

Combet v Commonwealth – Appropriations and Advertising

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Greg Combet and Nicola Roxon challenged an appropriation of funds for the Commonwealth government's advertising campaign on Industrial reform in August last year. The Commonwealth maintained that the funds were validly appropriated under the Appropriation Act (No 1) 2005.

The plaintiffs did not challenge the constitutionality of the Act. They simply argued that the Act made no provision for spending on the advertising campaign. The case was argued and decided, then, on a question of statutory interpretation. However, there are important constitutional issues underpinning the case which I will raise after a brief discussion of the decision itself.

The Appropriation Act (No 1) is passed annually under s53 of the Cth Constitution. It is a law for appropriating moneys for the 'ordinary annual services of government'. It is a special law in the sense that the Senate may not amend it.

The Schedule to the Act appropriated funds for expenditure by the Department of Employment and Workplace relations as follows:

	Department Outputs	Administered Expenses	Total
Outcome 1 – Efficient and effective Labour market assistance	\$1,235,216,000	\$1,970,400,000	\$3,205,616,000
Outcome 2 – Higher Productivity, higher pay workplaces	\$140,131,000	\$90,559,000	\$230,690,000
Outcome 3 – Increased workforce participation	\$72,205,000	\$560,642,000	\$632,847,000
Total	\$1,447,552,000	\$2,621,601,000	\$4,069,153,000

The parties agreed that the money for the advertisements came out of the total of \$1.447 billion for Department outputs.

The plaintiffs argued that the government's advertising campaign did not fall within any of the three outcomes which were specified for the department's expenditure, and that the department was limited to spending on these 3 outcomes under the act. Therefore, to fund

its advertising campaign, according to the plaintiff's the government needed a separate appropriation Act for that purpose.

[They argued that, under s15AB of the Acts Interpretation Act, the Portfolio Budget Statements were necessary to make sense of the outcomes, and that the statements made it clear that there was no allocation of funds for an advertising campaign such as the government's. If the PBS could not be used to interpret the Act, the plaintiffs argued that there was in any case no rational connection between the govt's advertising campaign and any of the outcomes stated in the schedule.]

In response, the Commonwealth argued that the funding of the advertisements fell within at least one of the three specified outcomes, but in particular, outcome 2 – higher productivity, higher pay workplaces.

The Court expressed a number of conflicting views on the interpretation of the Act:

The joint judgment of Gummow, Hayne, Callinan and Heydon JJ did not accept the arguments of either party, instead they held that the department *was not limited* to the specified outcomes in their spending of appropriated monies. They noted a contrast between expenditure for Department Outputs and Administered Expenses created in s7 and s8 of the Act. According to s8, administered expenses were limited to the amounts set under each outcome.

By contrast, an explanatory note to s7 stated that “the amounts set out opposite outcomes, under the heading ‘Department Outputs’ are ‘notional’. They are not part of the item and do not in any way restrict the scope of expenditure authorised by the item.”

The joint judgment interpreted this note to mean that for expenditure on department outputs, the outcomes themselves were notional, and not only the amounts to be spent under each outcome.

[To reach this surprising conclusion, the joint judgment focused on the apparent breadth of discretion granted by the words “do not in any way restrict the scope of expenditure”. They interpreted ‘scope’ to refer not only to the scope of the quantum under each outcome but the scope of outcomes themselves.]

The joint judgment's interpretation was in contrast to the interpretation of both the plaintiffs and the respondents in both their written and oral submissions and was not accepted by the other 3 judges.

The parties and the other judges all interpreted s7 of the Act to mean that the outcomes for departmental expenditure were fixed, but not the amounts that could be spent on each outcome. (in other words, you could juggle amounts between each of the outcomes. So if the advertising campaign was directed towards outcome two ‘higher productivity, higher pay workplaces’, money could be shifted from outcome 1 to pay for it).

The joint judgment held that its interpretation was an answer to the plaintiff's case. Under its interpretation, it didn't matter whether spending on the advertising campaign came within one of the specified outcomes. It was open to the department to add a new outcome which would clearly account for the advertising campaign.

The joint judgment's reasons raise questions of constitutional validity not comprehensively argued in the case:

First, whether an appropriation in such broad terms is sufficiently *restricted* to satisfy the description of an appropriation for 'the annual services of government' in section 53 of the Constitution,

Second, whether the appropriation is sufficiently *specific* to be an appropriation 'for the purposes of the Cth' under s81 of the Constitution.

