

SECTION II:

CONTROLLING THE PURSE STRINGS

Accounting and Accountability

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Abstract

In 2006, the High Court of Australia handed down its decision in *Combet v The Commonwealth*, a case which involved a challenge to a major government advertising campaign on the government's proposed industrial relations laws on the basis that the money for the campaign had not been appropriated for that purpose. Using the judgment as a starting point, the paper identifies some of the challenges to effective Commonwealth parliamentary scrutiny of expenditure that have become apparent over the past decade or so. Ironically, one challenge to transparency has been the adoption of accrual accounting in the late 1990s. Inquiries by particular committees and reports by the Auditor-General offer some hope that members of parliament may be sufficiently informed to follow the money trail but significant barriers to effective scrutiny remain.

Preamble

Fifteen years ago, not long after I had joined the Senate Department as Director of Research, I was tasked by the then Deputy Clerk to write a paper for a senator which I called Appropriations by Parliament: legislative and administrative controls on expenditure by the Executive. It was a lengthy paper, full of learned references, but its main purpose was to examine the alleged diminution of Parliament's control over expenditure. The introduction of Program Management and Budgeting (PMB) and the implementation of the Financial Management Improvement Plan (FMIP) from 1985 as part of wider reforms to the Australian public service had been trumpeted by the managerialists as improving the quality and efficiency of public sector administration. The nature and quality of information available to Parliament would dramatically improve. In turn, this would increase the ability of the Senate, in

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particular, to hold the executive to account by enhancing its scrutiny of expenditure. Was this, in fact, the case?

The new system under FMIP was loosely described as the running costs system and provided public sector managers with greater flexibility to move funds between salaries and administrative expenses, to manage for results, to employ risk management strategies, and to appreciate the value of what their departments did by charging each other with taxpayers' money for any function that could be re-badged as a service. Managers were given incentives to improve the efficiency of their agencies' operations. If they did well, they were rewarded with a 1.25 per cent cut in their appropriations for the following year. If they did badly, they were punished with a 1.25 per cent cut in their appropriations for the following year. This incentive was called the efficiency dividend (sic).

The great catch cry in the second half of the 1980s was 'Let the managers manage!' Responsibility was devolved and the old Public Service Board with its centralised control of staff numbers and classifications was abolished. But hovering in the wings remained Parliament's great ally, the Auditor-General, whose office had been established by the fourth enactment of the new Parliament of the Commonwealth of Australia in 1901 (beaten only by two Supply Acts and the Acts Interpretation Act). If public sector managers were to be allowed to become just a little bit like their private sector counterparts, they would be required to adopt some comparable checks and balances. The Audit Amendment Act 1988 created a statutory responsibility for departmental heads to prepare annual financial statements for inclusion in departmental annual reports. These statements were required to contain detailed information and to be audited, and annual reports were required to be tabled in Parliament.

At that time, 70 per cent of government outlays were not included in the annual appropriation acts but scattered through a large number of enactments in the form of special (or standing) appropriations. A contingency fund was available for expenditure outside the appropriation process, called, in our case, the Advance to the Minister for Finance. The AMF allowed the finance minister to authorise expenditure, ahead of parliamentary approval, for urgent and unforeseen purposes. On the other side of the balance sheet, various parliamentary committees, notably the Joint Committee of Public Accounts and the Senate Standing Committee on Finance and Government Operations and its successor committees on Finance and Public Administration had done significant work in pursuit of accountability. The House Standing Committee on Finance and Public Administration had also contributed, producing a highly-regarded review of FMIP, called *Not Dollars Alone*.

There is no doubt that the continuing pressure applied by unanimous, cross-party reports from these committees improved the quality of performance information provided to Parliament. In particular, the requirement for explanatory notes (called Program Performance Statements) prepared for Senate estimates committees to contain breakdowns of expenditure — often down to the sub-program level —

marked a high point in the transparency of performance reporting, though not in the readability of such publications. Notably, estimates committees were also able to follow the source of the money, because the Program Performance Statements were required to reconcile expenditure against appropriations from all sources: not only the 30 per cent appropriated in the annual appropriation acts but also the other 70 per cent coming from special appropriations. Detailed information about expenditure from the Advance to the Minister for Finance was required to be published for each month and tabled in Parliament at the earliest opportunity. It was also available for scrutiny by the estimates committees.

