HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

GREG COMBET & ANOR PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Combet v Commonwealth of Australia [2005] HCA 61
Date of order: 29 September 2005
Date of publication of reasons: 21 October 2005
S359/2005

ORDER

The questions stated by the parties in the Special Case for the opinion of the Full Court are answered as follows:

(1) Q. Do the Plaintiffs, or either of them, have standing to seek the relief sought in the Statement of Claim in the Further Amended Writ of Summons?

A. It is unnecessary to answer this question.

(2) Q. If yes to (1), is the withdrawal of money from the Treasury of the Commonwealth to pay for the Government's Advertisements authorised by the Departmental Appropriation?

A. It is not appropriate to answer this question.

(3) Q. If no to (2), have the Plaintiffs established a basis for any, and if so which, of the relief sought in the Amended Statement of Claim?

A. The Plaintiffs have not established a basis for any of the relief sought in the Amended Statement of Claim or the alternative relief foreshadowed at the hearing of the Special Case, namely, declarations concerning payments to meet expenses incurred by the Commonwealth under contracts and arrangements for and in relation to certain past advertisements.

(4) Q. If yes to (3), should any such relief be refused on discretionary grounds?

A. It is unnecessary to answer this question.

(5) Q. Who should pay the costs of the proceedings?

A. The Plaintiffs.

Representation:

S J Gageler SC with J K Kirk for the plaintiffs (instructed by Maurice Blackburn Cashman)

D M J Bennett QC, Solicitor-General of the Commonwealth with S B Lloyd and K J Graham for the defendants (instructed by Australian Government Solicitor)

Intervener:

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor's Office (Western Australia))

CATCHWORDS

Combet v Commonwealth of Australia

Statutes – Appropriation Act – Construction – Appropriation of moneys from Consolidated Revenue Fund – Expenditure of public money on advertising to provide information about, and promote, the Government's workplace relations reform package – Whether expenditure authorised by an appropriation made by law – Construction of *Appropriation Act (No 1)* 2005-2006 (Cth) – Whether expenditure falls within Outcome 2, "Higher productivity, higher pay workplaces", of the Department of Employment and Workplace Relations – Whether amounts issued out of Consolidated Revenue Fund for "departmental items" and for "administered items" tied to "outcomes".

Constitutional law (Cth) – Appropriation of moneys from Consolidated Revenue Fund – Standing to bring action for declarations and injunctions – Standing of Member of House of Representatives and Shadow Attorney-General – Standing of Secretary of peak union body – Justiciability of proceedings – Whether proceedings present a matter apt for judicial determination.

Constitutional law (Cth) – Appropriation of moneys from Consolidated Revenue Fund – Expenditure alleged to be unauthorised by *Appropriation Act (No 1)* 2005-2006 (Cth) – Relief – Injunction – Declaration – Whether relief claimed effective and confined to the expenditure impugned – Whether relief should be refused on discretionary grounds – Whether necessary or appropriate to answer such questions.

High Court – Practice – Special Case – Questions of law stated for the opinion of the Full Court – Matter presented by the arguments of the parties – Whether common assumption in the parties' submissions on questions of statutory construction – Whether Court obliged to decide controversy presented by the parties – Scope and content of that controversy – Extent to which parties' submissions foreclosed construction of the *Appropriation Act (No 1)* 2005-2006 (Cth).

Words and phrases – "appropriation", "appropriation made by law", "administered expenses", "administered item", "departmental expenditure", "departmental item", "departmental outputs", "outcomes".

Constitution, ss 53, 54, 56, 81, 83, 94, 97.
Appropriation Act (No 1) 2005-2006 (Cth), ss 3, 4, 7, 8, 15, Sched 1.
Financial Management and Accountability Act 1997 (Cth), ss 5, 26, 27.
Auditor-General Act 1997 (Cth).
Audit Act 1901 (Cth), ss 34, 40, 41.
Acts Interpretation Act 1901 (Cth), s15AB.

1 GLEESON CJ. Section 83 of the Constitution provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. The Special Case says that, in May 2005, the Government announced its intention to introduce a "workplace relations reform package". In response, the Australian Council of Trade Unions instituted "a national campaign opposing the [r]eforms". The Government "has ... engaged and proposes to continue to engage in advertising the purpose of which is to provide information about and promote the [r]eforms". The advertisements have been, and will be, paid for by moneys drawn from the Treasury. The appropriation by law relied upon is that made by the *Appropriation Act (No 1)* 2005-2006 (Cth) ("the Appropriation Act"). The plaintiffs contend that the Appropriation Act does not cover such drawings. The defendants contend that it does. That is the principal issue to be decided. The question is one of the construction of the Appropriation Act.

2 It is not contended that the Appropriation Act is invalid. Nor is it argued that expenditure of public money, by way of advertising or otherwise, upon the promotion of government policy is inherently unlawful or unconstitutional. 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. Such expenditure may sometimes attract political controversy. 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. Our concern, however, is only with justiciable issues.

3 The issues for decision have been put before the Court in a number of questions formulated in the Special Case. I agree with the answers proposed in the reasons of Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons"). I will, however, state my own reasons.

4 Questions of construction of the Appropriation Act are to be resolved by reference to text and context. The language of the text is controlling, but the meaning of that language is to be understood in a context which includes the Constitution, parliamentary practice, accounting standards, and principles and methods of public administration. The most relevant provisions of the Constitution are ss 53, 54, 81 and 83. The matter of parliamentary appropriation goes to the essence of relations between the Parliament and the Executive, and of relations between the Senate and the House of Representatives. Parliamentary practice comprehends procedures relating to budget estimates, audit, expenditure review, and performance assessment. Such procedures operate in a dynamic, political environment. In public administration, theory and practice change and develop. The Constitution was designed to allow for a necessary degree of flexibility in administrative arrangements[1].

---

1 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 401-403 [11]-[17].

5 The Constitution, consistently with the background of constitutional history and parliamentary practice with which the framers were familiar, reserves to the Parliament, and especially the House of Representatives, the power associated with control of funding through appropriation. It is for Parliament, consistently with the Constitution, to decide how it exercises that control. One factor of practical significance is the degree of specificity with which appropriations are made. Section 81 of the Constitution provides for the Consolidated Revenue Fund "to be appropriated for the purposes of the Commonwealth". It is for the Parliament, in making appropriations, to determine what purposes are purposes of the Commonwealth[2]. It is also for the Parliament to determine the degree of specificity with which such purposes are expressed. "Provided that purposes are stated it is a matter for the Parliament how minute and particular shall be the expression of purposes in any particular case."[3] "The purpose of any appropriation may be indicated generally. 'One-line' appropriations are valid."[4] In 1936, the Supreme Court of the United States, speaking of the provision of the United States Constitution that corresponds with s 83, said[5]:

> "The contention that there has been no constitutional appropriation, or that any attempted appropriation is bad, because the particular uses to which the appropriated money is to be put have not been specified, is without merit. The provision of the Constitution ... that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law' was intended as a restriction upon the disbursing authority of the Executive department, and is without significance here. It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress. ...
>
> The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of

---

2 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 254 per Latham CJ.

3 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 404 per Jacobs J.

4 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 422 per Murphy J.

5 *Cincinnati Soap Co v United States* 301 US 308 at 321-322 (1936).

large amounts, to be allotted and expended as directed by designated government agencies."

6 A recent development in the theory and practice of public administration is the trend towards "outcome appropriations" as a means of stating the purposes for which governments spend public money. This was implemented in the Commonwealth in 1999-2000. "Outcomes are the intended effects of government programmes, whereas outputs — the goods and services delivered by government — are the means of achieving those outcomes."[6] A suggested benefit of changing the focus of appropriations from outputs to outcomes is the placing of greater emphasis on performance in the public sector[7]. Outcome appropriation is related to issues of performance assessment. Furthermore, the *Financial Management and Accountability Act* 1997 (Cth) forms part of the context in which the system operates. The practical manifestation of the system of outcome appropriation in the Appropriations Act will be examined below. Typically, outcomes are stated at a high level of generality. Furthermore, they are commonly expressed in value-laden terms which import political judgment. Parliament is appropriating funds for use by a government, and the outcomes pursued may involve controversial policy judgments.

7 While the generality of statements of outcome may increase the difficulty of contesting the relationship between an appropriation and a drawing, appropriations are made in a context that includes public scrutiny and political debate concerning budget estimates and expenditure review. 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 review of such expenditure after it has occurred. Specificity of appropriation is not the only form of practical control over government expenditure. The political dynamics of estimation and review form part of the setting in which appropriations are sought, and made.

---

6 Brumby and Robinson, "Performance Budgeting, an Overview", paper delivered at the International Seminar on Performance Budgeting, Brasilia, 2004 at 7 (cited in Webber, "Managing the Public's Money: From Outputs to Outcomes – and Beyond", (2004) 4 *OECD Journal on Budgeting* 101 at 109).

7 Webber, "Managing the Public's Money: From Outputs to Outcomes – and Beyond", (2004) 4 *OECD Journal on Budgeting* 101 at 114; Boxall, "Outcomes and Outputs: The New Resource Management Framework", (1998) 88 *Canberra Bulletin of Public Administration* 39 at 41; Her Majesty's Treasury, *Better Accounting for the Taxpayer's Money: Resource Accounting and Budgeting in Government*, (1994) Cmnd 2626.

8 Section 53 of the Constitution provides that the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of government. Legislation appropriating funds for the costs and expenses of maintaining the ordinary annual services of government is dealt with separately from legislation dealing, for example, with extraordinary charges and appropriations. Quick and Garran wrote that "[t]he ordinary annual services include the various public departments manned and equipped to carry on the general work of the Government departments, such as customs and excise, posts and telegraphs, light-houses, light-ships, and quarantine, naval and military defence, the money to pay for which is voted by Parliament from year to year"[8]. The authors were writing at a time when the role of the Commonwealth was more modest than at present, but the idea they convey remains true. The Appropriation Act, in its long title, is described as an Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes. The scheme of the Appropriation Act is built around Sched 1, which identifies 16 portfolios including, relevantly, Employment and Workplace Relations, and allocates sums to various agencies within those portfolios, dividing the sums between "Departmental Outputs" and "Administered Expenses".

9 Some insight into the distinction between "departmental" and "administered" items or expenses may be gained from Australian Accounting Standard 29 concerning Financial Reporting by Government Departments, written in June 1998:

> "12.9.1 A government department's operating statement only recognises revenues and expenses of the government department. Similarly, a government department's statement of financial position only recognises assets which the government department controls and liabilities which involve a future sacrifice of the government department's assets.
>
> 12.9.2 However, the responsibilities of a government department may encompass the levying or collection of taxes, fines and fees, the provision of goods and services at a charge to recipients, and the transfer of funds to eligible beneficiaries. These activities may give rise to revenues and expenses which are not attributable to the government department. ... These administered revenues, expenses, assets and liabilities

---

8 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 669.

> are not recognised in the government department's operating statement or statement of financial position."

10 In the Summary of Appropriations in Sched 1 to the Appropriation Act, the total sum of $47,371,218,000 was divided into $33,788,542,000 for departmental outputs and $13,582,676,000 for administered expenses. The allocations were broken down further into portfolios, and, within portfolios, into agencies. For some agencies, there were departmental outputs but no administered expenses. For some agencies, there were administered expenses but no departmental outputs. For some agencies, there were both.

11 The Appropriation Act, in s 4, refers to Portfolio Budget Statements. This is a defined term, meaning the Portfolio Budget Statements that were tabled in the Senate or the House of Representatives in relation to the Bill for the Appropriation Act (s 3). Those statements, prepared by Ministers for the budget estimates process, contained information on proposed agency activities in support of spending proposed by the Appropriation Bill. Such statements explain and seek to justify the appropriations proposed. They are scrutinised as part of the budget process. They reflect government policy as it affects budgetary planning. Government policy, however, is not frozen over a given budget period. Policies constantly change and develop. Indeed, governments may change during a budget period. Nor is there a clear distinction between "new" policies and modifications of existing policy.

12 In Sched 1 to the Appropriation Act, for each agency of each portfolio there is a statement of an outcome, or a number of outcomes. Reference has already been made to the generality, and political content, of some of these objectives. Furthermore, in most cases, neither departmental outputs (goods and services provided) nor administered expenses could possibly be the sole sources of influence contributing to or bearing upon the stated outcome. For example, within the Foreign Affairs and Trade portfolio, an amount of $49,334,000 is appropriated for the Australian Centre for International Agricultural Research. The relevant outcome is: "Agriculture in developing countries and Australia is more productive and sustainable as a result of better technologies, practices, policies and systems". Plainly, that outcome is likely to be affected by a host of factors beyond the control or influence of the Australian Government. Furthermore, opinions may be divided upon whether agriculture at one time is "more productive and sustainable" than at another, or upon whether certain technologies, practices, policies and systems have been made "better". This is a description, in the broadest political terms, of an objective of governmental activity. Whether a particular form of expenditure on goods or services (output) is likely to contribute to that objective might be contestable. 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 by stating the outcome and asking whether the expenditure would contribute to it. The generality, and the value-laden content of the outcome would make that

impossible. It would be possible to frame an issue in terms of relevance. A court might ask whether a particular expenditure could rationally be regarded as having been made in pursuit of, and as being in that sense related to, the stipulated outcome. A negative answer to that question would need to have due regard to the breadth of expression of the outcome, and to the consideration that the court's capacity to make a judgment about issues of policy formation and implementation is likely to be limited. A judge's intuition may be an insecure foundation for a denial of any rational connection between an output and an outcome.

13 The relevant provisions of the Appropriation Act begin with s 3, a definitions section. The term "administered item" is defined to mean an *amount* set out in Sched 1 opposite an outcome of an entity under the heading "Administered Expenses". The term "departmental item" is defined to mean the *total amount* set out in Sched 1 in relation to an entity under the heading "Departmental Outputs". The term "entity" is defined to include an Agency.

14 To give relevant content to those definitions, it is necessary to refer to the first agency item relating to the Employment and Workplace Relations Portfolio in Sched 1. (References to the earlier budget period, 2004-2005, included in the Schedule in italics for purposes of comparison, will be omitted.)

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

Appropriation — 2005-2006

	Departmental Outputs	Administered Expenses	Total
	$'000	$'000	$'000
DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS			
Outcome 1 - Efficient and effective labour market assistance	1,235,216	1,970,400	3,205,616
Outcome 2 - Higher productivity, higher pay workplaces	140,131	90,559	230,690
Outcome 3 - Increased workforce participation	72,205	560,642	632,847
Total: Department of Employment and Workplace Relations	**1,447,552**	**2,621,601**	**4,069,153**

15 Applying the definitions in s 3, the relevant departmental item is $1,447,552,000, and the administered items are $1,970,400,000, $90,559,000 and $560,642,000.

16 Section 4 of the Appropriation Act provides:

> "4(1) The Portfolio Budget Statements are hereby declared to be relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*.
>
> (2) If the Portfolio Budget Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome."

17 Sections 7 and 8 effect what are described as the basic appropriation for departmental items (s 7) and the basic appropriation for administered items (s 8).

18 The language of s 4(2) ties in with the language of s 8(2). Section 8 relevantly provides:

> "8(1) For an administered item for an outcome of an entity, the Finance Minister may issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the lesser of:
>
> (a) the amount specified in the item; and
>
> (b) the amount determined by the Finance Minister in relation to the item, having regard to the expenses incurred by the entity in the current year in relation to the item.
>
> (2) An amount issued out of the Consolidated Revenue Fund for an administered item for an outcome of an entity may only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome."

19 As a note to s 4(1) indicates, s 4(1) is intended to relate specifically to s 15AB(2)(g) of the *Acts Interpretation Act* 1901 (Cth). The Portfolio Budget Statements may be considered to confirm that the meaning of a provision is the ordinary meaning conveyed by the text, or to determine the meaning of a provision when the provision is ambiguous or obscure or where the ordinary meaning conveyed by the text leads to a result that is manifestly absurd or is unreasonable.

20 The focus of argument in the present case has been the departmental item of $1,447,552,000. The basic appropriation of that item is found in s 7, which relevantly provides:

> "7(1) For a departmental item for an entity, the Finance Minister may issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the amount specified in the item.
>
> (2) 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."

21 The term "expenditure" is defined in s 3 as meaning payments for expenses, acquiring assets, making loans or paying liabilities. The composite expression "departmental expenditure" is undefined.

22 Unlike ss 4 and 8, s 7 makes no reference to outcomes. Its only reference to purpose is "for the departmental expenditure of the entity." If the plaintiffs are right in their contention, it must be because payment of the advertising expenses in question, out of the amount of $1,447,552,000, involves an application of part

of that amount otherwise than for the departmental expenditure of the Department of Employment and Workplace Relations.

23 I accept that the expression "departmental expenditure", in s 7(2), does not mean any expenditure that the Department chooses to make, or incur, or even any expenditure for the purposes of the Commonwealth that the Department chooses to make or incur. Description of the expenditure as "departmental" imports a purposive, as well as a factual, element. That follows from the constitutional context, a matter to which I shall return.

24 At the same time, I do not accept that expenditure cannot be supported under s 7 unless it is referred to in the Portfolio Budget Statement. Such a conclusion would be contrary to the terms of s 4, which are facultative, not limiting. Sub-section (2) of s 4 refers to what Portfolio Budget Statements "indicate". That word itself reflects the practical political context in which such statements are prepared, with the potential for developments and changes both in policy and in circumstances. The Appropriation Act characterises the statements as indicative, and says that if it is indicated that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure is taken to be for the purpose of contributing to the outcome. Such a question might arise most clearly in the case of administered items, having regard to the terms of s 8(2). Whether it could also arise under s 7 is an issue. In any event, to say that, if an activity is related to an outcome in the Portfolio Budget Statements, expenditure on that activity is to be taken to be for the purpose of the outcome is very different from saying that it is only expenditure on activities covered by Portfolio Budget Statements that may be taken to be expenditure for the purpose of contributing to achieving the outcome. As to the latter possibility, s 4 says no such thing. Putting to one side the practical difficulties that would arise from treating the Portfolio Budget Statements as definitive of the purposes of the appropriations effected by the Appropriation Act, such a conclusion cannot stand with the language of the Act.

25 In the case of administered items, the relationship between outcome and appropriation is clearly spelled out in the definition of administered item and the terms of s 8, read together with Sched 1. In the case of the Department of Employment and Workplace Relations, there are three administered items (amounts) and three outcomes, and an amount issued out of the Consolidated Revenue Fund must be related (in the sense explained in s 8(2)) to one of those items and to the outcome for which it has been appropriated.

26 We are, however, presently concerned with s 7(2). For the Department of Employment and Workplace Relations there is only one departmental item as defined, $1,447,552,000. An amount issued for that item may only be applied for the departmental expenditure of the Department. Such expenditure must, of course, be for a purpose of the Commonwealth (Constitution, s 81). The long title of the Appropriation Act, understood in the light of s 53 of the Constitution,

shows that the expenditure referred to in s 7 is for the ordinary annual services of Government. That, however, is an expression of wide import. Are the outcomes stated in Sched 1 relevant to the characterisation of expenditure as "departmental expenditure" within the meaning of s 7? In my view, they are. The constitutional context in which the Appropriation Act was enacted was one of parliamentary appropriation of funds, under the control of Parliament, to be made available to the Executive for stated purposes. The statement of purposes may be broad or narrow. In Sched 1, amounts under the heading "Departmental Outputs" are related in each case to a statement of outcome. The total of those amounts, for an entity, is a departmental item. It is unlikely that the statements of outcome were intended to be relevant only to administered items, because in the case of some entities or agencies there are statements of outcome, but no administered expenses. I acknowledge that the contrast between the language of s 7(2) and that of s 8(2) could support a view that outcomes are irrelevant to s 7(2). Against that, however, is the wider context, together with the specific textual consideration that Sched 1 identifies outcomes even where there are no relevant administered expenses. In the case of departmental items, the relationship with outcomes is not identical to the relationship between outcomes and administered items spelled out in s 8(2). There is only one departmental item, to which a number of outcomes may be relevant. Taken together, however, outcomes towards which the Department of Employment and Workplace Relations is working assist in considering what is meant by "departmental expenditure". They may exclude expenditure which is so clearly unrelated to the business of the Department that it could not rationally be regarded as expenditure for the purpose of that business. There are probably many aspects of the routine business of the Department, undoubtedly included in the ordinary annual services of the Government, which could be regarded as contributing to one or other of outcomes 1, 2 or 3 only in the most indirect fashion. No doubt much departmental expenditure is of a kind that would be incurred even if the Department were pursuing different policy objectives. Such expenditure may be directed to outputs of a kind that a government of any political persuasion would expect the Department to provide. Policy development and advice to the Minister is an obvious example. Such advice might be directed towards a wholesale re-definition of the outcomes themselves, and yet the cost of providing it would qualify as departmental expenditure.

27 The plaintiffs, in their submissions to the Court, acknowledged that the outcomes listed in Sched 1 "are statements of purpose at a very high level of abstraction". So much is clear. Provided such statements are not so general, or abstract, as to be without meaning, they represent Parliament's lawful choice as to the manner in which it identifies the purpose of an appropriation. To the extent to which it is necessary to have regard to those statements of purpose in order to decide whether expenditure bears the character of departmental expenditure referred to in s 7, then the generality, and the political character, of a statement may make it difficult to establish that particular expenditure is not related to the relevant purpose (in the sense earlier discussed). It does not follow

that the purpose should be confined, or stripped of its political content. By what process might such a narrowing legitimately take place? The plaintiffs argued, quoting the Portfolio Budget Statements, that outcome 2 might be narrowed to "providing policy advice and legislation development services to government" and "supporting employers and employees in adopting fair and flexible workplace relations practices". It has already been pointed out that the use of the Portfolio Budget Statements to restrict the generality, and thereby alter the meaning, of the language of the Act, including Sched 1, is inappropriate. If Parliament formulates the purposes of appropriation in broad, general terms, then those terms must be applied with the breadth and generality they bear. Furthermore, if (as appears to be common ground) "providing policy advice and legislation development services to government" serves a purpose described in Sched 1 as "higher productivity, higher pay workplaces", then it is instructive to consider why that is so.

28 If it be accepted (as it is) that "providing policy advice and legislation development services" is one way in which the Department pursues the outcome of "higher productivity, higher pay workplaces", that must be because the outcome is contributed to by development of policy, and formulation of legislation in accordance with such policy or, more precisely, because such activities could rationally be regarded as contributing to the outcome. It is not suggested that this result depends upon whether the policy advice, or proposed legislation, enjoys the approval of the person making the judgment. In the terms of outcome 2, "higher" must mean "higher than would otherwise be the case". Productivity and rates of pay in workplaces are influenced by many factors in addition to government action and legislation. Yet the assumption of Sched 1 is that they may be contributed to by departmental outputs, and the assumption of the Portfolio Budget Statements, and of the plaintiffs' argument, is that policy advice and legislation development services may reasonably be regarded as contributing to that outcome, regardless of the content of the advice or the merits of the legislation. If formulation and development of policy and legislation on the subject of workplace relations is related to "higher productivity, higher pay workplaces", then it is difficult to see why promotion of public acceptance of workplace relations policy and legislative change is not so related. It cannot be the case that it depends upon whether the policy is wise, or the changes constitute genuine reforms. These are political judgments, and the value-laden statements of outcome throughout Sched 1 invite differences of opinion on such questions.

29 In a representative democracy, governments, oppositions, politicians of all persuasions, and interest groups are constantly engaged in political struggle. Public, as well as private, funds are spent, in a variety of ways, on advocacy supporting or opposing proposals for executive action and legislative change. Persuading the public, or a sufficient number of members of the public, of the merits of government policy may be as important to successful formulation and implementation of policy as the drafting of advice and legislation. Persuading the public of the merits of policy and legislation may be vital to the achievement

of the desired policy objective. There may be many grounds of political objection to the advertising in question, such as that the proposed changes will not result in "higher productivity, higher pay workplaces", or that a publicly funded advertising campaign is an inappropriate means of advocating such changes. The legal question, however, is whether the drawings in question are covered by the appropriation. The relevant outcome is stated with such breadth as to require an answer to that question adverse to the plaintiffs.

30 Reference has already been made to the long title of the Appropriation Act, the reference in the long title to "the ordinary annual services of the Government", and the constitutional significance of that expression. An argument was advanced with respect to that matter, with particular reference to a history of communications between the Senate and the Minister for Finance on the contents of the annual Appropriation Bill (No 1). The relevant history is traced in the joint reasons. The concept of running costs, and the relationship to that concept of "advertising and public relations services" and "information services" was examined in argument. I agree that the boundaries of the running costs included in departmental expenditure are unclear, and the parliamentary history and practice relied upon does not advance the argument of the plaintiffs. Counsel for the defendants pointed out that the development of new policy cannot be excluded from running costs, especially when regard is had to the possibility of a change of government during a budget period, and the fact that "information activities" may be an integral part of the development of new programmes.

31 It is unnecessary to deal with the questions of the standing of the plaintiffs to bring these proceedings or the form of relief that might have been available had the plaintiffs made good their primary contention. Those questions involve issues of importance and difficulty, but on the view I have taken on the principal question of construction they do not arise.

32 For those reasons I agreed in the order that was made on 29 September 2005.

33 McHUGH J. The issues in this case arise out of a Special Case stated by Gummow J. The principal issue is whether the *Appropriation Act (No 1)* 2005-2006 (Cth) has authorised the withdrawal of money from the Treasury of the Commonwealth to pay for advertising by the federal government that promotes its industrial relations reform package.

34 In their pleadings, the plaintiffs seek two declarations and an injunction. They seek a declaration that the drawing of money from the Treasury of the Commonwealth to pay for advertisements promoting the workplace relations reform package is not authorised by *Appropriation Act (No 1)* 2005-2006 ("Act No 1"). They also seek a declaration that the drawing rights issued by a delegate of the third defendant, the Minister for Finance and Administration, under s 27 of the *Financial Management and Accountability Act* 1997 (Cth) to authorise the payment of public money for advertisements promoting the reform package are invalid. Finally, they seek an injunction restraining the third defendant from issuing any further drawing right under s 27 of the *Financial Management and Accountability Act* 1997 (Cth) to authorise the payment of public money for advertisements that promote the reform package.

35 In oral argument, however, the plaintiffs said that, if the Court was not prepared to grant the relief sought in their pleadings, it should grant two declarations. First, that the drawing of money from the Treasury for the purpose of making payments to meet expenses incurred by the Commonwealth in relation to past advertisements about the reform package was not authorised by Act No 1. Second, that the drawing rights issued by a delegate of the third defendant on 23 August 2005 have no effect in so far as they purport to authorise the debiting of an amount against the departmental item in respect of the Department of Employment and Workplace Relations in Act No 1 for the purpose of making payments of public money to meet expenses incurred by the Commonwealth in relation to the past advertisements.

36 In my opinion, Act No 1 did not authorise expenditure on *this* advertising. The defendants contend that it did so because the Act authorised expenditure by the Department of Employment and Workplace Relations on advertising that could reasonably result in higher productivity or higher pay in Australian workplaces. However, the defendants tendered no expert evidence that these advertisements might achieve either result and, after examining them, I can see no rational connection between the advertisements and higher productivity or higher pay. The advertisements provide no information, instruction, encouragement or exhortation that could lead to higher productivity or higher pay. The joint judgment of Gummow, Hayne, Callinan and Heydon JJ asserts, despite the contention of the defendants, that it is not necessary that the expenditure be conducive to achieving higher productivity or higher pay or any outcome specified in Act No 1. For the reasons set out in this judgment, however, that assertion cannot be accepted. Not only is it contrary to what was common ground between the plaintiffs and the defendants but it is contrary to the

language of Act No 1, the parliamentary practice, the parliamentary documents that explain the operation of Act No 1 and the understanding of all members of the Parliament. I venture to think that the joint judgment places a construction on Act No 1 that will surprise all members of the Parliament irrespective of party or ideology. It follows that Act No 1 did not authorise the expenditure of the moneys of the Commonwealth on the advertisements. A declaration to that effect should be made and the defendants should be restrained by injunction from spending the moneys of the Commonwealth on advertisements in the form or to the effect of those already published.

The material facts

37 In May 2005, the Prime Minister informed the House of Representatives[9] that the federal government intended to legislate to reform workplace relations in Australia by introducing a unified national system. The Prime Minister gave no details of how this would be achieved. When this Court heard argument in the present proceedings, no legislation had been introduced into either House of Parliament to give effect to the proposed changes.

