, Hayne, Callinan & Heydon JJ) and 683 (Kirby J).
61 Id at 685–686, 696 (Kirby J).
62 *Auckland Harbour Board*, above n57 at 327.
63 *Combet*, above n1 at 686.
64 Id at 692.
65 Id at 691.
66 *Brown v West*, n2 above; Lindell, above n21 at 24.
67 *Attorney-General (Victoria) v* Commonwealth (1945) 71 CLR 237 (hereafter *Pharmaceutical Benefits Scheme Case*) at 253.
68 Campbell, above n55 at 156–157; Saunders, above n24 at 29, 32 – both of course before *Brown v West,* above n2.

'settled constitutional doctrine.'[70] Nonetheless, there seems to be ongoing uncertainty over the degree of specificity required, or who should determine whether there is a purpose.

In the *AAP case*, Murphy J thought that one-line appropriations would be valid, as the Constitution did not demand 'any particular degree of specification of purpose'.[71] In characteristic style, his Honour added that 'it would be highly inconvenient if it did.'[72] In the opinion of the joint judgment in *Combet*, the appropriations were expressed to be for the purposes of the Act: one of which was the purpose of appropriating a sum of money for the departmental expenditure of one of the departments of State of the Commonwealth.[73] Besides, the joint judgment went on, it was for the Parliament to decide what degree of specificity was required.[74] For this reason, Gleeson CJ rejected McHugh J's approach:

> For such a contest to give rise to a justiciable issue, as distinct from a political or scientific controversy, the issue could not be formulated appropriately be stating the outcome and asking whether the expenditure would contribute to it.[75]

In Gleeson CJ's view, the outcomes being vague and value-laden, it was arbitrary to rely on a 'judge's intuition' to divine whether the activity could be associated with the outcome in question.[76] That the outcomes were so open, Gleeson CJ held, did not need correction by the Court: 'If Parliament formulates the purposes of appropriation in broad, general terms, then those terms must be applied with the breadth and generality they bear.'[77]

But if Parliament's words could be so vague that they did not allow for distinct authorisation, the appropriation would be in blank, Kirby J argued.[78] Citing Jacobs J's comments in the *AAP case*, Kirby J pointed out that an *Appropriation Act* was by nature authoritative and restrictive.[79] In this case, the plaintiffs had not contended that the Act was constitutionally invalid.[80] But both dissentients considered that the largely unforeseen construction employed by the joint judgment could call the Act's validity into question. If it were correct that 'departmental items' needed no further description, the Act would sanction

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69 *Brown v West,* above n2 at 208. Kirby J noted here there was an option of introducing additional Appropriation Bills if necessary, a course that had been taken previously to meet new requirements.

70 *Combet*, above n1 at 700 (Kirby J).

71 *AAP case*, above n24 at 422.

72 Ibid. A comment seemingly approved by Gleeson CJ at 623, who also notes the US Supreme Court also thought Congress had wide discretion to approve general appropriations in *Cincinnati Soap Co v United States* 301 US 308 at 321–322 (1936). See also the joint judgment at 668 (Gummow, Hayne, Callinan & Heydon JJ).

73 *Combet*, above n1 at 660 (Gummow, Hayne, Callinan & Heydon JJ).

74 Id at 668.

75 Id at 626 (Gleeson CJ).

76 Ibid.

77 Id at 629.

78 Id at 694, 695 (Kirby J).

79 Id at 696; relying on Jacobs J in the *AAP Case*, above n24 at 411.

80 Id at 622 (Gleeson CJ) and 691 (Kirby J).

appropriations not made by law, contrary to s83, Kirby and McHugh JJ each found.[81] Therefore, by a general rule as well as a statutory obligation under the *Interpretation Act*, a construction preserving the Act's validity was to be favoured.