That old paper began with a quote from section 83 of the Australian Constitution which is our version of the great constitutional principle that moneys of the Crown cannot be spent unless authorised by an Act of Parliament. In asking what constraints there might be on expenditure by the Executive of such moneys, once appropriated, I searched for what our High Court might have said on the subject. The AAP case in 1975 [*Victoria v. Commonwealth* (1975) 134 CLR 338] was authority for the principle that the validity of an appropriation act would not ordinarily be susceptible to an effective legal challenge. Such an act was a rare bird said Mason J., neither creating rights nor imposing duties [at 393]. According to Jacobs J., such an act was no more than an earmarking of the money. When moneys are voted to the Queen by Parliament for the purposes declared by Parliament, it falls within the prerogative to determine whether or not those moneys will be expended for that purpose and how. [at 404–405]

So what had happened to parliamentary control? This is what a minister had said to a parliamentary seminar on government expenditure and accountability held by the Public Accounts Committee in May 1980:

Despite this over-riding power of Parliament I am sure all members of Parliament have on at least one occasion asked themselves whether this power is more imaginary than real and whether the power given is exercisable either before the event or after the event.

It is true that section 83 of the Constitution requires that no money shall be drawn from the Commonwealth Treasury except under appropriations made by law. This should not be taken to mean that Parliament controls expenditure. The word control means power of directing or command and in the context of expenditure it should be used in the sense of the ability to determine the size and composition of public expenditure. This the Parliament does not do — the government party is in a majority which has a vested interest in supporting the proposals of the Executive. It is thus difficult to see how the House can control a situation when its own majority has to support the Executive. As in the fable of the Emperor's new clothes, parliamentary control of expenditure is a myth that all concerned have every reason to foster.

This was said in 1980 when the government of the day had a majority of seats in both houses. In 1991 when I wrote that paper: no party had a majority of seats in

the Senate; since the increase in the size of the Senate in 1984 no government was considered likely to win a Senate majority; and Senate committees had developed into respected and often surprisingly independent inquisitors over the twenty-odd years since their creation.

The very mention of Senate estimates committees made experienced public servants tremble. Given the Realpolitik of the situation in the Senate in 1991, compared with 1980, parliamentary control could hardly be dismissed as a myth. Could it?

The Combet Decision

There have been very few High Court cases on the appropriation power. The AAP case in 1975 appeared to throw cold water over the prospect of legal challenges to the validity of appropriation acts but the view that an appropriation nonetheless restricted expenditure to a particular purpose left some potential role for the courts in the future in safeguarding the rights of Parliament against executive expediency. In this context, the judgment in the Combet case was eagerly awaited (*Combet v Commonwealth* [2005] HCA 61). Greg Combet was and is the President of the Australian Council of Trade Unions. He and the Opposition Shadow Attorney-General, Nicola Roxon MP, challenged the validity of a multi-million dollar expenditure on a government advertising campaign on the government's proposed new industrial relations or Work Choices laws.

It was argued that the M\$55 campaign expenditure had not been authorised by Appropriation Act (No. 1) 2005–2006. In the end, the case was not one of constitutional principle but a matter of statutory interpretation, decided on what the Appropriation Act actually said.

In the late 1990s, the legislative framework for public sector financial governance was rewritten. The Audit Act 1901 was replaced by the Financial Management and Accountability Act 1997, the Auditor-General Act 1997 and the Commonwealth Authorities and Companies Act 1997. Program budgeting and the running costs system were replaced from 1999 by accrual-based budgeting and adherence to Australian Accounting Standards. Program Performance Statements were replaced by Portfolio Budget Statements and the new language of outcomes and outputs replaced the relatively transparent, activity-based program and sub-program model for explaining what agencies did, how they were structured and staffed to achieve what they were funded to do and how they measured performance against a cash bottom line. The so-called efficiency dividend, however, remained firmly in place.

An outcome is a high-level, aspirational statement of what an agency exists for. For example, the Senate Department's outcome is relatively specific. The outcome of our taxpayer-funded efforts is the effective provision of services to support the functioning of the Senate as a House of the Commonwealth Parliament. To achieve this outcome, we deliver a variety of outputs, including advice, secretariat services,

legislation processing, parliamentary education for schools, policy support and funding for interparliamentary relations, legislative drafting and procedural support, and ceremonial support services. We are required to budget for and report separately those expenses that we decide to incur — called departmental items — and those that we manage but have no discretion over because they are mandated by a policy or legislative direction. The latter are called administered items. They include, in the Senate Department's case, the payment of salaries to senators from the special appropriation under the Remuneration and Allowances Act 1990 at the rate determined from time to time by the Remuneration Tribunal.