38 In the weeks after the Prime Minister's announcement, the Australian Council of Trade Unions ("the ACTU") began a campaign opposing the proposed reforms. The campaign included rallies and marches and extensive television advertising. On and after 9 July 2005, the first defendant, the Commonwealth, responded to this campaign by publishing advertisements in newspapers in all States and Territories. On and after 23 July 2005, the first defendant also responded to the campaign of the ACTU by broadcasting advertisements on commercial radio stations. As at 15 August 2005, the first defendant had entered into contracts for advertising and related services with a value of at least $3.84 million. The cost of the advertising has been or will be met from public funds drawn from the Treasury of the Commonwealth. Unless restrained by this Court, the first defendant proposes to use funds of the Commonwealth to pay for advertisements concerning its industrial relations package.

39 A copy of one of the first defendant's newspaper advertisements is Annexure "A" to the Special Case. It is a fair sample of the nature of the advertising in question in these proceedings. The advertisement is headed:

MORE JOBS
HIGHER WAGES
A STRONGER ECONOMY

---

9 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 2005 at 38-43.

40 The advertisement asserts that, as a result of Australians working together, the nation has a stronger economy with new jobs and higher real wages and the capacity to provide more health, education, social and community services. It claims that, if Australia is to remain effective in a global economy, more has to be done to keep these benefits. Changes to industrial relations law are therefore needed. The advertisement makes a number of specific claims about the present state of Australian industrial relations and what will happen under the reforms. It asserts that:

- the Australian government will protect the rights and conditions of Australian workers by legislation;
- the government will continue to protect workers with a fair and sustainable safety net of wages and conditions;
- awards will not be abolished but will be updated so they continue to provide modern terms and conditions for those workers who choose not to have a workplace agreement;
- workers will continue to be protected from unlawful termination including dismissal on discriminatory grounds;
- it will remain unlawful for workers to be forced to sign an Australian Workplace Agreement (AWA) or be sacked for refusing to sign an AWA;
- the government's plan will make it simpler and easier for workers and employers to agree on working conditions;
- workers on AWAs currently earn 13% more than workers on certified agreements, and 100% more than workers on award rates;
- all agreements will be required by law to meet the new tests set out by the Australian Fair Pay and Conditions Standard;
- to keep pace with our modern economy the Australian Industrial Relations Commission will focus on dispute resolution and further simplification of awards;
- Australia currently has six different workplace relations systems and can no longer afford to force employees and employers to work with this complexity; and that
- Australia needs only one set of national laws to cover workplace relations.

41 The advertisement concludes by claiming that, by working together, "we will create more jobs, with higher wages in a stronger economy and secure the future for Australian workers and their families."

42 Whether expenditure on the advertisement and those like it was lawfully authorised depends on whether it could promote any of the items – Outcomes 1, 2 and 3 – in Table 1.1 of the Agency Budget Statements for the Department of Employment and Workplace Relations. Those Outcomes are identified as:

1. Efficient and effective labour market assistance

2. Higher productivity, higher pay workplaces

3. Increased workforce participation

43 The issue in the case is one of statutory construction. No question of constitutional law is directly involved although the explanation and the meaning of the text of Act No 1 lie in the history of constitutional conflicts between the Crown and Parliament. They also lie in conflicts between the House of Representatives and the Senate over the Senate's right to amend legislation appropriating money for the purposes of the Commonwealth. It will, unfortunately, be necessary to go beyond an examination of the text of the statute. That is because the joint judgment of four members of the Court has construed Act No 1 in a manner contrary to that asserted by the plaintiffs and relevantly accepted by the defendants. As a result, it will be necessary to set out extracts from various documents in considerable detail to show that the construction that the parties have placed on Act No 1 is correct and that of the joint judgment erroneous.

The constitutional background

44 For centuries before the enactment of the Constitution, the Crown conducted the day to day business of government – as theoretically it still does today. But the business of government, ancient and modern, requires access to a continual supply of money. Taxation of the income or property of the subject is an obvious way of raising money for the business of government. Historically, taxation and loans have been the principal means by which governments have raised money. From an early period in the history of English constitutional law, however, the House of Commons insisted on its right to control the levying of direct taxes on the subjects of the Crown and others. It "repeatedly asserted that taxes were not to be imposed without its consent"[10]. By the 17th century, the House of Commons had also insisted on its right to control the levying of indirect

---

10 Maitland, *The Constitutional History of England*, (1908) at 181.

taxation[11]. These demands of the Commons culminated in the promulgation of the Bill of Rights 1689 (UK) and its insistence "that levying money for or to the use of the Crown by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." As a result, for more than three centuries, a fundamental rule of English constitutional law has been that the Crown cannot levy a tax without parliamentary authorisation[12]. But not only did the Commons insist on controlling the levying of taxes, it also insisted on knowing the purposes for which the Crown intended to use the supply of money and on scrutinising the expenditures of the Crown[13]. As a result, another fundamental rule of the constitutional law of the Anglo-Australian peoples is that the Crown cannot expend money without the authorisation of Parliament[14]. When the Constitution was drafted, there was also a widely accepted convention that control over money Bills essentially belonged to the popularly elected lower House of Parliament from which the government was formed. Indeed, as early as the second half of the 17th century the House of Commons had resolved that money Bills should not be amended by the House of Lords and that such Bills could only originate from the Commons[15]. The Lords could "make no alteration in a money bill, but must simply accept it, or simply reject it".[16]

45 Sections 53, 54, 55 and 81 and 83 of our Constitution are the result of these rules of English constitutional law and this convention. Sections 53, 54 and 55 provide:

> "53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate ...

---

11 Saunders, "Parliamentary Appropriation", in Saunders et al, *Current Constitutional Problems in Australia*, (1982) 1 at 2.

12 *Attorney-General v Wilts United Dairies Ltd* (1920) 37 TLR 884 at 886.

13 Maitland, *The Constitutional History of England*, (1908) at 184, 328.

14 *Auckland Harbour Board v The King* [1924] AC 318 at 326; *Brown v West* (1990) 169 CLR 195 at 205.

15 *Victoria v The Commonwealth* (1975) 134 CLR 338 at 385-386. After 1689, the only power the House of Lords had in respect of money Bills was to withhold assent.

16 Maitland, *The Constitutional History of England*, (1908) at 247.

> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> ...
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.
>
> 54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.
>
> 55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect."

46 These three sections did not give full effect to the convention that control over money Bills belongs to the popularly elected House where the government is formed. That is because of a compromise made at the 1897 Adelaide Convention. Delegates from South Australia, Western Australia and Tasmania insisted on equal voting rights for the Senate in respect of all legislation passed by the Parliament[17]. In the end, they gave way in respect of money Bills to the extent provided for in s 53. Their compromise in respect of the "ordinary annual services" of the government reflected a convention that was then current in the United Kingdom and in the colonies of Australia.

47 By the 19th century, the United Kingdom Parliament had adopted a convention that expenditure falling outside the estimates for the ordinary annual expenditure of the government required explicit approval by the Parliament. Thus, expenditures for new purposes not already covered by the existing powers or functions of a department or where the expenditure required authority for more than one year[18] required separate approval by the Parliament. In 1857, after a

---

17 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 138.

18 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 20th ed (1983) at 750.

dispute between the House of Assembly and the Legislative Council in South Australia over the powers of the Council in respect of money Bills, the Council agreed to waive its claim that it could deal with appropriations concerning the ordinary annual expenses of government in South Australia[19]. This convention of the South Australian Parliament – now incorporated in the Constitution Acts of a number of Australian States – was the basis of the s 53 compromise. But as the events of 1975 showed, although the Senate cannot amend proposed laws appropriating revenue or moneys or imposing taxation, the compromise did not extend to failing to pass or rejecting them. Consequently, at the Constitutional Convention held in Sydney some months later, in 1897, s 57[20] was inserted in the draft Constitution to resolve deadlocks that might arise as the result of the last paragraph in s 53 of the Constitution.

48 Sections 81 and 83 of the Constitution, however, give full effect to the victory of the Houses of Parliament over the right of the Crown to spend public moneys at the Crown's discretion. They declare:

> "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 in the manner and subject to the charges and liabilities imposed by this Constitution.
>
> ...
>
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

The appropriations

49 The practice of the federal Parliament in relation to Appropriation Bills is conveniently summarised in Harris, *House of Representatives Practice*[21], which states:

> "The Parliament appropriates moneys from the Consolidated Revenue Fund on an annual basis in order to fund expenditure by the Government. Prior to 1999 the appropriation of funds by the annual

---

19 Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 142-143.

20 Section 57 is entitled "Disagreement between the Houses". It provides the mechanism for double dissolutions and joint sittings of both Houses of Parliament.

21 5th ed (2005) at 414.

> appropriation bills expired at the end of the financial year on 30 June. The annual appropriations, although related to activity in a specific year, no longer lapse at the end of the year – appropriations for departmental expenses are open ended, while appropriations for administered expenses are limited to expenses incurred in that year.
>
> **Appropriation Bill (No 1)** is a key element in 'the Budget'; it contains details of estimates for ordinary annual government services – that is, continuing expenditure by government agencies on services for existing policies.
>
> **Appropriation Bill (No 2)** is also introduced as part of the Budget and appropriates funds for expenditure on new policies, new capital expenditure ..."

50 In 1979, the Joint Committee of Public Accounts of the federal Parliament reported[22]:

> "Theoretically, control over both taxation and expenditure lies with Parliament but the right to initiate spending proposals lies with the government. Parliament can debate, examine and criticise the estimates, but must accept or reject the spending proposals as a whole. If they are rejected this is generally taken as a major defeat for the government, leading either to a vote of confidence or a general election.
>
> ...
>
> The main role of Parliament is limited to considering the estimates when they have been announced and later conducting a retrospective inquiry into how the money has been spent both in order to ensure compliance and to improve subsequent performance."

51 The legislation with which these proceedings are concerned gives effect to ss 53, 54, 55, 81 and 83 of the Constitution and their underlying policies. Act No 1 gives effect to s 81 of the Constitution by providing for the appropriation of money for the purposes of the Commonwealth for the financial year 2005-2006. That Act and the *Appropriation Act (No 2)* 2005-2006 (Cth) give effect to the requirements of s 54 of the Constitution. The long title to the Bill that became Act No 1 was "[a] Bill for an Act to appropriate money out of

---

22 Australia, *179th Report of the Joint Committee of Public Accounts of the Commonwealth Parliament*, (1979) at pars 4.10, 4.11 cited in Saunders, "Parliamentary Appropriation", in Saunders et al, *Current Constitutional Problems in Australia*, (1982) 1 at 13.

the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes".

52 The resolution of these proceedings depends upon the legal significance of a departmental "Outcome". The Outcomes are contained in Schedule 1 of Act No 1. In essence, they set down the goals towards which each department will work during the next year and for which they are provided with funds. The members of this Court who are parties to the joint judgment have reached a different conclusion on this question to that which, in my opinion, is compelled by the weight of the evidence contained in various documents that show what Act No 1 was intended to achieve and how it was to be achieved. In order to demonstrate the true legal effect of these Outcomes, it will be necessary to set out lengthy excerpts of a number of these documents. These include:

- Budget Paper No 4 for 2005-2006;

- The Schedule to Act No 1;

- Documents relating to established parliamentary practice concerning supply Bills;

- A 1999 letter from the Minister for Finance and Administration to the President of the Senate;

- A Ministerial advice on compliance with the "Outcomes & Outputs Framework Guidance Document"; and

- Portfolio Budget Statements.

The purpose of the excerpts is to demonstrate that, contrary to the views of the members of the joint judgment, the desired Outcomes that are specified for the Department of Employment and Workplace Relations, operate as a control upon the purposes for which that Department is authorised to make appropriations from the Treasury.

53 The 2005-06 Budget Paper No 4 provides a summary of the framework of the appropriations for that year. It states inter alia:

> "The annual appropriation bills, portfolio budget statements and agency annual reports are an integrated package showing the allocation of resources to government outcomes by agencies. The portfolio budget statements contain details of the estimated payments under each of the annual appropriation bills and legislation containing special appropriations. ... [T]he appropriation bills declare portfolio budget statements to be relevant documents for statutory interpretation. They can

be referred to if issues arise over how to interpret the associated annual appropriation acts.

The portfolio budget statements are prepared by portfolio ministers for the purposes of Senate Legislation Committees' examination of the Government's budget. The statements are published as Budget Related Papers and tabled in the Parliament at budget time.

...

The annual appropriation bills propose the payment of specified amounts by agencies in achieving the government's outcomes.

...

In accordance with the Constitution, appropriations are provided for particular purposes. For all expenses appropriations, those purposes are the outcomes which are shown beside the appropriation amounts. Outcomes are the results or impacts on the community or the environment that the Government intends to achieve. They are specified by the responsible portfolio minister with the endorsement of the Finance Minister.

...

Departmental expenses are appropriated as a single amount for each agency. The single appropriation represents the cost of all the outputs that the agency plans to deliver. Appropriation Bill (No 1) 2005-06 shows a split of that amount across agency outcomes. *The split is notional, providing an indication of the departmental resources that will be required to achieve agency outcomes.*

Administered expenses are those administered by the agency on behalf of the Government. They are normally related to activities governed by eligibility rules and conditions established by the government or Parliament such as grants, subsidies and benefit payments. Agencies have no discretion over how administered expenses are spent. Administered expenses are appropriated separately for agency outcomes (ie the split across outcomes is not notional), specifying precisely how much can be expended on each outcome." (emphasis added)

54 Section 15 of Act No 1 declared: "The Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act." Schedule 1 specified the "Services for which money is appropriated". The Schedule was divided into 16 portfolio items; one of them was described as the "Employment and Workplace Relations" Portfolio. It provided:

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

Appropriation (plain figures) – 2005-2006
Actual Available Appropriation (italic figures) – 2004-2005

	Departmental Outputs	Administered Expenses	Total
	$'000	$'000	$'000
DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS			
Outcome 1 - Efficient and effective labour market assistance	1,235,216 *492,862*	1,970,400 *2,253,763*	3,205,616 *2,746,625*
Outcome 2 - Higher productivity, higher pay workplaces	140,131 *141,056*	90,559 *83,558*	230,690 *224,614*
Outcome 3 - Increased workforce participation	72,205 -	560,642 -	632,847 -
Total: Department of Employment and Workplace Relations	**1,447,552** *633,918*	**2,621,601** *2,337,321*	**4,069,153** *2,971,239*

55 The use of the terms "Outcome", "Departmental Outputs" and "Administered Expenses" is the result of the change to accrual accounting by the government in 1999[23]. In February 1999, the Minister for Finance and Administration wrote to the President of the Senate informing her of the introduction of accrual budgeting in respect of federal government finance. The Minister said that it "would involve some modest changes to the Appropriation Bills with implications for the 1965 Compact between the Senate and the Executive on what constitutes 'the ordinary annual services of Government'". In 1965 – in what became known as the Compact of 1965 – the Senate had resolved to "reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government". It resolved inter alia:

---

23 Accrual accounting is the system under which items are brought to account and appear in financial statements as they are earned or incurred in contrast to a system where items are recorded when they are received or paid. For the purposes of these proceedings, the relevance of accrual accounting is simply that its adoption came with the adoption of the Outcomes and Outputs system.

"(2) That appropriations for expenditure on:

...

(e) new policies not previously authorised by special legislation,

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate Appropriation Bill subject to amendment by the Senate."

56 Much of the rest of the letter from the Minister for Finance and Administration to the President of the Senate must be set out because it makes clear what the "Employment and Workplace Relations Portfolio" of the Department of Employment and Workplace Relations in Act No 1 was intended to achieve. The relevant parts of the letter stated:

"The Government will present its 1999-2000 Budget on an accrual basis. The focus on outcomes and outputs under an accrual budget means that the Commonwealth's financial infrastructure needs to be modified. The 1965 Compact has been applied to a cash-based, input focused system to date and needs to be updated for accrual budgeting to be effectively implemented.

The Proposal

The changes proposed to the Compact are minimal and can be achieved while maintaining the integrity of what was originally agreed in 1965 ...

Funds for capital injections, Section 96 Grants to the States and new administered outcomes not previously appropriated for by Parliament would remain in Bill 2.

The Structure of appropriations under an accrual framework

The introduction of accrual budgeting means that the Commonwealth and its agencies are changing how they plan, budget and report. The focus is on outcomes and outputs, not programs and inputs. For instance, agencies will specify their outcomes and detail the outputs to achieve them. The accrual budgeting reforms change both what is measured and the basis of measurement. As a result, the financial performance of agencies and the Government should become more transparent.

Changing to the outcomes and outputs framework has important implications for the structure of Appropriation Bills 1 and 2. The bills will no longer appropriate for the cost of inputs or programs; they will

> appropriate funding on the basis of outcomes. ... There are some important changes to be noted:
>
> (i) Allocation against Departmental and Administered items
>
> For each outcome the total funding for departmental and administered items will be shown.
>
> In accordance with accrual accounting principles, departmental expenses are expenses that an agency has control over. These expenses represent the ordinary operating costs of Government Departments and agencies. They include:
>
> - salaries;
> - operational expenses including depreciation (or asset replacement);
> - accruing employee entitlements.
>
> Departmental expenses will be notionally split between outcomes ... thereby providing in the Appropriation Bills an indication of the departmental resources to be allocated towards the achievement of key outcomes for agencies. However, this split will be for information purposes only, with departmental items to be appropriated, as running costs are now, as a single amount for each agency. This will maintain the flexibilities to adjust departmental outputs to take account of emerging priorities available under present running cost arrangements. The single appropriation for departmental items will represent the price to be paid by Government for all the outputs the agency plans to deliver.
>
> Administered expenses are expenses that agencies do not have control over and are normally made pursuant to eligibility rules and conditions established by the Government such as grants, subsidies and benefit payments. Annual appropriations for administered expenses would be appropriated on the basis of agency outcomes, making it clear what the funding is intended to achieve rather than the program it is being spent on."

57 As these passages make clear, both departmental and administered expenses bear a clear connection to the Outcomes specified for each department. I will return later in these reasons to the significance of departmental items being "notionally split between outcomes". The Minister's letter continues:

> "(ii) Consistency of information between the Appropriation Bills, Portfolio Budget Statements and Annual Reports.

> An important change under the accrual budget will be the provision of consistent information in the Appropriation Bills, Portfolio Budget Statements (PBS) and Annual Reports, as all the documents will be presented on an outcomes basis. The lack of linkages between the Bills, PBS and Annual Reports has long been a concern to Parliament. Agency Portfolio Budget Statements (which will be available on Budget night) will contain detailed information on planned performance of outputs and outcomes on the same outcomes basis as the bills. Additionally, *information on actual performance will be published on an outcomes basis in agencies annual reports, enabling a clear read between the Bills, PBS and Annual Reports*.
>
> Not only will Senators and Members be able to make more informed assessments of the merits of appropriation bills using agency PBS, they will be able to assess actual versus planned performance by comparing information on:
>
> price, quantity and quality of outputs; and
>
> performance indicators for outcomes,
>
> in an agency's PBS with actual performance information in its Annual Report. This will improve Parliamentary scrutiny of the Bills and agency performance." (emphasis added)

58 The procedures outlined in the Minister's letter provide information that enables the Senate and others to scrutinise the purpose of appropriations and to check the performance of government agencies. The Senate has no power to amend "proposed laws appropriating revenue or moneys for the ordinary annual services of the Government". Hence, the Senate has a vital interest in knowing whether a particular appropriation is truly expenditure "for the ordinary annual services of the Government". Acting in accordance with its powers under s 53 of the Constitution, the Senate has frequently returned Bills to the House of Representatives with a request to amend or alter them[24]. In the first year of the sitting of Federal Parliament – in June 1901 – the Senate returned the *Consolidated Revenue (Supply) Bill 1901-1902 (No 1)* to the House of Representatives[25]. It was accompanied by a message requesting that House to amend the Bill by listing the items of expenditure comprised in the amounts for which the Bill provided. The House did not return the Bill, but subsequently it sent a second Bill to the Senate that identified the items of expenditure. Since that time, the Appropriation Bills and accompanying papers have sought to give

---

24 Odgers, *Australian Senate Practice*, 11th ed (2004), Appendix 6.

25 Odgers, *Australian Senate Practice*, 11th ed (2004), Appendix 6 at 661.

the Senate sufficient detail to enable the Senate to understand the purpose and objects of the appropriations.

59 Appropriation Bills for the financial years subsequent to 1999-2000 have followed the framework outlined in the Minister's letter of February 1999. To assist departments to comply with the framework, the Department of Finance and Administration has issued a "web-based advice", headed, "The Outcomes & Outputs Framework Guidance Document"[26]. This advice is also relevant in determining the meaning and construction of the "Employment and Workplace Relations Portfolio" of the Department of Employment and Workplace Relations in Act No 1 and what it was intended to achieve. It is part of the background to Act No 1 and gives content to the Department's Portfolio. Relevant parts of the advice state:

> "This guide takes the outcomes and outputs framework, first introduced in the 1999 Federal Budget, to the next level of development. It is aimed at practitioners within Commonwealth departments and agencies who have specific questions or issues about the framework and its application. The material in the guide draws on experience to date and differs from earlier advice in several respects. In particular, there is:
>
> - a greater emphasis on performance information, reporting and management, especially by identifying performance information with the major elements of the framework, that is, outcomes, administered items and departmental outputs;
>
> ...
>
> - an emphasis on the role of pricing of outputs."

60 Under the heading "Policy & purpose", the advice states:

> "The outcomes and outputs framework ... helps answer three fundamental questions:
>
> i. What does government want to achieve?
>
> (outcomes)
>
> ii. How does it achieve this?

---

26 Budget Paper No 4 laid before both Houses of Parliament on 10 May 2005 contains a link to The Outcomes & Outputs Framework Guidance Document. It is a relevant document for the purposes of s 15AB(1) of the *Acts Interpretation Act* 1901 (Cth) and may be taken into account in construing Act No 1.

(outputs and administered items)

iii How does it know if it is succeeding?

(performance reporting)

...

In other words, government delivers benefits to the Australian community (outcomes) primarily through administered items and agencies' goods and services (outputs) which are delivered against specific performance benchmarks or targets (indicators).

All Commonwealth agencies are required to report on the basis of an outcomes and outputs framework.

...

The framework has two basic objectives: to improve agencies' corporate governance and enhance public accountability. Managing through outcomes and outputs helps improve decision making and performance by focussing attention on the fundamental questions outlined above." (emphasis added)

61 Under the heading "The framework & how it works", the advice states:

"The outcomes and outputs framework is intended to be dynamic and flexible. It works as a decision hierarchy:

- government (through its ministers and with the assistance of relevant agencies) specifies the outcomes it is seeking to achieve in a given area;
- these outcomes are specified in terms of the impact government is aiming to have on some aspect of society (eg education), the economy (eg exports) or the national interest (eg defence);
- *Parliament appropriates funds to allow the government to achieve these outcomes through administered items and departmental outputs*;
- items such as grants, transfers and benefit payments are administered on the government's behalf by agencies, with a view to maximising their contribution to the specified outcomes;
- agencies specify and manage their outputs to maximise their contribution to the achievement of the Government's desired outcomes;

- performance indicators are developed to allow scrutiny of the effectiveness (ie the impact of the outputs and administered items on outcomes) and efficiency (especially in terms of the application of administered items and the price, quality and quantity of outputs) and to enable the system to be further developed to improve performance and accountability for results.

Outcomes, administered items and outputs form the basis of the Commonwealth's budgetary framework and documentation. Outcome statements define the purpose of appropriations in the Budget Bills, while administered items and departmental outputs are detailed in Portfolio Budget Statements, which form part of the Budget Papers." (emphasis added)

62 Under the heading "Performance indicators", the advice states:

"The specification of outcomes and outputs necessitates appropriate performance information. Performance indicators reflect:

- the effectiveness of contributions to outcomes;
- the price, quality and quantity of outputs; and
- the desired characteristics of relevant administered items."

63 Under the heading "Specifying Outcomes", the advice declares:

"An 'outcome' is the impact sought or expected by government in a given policy arena. ... Outcome statements also perform a specific legal function by describing the purposes of appropriated funds.

1.1 Policy & purpose

Outcome statements serve several purposes. They:

- define the impacts government expects from the work of the agency as well as administered items it manages;
- articulate the purpose of the relevant appropriations under the Appropriation Acts of the Commonwealth Budget;
- delineate the parameters for departmental outputs.

All departmental outputs must contribute – directly or indirectly – to the realisation of a specified outcome, including under purchaser/provider arrangements whereby the provider is delivering services to contribute to the purchaser's outcome(s). They must provide the Parliament, external accountability bodies, agency clients, interest groups and the general

> public with a clear statement of the broad goals of government and its agencies." (emphasis added)

64 Section 4 of Act No 1 gives statutory effect to the Portfolio Budget Statements to which The Outcomes & Outputs Framework Guidance Document refers. Section 4 declares:

> "(1) The Portfolio Budget Statements are hereby declared to be relevant documents for the purposes of section 15 AB of the *Acts Interpretation Act 1901*.
>
> (2) If the Portfolio Budget Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome."

65 The Portfolio Budget Statements 2005-06 ("PBS") for the Employment and Workplace Relations Portfolio consisted of a 228 page booklet. Under the heading "USER GUIDE", the PBS stated[27]:

> "The purpose of the 2005-06 [PBS] is to inform Senators and Members of Parliament *of the proposed allocation of resources to government outcomes* by agencies within the portfolio.
>
> ...
>
> The *[PBS] provide sufficient information, explanation and justification to enable Parliament to understand the purpose of each outcome proposed* in the Bills." (emphasis added)

66 Under the heading "Section 1: Agency overview", the PBS declares[28]:

> "The department's aims are to maximise the ability of working age Australians to participate actively in the workforce; and improve the productive performance of enterprises in Australia.
>
> To do this, the department provides the Government with high quality advice and services to achieve three outcomes:
>
> - efficient and effective labour market assistance;

---

27 PBS at (ix).

28 PBS at 17.

- higher productivity, higher pay workplaces; and
- increased workforce participation.

These outcomes:

- are integrally linked to the achievement of broader government economic performance, employment and social goals;

...

- recognise the requirements for further reform to create competitive workplaces."

67 Section 2 of the PBS contains 13 pages. Table 2.1[29] in that section "shows the total resources from all origins for 2005-06, including appropriations. The table summarises how revenue will be applied by outcome, administered and departmental classification."

68 Section 3 of the PBS is headed "Agency outcomes". It "explains how the resources identified in Section 2 will be used to deliver outputs and administered items to contribute to the three outcomes for the Department of Employment and Workplace Relations."[30]

69 In their submissions, the defendants relied on Outcome 2 – higher productivity, higher pay workplaces – to support the advertising campaign of the Commonwealth that is in issue in these proceedings. It is appropriate to set out lengthy extracts of what the PBS has to say under the heading "Outcome 2". Nine pages of the PBS are directed to this Outcome. They state inter alia:

> "Outcome 2 activities are directed towards encouraging employer[s] and employees to adopt flexible and modern workplace relations practices. This enables workplaces to be productive and competitive and to offer employees secure jobs that are well paid.
>
> Agreement making is at the centre of the workplace relations system. The system is underpinned by a fair safety net and compliance with workplace relations obligations. The department actively contributes to Outcome 2 by:

---

29 PBS at 19.

30 PBS at 32.

- providing policy advice and legislation development services to government; and

- supporting employers and employees in adopting fair and flexible workplace relations practices.

Key priorities for 2005-06

Key priorities for outcome 2 for 2005-06 are to:

- develop a workplace reform package which implements the Government's policy agenda;

- continue to pursue reform in the building and construction industry to achieve proper regard for workplace relations and occupational health and safety law;

- promote agreement-making choices to employers and employees;

- improve access for employers and employees to workplace information and advice through streamlining operations and innovative information technology applications;

- intervene in test cases to ensure the safety net is fair and facilitates agreement making;

- pursue strategic interventions in AIRC and court cases to ensure the objects of the *Workplace Relations Act 1996* are protected;

- progress flexible workplace relations solutions to achieve balance between work and family demands;

- promote workplace relations initiatives that address the emerging pressures of an ageing workforce;

- strengthen the operational framework and stakeholder partnerships for the General Employee Entitlements and Redundancy Scheme (GEERS);

- improve national outcomes in occupational health and safety and workers' compensation; and

- engage strategically with the International Labour Organisation (ILO) to advance Australia's interests."