C. The Ordinary Annual Services of the Government

Although they had not questioned its validity, the plaintiffs had argued that the appropriation was contrary to parliamentary practice.[82] In Australia, that practice is to introduce at least two pieces of legislation dealing with appropriation. The reason for this distinction is s53 of the Constitution, which states that the Senate may not amend proposed 'laws appropriating revenue or moneys for the ordinary annual services of the government.' An *Appropriation Act No 1* ordinarily covers the Government's ordinary annual expenses, while an *Appropriation Act No 2* is for new policies. Intervening on behalf of the plaintiffs, the State of Western Australia asserted that a campaign for new legislation would be a new policy.[83]

For much of their history, the two houses of the Parliament have debated the meaning of 'ordinary annual services of the government', disputing which bills the Senate could amend.[84] Under the 'Compact of 1965' (hereafter the Compact) the Houses came to an agreement on what matters could not be included in *Appropriation Act No 1*. One matter agreed to, which was reaffirmed in 1977, was 'new policies not authorised by special legislation.'[85] After 1988, when appropriations for 'running costs', including salaries and administrative expenses, were amalgamated into a single figure, it was agreed that this could include minor equipment and fit-out costs.[86] Later, in 1999, although accounting procedures were changed, the Senate approved a recommendation that the Compact remain in place but for three changes, which would not alter the spirit of the agreement.[87]

Although the joint judgment set out the history of Parliamentary practice, and accepted the reliance placed on it by *Brown v West*, they conclude that it offered no clear guidance in defining what they saw as the relevant issue, which was a 'departmental item'.[88] If anything, they found, Parliamentary history merely indicated past practice of making a single lump sum appropriation.[89] Similarly, Gleeson CJ found that it was not quite clear what was included under running costs but that historical parliamentary practice did not seem to support the plaintiffs' argument.[90] By contrast, Kirby J once again relied on *Brown v West*, where it was found that 'by parliamentary practice' the *Supply Act No 1 (1989–90)* (Cth) could not include an appropriation for new policies.[91] A costly advertising campaign was

81 Id at 648 (McHugh J) and 692, 700–701 (Kirby J).
82 Id at 630 (Gleeson CJ), 665 (Gummow, Hayne, Callinan & Heydon JJ) and 687 (Kirby J).
83 Kirby J at 686, 690. Id 665 (Gummow, Hayne, Callinan & Heydon JJ).
84 Saunders, n24 above, at 21 at 665 (Gummow, Hayne, Callinan & Heydon JJ) and 689 (Kirby J).
85 *Combet*, above n1 at 665–666 (Gummow, Hayne, Callinan & Heydon JJ) and 690 (Kirby J).
86 Id at 666 (Gummow, Hayne, Callinan & Heydon JJ) .
87 Id at 667.
88 Id discusses history from 665–667; conclusion drawn at 667.
89 Id at 668, 664.
90 Id at 630 (Gleeson CJ).
91 *Brown v West,* above n2 at 211; quoted by Kirby J Id at 690.

unlikely to be a new policy, let alone a major package of reform.[92] This taps in to some of the wider issues: did it matter that the campaign was political? And how much oversight does Parliament have to have?

8. Broad Implications

A. Sin and Tyranny

In this case, the court was rightly concerned to sift the legal issues from the surrounding political dispute.[93] Indisputably, there was a serious legal question to be tried.[94] But did this involve the political nature of the advertising? That advertising was a valid Commonwealth purpose was not questioned.[95] However, both McHugh and Kirby JJ thought it relevant that the advertisements appeared to be purely political.[96] There being no legislation, McHugh J thought the campaign could only be intended to curry favour for a highly controversial government policy, or at least blunt criticism of it. Considering US cases on governmental advertising campaigns, Kirby J noted Thomas Jefferson's 1779 observation that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'[97] Those US cases involved freedom of speech rather than Parliamentary oversight — although Kirby J did note the plaintiffs' argument that the government's speech was no longer free anyway, as it was being paid for by taxpayers.[98] Whether lavish governmental advertising campaigns should be publicly funded has often been contentious in Australia, such as the pre-election advertisements for tax reform in 1998. Because of this political sensitivity, the government should have more of an obligation to disclose the details to Parliament for debate — and is also all the less likely to do so unbidden.[99] Commenting on the Combet case, a former NSW Auditor-General Tony Harris thought the campaign was highly inappropriate, as 'propriety dictates that government advertising about legislation should await legislation.'[100] Indeed, the same can probably be said here as was observed of the 1998 campaign — if not illegal, it is at least improper.[101]

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92 Id at 685, 693 (Kirby J).