One of the reasons that the majority judgment in *Combet* is so difficult to read is that it is laden with accrual accounting jargon, not helped by the really quite ordinary drafting of the Appropriation Act. Two subsections that were critical to the interpretation favoured by the majority are reproduced below:

7(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.

8(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.

The funds for the advertising campaign came from the Department of Employment and Workplace Relations whose appropriations, divided into departmental outputs and administered expenses, were allocated between three outcomes described thus: Efficient and effective labour market assistance; Higher productivity, higher pay workplaces; and Increased workforce participation.

The main issue argued in the case was whether the advertising campaign could legitimately be funded by amounts appropriated to Outcome 2. Was the ad campaign sufficiently connected to the achievement of Higher productivity, higher pay workplaces to be funded under outcome 2? The gist of the majority judgment was that this question did not matter. The ad campaign was discretionary expenditure. This made it, in the terms of the accrual budgeting framework, a departmental item, as opposed to a non-discretionary administered item. According to subsection 7(2), quoted above, an amount appropriated for a departmental item may be applied only to departmental expenditure. Unlike administered items covered by subsection 8(2), there was no statutory requirement for departmental items to be applied to expenditure on activities for the purpose of achieving a particular outcome. Expenditure on departmental outputs need not target any of the specified outcomes.

In short, there was nothing wrong with the appropriation or its expenditure on an ad campaign. The Parliament could not rely on assistance from the High Court to assert its rights over the Executive which had almost unlimited freedom to spend

money for virtually any purpose. In any event, even if the High Court had declared the expenditure unlawful because it was not in accordance with the Appropriation Act there is no effective remedy. The contracts had been entered into, the services provided and the Commonwealth was liable to pay for them.

Following the Money Trail

By what means, then, can parliaments keep up the pressure for transparency in the information provided by the Executive to account for its expenditure of funds appropriated by the Parliament? The answers will come as no surprise because they are the same means that have been employed by most of our parliaments since their inception. They include an independent Auditor-General, reporting directly to the Parliament, and parliamentary committees that diligently perform the function of scrutinising the performance of departments and agencies and their ministers.

The media also plays an important role in bringing matters of concern to public attention. The media will always home in on the high profile cases that are susceptible to populist sloganeering involving emotive terms like rort, scandal or blunder. While these cases may result in equally high profile remedial action in the short term, the longer term, incremental gains are often more likely to be found away from the glare of publicity in the 50 or so performance audit reports presented each year by the Auditor-General, in the meticulous scrutiny of financial statements by that same office, and in the routine scrutiny undertaken by parliamentary committees.

Auditor-General's reports with dry titles often contain findings and analysis of great significance to the pursuit of accountability. Agency Management of Special Accounts (Audit Report No. 24 2003–2004), for example, revealed widespread non-reporting of the existence of such accounts, significant non-compliance with legislative requirements and poor management practices. Management of Net Appropriation Agreements (Audit Report No. 28 2005–2006) revealed similar shortcomings, with many agencies having agreements with the Department of Finance that had either expired or had been invalidly entered into. Roads to Recovery (Audit Report No. 31 2005–2006), apart from revealing many administrative shortcomings, showed that the outcomes system of appropriations was effectively meaningless from the point of view of parliamentary control. The department administering the program had previously charged expenditure on the program to one of its two outcomes but decided that it could just as well be attributed to the other one. Financial Management of Special Appropriations (Audit Report No. 15 2004–2005) confirmed that the proportion of government outlays falling outside the annual appropriations had risen to 80 per cent and that the management and reporting of these appropriations was not consistent across Commonwealth agencies. This stocktake of special appropriations found that many were no longer required but had not been repealed, some were being drawn on by

more than one agency for the same purpose, or one agency had access to more than one appropriation for the same purpose.

The proliferation of special (or standing) appropriations has long been of concern in parliamentary circles and one outcome of the Auditor-General's report was a decision by an all party Senate committee, the Scrutiny of Bills Committee, to add cumulative lists of bills introduced with standing appropriation clauses to its regular monitoring and reporting commitments. For more information about the committee's approach to this issue you will have to read its Fourteenth Report of 2005. It is the kind of low-key, incremental work by a committee that will never attract the interest of the popular press, although in terms of enhancing transparency, it is just as significant as those that do.