70 Earlier in these reasons I referred to the distinction between departmental items and administered items. As is clear from ss 7 and 8 of Act No 1, one distinguishing feature is that the amounts set out against departmental outcomes

are "notional". Those sections give statutory effect to the procedures outlined in the Minister's letter of February 1999. Section 7 provides as follows:

> "(1) For a departmental item for an entity, the Finance Minister may issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the amount specified in the item.
>
> (2) 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.
>
> (3) If:
>
> (a) an Act provides that an entity must be paid amounts that are appropriated by the Parliament for the purposes of the entity; and
>
> (b) Schedule 1 contains a departmental item for that entity;
>
> then the Finance Minister, under subsection (1), must issue out of the Consolidated Revenue Fund the full amount specified in the item.
>
> ..."

71 Section 3 of Act No 1 defines "departmental item" as "the total amount set out in Schedule 1 in relation to an entity under the heading 'Departmental Outputs'". The definition has a note appended to it which declares:

> "The amounts set out opposite outcomes, under the heading 'Departmental Outputs', are 'notional'. They are not part of the item, and do not in any way restrict the scope of the expenditure authorised by the item."

Section 3 of Act No 1 also defines "expenditure" as "payments for expenses, acquiring assets, making loans or paying liabilities". Section 8 of Act No 1 provides:

> "(1) For an administered item for an outcome of an entity, the Finance Minister may issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the lesser of:
>
> (a) the amount specified in the item; and
>
> (b) the amount determined by the Finance Minister in relation to the item, having regard to the expenses incurred by the entity in the current year in relation to the item.
>
> (2) An amount issued out of the Consolidated Revenue Fund for an administered item for an outcome of an entity may only be applied for

> expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome.
>
> ..."

72 Section 3 defines "administered item" as "an amount set out in Schedule 1 opposite an outcome of an entity under the heading 'Administered Expenses'".

73 Sections 26 and 27 of the *Financial Management and Accountability Act* 1997 (Cth) regulate the drawing of public money from the Treasury of the Commonwealth. Section 26 makes it an offence for an official or Minister to make payments of public money or to debit an amount against an appropriation or make a request that a debit be made, except as authorised by a valid drawing right. Section 27 empowers the Finance Minister to issue such a drawing right but subsection (5) provides that:

> "A drawing right has no effect to the extent that it claims to authorise the application of public money in a way that is not authorised by an appropriation."

The legal significance of Outcomes

74 In support of the relief sought, the plaintiffs argued that nothing in Act No 1 or the PBS provides any foundation for a claim that that Act authorised the appropriation of moneys for the payment of advertisements in relation to the government's workplace reform package.

75 In their written submissions, the defendants asserted that they proposed to pay for the advertising campaign in reliance on the departmental item for the Department. The defendants specifically pointed to "Outcome 2" – "Higher productivity, higher pay workplaces" – to justify paying for the advertising campaign. In their written submissions, the defendants did not contend that the payments could be justified on some other ground. Throughout the oral argument, the Solicitor-General for the Commonwealth maintained that position. He accepted that to justify the payment of public money for the advertisements, the defendants had to show that the payments could reasonably be regarded as contributing to achieving one or more of the Outcomes referred to in the Employment and Workplace Relations Portfolio. At one stage of the argument, the Solicitor-General, after referring to the Portfolio, said:

> "So what we have in the Act is a very simple situation in which the three administered items set out against each outcome are items that can only be spent in relation to that outcome, *whereas the departmental item, which is the 1.4 billion, can be spent on any or all of the three outcomes.* There is no requirement to comply with the breakdown. The breakdown is purely notional." (emphasis added)

76 When I asked the Solicitor-General whether the effect of his submission was that the Outcomes were not controlling in respect of Departmental Outputs, he answered, "Yes. ... Except to the extent that one must be within one of them." This answer made it clear that, while the defendants contended that the Department did not have to spend the appropriations set out against individual Outcomes, the appropriation for Departmental Outputs had to be spent on one or other of the Outcomes. Later, the Solicitor-General said:

> "All I am pointing out is that the Act has defined the expenditure in terms of Outcomes. A certain sum of money is limited to Outcome 2 and a certain sum of money can be applied, at departmental discretion, to Outcomes 1, 2 or 3."

77 Earlier in answer to a question from the Chief Justice, the Solicitor-General said that he was "content for present purposes to treat the relevant Outcome as Outcome 2."

78 Counsel for the plaintiffs also agreed that the Department had a discretion as to how to spend the total appropriation for Departmental Outputs, so long as it related to an Outcome. In argument, he said, "the whole of the bottom line of the departmental item is available to be spent on all or any departmental outputs."

79 Hence all parties agreed that expenditure on the advertisements for the proposed workplace reform package was authorised by Act No 1 only if the expenditure was capable of achieving one or more of the Outcomes identified in the Employment and Workplace Relations Portfolio. Neither the defendants nor the plaintiffs contended that the payments were authorised merely because they were Departmental expenditure.

80 However, the joint judgment of the Court fastens on the difference between s 7(2) and s 8(2) to hold that[31]:

> "the several amounts of Departmental Outputs which are identified against particular outcomes, and together make up the departmental item, are not tied to expenditure for the purpose of achieving any of the nominated outcomes. The only relevant requirement imposed by the Act is that the departmental item be applied only 'for the departmental expenditure of the entity'. That is, the text of ss 7(2) and 8(2) requires the conclusion that the note appended to the definition of 'departmental item' accurately records the effect of s 7(2) of the Act.

---

31 Reasons of Gummow, Hayne, Callinan and Heydon JJ at [128]-[129].

> There are two related propositions supported by the statement in the note appended to the definition of 'departmental item'. The note is to the effect that the amounts set out opposite outcomes under the heading 'Departmental Outputs' are 'notional', so that they are not part of the item and do not *in any way* restrict the scope of the expenditure authorised by the item (emphasis in original).

81 With great respect to the members of the Court who are parties to the joint judgment, these conclusions cannot be supported. There are many reasons why that is so.

82 First, it would mean that the specification of "Outcomes" in the Portfolios of every department – including the Department of Employment and Workplace Relations – in Act No 1 would have no controlling effect whatever on departmental outputs. At best, "Outcomes" would be but pious aspirations which departments could disregard if and when they pleased. A department could spend the total of the departmental outputs for any purpose it liked provided, presumably, that the money was spent for a purpose of the Commonwealth. Given the terms of the Minister's letter of February 1999, The Outcomes & Outputs Framework Guidance Document, the PBS for the Employment and Workplace Relations Portfolio and its "USER GUIDE", the conclusion that the total amount of the "Departmental Outputs" is not restricted to the pursuit of the identified "Outcomes" makes no sense.

83 Second, the construction accepted by the joint judgment is based on the conclusion that "the departmental expenditure of the entity" referred to in s 7(2) is at large. But, even leaving aside the external documents, when s 7(2) is read in the textual context of Act No 1, particularly s 4(2)[32] and the Portfolio in Schedule 1, the most natural reading of the phrase is that it is referring to the expenditure of the Department for the purpose of achieving the Outcomes specified in the Portfolio. The effect of s 4(2) is that, if a Portfolio Budget Statement indicates that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure on those activities is deemed to contribute to the Outcome. If the construction favoured by the joint judgment is correct, this subsection is redundant so far as "Departmental Outputs" are concerned. On that construction, there is no point in deeming the outputs to contribute to an Outcome because the outputs are not required to contribute to an Outcome.

84 With great respect, it is not credible that Act No 1 authorises the various agencies to make "payments for expenses, acquiring assets, making loans or paying liabilities" without regard to whether such transactions could achieve one

---

32 Set out earlier in these reasons at [64].

or more of the Outcomes identified in the Portfolio. If that was the case, there could be no consistent linkage between the Appropriation Bills, the Portfolio Budget Statements and the Annual Reports. There would be no way in which the Annual Reports of agencies could be consistently reconciled with the Portfolio Budget Statements and Appropriation Bills. On the construction that the joint judgment places on the Portfolios of agencies, the actual expenditure incurred by departments might bear little relationship to the Outcomes in their Portfolios or to their Portfolio Budget Statements. In his February 1999 letter, the Minister said that hitherto the "lack of linkages between the Bills, PBS and Annual Reports has long been a concern to Parliament." He said that an "important change under the accrual budget will be the provision of consistent information" in those documents. In his letter, he emphasised that "information on actual performance will be published on an outcomes basis in agencies annual reports, enabling a clear read between the Bills, PBS and Annual Reports." There can be no "clear read" if the construction placed on the Portfolios by the joint judgment is correct. Nor would the "three fundamental questions" set out in The Outcomes & Outputs Framework Guidance Document have any meaning. Those questions were:

i. What does government want to achieve?

(outcomes)

ii. How does it achieve this?

(outputs and administered items)

iii. How does it know if it is succeeding?

(performance reporting)

85 If the construction favoured by the joint judgment is correct, there would seem to be little point in the Senate scrutinising the appropriations in so far as they dealt with "Departmental Outputs". On that construction, the outputs referred to in the Portfolio Budget Statements might bear no relationship to the actual outputs of the agency in the year succeeding the Senate's scrutiny.

86 Third, it is only the "amounts set out opposite outcomes, under the heading 'Departmental Outputs'" that are "notional". Neither s 7(2) nor the note to that subsection indicate that the Outcomes referred to in the Portfolio are notional. If the "amounts set out opposite outcomes ... do not *in any way* restrict the scope of expenditure authorised by the item", then presumably a department could choose not to spend anything on that Outcome at all. This cannot be correct because the Outcomes have been set down in the Portfolio as the principal objectives for the Department for the forthcoming year. They therefore

have the force of law as stated objectives for each department and cannot be disregarded in a capricious fashion.

87 Fourth, the text of the Portfolio shows that Departmental Outputs must be related to the Outcomes. The Employment and Workplace Relations Portfolio shows not only the appropriation figures for 2005-2006 but also the actual available appropriation figures for the previous year. The moneys spent on Departmental Outputs for the previous year are segregated in terms of the Outcomes identified in the Portfolio. This is almost conclusive evidence that the Departmental Outputs can only be expended to achieve one or more of the identified Outcomes.

88 If there were any doubt about the requirement that outputs must be related to the identified Outcomes, it is put to rest by the Finance Minister's Orders that set out the requirements and guidance for the preparation of financial statements of Australian government entities[33]. Section 2D of that document deals with the "Reporting of Outcomes and Outputs". That section states that "[e]ntities in the General Government Sector must disclose in the notes the following tables relating to outcomes and outputs". Table A in that section then requires Administered and Departmental expenses, costs recovered and other external revenues of an entity to be classified under each Outcome "as specified in the Appropriation Acts relevant to the entity." Table B in that section also requires an entity to prepare a separate table showing "each relevant major class" of "Departmental expenses" "for each Outcome ... as specified in the Appropriation Acts relevant to the entity." Accordingly, when agencies furnish their Annual Reports showing how they spent their appropriation, they must itemise the expenditure – including Departmental Outputs – under the Outcomes in the Portfolio. With great respect to the Justices who are parties to the joint judgment, this is a complete answer to the conclusion that the amounts set out opposite Outcomes "do not *in any way* restrict the scope of the expenditure authorised by the item."

89 Fifth, the construction of s 7 favoured by the joint judgment raises an arguable question of constitutional invalidity. In *Attorney-General (Vic) v The Commonwealth*[34], Latham CJ rejected the notion that there could be valid "appropriations in blank". He said that, if an Act merely authorised a Minister or other person to spend public money without the purpose of the expenditure being stated, it would not be a valid appropriation Act. The construction favoured by the joint judgment contravenes this principle, for it appears to authorise an

---

33 *Financial Management and Accountability Orders (Financial Statements)*, issued under the *Financial Management and Accountability Act* 1997 (Cth).

34 (1945) 71 CLR 237 at 253.

agency to spend money on whatever outputs it pleases. Even if the authorisation is read down to confine the expenditure to "the purposes of the Commonwealth", the statement of Latham CJ indicates that the "appropriation" in this case was invalid. A statute of the Federal Parliament should not be construed in a way that gives rise to questions of its constitutional invalidity unless the words of the statute make it clear that such a construction was intended.

90 Sixth, in construing an appropriation statute, the construction placed on it by the Houses of Parliament, as demonstrated by their practices, is a matter of considerable weight. In the present case, the third defendant, the Minister for Finance and Administration, the second defendant, the Minister in charge of the relevant Department, and the second plaintiff, the shadow Attorney-General, all agree that Departmental Outputs can only be expended if they contribute to one or more of the Outcomes identified in the Portfolio. One can safely assume that their agreement reflects the understanding of members of the Parliament as to the manner in which appropriation Acts operate. Their agreement is not decisive. It is for this Court to determine the meaning of Act No 1. But if there is any ambiguity in s 7(2) – and I do not think that there is – it should be resolved in accordance with their common understanding.

91 Accordingly, the parties to these proceedings correctly construed s 7(2) and the Portfolio as authorising only those Departmental Outputs which contribute to one or more of the Outcomes identified in the Portfolio.

The advertisements were not authorised by the *Appropriation Act (No 1)* 2005-2006

92 In their written submissions, the defendants contended that "the subject matter, scope and purpose of the appropriation Act make it clear that spending is authorised where a relevant official can reasonably conclude that spending is capable of achieving the outcome." In broad terms, this submission is correct. However, the better way of stating the issues is to say that the expenditure is authorised if there is a rational connection between the spending and the outcome. I also think that the defendants are correct in contending that the Portfolio Budget Statements do not exhaust the expenditures that an agency may incur to achieve an outcome. The argument of the plaintiffs to the contrary is inconsistent with the parliamentary practice in respect of expenditures that contribute to an Outcome although not specified in a PBS. However, even accepting these contentions of the defendants, I find it impossible to conclude that there is any rational connection between the advertisements and Outcome 2 – which was the Outcome upon which the defendants relied.

93 There is simply nothing in the advertisements that could result in an increase in productivity or wages. On their face, the advertisements are concerned to reassure members of the public – and workers in particular – that, under the reform package, workers will not be worse off and that there will be

more jobs and higher wages for Australian workers and their families. The defendants tendered no expert evidence that "feel good" advertisements of this kind will increase the number of units of goods or services produced per worker or will induce employers to pay higher wages. In the absence of such evidence, I can see no connection – rational or otherwise – between the advertisements and higher productivity or higher wages. There is not a scintilla of material in the advertisements that could be construed as instructing workers to produce goods or services more efficiently or that could induce employers to pay higher wages. The advertisements do not instruct, encourage or exhort workers to increase productivity or employers to raise wages. The advertisements provide no information concerning techniques, products, processes or machinery that might increase the production of goods or services by workers. They provide no assistance to employers in obtaining skilled workers or to employees in obtaining skills that might increase productivity. They provide no information that might help employers to reduce costs or to increase revenue or production with a consequent increase in profit margins and higher wages.

94 Moreover, there is nothing in the PBS that is deemed to represent Outcome 2 that would justify the advertisements. The defendants asserted that the advertisements were supported by the activity, "develop a workplace reform package which implements the Government's policy agenda". But these advertisements do not develop such a package. The "key priorities", including that priority, are concerned with matters of substance. They "are directed towards encouraging employer[s] and employees to adopt flexible and modern workplace relations practice." They are not directed to the public generally or to promoting the image of the government. Developing a workplace reform package to implement the government's policy means developing a body of doctrine that can be transformed into law or industrial practice and change the present state of workplace relations so that they become more flexible and consistent with contemporary needs. The Portfolio Budget Statements contain numerous illustrations of the difference between policy initiatives and providing information – such as is found in advertisements – where the provision of information is a matter of substance. A department needs no specific authority to advertise as long as it contributes to one of the Outcomes. But these advertisements do not do so. Where advertisements do not have a rational connection with the specified Outcome, they are only authorised where they are deemed to have that connection by being specifically referred to in the PBS. Advertising or any general description that would cover advertising is not mentioned in the Department's PBS. The advertisements appear to be political in nature. They appear designed to win support for government policy or, at least, to negate the impact of criticism of that policy. Nothing in them provides any support for the conclusion that somehow by some means the advertisements will contribute to achieving higher productivity or higher pay workplaces.

95 In my opinion, there is no rational connection between the advertisements and Outcome 2. It follows that the defendants had no lawful authority to draw

funds from the Treasury of the Commonwealth to finance the advertisements in question.

Standing

96 The defendants contended that neither plaintiff has standing to obtain a declaration concerning the validity of the payments or an injunction to restrain the third defendant from issuing drawing rights to authorise the payment of public money for the advertising campaign. The first plaintiff is the Secretary of the ACTU. In *British Medical Association v The Commonwealth*[35], Dixon J doubted that the Federal Council of the British Medical Association in Australia, one of whose objects was to advance the general interests of the medical profession in Australia, had standing to challenge federal legislation that imposed a form of civil conscription within the meaning of s 51(xxiiiA) of the Constitution. His Honour said[36] that it "may be doubted whether this body has, as a corporation, a sufficient material interest, which would be prejudiced by the operation of the Act, to give it a title to maintain the suit". Similarly, in *The Real Estate Institute of NSW v Blair*[37], Latham CJ, Starke J and Dixon J were of the opinion that the Real Estate Institute of NSW had no standing to challenge legislation that made provision for the housing of members and ex-members of the armed forces. Their Honours thought that the Institute, in contrast to its members, had no material interest in the operation of the legislation. By parity of reasoning, the ACTU has no material interest in the operation of Act No 1. The Secretary of the ACTU is even further removed from the operation of the Act. It may be that the decisions and *dicta* in *British Medical Association v The Commonwealth* and *The Real Estate Institute of NSW v Blair* require reconsideration in the light of subsequent developments in the law of "standing" in relation to general law matters. It is not necessary, however, to determine whether the first plaintiff has standing. In my opinion, the second plaintiff as the shadow Attorney-General of the Commonwealth has sufficient interest in the proceedings to give her standing to bring these proceedings.

97 The second plaintiff is a member of the House of Representatives. Her status as a member is expressly recognised by the Constitution[38]. She voted for or against or could have voted for or against Act No 1. She has a special interest in ensuring that public moneys are not expended inconsistently with the terms of Act No 1 passed by the Parliament of which she is a member. Furthermore, she

---

35 (1949) 79 CLR 201 at 257.

36 (1949) 79 CLR 201 at 257.

37 (1946) 73 CLR 213 at 224, 226, 228.

38 Sections 24, 26, 27 and 29-39.

is seeking an injunction to restrain an officer of the Commonwealth from acting in contravention of the law and s 83 of the Constitution. Her action is brought under s 75(v) of the Constitution. The remedy of injunction available under that paragraph of s 75 is one of three remedies that the paragraph makes available against officers of the Commonwealth. Another remedy under that paragraph is "prohibition", a remedy that even under the general law is available, subject to exercise of the Court's discretion, to a stranger to the issue. If a stranger can obtain a writ of prohibition under s 75(v), it is difficult to see why, subject to the Court's discretion, a stranger cannot obtain an injunction under that paragraph. In many cases to which s 75(v) applies, the distinction between a writ of prohibition and a writ of injunction will be elusive.

98 Accordingly, the second plaintiff has standing to bring these proceedings.

Relief

99 In *Victoria v The Commonwealth and Hayden* (the "*AAP case*"), Jacobs J referred to the problem of identifying "any expenditure which is impugned and to frame a prayer for relief in terms which will enjoin that expenditure and that only"[39]. Relying on that passage, the defendants contended that, even if expenditure on the advertisements for the workplace reform package were not authorised by Act No 1, it was not possible to frame an injunction against the defendants that had utility. During argument, I put to the Solicitor-General for the Commonwealth that an injunction could be framed "restraining the third defendant from issuing any drawing right under section 27 of the *Financial Management and Accountability Act* purporting to authorise the payment of moneys for the purpose of advertisement in the form, or to the effect, of annexure A". The Solicitor-General replied that such an injunction would be too narrow to have any utility. However, such an injunction would restrain the third defendant from authorising payments for advertisements of the kind involved in these proceedings. In addition, a declaration to the effect that drawing rights already made or intended to be made were not authorised by Act No 1 would indicate to the defendants that expenditure on advertisements of the kind in question in these proceedings is unlawful. It would assist them in determining the nature of advertisements that are authorised by Act No 1.

100 Accordingly, the Court should issue an injunction under s 75(v) of the Constitution to the effect set out above. It should also make a declaration as set out above. Since this is a dissenting judgment, it is unnecessary to draft the precise form of the injunction and declaration that I favour.

---

39 (1975) 134 CLR 338 at 411.

Orders

101 The questions asked in the Special Case for the opinion of the Full Court should be answered as follows:

(1) The second plaintiff.

(2) No.

(3) The second plaintiff is entitled to the declaration and injunction described in these reasons.

(4) No.

(5) The defendants.

102 GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The issues presented by this Special Case turn upon interpretation of an appropriation law of the Commonwealth rather than upon any alleged invalidity of that law. Nevertheless, an understanding of the issues is assisted by reference at the outset to two provisions of Ch 4 of the Constitution.

103 Section 81 of the Constitution makes two relevant provisions. First, "[a]ll revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund". Secondly, the Consolidated Revenue Fund is "to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed" by the Constitution. Section 83 then forbids drawing money from the Treasury of the Commonwealth "except under appropriation made by law". Thus, appropriations have two relevant characteristics – that they are appropriations for the purposes of the Commonwealth, and that they are appropriations made by law (not by vote or resolution of either or both Houses of the Parliament).

104 The first plaintiff, Mr Combet, is secretary of the Australian Council of Trade Unions, the peak representative body for trade unions in Australia. The second plaintiff, Ms Roxon, is a member of the House of Representatives and Shadow Attorney-General.

105 On 26 May 2005, the Prime Minister, in a ministerial statement in the House of Representatives[40], announced that the Government intended to introduce legislation that would reform the way in which workplace relations are regulated in Australia. The statement gave a broad description of what was proposed. It was said that a new body, the Australian Fair Pay Commission, would be established to set a single adult minimum wage. It was said that the Government would work towards a unified national system governing workplace relations. No details were given of how a unified system would be achieved. No Bill to give effect to the changes was then introduced into either House of the federal Parliament and none had been introduced by the time oral argument of the present matter was heard in this Court.

106 The plaintiffs contend that expenditure of public money on advertising to provide information about, and promote, the Government's workplace relations reform package is unlawful. They contend that the expenditure is unlawful

---

40 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 2005 at 38.

because there is no "appropriation made by law"[41] which would authorise the drawing of money from the Treasury of the Commonwealth to pay for that advertising.

107 The plaintiffs' contentions were founded upon a construction of the relevant Act (the *Appropriation Act (No 1)* 2005-2006 (Cth)) that should not be accepted. As these reasons will demonstrate, the text of the Act does not bear the meaning asserted by the plaintiffs. Neither the constitutional framework which underpins the Act nor federal parliamentary practice support the plaintiffs' contentions about the construction of the Act.

The relief sought

108 By their amended pleading the plaintiffs seek declarations and an injunction. They claim:

(a) a declaration that the drawing of money from the Treasury of the Commonwealth to pay for advertisements promoting the workplace relations reform package announced on 26 May 2005 is not authorised by the departmental item for the Department of Employment and Workplace Relations ("the Department") in *Appropriation Act (No 1)* 2005-2006;

(b) a declaration that the drawing rights issued by a delegate of the third defendant (the Minister for Finance and Administration) under s 27 of the *Financial Management and Accountability Act* 1997 (Cth) ("the Financial Management Act")[42] purporting to authorise the payment of public money

---

41 Constitution, s 83.

42 So far as relevant, s 27 now provides:

> "(1) The Finance Minister may issue a drawing right to an official or Minister that authorises the official or Minister to do one or more of the following:
>
> (a) make a payment of public money for a specified purpose;
>
> (b) request the debiting of an amount against a particular appropriation;
>
> (c) debit an amount against a particular appropriation.
>
> …

(Footnote continues on next page)

for the purpose of advertisements promoting that reform package on the authority of the departmental item for the Department in *Appropriation Act (No 1)* 2005-2006 are invalid; and

(c) an injunction restraining the third defendant, by himself or his delegates, from issuing any further drawing right under s 27 of the Financial Management Act purporting to authorise the payment of public money for the purpose of any advertisement promoting that reform package on the authority of the departmental item for the Department in *Appropriation Act (No 1)* 2005-2006.

It is to be noted that each of these three forms of relief focuses upon the "departmental item" for the Department in *Appropriation Act (No 1)* 2005-2006. It will be necessary, later in these reasons, to identify the meaning given in the Act to the expression "departmental item", and the way in which the Act treats appropriations for departmental items.

109 At the end of oral argument the plaintiffs indicated that if the Court were to conclude that the relief sought in their amended pleading should not be granted, the Court should grant declarations:

(a) that the drawing of money from the Treasury for the purpose of making payments to meet expenses incurred by the Commonwealth under contracts and arrangements for and in relation to certain past advertisements about the reform package is not authorised by the appropriation that has been mentioned; and

(b) that the drawing rights issued by a delegate of the Minister for Finance and Administration on 23 August 2005 under s 27 of the Financial Management Act are of no effect in so far as they purport to authorise the debiting of an amount against the departmental item in respect of the Department in *Appropriation Act (No 1)* 2005-2006 for the purpose of making payments of public money to meet expenses incurred by the Commonwealth under contracts and arrangements for and in relation to those past advertisements.

---

(5) A drawing right has no effect to the extent that it claims to authorise the application of public money in a way that is not authorised by an appropriation."

The questions and answers

110 The parties joined in stating questions of law in the form of a Special Case for the opinion of the Full Court[43]. For that purpose they agreed certain facts. The questions were:

> "(1) Do the Plaintiffs, or either of them, have standing to seek the relief sought in the Statement of Claim in the Further Amended Writ of Summons?
>
> (2) If yes to (1), is the withdrawal of money from the Treasury of the Commonwealth to pay for the Government's Advertisements authorised by the Departmental Appropriation?
>
> (3) If no to (2), have the Plaintiffs established a basis for any, and if so which, of the relief sought in the Amended Statement of Claim?
>
> (4) If yes to (3), should any such relief be refused on discretionary grounds?
>
> (5) Who should pay the costs of the proceedings?"

111 It is unnecessary to answer the first question (about standing). It is inappropriate to answer the second question (which asks, in general terms not connected to the particular arguments advanced in this matter, whether the withdrawal of money from the Treasury is authorised by the departmental appropriation). Question 3 should be answered: "The Plaintiffs have not established a basis for any of the relief sought in the Amended Statement of Claim or the alternative relief foreshadowed at the hearing of the Special Case, namely, declarations concerning payments to meet expenses incurred by the Commonwealth under contracts and arrangements for and in relation to certain past advertisements". It is unnecessary to answer question 4 (which was predicated upon an affirmative answer to question 3). Question 5 (about costs) should be answered: "The Plaintiffs."

The nature of the parties' principal contentions

112 The plaintiffs' contention that expenditure of public money on advertising about the reform package is unlawful was a contention about the proper construction of the *Appropriation Act (No 1)* 2005-2006. They did not contend

---

43 High Court Rules 2004, r 27.08.

that there could be no appropriation for payment for government advertising as a purpose of the Commonwealth within the meaning of s 81 of the Constitution. Given the reasoning in *New South Wales v Bardolph*[44], that is unsurprising. Their contention was there *was no appropriation*, not there could never be an appropriation.

113 In support of their contentions about how the *Appropriation Act (No 1)* 2005-2006 should be construed, the plaintiffs made extensive reference to the constitutional provisions which regulate the relations between the two Houses of the federal Parliament in connection with money Bills, the provisions of Ch 4 of the Constitution concerning finance, and current and past practices in the federal Parliament.

114 The defendants joined issue with the plaintiffs not only on the ultimate question of construction of the *Appropriation Act (No 1)* 2005-2006 but also on some aspects of what the plaintiffs asserted to be relevant parliamentary practices of the federal Parliament. And the defendants also contended that the plaintiffs had no standing to maintain the present proceedings. As indicated earlier, it will be unnecessary to examine the question of standing.