93 Id at 622, 625, 629–630 (Gleeson CJ) and 671 (Kirby J); interestingly, the joint judgment did not state this explicitly.

94 Tony Harris, 'Let Canberra Pay for Ads,' *Australian Financial Review* (11 Oct 2005) at 62.

95 *Combet*, above n1 at 622 (Gleeson CJ); this would have been difficult given the wide interpretation given to the phrase in the Pharmaceutical Benefit Scheme and AAP cases, nor was it in the plaintiffs' interests to argue it. In 1998, after an inquiry into pre-election advertising for tax reform, the Auditor-General concluded the ads were for a valid purpose: see Lindell, above n21 at22.

96 *Combet*, above n1 at 649 (McHugh J), 673 and 674 (Kirby J).

97 Id at 675 (Kirby J), taken from Souter J in *Johanns v Livestock Marketing Association* 73 *USLW* 4350 (2005).

98 Id at 673 (Kirby J).

99 Lindell, above n21 at 21. *Combet*, above n1 at 680, 694 (Kirby J).

100 Harris, above n94.

101 Lindell, above n21 at 26.

Legality and propriety are not one and the same, of course, which can be a problem in a system largely dependent on convention. In a passage quoted so often it has become cliché, former Lord Chancellor Lord Hailsham said that the powers of government within Parliament are:

> [n]ow largely in the hands of the government machine, so that the government controls Parliament and not Parliament the government …. We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice.[102]

Legislative control over executive spending is already circumscribed.[103] In 1979, the Joint Committee of Public Accounts of the Commonwealth Parliament reported that:

> Theoretically, control over both taxation and expenditure lies with Parliament but the right to initiate spending lies with the government. Parliament can debate, examine and criticise the estimates, but must accept or reject the spending proposals as a whole.[104]

For the minority, preserving executive accountability to Parliament was important. Kirby J warned that 'Centuries of constitutional history', and the constitutional provisions giving that history effect, affirmed Parliament's role as the ultimate arbiter on the expenditure of public money.[105] McHugh J was concerned that if the majority approach were to be accepted, outcomes would be reduced to 'pious aspirations'.[106] Indeed, Kirby J warned all the government's efforts to set up complicated appropriations system, all the outcomes and outputs and PBS and budget papers would be reduced to 'an elaborate and immaterial charade'.[107] There would no longer be any way for Parliament to compare the Appropriation bills, the PBS and Annual Reports, as actual expenditure might have little connection with the promised outcomes.[108] As if to avoid responsibility for these troublesome consequences, the joint judgment refers to s97 of the Constitution, which provides for an audit process. From that, they draw the inference that the Constitution puts in place a designated office-holder for the purpose of overseeing Executive expenditure.[109] The joint judgment also noted the *Financial Management and Accountability Act 1997* (Cth), as providing another means of ensuring compliance by imposing criminal and other sanctions.[110] But the existence of such mechanisms could not oust the Court's jurisdiction, Kirby J argued.[111]

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102 Gerard Brennan, 'The Parliament, the Executive and the Courts: Roles and Immunities' (1997) 9 *Bond LR* 136 at 142.
103 Saunders, above n24 at 36.
104 Id at 13.
105 *Combet*, above n1 at 686 (Kirby J).
106 Id at 646 (McHugh J).
107 Id at 699 (Kirby J).
108 Id at 646–647 (McHugh J).
109 Id at 662, 663–664 (Gummow, Hayne, Callinan & Heydon JJ).
110 Id at 664.