Senate estimates hearings are another effective means of applying patient scrutiny, and have yielded much information of great public interest over many years. The three rounds of hearings held each year also serve as a vigorous test of the explanatory documentation each portfolio is required to compile in order to explain where the money will be spent. Annual reports are then supposed to report on outcomes of that expenditure. Estimates hearings have led to further, more detailed inquiries on specific subjects on many occasions, including the duties of Australian personnel in Iraq, an inquiry by the Foreign Affairs, Defence and Trade References Committee in 2005 arising from evidence given at estimates hearings about the infamous Abu Ghraib prison. They have also led to instructions from the Senate for a committee to reconvene its estimates hearings to take further evidence on specified matters, for example, allegations that certain radiologists received advance notice from the Health Minister of a 1998 Budget decision to extend Medicare funding for Magnetic Resonance Imaging machines and rushed out to buy them ahead of the qualifying deadline.

While these special references depend on majority decisions by the Senate, it would be a mistake to assume that committees are disempowered when governments have the numbers. Committees like Scrutiny of Bills have standing terms of reference, a history of working by consensus and a good record of ministers responding to their concerns. Estimates hearings have effectively replaced long committee of the whole stages on the appropriation bills. Even ministers have been known to acknowledge their value, especially when they hear testimony from departmental witnesses on subjects about which they have not been briefed by those same departments.

A final example is an inquiry that is currently underway into the transparency and accountability of Commonwealth public funding and expenditure. The Senate Finance and Public Administration Committee sought the reference from the Senate in June and is due to report in October. These kinds of inquiry were relatively common during the years that FMIP and program budgeting were in vogue. They usually began in response to complaints from senators about how difficult the explanatory documentation was to follow and how hard it was to relate it to the appropriation bills themselves. Between 1997 and 2000, the committee turned its

attention to the new accrual system and presented three reports on the format of Portfolio Budget Statements. The current inquiry takes the committee into broader territory. Although the number of submissions is not large, they are of great interest to any student of accountability, as is the transcript of evidence of a public hearing held on 8 September. These are all available on the committee's website. As one submission (from a former Department of Finance officer closely involved in FMIP) commented, accrual budgeting and accounting does provide better trend information than its predecessor and by including assets, liabilities and depreciation, it gives a more professional look to public sector accounts. If only it could incorporate some of its predecessor's sensible program-based activity reporting, much greater transparency would be achieved.

Conclusion

Accounting and accountability are far from synonymous. Accountability for expenditure depends on information of all types being available. Performance information that comes from constituent feedback via a weblog or by thousands of signatures on a petition drawing attention to a poorly administered government service is just as important as the technical information in financial statements, portfolio budget statements or annual reports of government agencies. An accounting system that facilitates easy connection between what the service deliverers claim to be doing and what the service recipients think, is a positive move. But accountability is not limited to the consumer model. Constitutional accountability is of fundamental importance and an accounting system that relies on fuzzy and vague descriptions of outcomes and the elevation of constitutionally irrelevant concepts like departmental and administered expenditure has the potential to undermine decades of negotiation and settlement between the executive and the Senate about the scope of the constitutional limitations on the Senate's legislative powers. There is a lot more on this aspect of accountability in the evidence given to the current inquiry by the Senate Finance and Public Administration Committee, which I commend for your attention.

Eternal vigilance by the Auditor-General and by parliamentary committees from their own unique perspectives is required to ensure that accounting remains the servant of accountability, not its substitute. ▲

End Notes

Extracts in this paper have been in part drawn from the Appropriation Act (No. 1) 2005–2006 (accrual budgeting), and the Appropriation Act (No. 1) 1993–94 (program budgeting).

Useful web addresses

Senate Finance and Public Administration Committee, Current inquiry on the transparency and accountability of Commonwealth public funding and expenditure.

Terms of reference, submissions and transcripts of evidence may be found at:

http://www.aph.gov.au/Senate/committee/fapa_ctte/funding_expenditure_06/index.htm

Senate Scrutiny of Bills Committee — Fourteenth Report of 2005

<http://www.aph.gov.au/Senate/committee/scrutiny/bills/2005/index.htm>

Senate Finance and Public Administration References Committee

The Format of the Portfolio Budget Statements (second and third reports):

http://www.aph.gov.au/Senate/committee/fapa_ctte/completed_inquiries/1999-02.htm

The Format of the Portfolio Budget Statements (first report):

http://www.aph.gov.au/Senate/committee/fapa_ctte/completed_inquiries/1996-99.htm

Other reports from Senate Committees on accounting and accountability issues

See under subject heading Public Administration, pp. 366–77 of the following publication: <http://www.aph.gov.au/Senate/committee/register/report/index.htm>

Auditor-General's reports <http://www.anao.gov.au/WebSite.nsf/Pub>