STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION
Legislation Committee

Inquiry into the Government Advertising (Accountability) Bill 2011

Submission by Dr Graeme Orr, Law School, University of Queensland

General

In general I support the motivation behind this Bill. In a Senate Lecture in 2005 I argued against the political inequality that flows from an uncapped system of government advertising.[1] The Labor government's adoption of guidelines and some level of independent scrutiny of large campaigns can - and has - gone some way to ensuring the content or pitch of individual campaigns is not unduly partisan. Yet such guidelines and scrutiny cannot address deeper problems with the size and selectivity of campaigns from a whole of government perspective.

The direct concern of this Bill is with the problem of unlimited government advertising of contentious policy contained in legislation yet to appear or be debated – ie policy not yet considered by Parliament. Obvious examples are the sizeable uses of taxpayer funds on the GST and WorkChoices campaigns by the Howard Government and the mining tax and climate tax campaigns by the Rudd-Gillard Governments. The GST and mining tax campaigns, having been initiated in election years on policies that were then inchoate, were particularly egregious instances.

In the *WorkChoices Advertising Case*,[2] both Justices McHugh and Kirby would have required a clear and specific appropriation for such campaigns. Justice Kirby particularly recognised that such campaigns can offend both Parliament's general role as the ultimate legislator, and the need for comity between the House of Representatives and the Senate, reflected in the Senate Compact of 1965.[3] Both he and Justice McHugh saw the initial WorkChoices advertising as pressuring parliament,[4] and Justice McHugh stressed parliament's great, historical role in regulating appropriations.[5] Even Chief Justice Gleeson, the only member of the High Court majority to directly address the practice of pre-legislative policy advertising, accepted that it was up to Parliament whether it wished to permit or constrain such advertising.

The counter-argument is that if governments do the right thing and announce policy proposals early with a view to wide consultation, it is unfair for them to be nakedly exposed to advertising retaliation by deep-pocket interest groups, such as unions, miners, tobacco companies, etc. Such 'third party' campaigns are increasingly a phenomenon of the permanent campaign cycle, although history reveals other examples, notably doctors and insurers against Whitlam Government policies for legislative reform. As an alternative to wholesale restriction of government campaigns in such circumstances, I have suggested a referendum-style model, allowing a 'pro'/ 'con' campaign balanced according to parliamentary will.[6] Whilst different, that proposal shares one aspect with the current Bill: institutionalising a straw-vote resolution of Parliament about whether the campaign should proceed ahead of the legislation.

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[1] G Orr, 'Government Advertising and Political Equality', Senate Occasional Lecture, 11/11/2005, published in (2006) 46 *Papers on Parliament*: http://www.aph.gov.au/senate/pubs/occa_lect/transcripts/111105.pdf See also G Orr, *The Law of Politics* (Federation Press, 2010) at 251-254.
[2] *Combet v Commonwealth* [2005] HCA 61.
[3] *Combet v Commonwealth*, ibid, at paras 93, 158, 237-252, 261.
[4] See oral argument in *Combet v Commonwealth* at [2005] HCA Trans 633 (29 August 2005) lines 3550-3578.
[5] *Combet v Commonwealth*, above n 2, at paras 44-48.
[6] Orr, above n 1 (see final two pages of the lecture).

Specifics of this Bill

It is a welcome thing for Parliament to adopt principle-based legislation to underpin and guide government advertising, rather than leaving the matter purely to executive discretion and internal policies.

The concern I have with this 2011 Accountability Bill is with its breadth.

It is not neatly targeted to the problem, which is the unlimited capacity to mount large scale campaigns to sell contentious *legislative* policy prior to parliamentary consideration.

I am not an expert in governmental administration. But there must be a myriad of situations where governments adopt new or modified policies where parliament is properly not involved, either because the power is a prerogative power or because the government is acting within an existing discretion. For instance, in immigration matters a policy might be adopted that country X is no longer so troubled as to be a source of refugee claims. That kind of policy obviously needs to be communicated, possibly by advertising to the communities concerned. The recent ban – and lifting of the ban – on live animal exports to Indonesia is another example where an important policy decision did not require legislation but did require communication. The approval or rejection of drugs for the pharmaceutical benefits scheme might be a third example.

On its face, the Bill would require either the Parliament or the Opposition leader to approve any spending on such communication. The Bill could be reworded to define 'advertising' and then only cover 'campaigns' over a certain level of expenditure,[7] so as not to trouble a busy Parliament or Opposition with relatively small matters, but that would only be a partial response.

The Bill as currently worded sets up a dichotomy. It distinguishes 'emergency' matters from ordinary policy matters. The Opposition leader can waive through 'emergency' campaigns, or face opprobrium. (This approach seems borrowed from the practice of the caretaker convention, although nothing in that convention requires such a strict definition of 'emergency' excluding the kind of routine examples of policy choices cited above). The alternative mechanism in the Bill is to have both houses of Parliament resolve to approve the expenditure in the campaign. But again, the Bill mistakenly assumes a paradigm of a subject-to-contentious-legislation policy decision, rather than a routine policy decision.

Recommendations

The way to address these concerns would be *to limit the bill's effect to the advertising of proposals which are dependent on changes in legislative policy or which will require substantive legislation*. ('Legislation' here could probably be limited to Acts of federal Parliament, and not cover mere ministerial regulation). I am not a legislative drafter, so I cannot offer suggestions of how to define that category without being over-inclusive: some new policies may require merely procedural or consequential legislative amendments. *Including a minimum threshold amount before the Bill's restrictions are triggered may go some way to alleviating that issue*.

Graeme Orr
Associate Professor
University of Queensland
BRISBANE QLD 4072

[7] Compare *Government Agencies (Campaign Advertising) Act 2009* (ACT) s 9 for the first legislative definition of government 'campaign' advertising.