All judges had something to say on the constitutional limits on appropriations in passing.

The Court confirmed that Appropriation Acts for the ordinary annual services under s53 can be expressed in very broad terms. If there was still some doubt about this following *Vic v Cth* (the AAP case) (1975) C134 CLR 338 and *Brown v West* (1990) 169 CLR 195, the Court has dispelled it.

In relation to the specificity of purposes expressed in the appropriation, Gleeson CJ – quoted with approval Jacobs J and Murphy J in *Victoria v Cth* (1975) C134 CLR 338: "It is for the Parliament to determine the degree of specificity with which such purposes are expressed. ... 'One line appropriations are valid'"[5]

The joint judgment accepted that there are some limits to Appropriation Acts, quoting with approval Latham CJ in *A-G (Vic) v Cth* (1945) 71 CLR 237 that it is not constitutional to pass legislation for "an appropriation in blank" (253). Although the joint judgment expressed no opinion on when this limit might be reached, it is a necessary implication of the joint judgment that it considered the Appropriation Act (No 1) 2005 to be within this limit. But the judgment did not explain how its interpretation of the Act differed from an 'appropriation in blank'.

McHugh J was alone in holding that the joint judgment's interpretation rendered the Appropriation Act unconstitutional. As he put it: it 'authorises an agency to spend money on whatever outputs it pleases.'[89]

Kirby J held that the joint judgment's interpretation of the act involved 'potential constitutional invalidity', but said no more than this. [289]

It is a disappointing aspect of the decision that the constitutional limits of Parliamentary appropriations was not fully argued in light of the joint judgment's interpretation of the Act.

Kirby is highly critical of the failure of the joint judgment to invite further submissions from the parties on the interpretation of the Act which it favoured for this, and other reasons. He stated at [294]:

“To dispose of these proceedings, as the joint reasons do, on an unconvincing interpretation of the Appropriation Act, alien to the Constitution, and to Australian parliamentary practice, advanced by no party, hypothesised from the Bench and answered on the run, is an unreasonable way of concluding such an important controversy.”

Briefly, on the other judgments,

Gleeson CJ found against the plaintiffs on the basis that the appropriation for the advertising campaign could arguably come within one of the three stated outcomes. He held that when an Appropriation Act was expressed in terms of ‘outcomes’ it must necessarily be interpreted broadly. He concluded that the outcome of ‘higher productivity, higher paid workplaces’ was of such breadth that it could conceivably extend to expenditure on the advertising campaign; and it was not for the Court to deny the possibility of a connection between the subject matter of the expenditure and the stated outcome.

McHugh and Kirby JJ dissented, holding that the expenditure on the advertising campaign had no rational connection to any of the three outcomes.

Discussion:

Ultimately, the case is significant for what it doesn’t say about the limits to government advertising. The case highlights that there is very little if any scope to challenge a government advertising campaign by challenging the constitutionality of the appropriation of funds for the campaign.

The timing of the case is interesting in this regard. The Senate Finance and Public Administration References Committee commenced an inquiry into ‘Government advertising and accountability’ in 2004. It was able to consider the impact of *Combet v Commonwealth* before it completed its report and recommendations in December 2005.

The case raises the question of what constitutional limits there are on the executive government using public money to fund politically partisan advertisements.

Is there something in the nature of partisan political advertising that means the Court ought to be prepared to construe ‘the ordinary annual services of govt’ more narrowly in regard to such spending?

If this goes too far, should the Court at least require appropriations for such purposes to be expressly stated in legislation?

Appropriation Acts are not the place to constrain Cth spending on advertising campaigns, are there other constitutional limits on such spending – perhaps within the implied freedom of political communication?

If not, what mechanisms are there for holding governments accountable for their spending on such advertising?

To answer these questions, it is first necessary to consider why the advertising practices of governments might be worthy of special consideration.

Governments advertise for many reasons, including for recruitment, promote health initiatives, and to inform the public about changes in the law.

It is difficult to draw a line between advertising that is partisan and advertising that is not. But there is a line, and there is little question that the government's advertising campaign on prospective workplace reforms crossed it, despite being couched in neutral terms and being 'authorised by the Australian government'. In fact, the main government justification for its advertising campaign was the need to counter advertisements authorised and funded by the Trade Union movement, which were unequivocally political. In the normal cut and thrust of political debate, one would expect private organisations with a different view to that of the Union to respond to the Union's campaign, and not the government.

b. Problems with advertising

i. The major potential problem with publicly funded advertising campaigns such as the one challenged in *Combet* is their potential impact on the democratic process

- governments have extraordinary power to influence people through advertising
 - o Note: the Cth government is the biggest advertiser in print, radio and television;
 - o Submissions to the Senate inquiry testified to significant spikes in advertising at election times;
 - o when advertising is party political (propaganda) and not simply information, it provides an extraordinary advantage to incumbents
 - o it undermines principles of free speech- generally, freedom of speech protects individuals from government regulation of their speech acts. One might ask further whether the government's exercise of 'speech' using public funds undermines the freedom of speech of others?