Appropriation Act (No 1) 2005-2006

115 The long title of the *Appropriation Act (No 1)* 2005-2006 was "An Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes." Section 15 provided that "[t]he Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act". Schedule 1 identified the "[s]ervices for which money is appropriated" and did so by 16 portfolios, one of which was Employment and Workplace Relations. The total of the items specified in Sched 1 was $47,371,218,000[45]. Of that, $4,153,551,000 was dealt with under the heading of the Employment and Workplace Relations Portfolio.

116 As the summary of that portfolio, set out in Sched 1, showed, six agencies were dealt with under the portfolio heading: the Department, the Australian Industrial Registry, Comcare, the Equal Opportunity for Women in the Workplace Agency, Indigenous Business Australia, and the National Occupational Health and Safety Commission. For the Department, separate

---

44 (1934) 52 CLR 455.

45 s 6.

provisions were made for "Departmental Outputs" and for "Administered Expenses". For the other five agencies dealt with under the portfolio heading, amounts were specified in the "Departmental Outputs" column but not in the "Administered Expenses" column. This situation was not peculiar to the treatment in Sched 1 of the Employment and Workplace Relations portfolio. Other instances are found, for example, in the treatment of agencies under the Attorney-General's portfolio and the Education, Science and Training portfolio.

117 For the Department of Employment and Workplace Relations, separate amounts for Departmental Outputs and Administered Expenses were specified against each of three "Outcomes". These were laid out in Sched 1 as follows:

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

Appropriation (plain figures)–2005-2006
Actual Available Appropriation (italic figures)–2004-2005

	Departmental Outputs	Administered Expenses	Total
	$'000	$'000	$'000
DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS			
Outcome 1 –			
Efficient and effective labour market assistance	1,235,216 *492,862*	1,970,400 *2,253,763*	3,205,616 *2,746,625*
Outcome 2 –			
Higher productivity, higher pay workplaces	140,131 *141,056*	90,559 *83,558*	230,690 *224,614*
Outcome 3 –			
Increased workforce participation	72,205 -	560,642 -	632,847 -
Total: Department of Employment and Workplace Relations	**1,447,552** *633,918*	**2,621,601** *2,337,321*	**4,069,153** *2,971,239*

118 In these proceedings, attention was given principally to Outcome 2: "Higher productivity, higher pay workplaces". The plaintiffs contended that the determinative question in the case is whether expenditure on advertising the Government's reform package fell within this outcome. They contended that answering that question required an examination of the Portfolio Budget Statements for the Employment and Workplace Relations Portfolio that had been

tabled in both the House of Representatives and the Senate in relation to the Bill for the *Appropriation Act (No 1)* 2005-2006. This followed, so the plaintiffs submitted, from the provision in s 4(1) of the *Appropriation Act (No 1)* 2005-2006 that the Portfolio Budget Statements tabled in relation to the Bill were "declared to be relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*"[46]. The plaintiffs submitted that neither the words of Outcome 2, nor what was set out in the Portfolio Budget Statements, encompassed expenditure of the kind now in question.

The text of the *Appropriation Act (No 1)* 2005-2006

119 It is important to begin by examining and construing the text of the *Appropriation Act (No 1)* 2005-2006. That examination reveals that the premise from which the plaintiffs' arguments proceeded is flawed. On its true

---

46 Section 15AB, so far as now relevant, provides:

> "(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
>
> (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:
>
> …
>
> (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section".

construction the Act does not bear the meaning asserted by the plaintiffs. Although some of the arguments advanced by the defendants assumed the validity of this premise for the plaintiffs' argument, the defendants submitted that it was flawed[47]. Indeed, much of the oral argument put by junior counsel for the defendants was directed to demonstrating its error by analysing the way in which drafting practices reflected in the *Appropriation Act (No 1)* 2005-2006 had developed with the changes made in government budget and accounting practices over the last 25 years.

120 To explain why the premise for the plaintiffs' arguments is flawed, it is necessary to pay close attention to the text of ss 4, 7 and 8[48] and to four different expressions used in the Act.

---

47 [2005] HCA Trans 650 at 5010-5086.

48 Those sections, and the notes printed with the sections, read as follows:

"**4 Portfolio Budget Statements**

(1) The Portfolio Budget Statements are hereby declared to be relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*.

Note: See paragraph 15AB(2)(g) of the *Acts Interpretation Act 1901*.

(2) If the Portfolio Budget Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome.

…

7 Departmental items—basic appropriation

(1) For a departmental item for an entity, the Finance Minister may issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the amount specified in the item.

Note: Generally, the Finance Minister is permitted, but not obliged, to issue the amounts out of the Consolidated Revenue Fund. However, subsections (3) and (4) impose an obligation on the Finance Minister to issue the amounts in certain circumstances.

(Footnote continues on next page)

(2) 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*. (emphasis added)

Note: The acquisition of new departmental assets will usually be funded from an other departmental item (in another Appropriation Act).

(3) If:

(a) an Act provides that an entity must be paid amounts that are appropriated by the Parliament for the purposes of the entity; and

(b) Schedule 1 contains a departmental item for that entity;

then the Finance Minister, under subsection (1), must issue out of the Consolidated Revenue Fund the full amount specified in the item.

(4) If a departmental item for an Agency includes provision for payment of remuneration and allowances to the holder of:

(a) a public office (within the meaning of the *Remuneration Tribunal Act 1973)*; or

(b) an office specified in a Schedule to the *Remuneration and Allowances Act 1990*;

then the Finance Minister, under subsection (1), must issue out of the Consolidated Revenue Fund, under that item, amounts that are sufficient to pay the remuneration and allowances and must apply the amounts for that purpose.

8 Administered items—basic appropriation

(1) For an administered item for an outcome of an entity, the Finance Minister may issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the lesser of:

(a) the amount specified in the item; and

(b) the amount determined by the Finance Minister in relation to the item, having regard to the expenses incurred by the entity in the current year in relation to the item.

(Footnote continues on next page)

121 The four different expressions are "departmental item", "Departmental Outputs", "administered item" and "Administered Expenses". "[D]epartmental item" is defined[49] as "the total amount set out in Schedule 1 in relation to an entity under the heading 'Departmental Outputs'". A note is appended to that definition. It is not part of the Act but is relevant to its construction[50] and it will be necessary to refer to it again in these reasons. The note states:

> "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."

The definition of "departmental item" is to be contrasted with the definition of "administered item". The latter is defined in s 3 as "an amount set out in Schedule 1 *opposite an outcome* of an entity under the heading 'Administered Expenses'" (emphasis added).

122 As noted earlier, Sched 1 to the Act tabulates appropriations in columns headed "Departmental Outputs", "Administered Expenses", and "Total", and in rows specifying "outcomes". But provisions in the body of the Act (notably ss 7 and 8) refer to departmental *items* and administered *items*. That is, they refer, in the first case, to the *total* amount under the heading Departmental Outputs and, in the second, to *each* of the amounts set out in the Schedule under the heading of Administered Expenses opposite an outcome.

---

(2) An amount issued out of the Consolidated Revenue Fund for an administered item for an outcome of an entity *may only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome.* (emphasis added)

Note: The acquisition of new administered assets will usually be funded from an administered assets and liabilities item (in another Appropriation Act).

(3) A determination made under paragraph (1)(b) is not a legislative instrument."

49 s 3.

50 *Acts Interpretation Act* 1901 (Cth), s 15AB(2)(a).

123 The distinction between departmental items and administered items is of critical importance for the outcome of this case. Section 7 makes radically different provision for the way in which amounts issued out of the Consolidated Revenue Fund for a departmental item may be applied, from the provision made by s 8 for the way in which amounts issued out of the Consolidated Revenue Fund for an administered item may be applied. Section 7(2) requires that an amount issued out of the Consolidated Revenue Fund for a departmental item for an entity (here the Department) may be applied "only … for the departmental expenditure of the entity". By contrast, s 8(2) provides that an amount issued out of the Consolidated Revenue Fund for an administered item "may only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving" the outcome to which the amount is attributed. Departmental items are not tied to outcomes; administered items are.

124 It is this contrast between s 7(2) and s 8(2) which provides the starting point for the reasoning which governs the outcome of this case. The course of argument in this Court does not foreclose consideration of the construction of s 7(2) and s 8(2) in this way.

125 As noted earlier, the principal weight of the plaintiffs' case was placed upon the proposition that the impugned expenditures would not, or did not, fall within Outcome 2. And in response, the defendants sought to meet that proposition directly. In that sense, but only in that sense, a deal of the defendants' argument assumed that it was relevant to ask, as the plaintiffs did, whether the impugned expenditures fall within Outcome 2. But the defendants did not confine their arguments to seeking to meet the plaintiffs' arguments about the reach of Outcome 2.

126 In the course of oral argument, close attention was directed to the different provisions made by the Act for departmental items and administered items. The Solicitor-General submitted[51] that the stated outcomes did not restrict the scope of expenditure authorised by the appropriation for the departmental item. And as earlier noted, junior counsel for the defendants developed this point by reference to some aspects of the history of federal appropriation acts.

127 The premise for the plaintiffs' argument was thus put in issue. In reply, the plaintiffs sought to counter the submissions of the Solicitor-General by contending that departmental expenditure must relate to one or other of the three Departmental Outputs.

---

51 [2005] HCA Trans 650 at 5010-5086.

128 The contrast to be drawn between s 7(2) and s 8(2) reveals no textual basis to support the plaintiffs' submission. Rather, the text of these provisions requires the conclusion that the several amounts of Departmental Outputs which are identified against particular outcomes, and together make up the departmental item, are not tied to expenditure for the purpose of achieving any of the nominated outcomes. The only relevant requirement imposed by the Act is that the departmental item be applied only "for the departmental expenditure of the entity". That is, the text of ss 7(2) and 8(2) requires the conclusion that the note appended to the definition of "departmental item" accurately records the effect of s 7(2) of the Act.

129 There are two related propositions supported by the statement in the note appended to the definition of "departmental item". The note is to the effect that the amounts set out opposite outcomes under the heading "Departmental Outputs" are "notional", so that they are not part of the item and do not *in any way* restrict the scope of the expenditure authorised by the item (emphasis added).

130 The first proposition is that a sum stated for a Departmental Output does not form part of the departmental item whether or not a particular agency has only Departmental Outputs and has no Administered Expenses. The outcomes stated throughout Sched 1 cannot assist the characterisation of expenditures as "departmental expenditure", whether or not in respect of the entity or agency in question there are no Administered Expenses. The text of ss 7 and 8 of the Act, which has been considered above, points strongly against such a result and the note confirms it.

131 The second proposition is that no contrary conclusion as to the significance of the note is to be drawn from the use therein of the phrase "*amounts set out opposite outcomes*" rather than an expression that the outcomes themselves are "notional" (emphasis added). To conclude that the only flexibility afforded by s 7 and the current system of appropriations is the freedom for Departments of State to transfer sums between the identified outcomes for each departmental item would be to ignore the reference in the note to the "scope of the expenditure" authorised by the departmental item itself.

132 Mere amounts may restrict the quantum, but not the scope, of an authorised expenditure. It would not have been necessary to indicate in the note that the amounts set out opposite the stated outcomes do not in any way restrict the scope of the expenditure authorised by the item unless neither the numerical amounts provided nor the outcomes to which they are tied should be taken to fetter the scope of the expenditure authorised by a departmental item.

133 Moreover, contrary to the plaintiffs' submissions, s 4 of the Act requires no different understanding of the Act's operation in relation to a departmental item. In particular, s 4(2) does not require that a departmental item be applied to activities in respect of any or all of the outcomes stated in Sched 1 to the Act. Section 4(2) does extend the activities that are to be regarded as contributing to achieving an outcome. It provides that if Portfolio Budget Statements indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving that outcome. But s 4(2) has no application with respect to departmental items. It has no application because the Act treats departmental items and administered items differently. The former need not be applied to activities in respect of a designated outcome; the latter must. A departmental item may be expended only on "departmental expenditure". And it will be recalled that the relief which the plaintiffs have sought is framed by reference to the appropriation for the departmental item in respect of the Department.

134 These conclusions about the textual construction of the *Appropriation Act (No 1)* 2005-2006 require the rejection of the plaintiffs' central contention. And no separate submission was made by the plaintiffs that, on this construction of the Act, expenditure on advertising the Government's reform package would not be a "departmental expenditure". If this is the proper construction of the Act it is not necessary to deal with the defendants' contentions that expenditure on advertising the Government's reform package does, in any event, fall within Outcome 2.

135 That the plaintiffs' submissions in answer to the challenge to the validity of the premise underpinning their principal contention were not lengthy does not relieve the Court of its obligation to construe the *Appropriation Act (No 1)* 2005-2006. And as has now been said so often[52], that requires close attention to

---

52 See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and Callinan JJ, 89 [46] per Kirby J; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11] per Gleeson CJ, Gummow, Hayne and Callinan JJ, 545 [63] per Kirby J; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 111-112 [249] per Kirby J; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 at [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

the statutory text rather than secondary materials. Likewise, the fact that the plaintiffs did not make any separate or additional submission about what is a "departmental expenditure" does not mean that the challenge to the premise for their principal argument is unfounded. In particular, the construction of the Act adopted in these reasons does not mean, and the plaintiffs did not contend that it meant, that the appropriation for the departmental item is an "appropriation in blank"[53], and it is not necessary to consider what, precisely, that expression is intended to convey. The appropriations made by the *Appropriation Act (No 1)* 2005-2006 were, and were expressed[54] to be, appropriations for the purposes of that Act. Those purposes included the purpose of appropriating a sum of money for the departmental expenditure of one of the departments of State of the Commonwealth. That is a purpose of the Commonwealth within s 81 of the Constitution. And as noted earlier, the plaintiffs made no separate submission that the impugned expenditure would not be a "departmental expenditure".

Conclusions respecting construction of the legislation

136 These may be expressed as follows:

(i) The entry in Sched 1 under the heading "Department of Employment and Workplace Relations" has columns headed "Departmental Outputs" and "Administered Expenses".

(ii) With respective reference to these expressions, the statute distinguishes between "departmental items" and "administered items".

(iii) Amounts issued for a departmental item may only be applied for departmental expenditure.

(iv) On the other hand, amounts issued for an administered item for an outcome may only be applied for expenditure for the purpose of carrying out activities to contribute to achieving that outcome.

(v) Outcomes appear in Sched 1 with respect to both departmental items and administered items.

---

53 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 253 per Latham CJ.

54 s 15.

(vi) But, in so far as they are linked to departmental items, outcomes are not part of that item and do not restrict the scope of the authorised expenditure.

(vii) Contrary to the plaintiffs' case, the question for decision is not whether the advertising expenditure answers one or more of the stipulated outcomes but whether it is applied for departmental expenditure.

(viii) Satisfaction of that criterion is not challenged by the plaintiffs.

137 It is, however, important to recognise, and deal with, several broader contentions made on behalf of the plaintiffs in support of their general proposition that the *Appropriation Act (No 1)* 2005-2006 should not be construed as authorising the impugned expenditure because so to construe the Act would diminish, if not eliminate, a necessary level of parliamentary control over expenditure by, or drawing rights issued to, the Executive Government. That general proposition was put in a number of ways in the course of argument but each amounted to the proposition that "the purpose identified in the law [appropriating money] must be a purpose that was notified to the Parliament [and] that was therefore capable of being scrutinised by the Parliament".

138 This general proposition was said to be supported by consideration of the relevant constitutional provisions and past parliamentary practice. It is convenient to begin by looking at those constitutional provisions that lead to the enactment of an appropriation Act.

Chapter 4 of the Constitution

139 Reference was made at the beginning of these reasons to ss 81 and 83 of the Constitution and to the propositions that appropriations are for the purposes of the Commonwealth and that they are made by law. Two other provisions of Ch 4 of the Constitution are relevant to a proper understanding of the system of appropriation for which the Constitution provides. They are ss 94 and 97. First, s 94 empowered the Parliament (after five years from the imposition of uniform duties of customs) to provide "on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth". The possibility may now appear to be remote that the federal Parliament would provide for the distribution of surplus revenue[55]. Nonetheless, s 94 emphasises

---

55 cf *New South Wales v The Commonwealth* ("the *Surplus Revenue Case*") (1908) 7 CLR 179.

the importance, to other integers of the federation, of the prohibition in s 83 against drawing from the Treasury except under appropriation made by law.

140 Section 97, on the other hand, is important because it emphasises that ss 81 and 83 are directed to regulating the relationship, in matters of finance, between the Executive and the Parliament. Section 97 provides for the review and audit of receipts and expenditures on account of the Commonwealth. Until the Parliament otherwise provided, colonial laws with respect to the receipt of revenue and expenditure of money on account of the government and the review and audit of receipt and expenditure were to apply to the receipt of revenue and expenditure of money on account of the Commonwealth. And s 51(xxxvi) gave to the federal Parliament power to make laws with respect to a matter "in respect of which this Constitution makes provision until the Parliament otherwise provides". In fact, one of the earliest statutes enacted by the federal Parliament was the *Audit Act* 1901 (Cth) (Act No 4 of 1901). But what the audit process required by s 97 reveals is that the constitutional provisions about finance were constructed on the basis that the Executive's expenditure of money was to be reviewed by an office holder who, under the colonial arrangements mentioned in s 97, had been obliged to report to Parliament the results of that review.

Part 5 of Ch 1 of the Constitution

141 The provisions of Ch 4 to which reference has been made must also be understood in the light of those provisions of Pt 5 of Ch 1 (in particular ss 53, 54 and 56) which regulate the relations between the two Houses of the federal Parliament in respect of money Bills. Each of those three sections deals with proposed laws appropriating revenue or moneys. They are directed, therefore, to steps taken *within* the Houses of Parliament before the law is made.

142 Four aspects of ss 53, 54 and 56 are of importance for present purposes. First, there are those aspects of s 53 which forbid the Senate amending proposed laws appropriating revenue or moneys "for the ordinary annual services of the Government", but permit the Senate to return such a law to the House of Representatives requesting omission or amendment of any item or provision. Secondly, s 53 provides that "[p]roposed laws appropriating revenue or moneys … shall not originate in the Senate". Thirdly, s 54 provides that a proposed law which appropriates revenue or moneys for the ordinary annual services of the Government "shall deal only with such appropriation". Finally, there is the provision in s 56 that "unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated" a vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed.

143 What thus is revealed is not only that appropriations "for the ordinary annual services of the Government" are treated as a distinct class of appropriation (in respect of which the Senate has no power of amendment) but also that it is the Executive Government which begins the process of appropriation. This the Executive Government does by specifying the purpose of the appropriation by message to the House of Representatives. In the present case, the message recommended that an appropriation be made "for the purposes of a Bill for an Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes" and identified that Bill as the Appropriation Bill (No 1) 2005-2006. As noted earlier, what became s 15 of the Act appropriated the Consolidated Revenue Fund "as necessary for the purposes of this Act". The purposes of the appropriation were "the purposes of [the] Act".

Audit

144 Examination and construction of an appropriation Act must also take account of the way in which effect has been given to the constitutional provision for the "review and audit of … the receipt of revenue and the expenditure of money on account of the Commonwealth"[56]. In particular, it must be recognised that provision was made in the colonial audit legislation[57] referred to in s 97 of the Constitution, and in the federal legislation enacted immediately after federation, for the review and audit of expenditure of public money by the holder of an office independent of control by the Executive and accountable to Parliament. Thus, the *Audit Act* 1901, as originally enacted, provided[58] that the Auditor-General for the Commonwealth was to hold office during good behaviour and could be removed from office only upon an address to the Governor-General by both Houses of the Parliament. It further provided[59] that money was to be paid out of the Treasury under warrant. The warrant was to set out, by reference to the relevant appropriation that had been made by law, the services or purposes for which the money was required. The warrant was to be signed by the Auditor-General, but only if that officer was satisfied that the money was legally available for, and applicable to, the services or purposes stated in the warrant.

---

56 s 97.

57 For example, *Audit Act* 1898 (NSW), Pt III, ss 30-46.

58 s 7(1).

59 s 32.

145 Many changes were made to federal audit legislation over succeeding years. It is not necessary to trace them. But until the enactment of the Financial Management Act in 1997 and the repeal of the *Audit Act* 1901 in that year[60] there were two central features of the federal audit legislation. First, money was not to be paid out of the Consolidated Revenue Fund save on the written certification of an officer that moneys were lawfully available for the payment[61]. Section 34(3) of the *Audit Act* 1901 made plain that moneys were not lawfully available unless, in the case of a payment from the Consolidated Revenue Fund, moneys sufficient for the payment were "available from a relevant appropriation of that Fund". Secondly, the Auditor-General was bound to audit the "accounts and records of receipts of, and payments out of, public moneys"[62] and not only "ascertain whether the moneys shown therein to have been disbursed were lawfully available for expenditure in respect of the service or purpose to which they have been applied or charged"[63], but also "ascertain whether the provisions of the Constitution … relating to public moneys have been in all respects complied with"[64].

146 The office of Auditor-General was not abolished with the repeal of the *Audit Act* 1901. Rather, the *Auditor-General Act* 1997 (Cth) provided for the office and provided[65] that the Auditor-General "is an independent officer of the Parliament". Although appointed for a term of 10 years[66], the Auditor-General could be removed from office only on an address of both Houses "on the ground of misbehaviour or physical or mental incapacity"[67], or upon bankruptcy[68]. The

---

60 *Audit (Transitional and Miscellaneous) Amendment Act* 1997 (Cth), Sched 1, item 1.

61 *Audit Act* 1901 (Cth), s 34(2) and (3).

62 *Audit Act*, s 40.

63 s 41(1)(a).

64 s 41(1)(b).

65 s 8(1).

66 *Auditor-General Act* 1997 (Cth), Sched 1, cl 1(1).

67 Sched 1, cl 6(1).

68 Sched 1, cl 6(2).

Auditor-General's functions include auditing financial statements of "Agencies" in accordance with the Financial Management Act. Under that latter Act, "Agencies" include[69] "a Department of State" (an expression evidently derived from s 64 of the Constitution and its reference to the Governor-General appointing "officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish").

147 Part 4 of the Financial Management Act[70] deals with what the heading of the Part calls "Accounting, appropriations and payments". Division 2 of Pt 4[71] deals with "Drawing rights". Section 26 prohibits certain conduct "except as authorised by a valid drawing right". It now provides:

> "An official or Minister must not do any of the following except as authorised by a valid drawing right:
>
> (a) make a payment of public money;
>
> (b) request that an amount be debited against an appropriation;
>
> (c) debit an amount against an appropriation.
>
> Maximum penalty: Imprisonment for 2 years."

Section 27 regulates the issue of drawing rights. The text of the relevant provisions of s 27 is set out earlier in these reasons. It will be recalled that s 27(1) permits the Finance Minister to issue a drawing right to an official or Minister that authorises making a payment of public money for a specified purpose, requesting the debiting of an amount against a particular appropriation or debiting an amount against a particular appropriation. It will also be recalled that s 27(5) provides that "[a] drawing right has no effect to the extent that it claims to authorise the application of public money in a way that is not authorised by an appropriation".

---

69 *Financial Management and Accountability Act* 1997 (Cth), s 5.

70 ss 19-36.

71 ss 26, 27.

The ordinary annual services of the Government

148 The plaintiffs emphasised what they contended to be an established parliamentary understanding of what is an appropriation "for the ordinary annual services of the Government"[72]. They contended that the expression is one which does not encompass appropriations for new policies. Because the *Appropriation Act (No 1)* 2005-2006 was an Act to appropriate money for the ordinary annual services of the Government it followed, so the plaintiffs submitted, that the Act should not, or at least should not readily, be construed as making an appropriation to advertise a "reform package", let alone one in respect of which draft implementing legislation had not been prepared.

149 There is a long history of debate between the two Houses of the federal Parliament about what is meant by "the ordinary annual services of the Government". As Odgers recorded in the 1972 edition of *Australian Senate Practice*[73]:

> "In the early debates of 1901-2 it was quickly asserted by the Senate that it had the right to amend appropriations for public works and buildings and the practice was established of presenting to the Parliament two appropriation Bills, one for the ordinary annual services and another for works and buildings. The former was a Bill which the Senate may not amend, but the Senate exercised the right of amendment in respect of the works and buildings Bill".

This distinction between appropriation Bills was noticed in *The Commonwealth v Colonial Ammunition Co Ltd*[74], but in that case no conclusion was drawn that was founded on the distinction. Rather, attention was directed to the "financial, not regulative"[75] object of an appropriation Act.

150 From time to time, particularly in the early 1950s and early 1960s, questions arose, both between the two Houses and within the Senate, about what proposed laws should be understood as falling within the prohibition against Senate amendment, contained in s 53 of the Constitution, or about how the

---

72 Constitution, ss 53, 54.

73 Odgers, *Australian Senate Practice*, 4th ed (1972) at 324.

74 (1924) 34 CLR 198 at 220-221 per Isaacs and Rich JJ.

75 (1924) 34 CLR 198 at 224 per Isaacs and Rich JJ.

Government should frame its appropriation Bills. In 1965, the two Houses reached an accommodation which has come to be known as the "Compact of 1965". Its terms were reflected in a statement[76] made to the House of Representatives by the then Treasurer, Mr Holt, on the second reading of the Supply Bill (No 1) 1965-1966. In particular, it was agreed that one appropriation Bill would be presented for the ordinary annual services of the Government and that a separate Bill would be presented containing appropriations for expenditure on:

(a) the construction of public works and buildings;

(b) the acquisition of sites and buildings;

(c) items of plant and equipment which are clearly definable as capital expenditure;

(d) grants to the States under s 96 of the Constitution; and

(e) new policies not authorised by special legislation.

This second Bill would be regarded as not for the ordinary annual services of the Government and thus subject to amendment in the Senate. It was further agreed, however, that subsequent appropriations for the last category of items, "new policies not authorised by special legislation", would be included in an appropriation Bill not subject to amendment by the Senate.

151 Writing in the 1972 edition of *Australian Senate Practice*, Odgers said[77] of the inclusion of this last category of expenditure (new policies not authorised by special legislation) in a Bill amenable to amendment by the Senate, that:

> "One of the virtues of this practice is that Parliament is thereby protected from the possibility of appropriations for any new policies not being readily identifiable in an omnibus Appropriation Bill. Members of both Houses can approach a consideration of the annual appropriations sure in the knowledge that only appropriations for services already approved are included in one Appropriation Bill, while those for any new policies not

---

76 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 May 1965 at 1485.

77 at 331.

previously authorised attract the searchlight of attention in a separate Bill."

Subsequently, during the mid-1970s, questions arose about whether certain appropriations should be included in one or other of the two Bills[78]. It is not necessary to pause to examine those particular questions. Rather, it is enough to notice that the Senate resolved, on 17 February 1977, to reaffirm that appropriations for (among other things) "new policies not previously authorised by special legislation" were not appropriations for the ordinary annual services of the Government[79].

152 It is then necessary to notice two subsequent developments, the first in the 1980s and the second in the 1990s. In 1986, the Government decided to introduce what was called the "running costs" system of appropriations with effect from the 1987-1988 financial year. The nature of the change that was made is sufficiently illustrated by comparing the *Appropriation Act (No 1)* 1986-1987 (Cth) with the *Appropriation Act (No 1)* 1987-1988 (Cth). In relation to the Department of Employment and Industrial Relations the 1986-1987 Act appropriated a total of $777,028,000 for what were described as the "ADMINISTRATIVE" expenses of that department. Those administrative expenses were divided between "Salaries and Payments in the nature of Salary", "Administrative Expenses", and "Other Services". By contrast, the 1987-1988 Act divided the "ADMINISTRATIVE" appropriation for what was by then the Department of Employment, Education and Training into "Running Costs" and "Other Services". That is, in the 1987-1988 year, appropriations for salaries, administrative expenses and operational expenses of the relevant department of State were consolidated into a single "running cost" appropriation.

153 During 1987, in correspondence between the then Minister for Finance and the then President of the Senate, there was discussion about whether "minor outlays for equipment and accommodation fit-out, of an ongoing nature might not also be more appropriately funded from running costs". The President concurred in the proposal to include these items in running cost appropriations, saying that he did not see the inclusion of such expenditures in the

---

78 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Ordinary Annual Services of the Government*, June 1976 at 5.

79 Australia, Senate, *Journals of the Senate*, 1976-1977, No 82, 17 February 1977 at 572.

non-amendable Bill "as a reinterpretation or a modification of the concept of ordinary annual services or of the Compact of 1965".