Ultimately, this was the issue at the heart of the case: just what was the Court's proper role? For the majority judges, the only justiciable questions were to be found in the *Appropriation Act* itself. Sticking to the words of the Act and deferring to the will of Parliament, the reasoning seems, would keep the court safely in legal territory, away from any political controversies. But for the minority, these were not to be sidestepped; they were part of the legal controversy. Kirby J pointed to Gleeson CJ's comment that the matter was political as being neither persuasive nor relevant: 'All constitutional decisions have political consequences. That has never in the past stopped this Court from doing its duty.'[112] His Honour also disputed the Chief Justice's 'judge's intuition' remark, saying that the rule of law required judicial analysis.[113]

This was a fundamental disagreement; hence the vehemence of the dissenting judges. Both McHugh and Kirby JJ were sharply critical of the joint judgment's reasoning, describing it variously as 'erroneous',[114] 'seriously flawed',[115] 'defective',[116] 'unconvincing',[117] and 'unreasonable'.[118] McHugh J suspected that it might 'surprise all members of the Parliament irrespective of Party ideology.'[119] Kirby J wrote:

> Were the Court to permit a departure from this rule [that appropriations require distinct authorisation from Parliament] it would turn its back on the constitutional text, ignore the long struggles that preceded it, impermissibly diminish the role of the Senate, undermine transparency in government, diminish the real accountability of the Parliament to the electors and frustrate the steps taken by successive governments and Parliaments to enhance good governance in the legislative (and specifically financial) processes of the Parliament.[120]

Reading such grave warnings, it is hard not to have reservations about the joint judgment's approach. Parliamentary authorisation of appropriations is important; it may not have been given due weight. Curiously though, in different ways, both the majority and minority considered they were upholding the role of Parliament: the majority deferring to what they saw as a decision of Parliament; the dissenting judges propounding legal principles asserting Parliament's oversight of the executive. If Parliament's ability to supervise the executive diminishes, judicial oversight becomes all the more important.[121]

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111 Id at 682 (Kirby J); Harris, a former Auditor-General, agrees, above n94. These mechanisms would also be of little use against such vague and open-ended criteria.
112 *Combet*, above n1 at 696 (Kirby J).
113 Id at 695–696.
114 Id at 633 (McHugh J).
115 Id at 697 (Kirby J).
116 Id at 698.
117 Id at 701.
118 Ibid.
119 Id at 632 (McHugh J).
120 Id at 693 (Kirby J).
121 Brennan, above n102 at 144.

B. Consequences

On one point at least, the minority judges are undeniably correct: the judgment has potential ramifications for the parliamentary appropriation process. On legal grounds, the government now has less inclination to detail its spending. The current government considers its course of action to be justified by the decision: Prime Minister John Howard announced after the Court released orders at the end of September, 'We always believed this advertising was both proper and lawful and the High Court has ruled in our favour.'[122] As a result, we may be likely to see more of same type of expenditure smuggled under broad and fuzzy terms. Admittedly, that is not necessarily the end of the matter. In June 1901, the *Consolidated Revenue (Supply) Bill 1901–1902 (No 1)* (Cth) showed only a lump sum.[123] The Senate returned it to the House, demanding that the items of expenditure be particularised. Subsequently, the Senate approved a new bill identifying specific outlays. It still remains at the Senate's discretion to demand higher standards. But this is not a step the Senate is likely to take lightly.[124]

9. Conclusion

For the majority, it was appropriate to decide the case on the narrow terms of the *Appropriation Act*. They were firmly determined not to become embroiled in questions of power, politics and money. But there were fundamental constitutional principles of Parliamentary oversight at stake. In the view of the minority, the Act could only be read in accordance with those principles. Parliament theoretically still has the power to demand more scrutiny of the appropriation bills. If the people are to have power over the public purse, then we can only rely on Parliament to exercise that power. The Court cannot — or will not — intervene on our behalf.

122 Harris, above n94.

123 Kirby J tells the story *Combet*, above n1 at 681.

124 See Joint Committee Report in Saunders, above n24 at 13. Saunders says the Senate has pressed requests 'at least 11 times' but this has been controversial at 19–20.