We provide a high level of constitutional and legislative protection to the electoral process in other ways, through the implied freedom of political communication, compulsory voting and careful calculation of public funding for political parties based on

their membership and representation. This is in contrast to the lack of protections from the potential impact of government advertising on the electoral process.

Gleeson CJ commented on some of these points in his judgment. He stated that: “IN a variety of ways, politicians, in and out of government, constantly engage in publicly funded activity promoting or opposing government policy. Costs of travel undertaken for purposes of political advocacy provide a simple example.”[2]

[But is this a reasonable comparison? – all MPs get a travelling allowance, not only government MPs. And political advertising is of a different nature to other forms of political advocacy.]

Gleeson CJ also stated (at [2]):

“Complaints of unfair or inappropriate use of public funds are part of the cut and thrust of political debate. If seen as justified, they may have an electoral impact.”

[But is the ‘electoral impact’ an adequate safeguard? The main complaint about partisan political advertising is that it unfairly influences the electorate by undermining the role of political debate.]

A disappointing aspect of the majority judgments in *Combet* is their failure to acknowledge the role of the Courts in protecting the democratic process, even if *Combet* was not the case to exercise these limits.

Undoubtedly, the nature and impact of government advertising is a highly political issue. However, if it is a threat to the integrity of the democratic process, it is a threat to the Constitution.

In *Al-Kateb*, Gleeson CJ held that when Parliament intends a law to have an impact on fundamental rights, it must make it express and plain on the face of the statute.

[*Al Kateb* per Gleeson CJ:

[19] In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

....

[20] A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.]

Perhaps this principle could be applied to interpreting an Appropriation Act by requiring Parliament to express a clear intention to authorise spending on advertising campaigns.

An alternative argument, not pursued by the plaintiffs, was that the government's advertising was contrary to principles of freedom of political communication. Similar arguments have been unsuccessful in the US.

[In *Donaggio v Arlington County, Virginia*, 880 F. Supp 446, 454-456 (E.D. Va 1995) the plaintiff argued unsuccessfully that the first amendment protection of free speech operated to limit government speech where it would "drown out" individuals.

The police department paid police to appear at a rally for a controversial assault weapons ban. John Denaggio, one of the police involved argued that he had been sent against his will, and brought an action against his county employer and police chief and arguing his 1st amendment rights had been infringed.

Donaggio argued that the first amendment protection of free speech operated to limit government speech where it would "drown out" individuals. The action failed. (at 19)]

In *Joyner v Whiting* 477 F.2d 456, 461 (4th Cir 1973), the Judge Butzer confirmed that 'both governments [state and federal] may spend money to publish the positions they take on controversial subjects.'

The Senate report on Government advertising and accountability noted that because of the interpretation of the Appropriations Act in *Combet*, there is almost nothing in the appropriations process itself that will provide any restraint on government expenditure on politically contentious advertising activities'.

If this is right, the parliamentary process is the only defence against the misuse of funds on partisan political advertising.

Submissions to the Senate inquiry noted the current lack of transparency in relation to government spending on advertising campaigns, and even if there were greater transparency, the difficulty of adequately assessing the outcomes of money spent on advertising compared with outcomes for money spent on government services such as health, education, national security, transport etc through Senate Estimates.

The Senate's majority report recommended that the current guidelines for Government advertising of 1995 be improved. Submissions to the inquiry provided examples of guidelines from Canada, the UK, and the US which were more comprehensive and required greater disclosure from the executive.

Accountability of the executive government has been a recurring theme in Australia in recent times. The phenomenon of party discipline, inadequacies in the operation of the Australian version of ministerial responsibility, and the level of control the executive

government exercises over Parliamentary committees has meant that there has been a new attention paid to the constitutional limits on executive power.

Limits on the executive's power to appropriate public money for advertising purposes is an under-theorised issue of public law. The government's use of public funds on an advertising campaign to promote prospective workplace reforms suggests this may need to change.

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