154 In the 1990s, the Government decided to have Government accounts and the Budget prepared on an accruals rather than cash basis. Accounting and budgeting on an accruals basis, rather than by reference to cash receipts and expenditures, led to reconsideration of the Compact of 1965. In March 1999, the Senate Standing Committee on Appropriations and Staffing reported to the Senate that the Minister for Finance and Administration had proposed that the classification of appropriations under the Compact of 1965 remain unchanged except in three respects[80]. The alterations proposed were that:

(a) items regarded as equity injections and loans be regarded as not part of the ordinary annual services;

(b) all appropriation items for continuing activities for which appropriations have been made in the past be regarded as part of ordinary annual services; and

(c) all appropriations for existing asset replacement be regarded as provision for depreciation and part of ordinary annual services.

The Committee reported to the Senate that it considered that no objections to those changes arose from the constitutional provisions or from the terms of the Compact of 1965 and that "[i]n the context of accrual budgeting, the proposed changes are in accordance with the spirit of both the constitutional provisions and the Compact"[81]. Subsequently, the Senate resolved to endorse that recommendation[82].

The significance to be attached to parliamentary practice

155 The Constitution makes the references it does to proposed laws appropriating revenue or moneys for the ordinary annual services of the

---

80 Australia, Senate, Standing Committee on Appropriations and Staffing, *Thirtieth Report*, March 1999 at 3.

81 Australia, Senate, Standing Committee on Appropriations and Staffing, *Thirtieth Report*, March 1999 at 3.

82 Australia, Senate, *Journals of the Senate*, 1998-1999, No 34, 22 April 1999 at 776.

Government for the purpose of regulating relations between the two Houses of the federal Parliament. It is unnecessary to decide whether a dispute about the application of those aspects of ss 53 and 54 could give rise to a matter to be decided by this Court[83]. Nor is it necessary to decide what limits there may be to the use that might be made in construing an appropriation Act of exchanges between the Houses, Ministers and presiding officers of the kind that have been described above. In that latter regard, no party submitted that the limited reliance placed on parliamentary practice in the reasons of the Court in *Brown v West*[84] was inappropriate.

156 It is unnecessary to decide these questions because what does emerge from consideration of the Compact of 1965 and subsequent events is the difficulty of marking any clear boundary around the types of expenditure that after 1987-1988 were included within the "running costs" appropriation for a department, or, since the adoption of accrual accounting and budgeting, fall within a "departmental item". Rather, as counsel for the defendants submitted, neither the Compact of 1965 in its original form, nor in the form it now takes, sheds any useful light on that question.

157 For the reasons given earlier, the determinative question in the present matter is not, as the plaintiffs submitted, what is encompassed by "Higher productivity, higher pay workplaces" (Outcome 2). Rather, the *Appropriation Act (No 1)* 2005-2006 required that money issued out of the Consolidated Revenue Fund for a departmental item be applied only for the departmental expenditure of the entity.

158 Making an appropriation for a departmental item that may be applied only for an entity's departmental expenditure (not otherwise specified or identified) does not represent any radical departure from previous federal parliamentary practice. As the Portfolio Budget Statements for the Department said in its "User Guide", under present budget and accounting arrangements, "departmental items" are:

> "Assets, liabilities, revenues and expenses in relation to an agency or authority that are *controlled* by the agency. Departmental expenses

---

83 See *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 79 ALJR 146 at 153-154 [40]-[41] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; 211 ALR 18 at 28-29.

84 (1990) 169 CLR 195 at 211.

include employee and supplier expenses and other administrative costs, which are incurred by the agency in providing its goods and services." (emphasis added)

By contrast, "administered items" are:

> "Revenues, expenses, assets and liabilities that are *managed* by an agency or authority on behalf of the Government according to set government directions. Administered expenses include subsidies, grants and personal benefit payments and administered revenues include taxes, fees, fines and excises." (emphasis added)

159 As counsel for the defendants rightly submitted, it is important to recognise that the immediate predecessor to the present system of appropriations was the making of a single lump sum appropriation for "running costs" of a department. And there is a very long history of the federal Parliament making appropriations that are not more closely identified than as being for the purpose of departmental expenditure. Indeed, the very first Act passed by the federal Parliament (an Act to grant and apply out of the Consolidated Revenue Fund a specified sum to the service of the period ending on 30 June 1901) contained items such as "For the Maintenance of the Department of the Minister of Defence" which, although divided into sums of expenditure in each State, were not further allocated between purposes or activities. Further, as noted earlier, immediately before the adoption of the running costs system, the appropriation for the maintenance of departments contained a large sum not specified further than as "Administrative Expenses".

160 It is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified[85]. It may readily be accepted that the constitutional provisions examined earlier in these reasons are to be understood as providing for what, in 1903, was said in relation to the House of Commons[86] to be "a comprehensive and continuous guardianship over the whole finance" of the Commonwealth. But the manner of exercising that guardianship, within the relevant constitutional limits, is to be determined by the Parliament. In that

---

85 *Surplus Revenue Case* (1908) 7 CLR 179 at 200 per Isaacs J; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 253, 256 per Latham CJ; *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 404 per Jacobs J; cf *Cincinnati Soap Co v United States* 301 US 308 (1937) at 321-322.

86 Redlich, *The Procedure of the House of Commons*, (1908), vol 3 at 170.

regard it is essential to recall, as Mason J pointed out in *Victoria v The Commonwealth and Hayden*[87], that:

> "It has been the practice, born of practical necessity, in this country and in the United Kingdom, to give but a short description of the particular items dealt with in an Appropriation Act. No other course is feasible because in many respects the items of expenditure have not been thought through and elaborated in detail."

161 What is apparent from consideration of past practice is that at least since the mid-1980s the chief means of limiting expenditures made by departments of State that has been adopted in annual appropriation Acts has been to specify the *amount* that may be spent rather than further define the purposes or activities for which it may be spent. There is, therefore, nothing in the relevant constitutional framework or in past parliamentary practices which suggests some construction of the *Appropriation Act (No 1)* 2005-2006 different from the construction required by its text.

Summary

162 In view of the complexity of the arguments advanced in this case, it is convenient at this point to summarise the reasoning set out above.

163 The question posed by the plaintiffs is whether expenditure on advertising the Government's reform package falls within the figure of $140,131,000 appearing in that part of Sched 1 to the *Appropriation Act (No 1)* 2005-2006 which relates to the Department of Employment and Workplace Relations. That figure is in the "Departmental Outputs" column against Outcome 2 – "Higher productivity, higher pay workplaces". The answer is in the affirmative for the following reasons.

1. That figure is an integer in the total amount of $1,447,552,000 set out in Sched 1 in relation to the Department under the heading "Departmental Outputs"[88].

---

87 (1975) 134 CLR 338 at 394.

88 See [117].

2. Therefore that total amount of $1,447,552,000 is a "departmental item". It is not an "administered item", because it is not set out opposite an outcome under the heading "Administered Expenses"[89].

3. Section 7(2) restricts the application of that departmental item of $1,447,552,000: it may only be applied "for the departmental expenditure" of the Department. But the Act imposes no narrower restriction on the scope of the expenditure[90].

4. In this respect s 7(2) is in contrast with the restriction imposed by s 8(2) on an administered item: an administered item may only be applied "for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving" the outcome to which the amount is attributed[91].

5. Therefore it does not matter whether any part of the $140,131,000 (or the $1,447,552,000) is spent otherwise than on activities leading to higher productivity or higher pay workplaces (or activities forming part of either of the other two outcomes), so long as it is "departmental expenditure"[92].

6. That conclusion is supported by the terms of the note to the definition of "departmental item"[93].

7. The plaintiffs did not contend that expenditure of either $140,131,000 or $1,447,552,000 on advertising the reform package was not "departmental expenditure"[94].

---

89 See [121].

90 See [123].

91 See [123].

92 See [128].

93 See [129]-[132].

94 See [135].

8. The affirmative conclusion stated above is not affected by s 4(2)[95] or by issues relating to the audit of expenditure[96].

Standing and relief

164 Because the present matter can be decided by dealing with the proper construction of the relevant statutory provisions, it is not necessary to consider whether the plaintiffs have standing to make the claims they do. Nor, given the conclusion that is reached about the construction of the Act, is it necessary to decide what forms of relief could be granted if the plaintiffs' central contention had been made good.

165 On that latter question of relief it is enough to make two points. First, the claim for injunction to restrain the future issuing of drawing rights encounters the very considerable difficulty identified by Jacobs J in *Victoria v The Commonwealth and Hayden*[97] of "carefully and precisely and exhaustively" defining the expenditures, and thus the drawing rights, in respect of which relief was granted. As Jacobs J said[98], that may be a "practical impossibility". Secondly, in so far as the plaintiffs would seek declarations that past expenditures, or drawing rights relating to past expenditures, were not authorised by a valid appropriation, there are evident difficulties in making a declaration in a proceeding brought under s 75(v) of the Constitution without granting relief under s 75(v). Moreover, there would also appear to be considerable difficulties in making a declaration which, in its effect, would declare that one or more of the defendants had committed an offence under s 26 of the Financial Management Act by requesting that an amount be debited against an appropriation without a valid drawing right. It is, however, not necessary to decide these questions about relief. The plaintiffs have established no basis for the grant of any of the relief claimed in their amended pleading or foreshadowed in oral argument.

---

95 See [133].

96 See [144]-[147].

97 (1975) 134 CLR 338 at 412.

98 (1975) 134 CLR 338 at 412.

Conclusion

166 For these reasons we joined in the orders, made on 29 September 2005, that the questions in the Special Case be answered in the manner indicated at the start of these reasons, namely:

(1) It is unnecessary to answer this question.

(2) It is not appropriate to answer this question.

(3) The Plaintiffs have not established a basis for any of the relief sought in the Amended Statement of Claim or the alternative relief foreshadowed at the hearing of the Special Case, namely, declarations concerning payments to meet expenses incurred by the Commonwealth under contracts and arrangements for and in relation to certain past advertisements.

(4) It is unnecessary to answer this question.

(5) The Plaintiffs.

167 KIRBY J. These proceedings are brought pursuant to s 75(v) of the Constitution. That is the distinctive provision that assures "to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them"[99]. It ensures that the constitutional assumption of the rule of law[100] is rendered a reality in matters of federal concern.

168 The threshold issue in the proceedings is one of statutory construction. It is whether any item in the *Appropriation Act (No 1)* 2005-2006 (Cth) ("the Appropriation Act") authorised the withdrawal of money from the Treasury of the Commonwealth to pay for certain advertisements promoting proposed future changes to federal laws governing industrial relations. Such changes have not been introduced to, considered, still less enacted by, the Federal Parliament[101]. The plaintiffs assert (and the defendants deny) that the withdrawal, or proposed withdrawal, of such money is unlawful, as unsustained by the Appropriation Act or by any other law and is therefore forbidden by the Constitution[102]. Self-evidently, in assessing this assertion, this Court is not, as such, concerned with the wisdom or merits of the expenditure. It is concerned solely with its legality[103].

169 The issue of statutory construction presented cannot be resolved by reference only to the terms of the Appropriation Act. Regard must be had to the provisions of the Constitution, against the background of which the Appropriation Act is expressed[104], as well as centuries of constitutional history, including in Australia, concerning appropriation and the practice of parliaments, specifically the Federal Parliament, in giving effect to this law and history.

---

99 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [104].

100 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31].

101 Their broad intent was described by the Prime Minister in the House of Representatives: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 2005 at 38-43.

102 Constitution, s 83 which requires the withdrawal of money from the Treasury to be "under appropriation made by law".

103 *Victoria v The Commonwealth and Hayden* ("the *AAP Case*") (1975) 134 CLR 338 at 351. In cases of this kind, questions of constitutional validity and interpretation are closely related: *Brown v West* (1990) 169 CLR 195 at 200-201.

104 Especially Constitution, ss 53, 54, 55, 56, 81, 83 and 97.

170 The proceedings also raise questions about the justiciability of the foregoing issues; the standing of the plaintiffs to obtain relief; the susceptibility of the plaintiffs' complaints to the provision of effective relief; whether any such relief should be refused on discretionary grounds; and who should pay the costs.

171 In *Onus v Alcoa of Australia Ltd*[105], Gibbs J cautioned against the determination of an issue of standing disjoined from a thorough appreciation of the issues of substance proffered for determination. The same caution applies to decisions on any question of justiciability which, in these proceedings (if it arises at all) is closely related to the issue of standing[106]. Similarly, the amenability of the issues to the formulation of relief and questions as to the provision of such relief can only be decided when the controversy is understood. For these reasons, although logically questions of justiciability and standing arise at the threshold, the arguments of all parties postponed the resolution of those questions until the matters of substance were considered and a view reached as to their disposition. This was a sensible course. It is one that I will follow in these reasons.

172 The plaintiffs have made good their challenge to the lawfulness of the withdrawal of money from the Treasury for the advertisements that they impugn. When the Appropriation Act and the items advanced to justify authorisation by the suggested appropriations are read, understood against the background of the Constitution, constitutional history and parliamentary practice, the propounded appropriations do not support the drawing of such money from the Treasury. The plaintiffs' complaints are justiciable. The second plaintiff, and probably the first, have standing. Appropriate relief can be framed. No discretionary barrier stands in the way of the issue of a constitutional injunction under s 75(v). The plaintiffs are entitled to relief together with their costs.

173 On 29 September 2005, a majority of this Court reached conclusions different to mine. Orders were made rejecting the plaintiffs' proceedings and ordering them to pay costs. I now state my reasons for coming to the opposite conclusion.

The facts

174 *The parties to the proceedings*: Many of the facts necessary to my reasons are set out by others[107]. The primary facts, and the sequence of events, were not

---

105 (1981) 149 CLR 27 at 38.

106 *AAP Case* (1975) 134 CLR 338 at 379.

107 See reasons of McHugh J at [37]-[42]; reasons of Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons") at [105].

in dispute. However, each side to the contest sought to provide a large number of factual items of limited relevance (or of no relevance at all) to the legal issues. It is necessary to sort out the few precious grains of litigious wheat from a great deal of chaff.

175 The first plaintiff (Mr Greg Combet) is Secretary of the Australian Council of Trade Unions ("ACTU"). This is the peak representative body for trade unions in Australia, many of them organisations of employees registered under federal law[108]. The defendants did not seek to draw any differentiation between Mr Combet and the ACTU, the objectives of which include the organisation and representation of the Australian workforce through industrial unions. The second plaintiff (Ms Nicola Roxon MP) is a member of the House of Representatives and of the Australian Labor Party ("ALP"). She is described in the special case as the Opposition spokesperson on legal issues or "Shadow Attorney-General".

176 The defendants are the Commonwealth, the Hon Kevin Andrews MP, a Minister of State with responsibilities for administering the Department of Employment and Workplace Relations ("the Department") and Senator the Hon Nicholas Minchin, also a Minister, with responsibilities for administering the Appropriation Acts and the *Financial Management and Accountability Act* 1997 (Cth) ("the FMA Act").

177 *The advertising campaign*: On 26 May 2005, the Prime Minister (the Hon John Howard MP) announced to the House of Representatives the intention of the Government to propose amendments to federal legislation on industrial relations. Amongst the legislative changes foreshadowed were alterations to the role of the Australian Industrial Relations Commission; changes to the law respecting the setting of minimum wages and conditions; amendment of unfair dismissal laws; and pursuit of "the goal of a national industrial relations system" in substitution for the mixture of federal and State regulation now applicable in most parts of Australia[109]. No discussion paper was issued. Nor was any call made for submissions, before or after the foregoing announcement. At the time of the announcement, and to the date on which these proceedings were

---

108 *Workplace Relations Act* 1996 (Cth), Sched 1B, items 18-19.

109 Ministerial Statement on Workplace Relations Reform, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 2005 at 38-43. Victoria alone of the States has referred powers with respect to industrial matters to the Federal Parliament: see *Workplace Relations Act* 1996 (Cth), Pt XV.

decided[110], no Bill had been introduced into the Parliament to give effect to the "reform package" described by the Prime Minister.

178 In response to the Prime Minister's announcement, the ACTU initiated a national campaign of opposition to the foreshadowed legislation. This included a "National Week of Action" between 27 June 2005 and 1 July 2005; the holding of large rallies involving some employees who had absented themselves from work in order to attend the meetings; and the initiation of advertisements in the print and electronic media: the latter on television, radio and the internet. By inference, such advertising was funded by the ACTU or by private organisations and persons sympathetic to its causes. The ALP, in and out of the Parliament, supported the ACTU in opposition to the announced intended legislation. Ms Roxon took her part in this campaign. By inference, the political opposition was likewise privately funded.

179 In response, there were many public speeches and statements in defence of the proposals by the Minister, Mr Andrews. Exchanges of that type are the very kind of "free expression" of a political or governmental character implicit in the representative democracy of the Commonwealth established by the Constitution[111]. But it was at this point that events occurred which the plaintiffs depict as a shift from "free expression" to "publicly funded expression", in support of the Government's proposed laws; but without an appropriation for that purpose granted by the Parliament.

180 From 9 July 2005, advertisements began to appear throughout Australia, in a form exhibited by the plaintiffs in these proceedings, both in the print media and, after 23 July 2005, in radio broadcasts. Such advertisements were not funded by employers' industrial organisations equivalent to the ACTU, nor by private businesses, nor by the political parties whose members (including the named Ministers) have formed the Government of the Commonwealth, nor by individuals supporting the Government and its policies. Instead, the advertisements make it plain that they were (as the newspaper versions declared) "authorised by the Australian Government, Capital Hill, Canberra, ACT"[112].

---

110 The Court answered the application unfavourably to the plaintiffs on 29 September 2005.

111 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-562 and cases there cited.

112 The text of a sample of such advertisements is set out in the reasons of McHugh J at [39]-[41].

181 The advertisements appear under the coat of arms of the Commonwealth and insignia of the "Australian Government". They refer to "our plan"; to the commitment that "we" give; and to what "we won't do". They repeat many of the points made in the Prime Minister's statement to the Parliament. The advertisements are not simply informative or descriptive. They are argumentative. Like those published by the ACTU, they are expressed in rhetorical language. The only difference is the source of the funding. The question in these proceedings is whether, in such circumstances, in advance of the passage (or even the introduction) of the "package" of promised legislation, the Federal Parliament had appropriated funds for such a use by the terms in which it enacted the Appropriation Act or any other law. By the special case, the Commonwealth was said to be considering the broadcast of advertisements on commercial television. By inference, these would be in a similar form and to a like effect, but more expensive.

182 Unless restrained by order of this Court, the Commonwealth proposes to pay for the Government's advertisements using public money drawn from the Treasury. Already, a delegate of Senator Minchin, in his capacity as Minister administering the FMA Act, has issued drawing rights under s 27 of that Act authorising one or more persons in the Department to make payments of public money in respect of the impugned advertisements. Unless restrained, delegates of that Minister could issue still further drawing rights to make payments of public money for further advertisements, ostensibly under the authority of the appropriations made for the departmental item for the Department in the Appropriation Act. The defendants propose that officers of the Department will draw money from the Treasury, in accordance with such drawing rights, to pay for the advertisements.

183 Relying on information contained in a letter from the defendants' solicitors, the plaintiffs contend that the initial cost of the Government's advertising campaign, together with some related expenditure, up to 24 July 2005, was at least $3.84 million. The plaintiffs invited the Court to infer that the total cost of the Government's "campaign" would be well in excess of this amount, given that the advertising is intended to be ongoing; that the cost of most radio advertising had not by 24 July 2005 fallen in; and that television advertising was under consideration. The precise cost, and likely future cost, of the Government's campaign is not ascertainable. But obviously it is most substantial[113].

---

113 The plaintiffs relied on a statement made by the Chairman of the Government's Taskforce on Workplace Relations Reform to the effect that the total expense would be of the order of that spent on the advertising campaign in support of the goods and services tax. According to published reports, this advertising campaign cost $14.9 million: see Lindell, "Parliamentary Appropriations and the Funding of

(Footnote continues on next page)

184 *A common question*: The issues for determination are to be decided on the facts of the present case. However, the circumstances of the case are by no means unique. In recent years, at every level of government in Australia and in governments formed by members of all major political parties, publicly funded advertising campaigns on contentious and politically charged issues have become more common, whereas they were rare or non-existent in the past. This is not a reference to advertising to seek public input into the design of governmental policy, an indication of interest to join government bodies or an expression of views on the shape of legislation under contemplation. Nor is it a reference to advertising that informs its recipients of new legislative or other entitlements and responsibilities enacted by the Parliament or advertising in neutral terms on matters of general social concern (such as messages on road and boat safety, water conservation or the importance of voting or of jury duty). What is new is the expenditure on advertising on subjects "of major political debate and division in the community"[114], whereby public funds have been used to pay for the advertisements. The ultimate question is whether this can be done without the approval of the Parliament to an appropriation, granted with the necessary clarity for that purpose.

185 Expenditures for contested governmental advertising campaigns have emerged in recent years in other countries, presenting legal issues in some ways similar to those arising in this case. In *Johanns v Livestock Marketing Association*[115], the Supreme Court of the United States was divided on the lawfulness of a levy imposed for a promotional campaign concerning beef products. The case was the third in eight years that addressed whether a federal programme financing generic advertising violated the First Amendment to the United States Constitution. The specific issue before the Supreme Court was therefore different from the issues arising in this case.

186 However, in *Johanns*, Souter J recalled that one of the reasons behind the prohibition on the establishment of a State religion, adopted in the United States Constitution and copied in Australia, was Thomas Jefferson's 1779 observation that "to compel a man to furnish contributions of money for the propagation of

---

the Federal Government's Pre-Election Advertising in 1998", (1999) 2 *Constitutional Law and Policy Review* 21 at 21 (hereafter "Lindell").

114 Lindell at 22.

115 73 USLW 4350 (2005).

opinions which he disbelieves, is sinful and tyrannical"[116]. His Honour explained that this thinking had illuminated earlier decisions of the United States Supreme Court, to the effect that the free expression of political opinions "are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors"[117].

187 *Johanns* was thus concerned with "targeted taxes". But are analogous reasons for strict scrutiny of legislation, said to authorise expenditures for the "propagation of opinions" that many in the community disbelieve, susceptible to equal vigilance by the Federal Parliament in this country and by this Court? If such expenditures are to be lawful, do the language and scheme of the Constitution and the expression of the appropriation statute require the authority to be expressed with clarity? Is this necessary, so that the provisions and assumptions of the Constitution are fulfilled; the legislative process is rendered transparent; and those in Government proposing, and in the Parliament supporting, such expenditures are made accountable to the electors of the Commonwealth, whose money they appropriate and expend for such purposes?

188 *The resulting issue*: The plaintiffs in these proceedings did not assert that the Federal Parliament could never appropriate, nor the Commonwealth spend, money on advertising campaigns. Nor did they assert that such expenditure would never be a "purpose of the Commonwealth", within s 81 of the Constitution. Instead, they argued that the Parliament had not, by the nominated items in the Appropriation Act, appropriated money for the advertising campaign, illustrated in the advertisements and transcripts evidenced in the case. It is in this way that the threshold issue for resolution became one of statutory construction[118]. However, it is a question of construction to be resolved against the background of the provisions of the Constitution and the conventions and assumptions to which those provisions give effect, read, in turn, with due regard to centuries of constitutional history, practice and principle.

189 Analysis of the issues in this case must therefore commence with the Appropriation Act and the legislative materials that supplement and explain its provisions. It must then address the provisions of the Constitution and

---

116 73 USLW 4350 at 5356 (2005) per Souter J citing *The Founders' Constitution* §37, *A Bill for Establishing Religious Freedom*, (1987) at 77, codified in 1786 as Va Code Ann §57-1.

117 *United States v United Foods Inc* 533 US 405 at 411 (2001), referred to by Souter J in *Johanns* 73 USLW 4350 at 5356 (2005).

118 *The Queen v Lords Commissioners of the Treasury* (1872) LR 7 QB 387 at 396 per Blackburn J.

considerations of constitutional history with which, in the absence of a clear indication to the contrary, the Appropriation Act and its provisions are to be taken to have conformed.

The legislative provisions and materials

190 *The contents of the Appropriation Act*: In the world of statutes an Appropriation Act is a rare bird[119]. However, it is an Act of the Federal Parliament. Indeed, it is expressly envisaged as one of the laws which the Parliament must make[120]. It must therefore observe the constitutional requirements for the enactment of a law. When made, it is subject to examination by this Court, according to its terms, in a proceeding brought by a party with a requisite interest[121].

191 The Bill that became the Appropriation Act was introduced into the House of Representatives as Appropriation Bill (No 1) 2005-2006 (Cth). It was introduced, together with Appropriation Bill (No 2) 2005-2006 (Cth), on 10 May 2005. This was the occasion of the presentation to the Parliament of the Government's Budget. Accompanying the Bills were a number of budget papers. Under the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"), such papers are available to this Court as material "not forming part of the Act [which] is capable of assisting in the ascertainment of the meaning of the provision"[122]. Specifically, the Court may have regard to such material for this purpose "to confirm that the meaning of the provision is the ordinary meaning conveyed by the text … taking into account its context in the Act and the purpose or object underlying the Act"[123] and as a "relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted"[124].

192 The parliamentary practice of introducing at least two Appropriation Bills, leading to the enactment, if approved, of an *Appropriation Act (No 1)*, and

---

119 *AAP Case* (1975) 134 CLR 338 at 393 per Mason J.

120 Constitution, ss 53, 54, 56 and 83.

121 *Brown v West* (1990) 169 CLR 195 at 209. See also Saunders, "Parliamentary Appropration", in Saunders et al (eds), *Current Constitutional Problems in Australia*, (1982) 1 at 35-36.

122 Interpretation Act (Cth), s 15AB(1).

123 Interpretation Act (Cth), s 15AB(1)(a).

124 Interpretation Act (Cth), s 15AB(1)(e).

Appropriation Act (No 2), is the result, in Australia, of constitutional provisions that limit the powers of the Senate, relevantly, to amend "laws appropriating revenue or moneys for the ordinary annual services of the Government"[125]. Some of the history and practice of the Commonwealth and of the Federal Parliament in this regard is described in *Brown v West*[126].

193 As stated in the long title to the Appropriation Bill, in question in these proceedings, it was "a Bill for an Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes". The operative provisions of the Bill for the Appropriation Act were found in cl 15[127]. That clause provided that: "The Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act". Schedule 1 to the Bill provided for "Services for which money is appropriated". The Schedule was divided into the several designated portfolio items of the Executive Government of the Commonwealth. That which is said to be relevant to the appropriation in issue in these proceedings is the entry for the "Employment and Workplace Relations Portfolio".

194 In accordance with a new federal budgetary practice the appropriations in the Schedule are expressed, relevantly, in terms of specified "Outcomes". The appropriations are then further subdivided into "Departmental Outputs" and "Administered Expenses". The relevant items of the Schedule are set out in the reasons of Gleeson CJ[128] and elsewhere[129]. I incorporate the Schedule by reference.

195 The substantive provisions of the Bill contained explanations of the differentiation between "departmental items" and "administered items"[130]. The differences are further explained in the Portfolio Budget Statements 2005-06: Employment and Workplace Relations Portfolio (the "PBS")[131]. The PBS is a budget related paper, issued with the relevant Appropriation Bill on its

---

125 Constitution, s 53.

126 (1990) 169 CLR 195 at 206-208. See also Harris (ed), *House of Representatives Practice*, 5th ed (2005) at 416-423.

127 Now, the Appropriation Act, s 15.

128 Reasons of Gleeson CJ at [14].

129 Reasons of McHugh J at [54]; joint reasons at [117].

130 Respectively cll 7 and 8 of the Bill. Now the Appropriation Act, ss 7 and 8.

131 Budget Related Paper No 1.6 at xii.

introduction into the Parliament. By cl 4 of that Bill such "Portfolio Budget Statements are hereby declared to be relevant documents for the purposes of section 15AB of the [Interpretation Act]"[132]. By virtue of this declaration, any doubt as to the use that might be made of the PBS in interpreting the Appropriation Act, pursuant to the universal provisions of the Interpretation Act, is laid at rest. The PBS is declared to be available. By reference to the PBS, it is made plain that "departmental outputs" relate to expenses controlled by the agency. On the other hand, "administered items" cover other expenses such as "subsidies, grants and personal benefit payments"[133].

