

Senate Standing Committee on Finance and Public Administration

Inquiry into Preventing the Misuse of Government Advertising Bill 2010

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1. Acknowledgment

I thank the Committee Secretary for the invitation to make this submission. Due to the extremely truncated timeframe (two working days for submissions, barely two further days for the report) this submission will necessarily be short.

2. Credentials

I have spent over a decade researching and commenting on the law of politics and recently completed *The Law of Politics: Elections, Parties and Money* (Federation Press, 2010, forthcoming).

My views on government advertising are laid out in:

- a Senate Lecture
http://www.aph.gov.au/senate/pubs/occa_lect/transcripts/111105.pdf
- a chapter on 'Government Communication and the Law' in Sally Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007).

3. General Principles

I welcome the concept of legislating for government advertising. The ACT was recently the first Australian jurisdiction to do so. As with other areas where incumbents have abused public resources at the expense of political equality (such as MPs' communications allowances), it is advisable to enact principled legislation to guide and restrain executive discretion. This Bill, in essence, will give binding statutory force to the administrative regime which the Rudd Government applied until early 2010.

The problem of government advertising is a relatively contemporary one, charting the rise of the PR state. The essentially publicly spirited nature of government information has come to be overshadowed by routine instances of large-scale advocacy campaigns, promoting either controversial policies or soft-soaping popular policies or (especially at state level, achievements). To be fair to governments, they have to compete for attention in a crowded, consumption oriented media market.

As I have argued elsewhere, it is the unlimited capacity (ie size) of campaigns and selectivity which creates the greatest obstacles in this area. A bill like this only indirectly addresses these problems, to the extent that the Auditor-General may unfavourably comment on the need for a campaign or the estimated cost and choice of media.

4. Objects of Bill and Authorisation Tags

Object 3(a) speaks of avoiding ‘electoral matter’, although this term is never defined. (The guidelines speak of promoting goodwill towards a party). In the *Commonwealth Electoral Act*, ‘electoral matter’ means any matter ‘likely to affect voting’. It seems to have been broadly interpreted in practice – eg the AEC’s advice that billboards outside schools relating to school building funded by a stimulus package were ‘electoral matter’ because the stimulus package was a political topic. Governments, far from objecting to such rulings, routinely tag all manner of ads with ‘Australian Government, Canberra’, including things like health promotions that are nonpartisan and unconnected with political debates. They do this not for accountability (there is no legal entity called the ‘Australian Government’) but because the term is understood to refer to a political grouping, the Prime Minister and his partisan executive. As I have argued elsewhere, legislation should insist that the agency, department or formal title of the responsible minister, should be used wherever possible as an accountability tag at the end of all campaign advertising.

5. Auditor Review and Development

Whilst it may be valuable to have the Auditor-General involved so early in the life of a potential campaign, that role is fairly limited. It is only when an advertising agency prepares draft advertising that the informational vs advocacy nature of the campaign can be fully assessed. Under Senator Ludwig’s recent reforms, this vetting role is undertaken by a panel of three retired public servants. It is not clear if this Bill is meant to augment that panel: the Guidelines only refer to the Auditor-General’s report on a proposed campaign (guideline 2). It would be wise, in any principles-based legislation, to ensure that some independent vetting mechanism is required during the development of large campaigns.

6. Transparency

The Bill proper provides for presentation of agency statements and Auditor reports to Parliament. This may alert the non-government parties, but is not exactly freedom of information. The Guidelines only provide for the agency to publish its formal certification on its own website (guideline 8). In the interests of transparency, the Guidelines should require all certificates, Auditor-General reports and final expenditure figures, for each campaign over \$250 000 that is certified to proceed, to be published on a dedicated government advertising section of the Finance or Special Minister of State’s departmental website.

7. Drafting Infelicities

The Bill seems hastily drafted. For example, para 11 of the Schedule begins with a verbless sentence. Clause 5(2) imposes an obligation on the Minister to have ‘given’ statements to the Auditor-General, when the obligation in clause 5(3) is imposed on the CEO of the relevant agency. (Perhaps clause 5(2) should be reworded to impose an obligation on the Minister to ensure that clause 5(3) has been satisfied).

8. Campaigns on Policy – Prior to Parliamentary Consideration

The biggest controversies in this area have involved large-scale campaigns promoting policy, where the policy still requires parliamentary approval via legislation: eg, the first GST and WorkChoices campaigns, more recently the Mining Tax and Health Reforms. The

sensitivities are obvious. As Justices Kirby and McHugh pointed out in the WorkChoices Advertising case (*Combet v Commonwealth*) such advertising may affront the Parliament, particularly the Senate-House compact. Such campaigns by definition become advocacy campaigns: there are after all no legal obligations, rights or mechanisms yet in place to explain. Such campaigns may be completely wasteful if the policy changes or is rejected by Parliament.

I note this Bill maintains executive freedom to mount such campaigns. Presumably it does so on the basis that government policy in complex areas may need to be explained by advertising, the better to generate informed debate. The other rationale sometimes given by executive governments is to counter 'misinformation' in rival campaigns (eg by the ACTU and mining sector). But I note the reaction of civil and corporate society to policies and bills is hardly a new thing; the Chifley government did not reach for taxpayer funded advertising to respond to the banks in 1947-8.

If we really believe such campaigns are a necessary part of an executive's armoury, there are two options:

1. To cap expenditure on each and every such campaign.
2. To borrow the referendum model, in which pro and con campaigns would be run.

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