196 By the defendants' amended defence in these proceedings, it is asserted that the impugned advertising campaign is to be paid for in reliance upon the departmental item for the Department. Specifically, the defendants relied on "Outcome 2". This refers to the outcome of "Higher productivity, higher pay workplaces". The defendants submitted that the impugned advertising campaign is inherent in, or incidental to, the outcome so described for which, by enacting the Appropriation Bill No 1, the Parliament has appropriated the necessary money, authorising such money to be drawn from the Treasury as the Constitution envisages, so as to pay for the advertisements published in support of the campaign[134].

197 The Appropriation Bill contained a number of clauses suggesting a measure of precision in the appropriations that it proposed to the Parliament. Thus, cl 4(2)[135] provided:

> "If the [PBS] indicate that activities of a particular kind were intended to be treated as activities in respect of a particular outcome, then expenditure for the purpose of carrying out those activities is taken to be expenditure for the purpose of contributing to achieving the outcome."

198 This provision demonstrates clearly enough the central importance of the PBS in elaborating, with the detail necessary to the activities of modern government, the general expressions of outcomes stated in the proposed law itself.

---

132 Now Appropriation Act, s 4.

133 PBS at xii.

134 Constitution, s 83.

135 Now Appropriation Act, s 4(2)

199 Likewise, the command of cl 7 of the Appropriation Bill was imperative[136]:

> "(1) For a departmental item for an entity, the Finance Minister may issue out of the Consolidated Revenue Fund amounts that do not exceed, in total, the amount specified in the item.
>
> (2) 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.
>
> (3) If:
>
> (a) an Act provides that an entity must be paid amounts that are appropriated by the Parliament for the purposes of the entity; and
>
> (b) Schedule 1 contains a departmental item for that entity;
>
> then the Finance Minister, under subsection (1), must issue out of the Consolidated Revenue Fund the full amount specified in the item.
>
> …".

200 The instruction of specificity was carried forward in cl 8 of the Bill, notably cl 8(2)[137]:

> "An amount issued out of the Consolidated Revenue Fund for an administered item for an outcome of an entity may *only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome*."

201 Within the "departmental items" some measure of flexibility, also appropriate to the needs of modern government, was indicated in the definition of that expression in cl 3 of the Bill[138]. The phrase "departmental item" is there defined to mean "the total amount set out in Schedule 1 in relation to an entity under the heading 'Departmental Outputs'". A note is added which, although not part of the Bill, was designed to assist in understanding its purpose. The note reads:

---

136 Now Appropriation Act, s 7.

137 Now Appropriation Act, s 8(2) (emphasis added).

138 Now Appropriation Act, s 3.

> "The amounts set out opposite outcomes, under the heading 'Departmental Outputs', are 'notional'. They are not part of the item, and do not in any way restrict the scope of the expenditure authorised by the item."

This indicates an apparent purpose to permit the transfer of sums for "departmental outputs" as between the several identified outcomes. However, contrary to the approach taken by Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons")[139], it does not expand the nominated outcomes nor indicate approval for disregarding such outcomes in a way that would render parliamentary authority for the appropriation nugatory or meaningless.

202 *The contents of the PBS*: The general purpose of the PBS, relevant to the items concerning the Department, is stated in a covering letter, contained within it, addressed by the Minister, the second defendant, to the President of the Senate and the Speaker of the House of Representatives. The letter states:

> "I present these statements by virtue of my Ministerial responsibility for accountability to the Parliament and, through it, the public."

203 The opening page of the PBS also contains a "User Guide", identifying the "Purpose of the Portfolio Budget Statements"[140]. The following appears in that guide:

> "The purpose of the [PBS] is to inform Senators and Members of Parliament of the proposed allocation of resources to government outcomes by agencies within the portfolio. …
>
> A key role of the [PBS] is to facilitate the understanding of proposed annual appropriations in Appropriation Bills No 1 and No 2 …
>
> The [PBS] provide sufficient information, explanation and justification to enable Parliament to understand the purpose of each outcome proposed in the Bills."

204 In describing the "agency outcomes" the PBS states that "[t]his section explains how the resources identified in Section 2 will be used to deliver outputs and administered items to contribute to the three outcomes for the Department of Employment and Workplace Relations"[141].

---

139 See below these reasons at [287]-[288].

140 PBS at ix.

141 PBS at 32.

205 In supporting their arguments the defendants pointed with the greatest conviction to "Outcome 2". The parts of the PBS relevant to this outcome are extracted by McHugh J[142]. However, there is no item in Outcome 2, or the key priorities for 2005-2006, that identifies, directly or indirectly, the implementation of a major and costly advertising campaign designed to persuade its recipients of the merits of proposed future legislation. Neither by express language nor in general terms does such expenditure get the slightest mention. This may be unsurprising because, at the time the Appropriation Bill No 1 was presented to the Parliament, the details of such anticipated legislation were unknown, still less enacted. The advertising campaign had not yet commenced.

206 In a table (Table 3.1.2) showing the total resources for Outcome 2, expressed in thousands of dollars, two items are nominated which might have a remote connection with the advertising campaign. These are Output 2.1.1 "Workplace relations policy advice" ($19,085) and Output 2.1.2 "Workplace relations legislation development" ($5,851). The plaintiffs accepted that these appropriations were capable of extending to the development by the Department of the Government's anticipated "package" of legislation. But could these items amount to appropriations for the expensive advertising campaign? Neither by express language nor by any relevant general words, was such a "campaign" specified.

207 In Australia, to this time, the provision of policy advice and the development of legislation by a Department of State has not normally involved an advertising campaign directed at the public in advance of the enactment, or even the introduction, of such legislation. Occasionally, the public might be invited to make submissions on identified questions of public policy or on the contents of proposed legislation. No such invitations appeared in the advertisements complained of by the plaintiffs. The provision of policy and the development of legislation are governmental activities different in kind from publicly funded advertising campaigns for the purpose of public persuasion and to respond to a privately funded campaign by political opponents.

208 A contextual consideration, appearing in the PBS, lends support to this conclusion suggested by the language of the Appropriation Act read with the PBS. One of the Department's priorities for "Outcome 2" is identified as the promotion of nominated initiatives addressed to an ageing workforce[143]. Similarly, under the PBS item for "Outcome 1", express provision is made for a

---

142 PBS at 46-47: see reasons of McHugh J at [69].

143 PBS at 46.

"communication strategy" in relation to a "Welfare to Work" programme[144]. An allocation for that strategy was itemised in the PBS[145]. It was spelt out in more detail in Budget Paper No 2[146]. That Budget Paper is explicit[147]:

> "The Government will provide $29.0 million over four years to implement a *communication strategy* focusing on increasing workforce participation. The strategy will target the community as a whole and various groups, including people with disabilities, parents, mature age people and the long-term unemployed."

209 Similar examples of express identification of "communication strategies" may be found in the budget papers in relation to the proposed activities of other portfolios of the Government. One may search the budget papers high and low, in all of their detail, and not find any reference, with direct or indirect particularity, in relation to the advertising campaign or "communication strategy" impugned in these proceedings.

210 Many items referring to appropriations concerning much smaller amounts, with lesser significance and controversy, are spelt out with due detail so as to fulfil the asserted purpose of the PBS as declared by the Minister and explained in the "User Guide". But nothing is expressed that would have given the slighest clue to the Senators and Members of Parliament considering the Appropriation Bill No 1, read with the assistance of the budget papers including the PBS, that they were approving an appropriation for the purpose of a large-scale public advertising campaign in advance of the introduction of the legislation to which it related.

211 *Two contextual considerations*: Because these reasons may be read years from now when current circumstances are forgotten, it is appropriate to note two further contextual considerations that are relevant.

212 First, there has been a considerable growth in the past fifteen years of governmental expenditures on public advertising. In so far as such expenditures, by governments of differing political persuasions, have concerned contentious

---

144 PBS at 36.

145 PBS at 22 (second last entry).

146 Budget Paper No 2 at 133.

147 Budget Paper No 2 at 141 (emphasis added).

subjects of major political debate and differences in the community, they have been controversial. Their legality and propriety have been questioned[148].

213 Secondly, at the time that the Appropriation Bill No 1 was introduced into the Parliament and considered by the Senate, and at the time that the Bill passed all stages in the Parliament, so as to become the *Appropriation Act (No 1)* 2005-2006 (Cth) on 29 June 2005, the political parties whose members had formed, in coalition, the Executive Government of the Commonwealth, did not, in their own right, enjoy a majority of votes in the Senate. Any powers which the Senate may have had to request amendments to the Bill for that Act, for the deletion of an item considered outside the proper subject matter of Appropriation Act No 1, were not enlivened by the silence of the Bill on an item of large-scale public advertising, potentially of much industrial significance and political sensitivity.

214 Since the first Federal Parliament in 1901, the Senate has repeatedly returned Bills, including Bills relating to appropriations, requesting the House of Representatives to amend them or to delete or alter items to which the Senate has objected[149]. The first occasion on which this was done was on 14 June 1901 when the Consolidated Revenue (Supply) Bill 1901-1902 (No 1) (Cth) was returned by the Senate to the House of Representatives with the request that the House amend the Bill to show the items of expenditure comprised in the sums which the Bill purported to grant. In consequence of the Senate's request, the original Bill was not returned to the Senate by the House. A new and different Bill was forwarded. As requested by the Senate it showed the specified items[150]. The sufficient identification of proposed expenditures (especially those likely to be politically sensitive and controversial) is not relevant only to the achievement of parliamentary and public scrutiny, as stated in the PBS. It is also relevant to enlivening the residual powers of the Senate, under the Constitution, in respect of Appropriation Bills other than those identified which the Senate may not amend[151].

215 *The operation of the FMA Act*: It is uncontested that the third defendant has issued drawing rights (and may issue further such rights) under s 27 of the FMA Act, authorising officers of the Department to make payments of public money, purportedly under the authority of the appropriation made for the

---

148 The Auditor-General of the Commonwealth was asked to investigate the subject: see Lindell at 22.

149 *Odgers' Australian Senate Practice*, 11th ed (2004), Appendix 6.

150 The story is told in Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 145-147.

151 Constitution, s 53.

nominated departmental item in the Appropriation Act. Exhibited in the proceedings was an instrument signed by the Secretary of the Department, addressed to designated persons performing specified duties, affording them drawing rights "that authorise the payment of public money for the purpose specified in column 2 of Schedule 1" of the instrument. That purpose, as stated in that column, was "to meet expenses incurred by the Commonwealth under contracts and arrangements for or in relation to advertising regarding workplace relations reform".

216 The instrument specifies the "particular appropriation", upon which it relies, as being "that provided by *Appropriation Act (No 1) 2005-2006* in respect of the departmental item for the Department of Employment and Workplace Relations".

217 The purpose of the regime set in place by s 27 of the FMA Act, in respect of the payment of money out of the Consolidated Revenue Fund, is to ensure compliance with the Constitution, with the law and practice governing appropriations and with the provisions made by, and under, the FMA Act[152]. The object is to prevent and counteract misappropriation by unauthorised, fraudulent and other means. The FMA Act provides for a number of offences that may be committed by persons who fail to act in this regard in accordance with law[153]. Such criminal sanctions are, however, and are expected to be, rarely invoked. Other sanctions include parliamentary scrutiny, both in the Houses of Parliament and in committees and examination of the accounts, normally after the expenditure, by the Auditor-General[154]. Obviously, the availability of these and other assurances for compliance with the law of expenditures of the Commonwealth[155], does not oust the jurisdiction and powers of this Court where compliance with a nominated appropriation is called into question[156].

---

152 See Financial Management and Accountability Regulations 1997 (Cth), made under the FMA Act.

153 See eg FMA Act, ss 7, 13, 14.

154 Under the *Financial Management and Accountability Act* 1997 (Cth), s 57(2)(a). See also *Auditor-General Act* 1997 (Cth), ss 11, 15, 23, 25; Campbell, "Parliamentary Appropriations", (1971) 4 *Adelaide Law Review* 145 at 164-168.

155 In accordance with the Constitution, s 83.

156 As *Brown v West* (1990) 169 CLR 195 at 212 demonstrates; cf *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 572, 577, 578-579, 584-585.

218 *Additional Appropriation Acts*: Where an amount, provided in Appropriation Acts is insufficient to meet commitments falling due in a financial year, additional or supplementary appropriations may be sought from the Parliament in further Appropriation Bills[157]. This is regularly done in the practice of the Federal Parliament. Additionally, further Appropriation Bills may be proposed so as to reallocate funds previously appropriated for other purposes[158].

219 Furthermore, occasional additional Appropriation Bills are introduced for special purposes. This was done, for example, to appropriate funds to meet urgent requirements arising as a consequence of Australian involvement in the Gulf War in 1990; for special funds for book industry assistance; a welfare programme and for expenditure on environmental matters in 1999; for expenditure related to peace-keeping in East Timor[159]; and for the Tsunami disaster in the Indian Ocean States in 2004[160]. Such Bills are preceded by the announcement of a Governor-General's message recommending appropriation[161]. According to the practice of the House of Representatives, such Bills may be introduced without notice[162].

220 The facility for Supplementary Bills to provide for appropriations, that were not made at Budget time in Appropriation Acts (No 1) and (No 2), indicates that the Executive Government, faced with new or unexpected obligations not provided for in appropriations already approved by the Parliament, is not without remedy. Both on large and not so large items, it may seek supplementary appropriations. The impediments are those of politics and convenience, not of law.

---

157 Harris (ed), *House of Representatives Practice*, 5th ed (2005) at 421.

158 Appropriation Bills (Nos 3 and 4) 1992-1993 (Cth) were introduced with this explanation: see Harris (ed), *House of Representatives Practice*, 5th ed (2005) at 421. As to unforeseen expenditure and the practices adopted to cope with unexpected developments, see Campbell, "Parliamentary Appropriations", (1971) 4 *Adelaide Law Review* 145 at 149-153.

159 *Appropriation (East Timor) Act* 1999-2000 (Cth).

160 *Appropriation (Tsunami Financial Assistance) Act* 2004-2005 (Cth); *Appropriation (Tsunami Financial Assistance and Australia-Indonesia Partnership) Act* 2004-2005 (Cth).

161 Australian Parliament, House of Representatives, Standing Orders, 180(b).

162 Australian Parliament, House of Representatives, Standing Orders, 178: see Harris (ed), *House of Representatives Practice*, 5th ed (2005) at 421.

The constitutional provisions and history

221 *Constitutional provisions*: A number of provisions of the Constitution[163] must be noticed to derive the meaning to be assigned to the Appropriation Act, read with the relevant budget papers, including the PBS in relation to the Department.

222 By s 53 of the Constitution it is provided:

> "Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. …
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

223 By s 54 of the Constitution, provision is made for the contents of Appropriation Bills:

> "The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation."

224 By s 56, the Constitution provides, relevantly, that a proposed law for the appropriation of revenue or moneys "shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the

---

163 Under the United States Constitution, Art 1, §9, cl 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law". This has been held to restrict the disbursing authority of the Executive so that no money is paid out of the Treasury unless it has been appropriated by an Act of Congress: see *Cincinnati Soap Co v United States* 301 US 308 at 321 (1937).

Governor-General to the House in which the proposal originated". In respect of Appropriation Bill (No 1) 2005-2006 (Cth), by Message No 59 of 6 May 2005, the Administrator of the Commonwealth, Mr John Landy, deputising for the Governor-General, recommended to the House of Representatives, in accordance with s 56 of the Constitution, "that an appropriation be made for the purposes of a Bill for an Act to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the Government, and for related purposes". This was the Bill that, when enacted, became the Appropriation Act in question in these proceedings.

225 Three further constitutional provisions need to be noticed. By s 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 in the manner and subject to the charges and liabilities imposed by this Constitution". Once again, reference is made to "purposes", suggesting a constitutional requirement for sufficient identification, in appropriations, of the "purposes" concerned, so as to conform with the presupposition of s 81. The meaning of this provision was the subject of differences of opinion in *Victoria v The Commonwealth and Hayden* ("the *AAP Case*")[164]. In the present proceedings, the plaintiffs made no complaint that any expenditure would exceed the "purposes of the Commonwealth". However, they insisted on the need to identify such "purposes" in appropriations with sufficient clarity to ensure conformity with s 81.

226 Critical to the plaintiffs' case was s 83 of the Constitution. That section provides:

> "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

227 The reference to "by law" makes it plain that, in Australia, an Appropriation Act must be passed by both Houses of the Parliament so as to become "law"[165]. The Executive has no inherent power to appropriate money in the Treasury nor to draw money from the Treasury except under an appropriation granted by the Parliament. In this way, the ultimate control of public money resides in the Parliament, although the initiative for proposed appropriations belongs to the Executive Government, in accordance with s 56 of the Constitution[166].

---

164 (1975) 134 CLR 338.

165 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 250. See also Constitution, s 53.

166 Lane, *Lane's Commentary on the Australian Constitution*, 2nd ed (1997) at 644.

228 This allocation of functions and responsibilities is not atypical of the arrangements existing in many countries that derive their constitutional traditions from England. However, the provisions concerning the powers of the Senate in relation to Money Bills (ss 53 and 54) and for the resolution of disagreements between the Houses of the Federal Parliament (s 57) are peculiar to Australia. In these proceedings, no consideration can be given to the meaning of the Appropriation Act in question, the effect of the appropriations there made and the identification of the "purposes" of such appropriations, without close attention to the foregoing constitutional provisions and to the place that they allocate to the Senate[167].

229 *Constitutional history and purpose*: The history that preceded the adoption of these Australian constitutional provisions reinforces the inference to be derived that a minimum standard of disclosure to the Parliament (including the Senate) is necessary to fulfil the postulates of the form of parliamentary government established by the Constitution.

230 In the *AAP Case*, Stephen J described the long struggle of the English House of Commons with the Plantagenet, Tudor and Stuart Kings for control by Parliament over the financial affairs of the kingdom[168]. The principle of appropriation of supply to the King for specific purposes first emerged in England in the fourteenth century; but was later denied. It re-emerged in 1665. However, the control over the raising of funds and of their expenditure was only finally achieved following the English Revolution of 1688[169]. The House of Lords was then left only with the power to withhold consent to Money Bills, not to propose or amend them. That was how things stood when the Australian Constitution was adopted and the respective powers of the Houses of the Federal Parliament were assigned[170].

---

167 There are exceptions to the need for specific appropriation recognised by the Constitution but these do not need to be considered here: *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 251; *AAP Case* (1975) 134 CLR 338 at 353.

168 *AAP Case* (1975) 134 CLR 338 at 385-386.

169 Maitland, *The Constitutional History of England*, (1955) at 182-184, 309-310.

170 By the *Parliament Act* 1911 (UK) a Money Bill, not passed by the House of Lords, may be presented for the Royal Assent and become an Act without enactment by the Lords: see *AAP Case* (1975) 134 CLR 338 at 386 per Stephen J. No analogous amendment to the Australian Constitution has been adopted. See, however, Constitution, s 53 and *Brown v West* (1990) 169 CLR 195 at 201.

231 Whatever differences may have existed within this Court in the *AAP Case* (mostly concerned with the question whether the "purpose" specified in the appropriation was a "purpose of the Commonwealth" within s 56 of the Constitution[171]) by the time the Court delivered its unanimous decision in *Brown v West* (where the "purpose of the Commonwealth" was uncontested), certain features of the Australian law governing federal Appropriation Acts were clearly established. The authority of *Brown v West* was not challenged by any party to these proceedings. It is a recent and unanimous decision of this Court. In my view it is correct. It applies to the issues in question here. It draws, as the Court acknowledged in that case, on the constitutional history of England that helps to explain the provisions governing appropriations contained in the Australian Constitution.

232 In *Brown v West*[172] this Court approved the remarks of Mason J in the *AAP Case*[173] when his Honour said:

> "Section 83 in providing that 'No money should be drawn from the Treasury of the Commonwealth except under appropriation made by law', gives expression to the established principle of English constitutional law enunciated by Viscount Haldane in *Auckland Harbour Board v The King*[174]: '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'. An Appropriation Act has a twofold purpose. It has a negative as well as a positive effect. Not only does it authorize the Crown to withdraw moneys from the Treasury, it 'restrict(s) the expenditure to the particular purpose', as Isaacs and Rich JJ observed in *The Commonwealth v Colonial Ammunition Co Ltd*[175]."

233 This Court also upheld a principle that had been stated by Latham CJ in *Attorney-General (Vict) v The Commonwealth*[176]:

---

171 See *Brown v West* (1990) 169 CLR 195 at 209.

172 (1990) 169 CLR 195 at 208.

173 (1975) 134 CLR 338 at 392.

174 [1924] AC 318 at 326.

175 (1924) 34 CLR 198 at 224.

176 (1945) 71 CLR 237 at 253. The appropriation is the authority to the Treasurer to make "the specified disbursements": see *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 at 190 per Griffith CJ; see also at 200 per Isaacs J; cf *Brown v West* (1990) 169 CLR 195 at 205.

> "[T]here cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose."

And the Court gave effect to what Isaacs J had said still earlier in *The State of New South Wales v The Commonwealth* ("the *Surplus Revenue Case*")[177]:

> "'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of *some purpose which either the Constitution has itself declared, or Parliament has lawfully determined*, shall be carried out."

234 To make these points doubly sure, this Court in *Brown v West*[178] added emphasis to the principle stated by Viscount Haldane in *Auckland Harbour Board v The King*[179] by expressly endorsing a passage in his Lordship's reasons which followed that already quoted:

> "The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment."

235 Their Honours might also have added, as I do now, a further sentence in the *Auckland Harbour Board Case* that came immediately after those cited[180]:

> "Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced."

236 If these strong words of the Privy Council could be applied in 1924 to describe the constitutional arrangements of the United Kingdom and of New Zealand, how much more applicable are they to the requirements of the Australian Constitution, expressed in a written instrument stated in imperative terms, designed to make certain, and to immure from easy change, similar British constitutional precepts? The criterion, thus endorsed by this Court, is one of

---

177 (1908) 7 CLR 179 at 200. The emphasis was added by this Court in *Brown v West* (1990) 169 CLR 195 at 208.

178 (1990) 169 CLR 195 at 209.

179 [1924] AC 318 at 326-327.

180 [1924] AC 318 at 327.

"distinct authorization from Parliament itself". To the extent that the Executive Government seeks to justify expenditures, except where there is "a distinct authorization", it challenges centuries of constitutional history. It departs from the provisions of the Australian Constitution designed to give that history effect. It detracts from the basic purpose of such provisions, being to assure to the people in Parliament the final say about the expenditure of public moneys. It weakens accountability of the Government to the Parliament in all such matters[181]. To conclude otherwise would be to depart from the principles endorsed in *Brown v West*. This Court should not retreat from the clear rule expressed in that case. Behind it stands a principle of comparative strictness required by the text of our Constitution, by centuries of history and by policies of good governance to which that text gives effect[182].

237 *Ordinary annual services of government*: There is an additional contextual consideration that may be traced to the Constitution which reinforces an inference that, in this case, the failure to identify a distinct appropriation for the purpose of the impugned advertising campaign meant that no "particular purpose" was established to authorise such expenditure under expressions in the Appropriation Act cast in general and non-particular terms.

238 This argument, which was elaborated by the State of Western Australia, intervening in support of the plaintiffs, latched onto the words "the ordinary annual services of the Government". That phrase appears in the second paragraph of s 53 of the Constitution. The words likewise have a long history in the practice of the Parliament of the United Kingdom in granting authorisation for appropriations of money for the recurring services of the Government.

239 The appropriation for the departmental item in question in this case is contained in an Act appropriating money out of the Consolidated Revenue Fund for the ordinary annual services of the Government[183]. I accept, as the State of Western Australia submitted, that it may be assumed that the Parliament intended that the appropriations provided for in the Act be appropriations for the "ordinary annual services of the Government", as that phrase is understood in the Constitution. In construing the Act, it is therefore relevant to consider whether expenditure on advertising for the proposed reforms falls within the ambit of that concept. In doing so, it is helpful to consider the meaning of the phrase "ordinary annual services of the Government" as it has been understood in its historical and constitutional context.

---

181 As envisaged by the Constitution, s 64. See also s 61.

182 cf *State v Moore* 69 NW 373 at 376 (1896) (SC Nebraska); *Crane v Frohmiller* 45 P 2d 955 at 959 (1935) (SC Arizona).

183 The long title to the Appropriation Act.

240 By the nineteenth century, in England, the estimates for the ordinary annual expenditure of the government comprised three main divisions: for the Army, the Navy and the Civil Services[184]. The estimates for the last category included public works and buildings, the salaries and expenses of civil departments, law and justice, education, science and the arts, foreign and colonial services, non-effective and charitable services, old-age pensions, labour exchange costs and insurance[185]. The general position was that the Crown in the United Kingdom was not restrained in presenting an estimate of expenses within these divisions[186]. Different procedures were followed in relation to expenditures falling outside the estimates for such ordinary annual expenditure of the Government. For other expenditures, explicit approval was sought, according to the nature of the demand.

241 It became accepted that expenditures for new purposes, not covered by the existing powers and functions of a governmental department or authority[187], or expenditures for novel purposes[188], or where the expenditure was required to be authorised for longer than a year or for an indefinite period[189] or was authorised on conditions[190] all required separate appropriation approval by Parliament. They could not be wrapped up in the recurrent estimates for the ordinary, annual expenditure of the Government when approaching Parliament for approval of appropriations.

242 Unsurprisingly, this emerging convention of the British Parliament was also reflected in the practice followed from the early days in the Australian colonies. In 1857, in South Australia, disputes arose as to the respective powers of each House of the legislature in relation to Money Bills. Ultimately, the

---

184 Durell, *The Principles and Practice of the System of Control Over Parliamentary Grants*, (1917) at 15.

185 Durell, *The Principles and Practice of the System of Control Over Parliamentary Grants*, (1917) at 46.

186 Gordon (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 20th ed (1983) at 791 ("hereafter Erskine May").

187 Erskine May at 791. See also Gordon (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed (2004) at 882.

188 Erskine May at 760.

189 Erskine May at 793.

190 Erskine May at 791.

Legislative Council resolved to waive the claim that it could deal with the details of the ordinary annual expenses of the Government, submitted in an Appropriation Bill in the usual form[191]. The resulting convention in South Australia encouraged the adoption of provisions in what are now the constitutions of the States of Australia, whereby the "ordinary annual services of the Government" are sometimes expressly and separately provided for[192].

243 It was against the background of this Imperial and colonial parliamentary practice that the language of s 53 of the federal Constitution was adopted, segregating specific categories of proposed laws that might not be amended by the Senate. Relevantly, these were proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

244 During the Convention debates, leading to the adoption of the foregoing provisions of the Constitution, the phrase in question was not considered at any length. However, suggestions were made that the words were directed to a Bill which "simply appropriates revenue and carries out a settled policy involving no new departure"[193]. Or to a Bill which "simply covers the expenditure based upon a policy previously agreed to"[194]. It was also observed that the "ordinary expenditure of the year covers the expenditure of the various departments of the Commonwealth"[195]. The view was expressed in the Convention debates that a Bill for such ordinary annual services would not appropriate "extraordinary supplies"[196]. "Ordinary" services were distinguished "from special grants and from loan services"[197]. Shortly after Federation, Attorney-General Deakin

---

191 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 142-143.

192 See eg *Constitution Act* 1902 (NSW) s 5A; *Constitution Act* 1975 (Vic), s 65; *Constitution Acts Amendment Act* 1899 (WA), s 46; *Constitution Act* 1934 (Tas), s 36; cf Twomey, *The Constitution of New South Wales*, (2004) at 568.

193 *Official Report of the National Australasian Convention Debates*, (Sydney), 3 April 1891 at 720 (Mr McMillan).

194 *Official Report of the National Australasian Convention Debates* (Sydney), 6 April 1891at 756 (Mr McMillan).

195 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 March 1898 at 2077 (Mr Deakin). See also at 2076 (Mr Barton).

196 *Official Report of the National Australasian Convention Debates*, (Adelaide), 14 April 1897 at 605 (Mr Glynn).

197 *Official Record of the Debates of the Australasian Federal Convention Debates*, (Melbourne), 8 March 1898 at 2076 (Mr McMillan).

expressed the opinion that the phrase "ordinary annual services of the Government" encompassed "[a]ppropriations for new buildings or additions when these are required in the ordinary course of departmental business"[198].

245 Obviously, the expression "ordinary annual services of the Government" should be given a broad and not a narrow meaning[199]. By the same token, the phrase is not completely open-ended. Nor, in a sparse constitutional text, can it be suggested that the words "ordinary" and "annual" are superfluous or devoid of meaning. Given the consequence of excluding the powers of amendment by the Senate (which is otherwise to have a power of amendment in respect of all proposed laws equal to that of the House of Representatives[200]) and given the practice of isolating appropriations for such services of the Government in the separate annual Appropriations Bill No 1, the adjectives "ordinary" and "annual" must be taken to be descriptive of limitations to be observed in the content of Appropriation Bills. Only such services enjoy the designated immunity from Senate amendment.

246 *The 1965 Compact and new policies*: In the Federal Parliament, the potential for serious disagreement between the two Houses and the Executive Government on what constitutes "ordinary annual services of the Government" was substantially resolved by an agreement between the interested parties, reached in 1965, as to what those words should be taken to mean. This agreement is known as the "Compact of 1965"[201].

247 The determination by the Houses of Parliament (and the Executive Government) of their respective understandings of the constitutional words is not, of course, conclusive. Ultimately, it is for this Court to give meaning to the words of the Constitution, where that step is required. However, especially as the phrase concerns the internal procedures of the Parliament, in respect of which deference is ordinarily accorded by courts to parliamentary understandings[202], it

---

198 Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia*, (1981) vol 1 at 28 (opinion dated 26 September 1901).

199 cf *AAP Case* (1975) 134 CLR 338 at 413 per Jacobs J, 418, 422 per Murphy J.

200 Constitution, s 53 (par 5).

201 *Odgers' Australian Senate Practice*, 11th ed (2004) at 282. See also *Odgers' Australian Senate Practice*, 6th ed (1991) at 581-582.

202 cf *AAP Case* (1975) 134 CLR 338 at 394; *Egan v Willis* (1998) 195 CLR 424 at 466-467 [79] per McHugh J, 487-494 [124]-[134] of my own reasons; *Sue v Hill* (1999) 199 CLR 462 at 557 [247] per McHugh J, 567-568 [277], 568-569 [279] of my own reasons.

is proper for this Court to note the Compact of 1965. This Court has earlier endorsed reliance on the Compact and consequent parliamentary practice to assist in the interpretation of Appropriation Acts[203]. It may safely be assumed that the Appropriation Bill No 1, in issue in these proceedings, was presented to the Parliament and considered by each House, on the footing that it was intended to comply with that Compact. The defendants expended some effort in argument to suggest that the Compact of 1965 had been amended in a relevant way by later decisions of the Executive Government, agreed to by the Senate. However, this does not appear to be the way such developments were understood. Nor is it the way those developments are interpreted in contemporary statements of the Compact of 1965, at least so far as it affects the point of significance for the present proceedings[204].

248 As formalised by a resolution of the Senate in 1977, following a report by the Senate Standing Committee on Constitutional and Legal Affairs, chaired by Senator A N Missen[205], the Compact of 1965 reads[206]:

> "That the Senate resolves:
>
> (1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government.
>
> (2) That appropriations for expenditure on:

---

203 *Brown v West* (1990) 169 CLR 195 at 206-208, 211-212.

204 Thus in 1999, when the Executive Government adopted accrual accounting, the Finance Minister noted that the allocation of items between Appropriation Bills Numbers 1 and 2 "would be largely unchanged" and that Bill 2 would be appropriation, relevantly, for "new policy for new outcomes not previously approved by Parliament or authorised by special legislation". The Senate Committee approved the proposed changes as being "in accordance with the spirit of both the constitutional provisions and the Compact": see Australia, Senate Standing Committee on Appropriations and Staffing, *13th Report of the Senate Standing Committee on Appropriation and Staffing*, (1999) at 3. This Report was adopted by the Senate.

205 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Ordinary Annual Services of the Government*, (1976) (Parliamentary Paper 130/1976) at 4-5.

206 The resolution appears in Australia, Senate, *Journal of the Senate*, (1977), vol 82 at 572, No 20 (17 February 1977) (emphasis added). See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 May 1965 at 1485.

(a) the construction of public works and buildings;

(b) the acquisition of sites and buildings;

(c) items of plant and equipment which are clearly definable as capital expenditure;

(d) grants to the States under section 96 of the Constitution; and

(e) *new policies not previously authorised by special legislation*,

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys or expenditure on the said matters shall be presented to the Senate in a separate Appropriation Bill subject to amendment by the Senate."

249 So far as "new policies" are concerned, as expressed in par (2)(e) of this resolution, it appears clear that the Compact of 1965 is still assumed to be in full operation. So much was accepted by this Court in *Brown v West*[207]. Addressing the suggestion that Supply Bill (No 1) of 1989-1990 had contained an appropriation for the purpose of supplementing the postal allowance for Senators and Members of Parliament, in issue in that case, this Court observed that such an argument would involve[208]:

> "find[ing] in it an appropriation for the funding of a new policy which, by parliamentary practice, would be found only in a bill for special legislation or, at the least, in Appropriation Bill (No 2). It can therefore be taken that, ... as a matter of parliamentary practice, the *Supply Act (No 1)* 1989-1990 was not intended to include an appropriation for new policies".

250 By analogous reasoning, the plaintiffs, and Western Australia, submitted that, consistently with the Compact of 1965, and parliamentary practice based

---

207 (1990) 169 CLR 195 at 211. The Court referred to the Compact of 1965 at 207. The Appropriation Act was read in the light of the existing federal law and parliamentary practice. It was not taken to have effected an implied repeal of the earlier federal legislation. By parity of reasoning, the existing federal law on industrial relations is primarily the *Workplace Relations Act* 1996 (Cth), enacted by the Parliament. Obviously, no announced proposed amendment of that Act could be taken to have repealed the provisions of that Act which remains the law of the Commonwealth: cf Lindell at 25.

208 (1990) 169 CLR 195 at 211.

upon it, the initiation of a major advertising campaign, involving widespread promotion of as yet unknown and unenacted legislation, would amount to appropriation for expenditure on "new policies not previously authorised by special legislation". It would not find its place in Appropriation Bill (No 1), immune from Senate amendment. In accordance with the Compact, it would have to run the gauntlet of Senate scrutiny and the possibility of Senate amendment. It would have to do so, as stated in *Brown v West*, as an item in a "bill for special legislation or, at the least, in Appropriation Bill (No 2)".

251 Quite apart from the question whether such an advertising campaign would be so classified there is, in any case, much force in the submission of Western Australia that the proposed changes to federal industrial relations law, to which the advertising campaign was addressed, are themselves within the contemplation of "new policies not previously authorised by special legislation" and thus within the Compact of 1965. The changes are not concerned with limited amendment of present federal legislation, enacted by the Parliament. Instead, what appears to be intended is to "introduce a national system of workplace relations". So much is stated in the Commonwealth's advertisement, exhibited in the special case. By necessary inference, such a system would involve very significant changes to the States industrial relations systems and their replacement in an unspecified way by a "national system". It therefore appears that, pursuant to the intended changes, the Commonwealth proposes to provide services related to workplace regulation that are either entirely new, or of a kind currently provided by the States and not by federal institutions or laws. For this reason, if implemented, the reforms would not constitute services "ordinarily provided" by the Government of the Commonwealth. It follows that advertising to promote and publicise such reforms could not be described as an ordinary annual service of the Government or a service incidental thereto. It is therefore extremely unlikely that an item of appropriation for such expenditure would be found, or properly found, in Appropriation Bill No 1.

252 Until the Parliament has spoken upon it, it cannot be assumed that legislation to implement the foregoing scheme will be enacted. The Parliament of this country is not a rubber stamp of the Executive Government. As Professor Harrison Moore pointed out in the early days of the Commonwealth, the Senate in Australia is an unusually powerful upper house. It has commonly performed a distinctive function. It is "less easily 'led' by the Government". The "'Opposition' is not so clearly defined"[209]. If, as an outcome of parliamentary debate, the foreshadowed legislative "package" were defeated or significantly altered, federal expenditure on an advertising campaign to promote it, in advance of its passage, would have been wasted, in whole or part. It would not therefore

---

209 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 152.

lightly be assumed that the Federal Parliament intended, merely by general language in the Appropriation Act and its associated documents, to approve an appropriation for the advertising campaign challenged by the plaintiffs.

253 *Interpretative principles*: The plaintiffs did not challenge the constitutional validity of the Appropriation Act. To this extent, the present is a case closer to the *construction* question unanimously resolved in *Brown v West*[210] than to the *validity* question considered in the divided decision in the *AAP Case*[211]. The plaintiffs' argument accepted the validity of the Act. However, the plaintiffs submitted that, properly construed, the terms of the Act did not extend to appropriate moneys for the advertising campaign described in the materials, whether for the ordinary annual services of the Government or otherwise. The Act thus gave no lawful authority for the drawing of money from the Treasury of the Commonwealth for such a purpose.

254 The principle that a statute, enacted by the Parliament must be construed, so far as the words permit, to remain within the powers conferred, and conforming to the restraints imposed, by the Constitution is one deeply entrenched in the law of this country[212]. It is given encouragement, and support, by the command of the Parliament itself in s 15A of the Interpretation Act. By that section "[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth [but to] be a valid enactment to the extent to which it is not in excess of that power".

255 There are limits to the extent to which such interpretive provisions can save from invalidity over-reaching laws[213]. However, where the question presented is one initially of legislative construction, and the language permits of alternative constructions (one that is constitutionally valid and the other invalid), it can readily be assumed that the Parliament intended this Court to adopt the interpretation that involves no invalidity. The Parliament has said as much in s 15A.

256 The plaintiffs submitted that the language of the Appropriation Act in question here, passed when the foregoing Appropriation Bill was enacted by both Houses and given the Royal Assent, read with the PBS and other budget

---

210 (1990) 169 CLR 195 at 212.

211 (1975) 134 CLR 338.

212 *Chief Executive Officer of Customs v El Hajje* (2005) 79 ALJR 1289 at 1304 [74]-[75] and cases there cited; 218 ALR 457 at 477.

213 cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403 at 429-431 [92]-[95] per McHugh J, 493-494 [367]-[370] of my own reasons.

documents, and understood against the background of constitutional law and history, authority and principle, supported their contention. They suggested that the language of the Act and the PBS were unambiguous. Neither contained any reference to appropriation for the advertising campaign for proposed future legislation upon which the Executive Government had embarked. Accordingly, the Parliament had as yet given no assent to it. Alternatively, the plaintiffs argued that, if there were ambiguities in the language of the Appropriation Act, understood by reference to the PBS, by reason of the same considerations, a meaning and effect of that Act should be preferred that excluded appropriation for the advertising campaign to one that accepted the appropriation as sufficiently approved in terms of a generally expressed item, such as departmental "Outcome 2".

The appropriation was not made

257 *Absence of distinct authorisation*: The parliamentary appropriation for the Executive Government's advertising campaign challenged by the plaintiffs was not made. The "distinct authorization from Parliament itself" was not given for the appropriation propounded in this case[214].

258 However much the requirement of specificity and distinctiveness of appropriations is blunted by Executive Government practice, and even parliamentary acquiescence, it cannot be denuded of meaning in Australia, given the constitutional provision that requires that appropriations must be for designated purposes. Parliamentary appropriations cannot be given in blank or with no reference to a purpose. The purpose must either be declared in the Constitution itself or lawfully determined by the Parliament. In the exigencies of modern government, it may be accepted that such purpose can be declared at a level of generality. However, that generality cannot be so vague and meaningless as to negate the significant constitutional consequences that attach to the designation of the appropriation and its purpose. Were this Court to permit a departure from this rule 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.

259 The facilitation of public scrutiny of economic policy and performance is the first stated object of the *Charter of Budget Honesty* which has been adopted

---

214 *Auckland Harbour Board* [1924] AC 318 at 326, approved in *Brown v West* (1990) 169 CLR 195 at 208-209. The "distinct authorization" must be either expressly or referentially granted: *AAP Case* (1975) 134 CLR 338 at 360.

by the Parliament[215]. It should be assumed that the Federal Parliament meant what it said in adopting that Charter. It should therefore be presumed that enactments, including those for appropriations, are intended to fulfil this commitment to honesty, transparency and accountability and to contribute to their observance in the budget processes of the Parliament.

260 *Reasons for upholding the objections*: When such tests are applied to the Appropriation Act in question here, there are many reasons to uphold the submissions of the plaintiffs and to reject those of the defendants.

261 First, it is highly doubtful that, conformably with the Constitution and the Compact of 1965, a provision for advertising of an as yet unenacted federal law, containing radical changes to existing federal law, could amount to (or would be taken by the Parliament to include) appropriation for the "ordinary annual services of the Government". Within the Compact of 1965, any such law would clearly involve "new policies not previously authorised by special legislation". Appropriations for expenditures on such policies would accordingly fall outside appropriations for the ordinary annual services of the Government. On the face of things, this analysis supports the submission that, in accordance with s 53 of the Constitution, the Compact of 1965 and the practice of the Federal Parliament, the provisions in Appropriation Bill No 1 did not cover the advertising campaign initiated by the Government and challenged by the plaintiffs. No other legislation has been nominated to afford a relevant appropriation. It is either the Appropriation Act or it is nothing. If this conclusion is correct, this Court should not struggle to read into the general language of the Appropriation Act, considered with the PBS and supporting documents, words which the foregoing make it unlikely to expect in such a context.

262 Secondly, when the words nominated by the defendants are examined, there is no particular item anywhere in the Appropriation Act that appropriates money to expenditure on a public advertising campaign in support of unenacted laws on the highly controversial and potentially divisive topics identified in the exhibited advertisements. This is significant in itself, but especially so when the items in the Appropriation Act, called in aid by the defendants, are contrasted with express provisions contained in that Act referring with particularity to the "promotion" of an identified policy or, specifically, communication and advertising. In such circumstances too, this Court would not struggle to turn the general language of the Act into the "distinct authorization from Parliament itself" that is required by settled constitutional law.

263 Thirdly, when the nominated general outcomes are read, and in particular Outcome 2 upon which the defendants most strongly relied, they fall far short of

---

215 *Charter of Budget Honesty Act* 1998 (Cth), s 3, Sched 1, cl 1.

providing parliamentary authorisation for the advertising campaign challenged by the plaintiffs. Obviously, Outcome 2 ("Higher productivity, higher pay workplaces") is expressed at such a high level of abstraction that, unless confined within limits, it would lend itself to authorising the appropriation of moneys for clearly illegitimate purposes. Thus, the item could not extend to cover the payment of federal bonuses to private sector employees or corporate executives (promoting "higher pay") or subsidising holiday trips ("higher pay" and "higher productivity") or providing public transport or public health facilities ("higher productivity"). To give the vague and general outcome meaning, in a legal context that includes the high constitutional purposes that I have described, a boundary must be placed around the chosen words. Otherwise, by the choice of such language, the purpose of obtaining distinct parliamentary approval of appropriations proposed by the Executive Government would be set at nought[216].

264 It should not be assumed that the Federal Parliament, in the circumstances disclosed in the present proceedings, has abandoned that degree of "distinct authorization" involved in its constitutional function of "appropriation" so as to default in, or abdicate, the performance of that function. That would be constitutionally impermissible. Where necessary, courts must read the items for a particular appropriation as it will be presumed that the Parliament itself would do[217]. This is achieved by viewing the item in concrete terms, confined (where unexpressed and unelaborated) to those activities and services only that are necessarily inherent in the words chosen.

265 When this approach is adopted, there is nothing in the words "Higher productivity, higher pay workplaces" that suggests the institution of a substantial publicly funded advertising campaign in support of announced legislation, not yet enacted. Such a campaign is too remote from the achievement of "higher productivity" or "higher pay workplaces". Indeed, any linkage is tenuous in the extreme. Moreover, it is unsubstantiated on the documentary evidence placed before this Court[218].

---

216 There are many examples showing the need to adopt this approach. For instance, the outcomes of the Department of Prime Minister and Cabinet include "sound and well coordinated government policies, programmes and decision making processes". If read broadly, this would encompass virtually any Government policy at all.

217 Thus in *New South Wales v Bardolph* (1934) 52 CLR 455 at 472 Evatt J cited an example to illustrate the degree of particularity required. Hence, it would require identification of expenditure on a library but not appropriation for particular books.

218 See also the reasons of McHugh J at [93].

266 Fourthly, this conclusion is reinforced by an awareness of the controversy, and suggested impropriety (and even illegality) of expenditures of public funds on such public advertising campaigns in the past and in support of policies not yet enacted by the Parliament[219]. Against the background of such controversies, it is reasonable to expect that explicit, or at least implicit, attention of the Parliament would be drawn in an Appropriation Bill to a proposal to institute such a substantial and costly advertising campaign. This Court, in defence of the principles of accountability of the Parliament to the electors, as the Constitution envisages, should continue to uphold a rule of particularity in such a case. If there is a choice of construction of the provisions of the Appropriation Act that has this effect and one that does not, it is the former that I would impute to the Parliament.

267 Fifthly, the defendants sought to minimise the significance of the PBS relevant to the Department and the detail outlined within it. This would not ultimately assist the defendants because, without the PBS, they are left with no more than the items identified in Schedule 1 to the Appropriation Act that are stated in such general terms that, for the foregoing reasons, they would not sustain a suggested appropriation as a "distinct authorisation" for a campaign of the kind, and for the purpose, that was launched.

268 This argument must, in any case, be rejected because of the clear contemplation in s 4 of the Appropriation Act that that Act was to be read with the PBS as "relevant documents" and that the PBS was to be used in assisting the ascertainment of the purposes for which the expenditure was authorised by the Parliament.

269 In achieving the purposes of appropriation contemplated by the Constitution, the PBS introduced a new and different problem for transparency and accountability. This is the inundation of the Parliament, the electors and (where applicable) this Court, with a vast mass of materials, commonly still expressed in vague generalities, that make practical examination of particular and distinct appropriations difficult or next to impossible. However, at least by reference to the PBS and other budgetary papers, interested experts, the specialised media and political critics within and outside the Executive Government, can identify items that may be considered debatable or objectionable[220]. By doing so, they render the Executive Government accountable to the Parliament. They may occasion legislative amendments including (as history shows) at the request of the Senate. They permit the

---

219 Lindell at 22.

220 As to the use of supplementary materials see *AAP Case* (1975) 134 CLR 338 at 360.

branches of Government to play their respective roles, as the Constitution envisages.

270 These are arguments for adopting the submissions of the plaintiffs in respect of the functions of the PBS, so far as they elaborate the proposed activities and outcomes of the Department in issue here. They are reasons for rejecting the arguments of the defendants which would reverse the approach adopted by this Court in *Brown v West*. The defendants' approach to the meaning and effect of the Appropriation Act would approve a constitutional procedure of appropriation (and the drawing of funds pursuant to a grant) that is devoid of any meaning. This does not conform to the imperative language of the Constitution and especially the command of s 83.

271 In his reasons Gleeson CJ[221] suggests that the test is whether the identified "outcomes", concededly stated in very general terms, are so general as to be without meaning. With respect, this puts the bar too low. It overlooks the duty, traced ultimately to the Constitution, to identify a sufficient meaning to fulfil the purpose of an appropriation. Likewise, Gleeson CJ[222] rejects what he calls a "judge's intuition" as an insecure foundation for discerning a rational connection between an output and an income. But this cannot mean that judicial analysis is pointless because that is precisely what the rule of law requires. Otherwise, this Court might just as well renounce the function it has hitherto asserted to uphold the legislative and constitutional requirements in the matter of appropriation. Nor is it the Chief Justice's suggestion that such issues are political[223], persuasive or even relevant. All constitutional decisions have political consequences. That has never in the past stopped this Court from doing its duty[224].

272 In the interpretation of the appropriation law considered in *Brown v West*, this Court spoke with a unanimous voice. It should do so again in these proceedings. The question raised is closely analogous. The constitutional, historical and policy reasons for doing so are relevantly identical. True, there is not in this case a clash between an appropriation statute and an earlier federal law, said to be inconsistent as there was in *Brown v West*. But here, it is the very absence of any federal law that supports the proposition that the appropriation statute was not intended to authorise funds publicly to attack laws that the Parliament has earlier enacted and that remain in force until lawfully changed.

---

221 Reasons of Gleeson CJ at [27].

222 Reasons of Gleeson CJ at [12].

223 Reasons of Gleeson CJ at [28]-[29].

224 See *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82 per Dixon J.

This Court should make it clear that, if such an advertising campaign is ever to be permitted in such a case, using money drawn from the Treasury of the Commonwealth, it cannot occur "except under a distinct authorization from Parliament itself". And that was missing in this instance.

273 *Conclusion: No valid drawing*: The result is that there was no appropriation made by law, under the Appropriation Act or otherwise, to authorise the drawing of money from the Treasury of the Commonwealth for the advertising campaign described in the special case, as contemplated in the instrument signed by the Secretary of the Department. The Appropriation Act, of itself, "earmark[s]" money which, until disposed, remains the property of the Commonwealth[225]. However, such an Act discloses that the Parliament consents to the expenditure of the moneys raised from the people, appropriated for the purposes stated in the appropriation. Only then may the Executive Government, within the law, expend those moneys, being thereby given the "authority and opportunity" to do so[226].

274 As has been said many times, an appropriation law wears a double aspect[227]. It authorises expenditure. But by s 83 of the Constitution, it also forbids the drawing from the Treasury of moneys except in accordance with the appropriation law. It grants. And it restricts. Each aspect is equally important to the constitutional design.

275 *The residual issues require decision*: It is the issuance of drawing rights to meet expenses under a supposed appropriation, which does not on analysis exist, that enlivens past and prospective breaches of the law of the Constitution (as well as other federal law). It is those breaches, and any anticipated future such breaches of a like kind, that give rise to an entitlement to relief. That entitlement is subject to the residual issues in these proceedings. Are the challenges presented by the plaintiffs justiciable? Do they have standing to make them? Can the plaintiffs formulate orders for relief, in terms that will enjoin the unlawful expenditure and that only? Are there any residual discretionary reasons why relief should be refused in the circumstances? How should the Court provide for costs in the light of the resolution of all of the issues?

276 It is necessary to turn to these residual issues. However, before doing so, I will make some brief comments in relation to the reasons of Gleeson CJ and the

---

225 *AAP Case* (1975) 134 CLR 338 at 411 per Jacobs J.

226 *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 222.

227 *AAP Case* (1975) 134 CLR 338 at 392 citing *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224 per Isaacs and Rich JJ.

joint reasons. In my view, the approaches adopted by the majority are seriously flawed.

The infirmity of the majority reasons

277 *The reasons of the Chief Justice*: Neither Gleeson CJ[228] nor McHugh J[229] agrees in the construction of the Act adopted in the joint reasons. Both approach the question of statutory construction presented by the special case in the same manner as I do. However, Gleeson CJ comes to an outcome opposite to that reached by McHugh J and myself, finding that the appropriation in question falls within the terms of Outcome 2. The reasons why I reject this conclusion will be apparent from what I have already said.

278 It does not logically follow that, because the provision of legislative advice and the development of legislation fall within the scope of Outcome 2, advertisements for a public campaign to procure support for intended legislation also come within that outcome[230]. There is a clear difference between legislative and policy development, on the one hand, and political advertisements of the kind exhibited in this case, on the other. On no rational basis[231] can such advertisements be seen to promote "higher productivity or higher pay". Still less do they constitute "providing policy advice and legislation development services to government".

279 *The interpretation in the joint reasons*: The joint reasons strike out on a novel approach. They reject the construction of the Act advanced by the plaintiffs (and accepted by the defendants[232]). They hold that, because of a difference between the text of s 7 and s 8 of the Appropriation Act, an amount of money appropriated from the Consolidated Revenue Fund in respect of a departmental item is not limited to "expenditure for the purpose of achieving any of the nominated outcomes"[233]. That is, the designated outcomes do not restrict the expenditure of the appropriated amount in any way. The sole requirement imposed by the Act is that "a departmental item be expended only on

---

228 Reasons of Gleeson CJ at [23]-[26].

229 Reasons of McHugh J at [81]-[91].

230 cf reasons of Gleeson CJ at [28].

231 See reasons of McHugh J at [92]-[95].

232 [2005] HCATrans 650 at 4292-4297. See also the reasons of McHugh J at [75]-[79], setting out the relevant submissions of the defendants.

233 Joint reasons at [128].

'departmental expenditure'". On this footing, the joint reasons dismiss the plaintiffs' "central contention". On that basis, they refuse the relief sought[234].

280 Assuming that this construction of the Act is correct, it would not follow that the plaintiffs' case must fail. Rather, the construction favoured in the joint reasons shifts the focus of the question for decision from a contest over the scope of the relevant "outcomes", to one over the meaning of the term "departmental expenditure". This is because, if it is accepted that a departmental item may only be expended on "departmental expenditure", two supplementary questions of construction arise. The first is, what meaning is to be given to the term "departmental expenditure"? The second is, does expenditure on advertising promoting the proposed changes to federal law fall within the term as so defined?

281 *A defective procedure*: Unsurprisingly, neither party to these proceedings made considered submissions on these issues. This is so because the basic approach to the Act put forward by the plaintiffs represented common ground. Although the interpretation now favoured by the joint reasons was briefly raised by members of the majority during argument[235], neither party was invited to provide supplementary submissions. Similarly, although it is true that the principal weight of the plaintiffs' case was placed on the proposition that the impugned expenditure did not fall within Outcome 2 (presumably because this was the justification suggested by the defendants), the plaintiffs also advanced the argument, in response to queries from the Bench in relation to the contrast between s 7(2) and s 8(2), that the phrase "departmental expenditure" must relate to one of the three relevant departmental outputs. During argument in chief[236], in response to a series of questions by Gleeson CJ[237], counsel for the plaintiffs, agreed that an appropriation for a departmental item could "move between" the three specified outcomes. He argued that "departmental expenditure" is not defined. In the context it meant expenditure on departmental items "on or for the purpose of departmental outputs"[238]. That interpretation of the Appropriation Act should be accepted. Indeed, it is accepted by Gleeson CJ who was presumably satisfied with the answers that his questions had elicited. Not so the joint reasons.

---

234 Joint reasons at [134].

235 [2005] HCATrans 650 at 6905. See also at 4254-4276, 5015, 5020. See reasons of McHugh J at [75]-[79].

236 cf joint reasons at [127].

237 [2005] HCATrans 633 at 2010-2030, esp at 2030.

238 [2005] HCATrans 633 at 2013-2017.

282 The absence of substantive argument, from the parties and the intervener, may explain why so little attention is given in the joint reasons to the meaning of the expression "departmental expenditure". The point was simply not examined before the Court in a way that subjected the propounded interpretation to the stringent analysis required by a case of this importance. Because the decision in the joint reasons turns on this construction of the Appropriation Act, I will make a number of observations about it. Necessarily, I must do so without the benefit of full submissions of the parties; scrutiny of the relevant Australian and other parliamentary procedures; and examination of any additional constitutional submissions by governmental parties that such an approach might have elicited, if it had been put on proper notice[239].

283 The phrase "departmental expenditure" is undefined in the Appropriation Act. That does not mean that it has no meaning, or that its meaning cannot be ascertained from the text, structure and context of the Act. "Expenditure" is defined in s 3 of the Appropriation Act to mean "payments for expenses, acquiring assets, making loans or paying liabilities". On one view, then, (and this appears to be the view accepted by the joint reasons) "departmental expenditure" is a virtually unconstrained concept. Its scope includes any money expended by the department on departmental expenses, assets, loans or liabilities. On this approach, the focus of the appropriation is the *entity* that performs the expenditure. It is not the *subject matter* of that expenditure. If money is expended by a department, it is "departmental expenditure" within the meaning of s 7 of the Appropriation Act. End of question.

284 *Inconsistency with statutory scheme*: Apart from the obvious circularity of this construction of the Appropriation Act, it presents many difficulties. First, it is not consistent with the scheme of the Appropriation Act itself, the accompanying budget papers and the explanatory material. As outlined earlier, these materials all indicate that the federal parliamentary appropriations system is designed to revolve around outcomes and outputs. No distinction is made in this regard between departmental items and administered expenses, whether in Schedule 1 of the Appropriation Act[240], the budget papers or the other materials. It would be an astonishing result if the Parliament, having gone to all the trouble of designing and implementing the complicated appropriations system which

---

239 cf *Chief Executive Officer of Customs v El Hajje* (2005) 79 ALJR 1289 at 1295 [28]; 218 ALR 457 at 464. Note that in that case a reference to a constitutional argument was criticised although it was confined to one that merely offered a context for interpretation. Here, the consideration embraced in the joint reasons is determinative of the outcome of the entire proceedings.

240 See the reasons of Gleeson CJ at [26], noting that Sched 1 identifies outcomes even where there are no relevant administered expenses.

operates by reference to departmental outcomes, then proceeded to appropriate a great part of federal revenue in a manner falling outside that system that it had so painstakingly adopted.

285 *Inconsistency with statutory provisions*: Secondly, such a broad and unrestricted interpretation of "departmental expenditure" is contrary to the meaning of that term as indicated by the Appropriation Act. A note accompanying s 7(2) of that Act provides that:

> "The acquisition of new departmental assets will usually be funded from an other (sic) departmental item (in another Appropriation Act)."

This note indicates that the meaning of "departmental expenditure" has (and is intended to have) distinct limits. If this were not the case, and the wide view of s 7 of the Act were accepted, as favoured in the joint reasons, the "acquisition of new departmental assets" would clearly fall within the scope of "departmental expenditure". It would therefore be authorised by an appropriation under s 7.

286 The note, with its reference to other items, would be redundant on this construction. By way of contrast, the note as expressed is consistent with an understanding of "departmental expenditure" which is informed not only by the relevant outcomes and outputs, but also by applicable parliamentary practice and the governing constitutional principle. Appropriation for capital expenditure on departmental assets is not usually considered to be expenditure for the "ordinary annual services of the Government"[241]. According to the Compact of 1965, such an appropriation should therefore be included in an Appropriation Bill No 2, which is subject to amendment by the Senate. Consistently with the note accompanying cl 7 of the Appropriation Bill (now s 7 of the Appropriation Act) it would therefore be expected that an appropriation for "departmental expenditure" under the Appropriation Act would not extend to the acquisition of important new departmental assets. Thus, contrary to the view embraced in the joint reasons, and consistently with the long-standing parliamentary practice revealed in the evidence, the note indicates that the phrase "departmental expenditure" is subject to expressed limits.

287 The joint reasons place great weight on the note accompanying the definition of "departmental item"[242]. However, as explained, the note indicates that a measure of flexibility has been incorporated into the appropriation system[243]. By s 7 of the Act, read with the definition of "departmental item", the

---

241 See the Compact of 1965, par 2(b) and (c), noted above in these reasons at [248].

242 Joint reasons at [129]-[132].

243 See above these reasons at [201].

Appropriation Act permits the transfer of sums between the identified outcomes for each departmental item. Significantly, the note only refers to the "amounts set out opposite outcomes". It does not refer to the outcomes themselves. Only the amounts are said to be "notional". Only the amounts are stated not to "restrict the scope of the expenditure authorised by the item". This suggests strongly that the "outcomes" are intended to be more than "notional". They are intended to "restrict the scope of the expenditure authorised by the item"[244].

288 With all respect, the note, therefore, provides no support for the contention in the joint reasons that the expressly specified outcomes are to be ignored in relation to departmental items. If that had been the Parliamentary purpose, it would have been easy enough, in the note accompanying the definition of "departmental item" or elsewhere, for the drafter to have indicated that neither the outcomes nor the related amounts restricted the scope of expenditure authorised by the item. Unsurprisingly, given the context, there is no such provision.

289 *Inconsistency with constitutional doctrine*: Thirdly, and most importantly, the interpretation of s 7 of the Appropriation Act accepted by the joint reasons in my view involves potential constitutional invalidity[245]. It posits an appropriation without a purpose sufficiently stated to satisfy the requirements of s 81 of the Constitution. In *Attorney-General (Vict) v The Commonwealth* Latham CJ, rejecting "appropriation in blank", stated that[246]:

> "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."

290 This settled constitutional doctrine was not challenged in these proceedings. It was accepted by both sides. An appropriation cannot therefore validly be made in such a way, only by reference to the person or entity to which the money is appropriated. A purported appropriation in such terms would be invalid for want of sufficiently identifying a "purpose". On this basis, if the term "departmental expenditure" is given an unrestricted meaning, the appropriation in s 7 amounts to an impermissible "appropriation in blank". Unless the term "departmental expenditure" is given more specific content, and unless its scope is limited by the specified outcomes (or by some other means), it is an appropriation by reference to the *repository* to which the money is appropriated, rather than an appropriation by reference to the *purpose* of the expenditure of that

---

244 See reasons of McHugh J at [86].

245 See reasons of McHugh J at [89].

246 (1945) 71 CLR 237 at 253. See above these reasons at [233].

entity. Such an interpretation must be rejected because it would impute to the Parliament an intention to infringe the Constitution. No such intention should be accepted because none was asserted by any party and all indications in text, practice and history are that the opposite was the parliamentary purpose.

291 *Meaning of "departmental expenditure"*: The Appropriation Act itself provides the tools required to give the term "departmental expenditure" (and hence the appropriation in s 7) the necessary constitutional purpose. Such tools are the outcomes and outputs identified in Schedule 1, and elaborated in the PBS.

292 It follows that "departmental expenditure" in the present context should be understood to mean expenditure by a department for the purposes of the outcomes specified in Schedule 1[247]. By virtue of s 4, such outcomes must be read in light of the information provided by the PBS. This interpretation avoids potential problems of constitutional invalidity. It gives support to parliamentary supervision of the Executive Government in financial matters (as mandated by the Constitution). It is consistent with the appropriations scheme established by the Parliament itself, as demonstrated by the Appropriation Act, budget papers and other explanatory material. It avoids treating such materials as an elaborate and immaterial charade. It attributes to the Parliament the purposes of good governance, financial transparency and accountability, repeatedly stated in federal laws and ministerial statements[248]. It follows that the impugned expenditure is not authorised by the relevant departmental item.

293 *An unreasonable outcome*: One final point should be noted in relation to the approach adopted in the joint reasons. It is undesirable that this Court should decide significant issues of statutory and constitutional law, such as those presented by the present proceedings, on a substantially unanalysed point of statutory construction. That point was only dealt with in passing, and then in response to isolated questions from the Court, with no notice so as to stimulate considered submissions. The issues presented by both of the parties in this case concerned matters important to Australia's system of parliamentary democracy. Such questions were properly argued before the Court[249]. The parties were well represented and they advanced considered arguments. It is the duty of this Court to grapple with the matter brought before it and to resolve that matter. True it is that the parties, including in cases involving the Constitution, cannot finally

---

247 This approach was accepted by the defendants: [2005] HCATrans 650 at 4292-4297.

248 Such as those referred to above, these reasons at [259].

249 Pursuant to the Constitution, ss 75(iii) and 75(v).

define the legal issues that the Court must decide[250]. However, if the Court is to embark on a different approach, it requires a sounder procedure than was followed in these proceedings.

294 This Court is the ultimate body reposed with the duty to interpret and uphold the Constitution. It has no higher responsibility or purpose. 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. It involves the Court in a departure from its own past unanimous authority[251] and from its clear constitutional duty in this case.

Justiciability and standing

295 *The issue of justiciability*: To arrive at the orders that I favour, I am obliged to respond to the remaining arguments that the defendants advanced to resist the claims of the plaintiffs to relief. They were substantive arguments. It is necessary for me to address them.

296 The defendants did not assert that the issue of the lawfulness of a suggested expenditure, outside an appropriation, was inherently non-justiciable. However, they pleaded that the plaintiffs did not have standing. To that extent, they argued, there was no constitutional matter before the Court engaging its jurisdiction and powers[252]. It was in that sense only that the defendants contended that the issues presented by the plaintiffs were non-justiciable.

297 In the *AAP Case*[253], Barwick CJ dealt with the justiciability of those proceedings in terms that I regard as correct. If an Appropriation Act is beyond the powers of the Parliament, like any other statute with such a flaw, it is invalid. The power of this Court so to declare is, in such a case, "beyond question". It is "an essential feature of the Australian Constitution that the Court, in the exercise of the judicial power of the Commonwealth, not only may declare acts of the

---

250 See eg *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144].

251 *Brown v West* (1990) 169 CLR 195.

252 They relied on *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372. See eg at 449 [204].

253 (1975) 134 CLR 338 at 364.

Parliament to be void but, when approached by a litigant with an appropriate interest in the statute or its operation, is under a duty to do so"[254].

298 It is true that an annual Appropriation Act has unique characteristics. It has been described as fiscal and not regulative in character[255] because it does not confer any legal rights or impose any duties on ordinary citizens. In some respects, an Appropriation Act therefore concerns matters internal to the workings of the Parliament. As such, a challenge to an Appropriation Act may raise difficulties of justiciability and standing according to the usual principles of judicial review[256]. However, as Professor Cheryl Saunders has observed, these characteristics are neither "so extreme nor so different from the norm as to isolate an Appropriation Act from the general body of statute law"[257]. Indeed, the annual Appropriation Act has an effective and crucial legal consequence: it authorises expenditure of the revenue of the Commonwealth that would otherwise be unconstitutional and hence unlawful[258].

299 There is no reason why an annual Appropriation Act, once enacted, should not be subject to judicial examination in the way that any other federal law may be, whether pursuant to a direct constitutional challenge or on a question of statutory construction (as in the present case). Given the essential role played by the annual Appropriation Acts in our system of government, there are strong reasons of principle and policy to support the proposition that an Appropriation Act, and the action of the Executive Government pursuant to such an Act, should be amenable to judicial supervision in the usual way. Any other conclusion would undermine a fundamental precept of our constitutional tradition that the Parliament controls the appropriation and expenditure of public monies[259]. To

---

254 (1975) 134 CLR 338 at 364. In the United States, in a number of cases the Supreme Court has found particular appropriations and expenditures beyond power: *United States v Butler* 297 US 1 at 74, 87 (1936): see *AAP Case* (1975) 134 CLR 338 at 359.

255 See eg *AAP Case* (1975) 134 CLR 338 at 386-387, 393.

256 See *Davis v The Commonwealth* (1988) 166 CLR 79 at 96.

257 Saunders, "Parliamentary Appropriation", in Saunders et al (eds), *Current Constitutional Problems in Australia*, (1982) 1 at 36.

258 *Brown v West* (1990) 169 CLR 195 at 208; Saunders, "Parliamentary Appropriation", in Saunders et al (eds), *Current Constitutional Problems in Australia*, (1982) 1 at 36.

259 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 505-506.

forbid judicial scrutiny at the suit of a person with a requisite interest would be to undermine a feature that lies at the heart of the Constitution[260].

300 In this case, constitutional invalidity is not, as such, in issue. But the meaning and effect of the Appropriation Act, as a law of the Commonwealth, are. The question of statutory construction so presented is justiciable. Defining the law that can be carried into effect (and, where relevant, pronouncing whether that law is valid or not) is part of the function of the judiciary essential to the federal form of government. Specifically, it is one of the duties of this Court under the Constitution[261]. I agree with the opinions of the majority of this Court in the *AAP Case* and with the opinion of the entire Court in *Brown v West* that no reason exists for placing Appropriation Acts in an exceptional position of "constitutional inviolability"[262] or of placing the meaning and effect of such laws outside of the scrutiny of this Court.

301 This Court also has the function and duty of pronouncing on the validity of the action of the Executive Government when it is challenged. In accordance with s 75(v) of the Constitution, it may decide the lawfulness of the acts and omissions of an officer of the Commonwealth and provide relief directed to such officer and to the Commonwealth as envisaged in that provision of the Constitution and in other federal law. In the *AAP Case*, Gibbs J suggested that the justification for review by the courts of the validity of acts of the Executive Government was conceptually stronger than in the case of review of the validity of legislation enacted by the Parliament[263]. However that may be, as it was developed, the challenge in these proceedings was not to the validity of the Appropriation Act. The plaintiffs upheld the Act. Indeed, they relied upon it. What was presented for decision was nothing more nor less than a determination of the meaning and effect of an Act. This is a standard task performed every day by this Court and other Australian courts.

302 Subject, therefore, to the disputed issue of standing, it follows that there is a matter before this Court, within the Constitution, apt for judicial resolution. It involves a controversy that is suitable for judicial determination and justiciable.

---

260 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31], 513 [103].

261 cf *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-278 cited by Gibbs J in the *AAP Case* (1975) 134 CLR 338 at 379.

262 *AAP Case* (1975) 134 CLR 338 at 380 per Gibbs J.

263 (1975) 134 CLR 338 at 380.

To the extent that the defendants questioned the justiciability of the plaintiffs' proceedings, their arguments should be rejected.

303 *Standing in federal causes*: The defendants strongly contested the standing of the plaintiffs, and each of them. Although Western Australia intervened, the Attorney-General for that State did not (as he might have done) issue a *fiat* to the plaintiffs, or either of them, to permit them to bring the proceedings by his authority. Nor did the Attorney-General elect to bring the proceedings in the name of the State. Had this been done, on the present authority of this Court[264], the challenge to the plaintiffs' standing would have disappeared.

304 It cannot be the case that serious questions concerning the meaning and operation of federal law in the Australian Commonwealth, as read in the light of the federal Constitution, can only be brought before the Judicature for resolution by the Commonwealth, by a State or Territory, by an Attorney-General or by a party with a financial or similar interest in the issue presented. That view of the standing of individuals to challenge federal laws and Executive acts takes too traditional and mercantile a view of the requirements of standing to be appropriate to a federal polity. It involves the unthinking importation into the resolution of federal constitutional and legal questions in Australia of judicial authorities on standing, originally devised in England for purposes quite different from those involved in deciding matters arising under the Australian Constitution and federal law[265]. For at least the past fifty years, this Court has repeatedly said that the principle of the rule of law underlies Australia's constitutional text and its operation[266]. Whilst the Commonwealth, the States, the Territories and (by tradition or statute) the Attorneys-General have standing to bring proceedings before this and other courts, concerning enforcement of the Constitution and challenges to federal Executive action, they are not alone in enjoying such rights. To hold this would be to undermine the commitment of the Constitution, and the Judicature which it creates, to upholding the rule of law for all persons, where the law is seriously challenged.

---

264 *Victoria v The Commonwealth* (1926) 38 CLR 399 at 406-407; *AAP Case* (1975) 134 CLR 338 at 365-366 per Barwick CJ, 383 per Gibbs J, 401-402 per Mason J; *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 588-589.

265 *AAP Case* (1975) 134 CLR 338 at 391, 424-425.

266 Since the *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

305 Sometimes, there will be no government willing to mount such a challenge. However, the Constitution is more than a congenial arrangement between governments. Its ultimate foundation rests on the assent of the citizens as electors of the Commonwealth. To them is reserved[267] the power of final concurrence in formal constitutional amendments[268]. With this in mind, there is a need to re-express the requirements of standing in constitutional and related litigation[269]. What has been said in other cases and other circumstances may not be equally applicable to proceedings brought by plaintiffs such as the present[270].

306 Seeking the relief of an injunction, as expressly provided by s 75(v) of the Constitution, involves an invocation of federal, indeed constitutional, jurisdiction. It would be a mistake to graft onto a claim for such relief, especially before this Court, all of the learning that was devised in respect of the provision of equitable relief in private litigation. Necessarily, in matters of public law, potentially there is an additional interest. This is the interest of the public generally to ensure the compliance of officers of the Commonwealth with the law, specifically the law of the Constitution and federal enactments that bind such officers.

307 It would be a serious misdescription to suggest that the only interests of the plaintiffs in these proceedings were "intellectual" or "emotional". Nor could it be said that the only interests of the plaintiffs are those of being members of the public, electors of the Commonwealth or taxpayers (assuming that such interests are not themselves sufficient for standing in proceedings of the present kind)[271].

---

267 Under the Constitution, s 128.

268 See eg *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70 per Deane and Toohey JJ.

269 It has been suggested that the relator procedure is not appropriate to the Australian judicial system because of the function that Attorneys-General play as Ministers in the Executive Government: see *AAP Case* (1975) 134 CLR 338 at 425 per Murphy J.

270 The unreality of relying on an Attorney-General to provide standing suggests the need for re-expression of the rules of standing in public law: Lindell at 26. See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 260-267 [33]-[48], 284-285 [107]-[109]; *Re McBain* (2002) 209 CLR 372 at 449-450 [206].

271 cf *Flast v Cohen* 392 US 80 (1968). See *AAP Case* (1975) 134 CLR 338 at 389; see also at 381.

308 *The parliamentarian's standing*: Take the second plaintiff, Ms Roxon, first. She is a member of the Federal Parliament, in the House of Representatives. She is therefore a person with a status repeatedly recognised by the Constitution[272]. As a Member of Parliament, she has a particular interest in ensuring obedience by the Executive Government to the requirements prescribed by the Constitution and by federal law[273]. In my view, this gives her a special interest in the subject matter of the present proceedings[274]. She is seeking to enforce a public right. She is claiming, in effect, that on the Executive Government's case and its actual or prospective drawing of funds, the law of appropriations has not been observed or may not be observed in the future unless this Court grants relief. She seeks confirmation that such law will now be observed and that any drawing of funds will only be made "under appropriation made by law"[275]. On any basis, this is a serious question apt for judicial decision. It is not raised by an intervener or someone with a vexatious or purely hypothetical interest in the resolution of the issue.

309 The second plaintiff therefore has a sufficient special interest to sustain the proceedings that she has brought. I can reach this conclusion without deciding wider questions about the entitlement of taxpayers or electors of the Commonwealth or others more generally to bring proceedings under s 75(v) of the Constitution in federal causes.

310 Similarly, it is unnecessary for me to consider the second plaintiff's alternative argument that she enjoyed the identical standing as Mr Brown in *Brown v West* as "Shadow Attorney-General", that is the Opposition representative on legal affairs. The defendants argued that in *Brown v West* it was not Mr Brown's status as a Parliamentarian or "Shadow Minister", as such, but his personal interest in the existence, or absence, of a supposed additional postal allowance, that afforded him standing in that case. The only reason Mr Brown enjoyed that purported entitlement was because he was a Member of Parliament. However that may be, the words of Gibbs J in the *AAP Case* remain

---

272 Constitution, ss 24, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 41.

273 cf *Cormack v Cope* (1974) 131 CLR 432 at 459.

274 See *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 511, 530-531, 547-548; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 37; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Bateman's Bay* (1998) 194 CLR 247; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403 at 436 [116] per Gummow J, 469 [274]-[275] of my own reasons.

275 Constitution, s 83.

as true today as when they were written: "[W]hatever may be the position in the United States, where there is a complete separation of the executive from the legislative power, I would, in Australia, think it somewhat visionary to suppose that the citizens of a State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible"[276]. The broader arguments of the second plaintiff may one day be upheld in a proceeding such as the present. For present purposes, in relation to the meaning and effect of a law on appropriations, it is sufficient to accept the second plaintiff's interest as a Member of the Parliament to whom the contested Appropriations Bill, the PBS and budget papers were presented for approval and enactment and who seeks to keep the Executive Government within the law. This was a special interest.

311 *Standing of the union official*: This conclusion disposes of the defendants' objections to standing and justiciability of these proceedings. If one of the plaintiffs has standing those questions, as presented, evaporate. However, I am not convinced that the first plaintiff, Mr Combet, lacked standing of his own to initiate the proceedings. Assimilating him (as the defendants accepted) to the ACTU, his interest in challenging the advertising campaign, funded from the public purse, was clearly related to the role that the ACTU was playing in the political and industrial debate concerning the proposed amendments to federal workplace relations laws. This was the subject of the advertising, the payment for which was in question.

312 The first plaintiff's interest in the proceedings is not ephemeral, purely intellectual or emotional. The first plaintiff, and the organisation he represents, have a real and substantial interest to curtail a purported reliance on an appropriation of public money for the Executive Government's advertising campaign. He, and the ACTU, have a direct interest to attempt to prevent the drawing of such money from the Treasury without lawful approval of a parliamentary appropriation for that purpose. Such an interest, whilst raising public law considerations, probably involves in this case the kind of mercantile and economic "special interests" often given weight in decisions on standing in private litigation. In the unequal battle between advertising privately funded by the ACTU and its supporters and advertising funded by the Executive Government from the Consolidated Revenue Fund, the winner is not hard to predict. As with the second plaintiff, it is unnecessary to consider whether the first plaintiff's status as a taxpayer, or an elector, would alone be sufficient to sustain his standing in the proceedings.

---

276 *AAP Case* (1975) 134 CLR 338 at 383; cf *Bateman's Bay* (1998) 194 CLR 247 at 262 [37]; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 528 [32]; *Truth About Motorways* (2000) 200 CLR 591 at 611-612 [45]-[50] per Gaudron J, 629 [100] and 637 [122] per Gummow J, 659-660 [176]-[180] of my own reasons.

313 McHugh J, relying on *British Medical Association v The Commonwealth*[277] and *The Real Estate Institute of NSW v Blair*[278], holds that the first plaintiff like the ACTU does not have standing. However, these cases were decided more than fifty years ago, before this Court elaborated its views on the requirements of standing in public interest litigation. The cited decisions have been overtaken by subsequent developments of legal doctrine[279]. Therefore, for the foregoing reasons and based on the current law (as stated in *Onus* and similar cases), it is likely that the ACTU, as represented by the first plaintiff, has standing in this matter.

314 *Conclusion: a decision is required*: It follows that the second plaintiff had the legal standing necessary to bring the proceedings. The first plaintiff may also have had such standing but it is not necessary for me to reach a final conclusion on that question. The second plaintiff's standing disposes of that issue. The defendants' contentions to the contrary, and the related suggestion that, in consequence, the issues presented by the plaintiffs were non-justiciable, fail.

The provision of relief and discretion

315 *Relief in earlier appropriation cases*: The defendants submitted that the plaintiffs had found it impossible, within the words of Jacobs J in the *AAP Case*, to "identify any expenditure which is impugned and to frame a prayer for relief in terms which will enjoin that expenditure and that only"[280].

316 In formulating the suggested relief which they asked this Court to provide, the plaintiffs were mindful of the difficulty of doing so mentioned not only in the *AAP Case* but also in the closing words of this Court's reasons in *Brown v West*[281]. There, the Court acknowledged that there were difficulties in the way of

---

277 (1949) 79 CLR 201 at 257.

278 (1946) 73 CLR 213 at 224, 226, 228.

279 See *Onus* (1981) 149 CLR 27 at 37; *Bateman's Bay* (1998) 194 CLR 247. In *Shop Distributive and Allied Employees Association* (1995) 183 CLR 552 at 557-558, this Court held that the union had a special interest sufficient to ground standing. It assumed that the interest of the union was the same as that of its members. See also *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 133-134 per Gummow J.

280 (1975) 134 CLR 338 at 411.

281 (1990) 169 CLR 195 at 212-213.

making the declarations that Mr Brown had sought. Nevertheless, by necessary inference from the orders that ensued, this Court did not treat the proceeding in *Brown v West* as doomed to fail on the ground that the provision of relief was futile and its formulation impossible. On the contrary, the Court allowed the demurrer to the amended defence which had claimed that the additional entitlements for postal allowances were supported by "the authority of the Executive and … the *Supply Act (No 1)* 1989-1990"[282]. Clearly, therefore, this Court contemplated that, in the trial of the action in that matter, freed from the demurrer, relief could be framed which would uphold the plaintiff's application for a judicial determination. As appears from the report, the only relief sought in *Brown v West* was a declaration that the Minister had no power to alter the existing postage allowance or to apply the public moneys of the Commonwealth in providing an increased allowance. The same relief was claimed against the Commonwealth[283]. The report in *Brown v West* does not indicate that the plaintiff had sought an injunction.

317 *Reformulation of relief*: In the course of argument in the present proceedings, the plaintiffs reformulated the relief that they sought. They claimed a declaration that:

> "The drawing of money from the Treasury of the Commonwealth for the purpose of making payments to meet expenses incurred by the first defendant under contracts and arrangements for and in relation to the advertisements referred to in sub-paragraph 11(a) and 11(b) of the special case is not authorised by the appropriation made in respect of the departmental item for the Department of Employment and Workplace Relations in Appropriation Act (No 1) 2005-2006 (Cth)".

Alternatively, or additionally, the plaintiffs sought a declaration that:

> "The drawing rights issued by a delegate of the third defendant on 23 August 2005 under s 27 of the *Financial Management and Accountability Act* 1997 (Cth) are of no effect in so far as they purport to authorise the debiting of an amount against the departmental item [so described] for the purpose of making payments of public money to meet expenses incurred by the first defendant under contracts and arrangements for and in relation to the advertisements referred to in sub-paragraphs 11(a) and 11(b) of the special case".

318 These declarations identify, with the particularity demanded by Jacobs J in the *AAP Case*, the appropriation to which they are successively addressed.

---

282 (1990) 169 CLR 195 at 200.

283 (1990) 169 CLR 195 at 200.

319 The making of a bare declaration would have defects, even in proceedings of this kind[284]. However, there is sufficient evidence concerning the incurring of past obligations for expenditure of substantial public funds on the advertising campaign to warrant the issue of an injunction under s 75(v) of the Constitution. Such an injunction should be addressed to the third defendant restraining him, by himself or his delegates, from:

> "Issuing any further drawing right under section 27 of the *Financial Management and Accountability Act* 1997 (Cth) purporting to authorise the payment of public money for the purpose of any advertisement promoting proposed amendments to the workplace relations laws of the Commonwealth in the form, or to the effect, of the advertisements referred to in sub-paragraphs 11(a) and 11(b) of the special case, on the authority of the departmental item for the Department of Employment and Workplace Relations in *Appropriation Act* (No 1) 2005-2006 (Cth)".

320 So formulated, the declarations and injunction would give effect to the determination of serious issues of principle, drawing upon constitutional provisions that have been litigated in these proceedings. Where such questions are disclosed and resolved in favour of a party that has standing to bring them, it is essential that this Court, maintaining its constitutional function and upholding the public law of the Commonwealth, should fashion remedies appropriate to meet the case.

321 I agree with the remark of Gibbs J in the *AAP Case*, that earlier statements on the issue of standing "sometimes made under the influence of principles of private law" are "not entirely applicable to constitutional cases"[285]. The same comment must be made in respect of the fashioning of remedies. Where parties with a requisite interest demonstrate defects in compliance with federal statute law, as that law is understood in the light of the Constitution, it behoves this Court to say so and to afford relief that gives practical effect to the Court's conclusions[286]. To treat great disputes involving the meaning of the Constitution and the public law of the Commonwealth in the same way as *inter partes* private litigation involves a most serious error. It amounts to an abdication of this Court's central constitutional function. The writs referred to in the Constitution are not equitable remedies. Nor are they prerogative privileges. They are

---

284 But see *Ainsworth v Criminal Justice Commission* (1990) 175 CLR 564 at 581-582, 595-597.

285 (1975) 134 CLR 338 at 383.

286 cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 367-371 [80]-[89]; cf at 356-360 [48]-[58].

constitutional writs to uphold the public law of this nation. I will not be guilty of the error of narrowness or of so inadequate a conception of this Court's remedial purpose and powers.

322 *Discretion and relief*: Having reached the foregoing conclusions, it is enough to say that there are no discretionary reasons for refusing the identified relief to the plaintiffs. There is every reason for affording such relief. It resolves authoritatively the arguments which the parties and intervener have addressed to the Court in the matter. Its provision upholds the applicable Appropriation Act according to its terms. It conforms to the great design of the Constitution. It respects long-standing constitutional history. It defends the role of the Parliament, and specifically the Senate. It reinforces transparency, honesty and accountability in the expenditure of the money of the Commonwealth, raised from the people. It is conducive to good governance, which is a distinctive policy objective of the Commonwealth and its laws that we proclaim to other countries[287]. If such public advertising campaigns, as disclosed in these proceedings, are to be permitted in the future, they must, in my view, be expressly approved in an appropriation particularly authorised for that purpose by the representatives in the Parliament who will thereby be rendered accountable to the electors from whom, principally, the taxes are raised, just as the Constitution envisages.

Orders

323 Although the Court majority has rejected the plaintiffs' proceedings in terms of the orders announced on 29 September 2005, it follows from these reasons that I disagree. In my opinion, the questions raised in the special case for the opinion of the Full Court should have been answered as proposed by McHugh J.

---

287 cf *Ruhani v Director of Police* (2005) 219 ALR 199 at 246 [202] fn 190.