



Submission of the Accountability Round Table

to the **Senate Finance and Public Administration Legislation Committee**

Inquiry into the Government Advertising (Accountability) Bill 2011

Introduction

The Accountability Round Table (ART) is a non-partisan group of citizens with diverse backgrounds (academics, lawyers, politicians, journalists, authors) who are gravely concerned with the current erosion of honesty and integrity of our democratic parliamentary and governmental process. The Accountability Round Table is dedicated, in particular, to the resurrection and enlivening of the principle of ministerial accountability.

In relation to the Government Advertising (Accountability) Bill 2011, ART supports the basic principle that government public information advertising should be reserved for the provision of information in the public interest and should not be used by the Executive in the interests of its political party or coalition. This principle stems from the constitutional arrangements whereby the Executive exercises a public trust, acts in the public interest and uses resources appropriated by the Parliament for public purposes.

This principle relating to the use of government funds for public advertising should be codified and legislated so as to put its interpretation and implementation on a secure basis, in which it would be free from risks that the Executive could use prerogative powers to circumvent, subvert or overturn the principle for incumbent party advantage.

ART notes that more rigorous standards and monitoring of advertising expenditure by incumbent governments would also release funds for public funding.

The present position

As the ART understands the situation,, Government advertising is subject to published guidelines. The principles to be applied are set out in Appendix A

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Provisions of the Bill

The Explanatory Memorandum indicates that the

“bill provides that it is improper for public money to be used for the advertising for a government policy, unless the policy has been either:

- enacted in legislation, or,
- a resolution has been passed by both Houses of Parliament, agreeing to the expenditure of money for the purpose of advertising a particular policy, or,
- in the event of a national emergency, the Minister has obtained consent from the Leader of the Opposition to spend public money for the purpose of advertising a particular policy.

“A 'national emergency' is considered to be events such as urgent health issues, natural disasters, defence issues, critical issues of public safety and importance and the like. Under this subsection, it would be up to the discretion of the Leader of Opposition to provide consent, and in doing so, decide whether he or she considers the event to be an emergency.”

Whilst the “national emergency” provision may be politically attractive, ART believes it is better if all government advertising is subject to certification by an appropriate independent reviewer rather than responsibility being divided, especially in emergency circumstances.

The proposed Bill applies to government advertising that occurs at any time and not just that during election campaigns. The ART supports that approach but is concerned about its otherwise narrow approach.

In his second reading speech, Senator Xenophon said that broader reforms are needed to regulate government advertising but argued that government advertising should not be allowed on policy matters yet to be enacted into law except where Parliament agrees or, in an emergency situation, with the approval of the Leader of the Opposition.

The ART submits that there are at least two problems with this approach in the Bill.

1. The permitted advertising on enacted policies.

There is nothing proposed in the Bill to stop a government engaging in blatant party political promotion of policies that have been enacted.

2. The embargo on advertising prior to the passing of legislation.

The question is whether it is in the public interest in the context of today's communication systems that where persons seek to influence the debate on issues by

using advertisements, the government of the day should be able to use public funds to join the debate in the same way or not, and, if so, what regulation should there be.

Senator Xenophon suggested that it should be enough for the PM to call a press conference to deal with the policy debate. But is that enough? Would it have been reasonable in the context of issues such as Work Choices and the Mining Tax where there are prolonged and well-funded opposing campaigns using advertising methods? We note that where the advertising can be claimed, and is claimed, as a tax deductible business expense, that too involves the use of public funds. The media, as it now functions, tends to report long running issues by focusing on who is winning the political battle. It rarely critically examines the accuracy or fairness of the statements made by the protagonists, particularly in advertising campaigns. If governments cannot use the advertising medium then there is a grave danger of the policy argument being high-jacked by those who can use that medium.

The ART submits that legally binding regulation is necessary to protect the fairness and integrity of community policy debate and to hold governments to account.

Issues to be addressed

As a general rule regulation should directly address the identified problem. There are two major problems to be addressed.

1. The use of public funds for party political purposes by government through advertising, and
2. The use of false and misleading advertising on occasions by government and those opposing changes to policy.

Each involves a breach of the trust we invest in government and can also result in governments avoiding accountability. Each involves a misuse of public funds. The second involves distortion of the public debate and excludes from it those lacking the resources to be able to participate.

Initiatives elsewhere

In developing this submission, ART has had regard to relevant initiatives elsewhere in Australia.

ART draws the Committee's attention to the ***Public funding of election campaigns*** [report] of New South Wales -Parliament Joint Standing Committee on Electoral Matters.¹ In respect of Government Advertising, the Report recommended, *inter alia*, as follows:

¹ Available from <http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/82F12C9FC8E2DBDCCA2576F200213DB6>
[http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/82f12c9fc8e2dbdcca2576f200213db6/\\$FILE/Final%20Report%202-54.pdf](http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/82f12c9fc8e2dbdcca2576f200213db6/$FILE/Final%20Report%202-54.pdf)

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RECOMMENDATION 24: The Committee recommends that the Premier present legislation making provision for the pre-review of government advertising by an appropriate independent body to:

- (a) ensure there is no 'partisan' or 'party political' content, for the regulated election period.
- (b) the composition of the independent body should be a matter for consultation during the draft exposure phase of the legislation for the new scheme.
- (c) include a workable definition of 'partisan' and 'party political' content to be used to regulate government advertising in the election period. The Committee notes that the definition should be consistent with the relevant principles contained in the current Department of Premier and Cabinet guidelines and bear in mind the existing definitions of 'electoral matter' and 'electoral material' within the Parliamentary Electorates and Elections Act.
- (d) require government departments and agencies, in the regulated period, to submit advertisements to the independent body for assessment against the definition and guidelines, prior to the commencement of the 'peer review' approval process that will continue to govern all types of government advertising.
- (e) provide for a seven day turnaround time for completion of the pre-approval assessment and for automatic approval of government advertisements in cases where the process is not finalised within the seven days.
- (f) require that government advertisements during the regulated election period be identified as having been the subject of the pre-approval process.

RECOMMENDATION 25: The Committee recommends that:

- (a) the independent body not be involved in the 'peer review' approval process that follows the pre-approval assessment in the regulated election period;
- (b) certain categories of government advertising, for example, job notices, notifications, public health and natural disaster announcements, are not to be subject to the pre-approval assessment process undertaken by the independent body.

RECOMMENDATION 26: The Committee further recommends that the Premier consider the options for action to be taken by the independent body where government advertising is in breach of the definition of 'partisan' and 'party political' content contained in the Act and is not in keeping with the relevant guidelines. Possible options for amendments may include:

- (a) the independent body reporting immediately to Parliament on the particular instance, including details of the advertisement and its cost;
- (b) providing that it is a breach of the Act and an offence for a government department or agency to proceed with an advertisement where the independent body has determined that the advertisement is 'partisan' and 'party political' and that such a contravention of the Act should be subject to a penalty.

RECOMMENDATION 27: The Committee recommends that:

- (a) the Auditor General conduct more regular reviews of government advertising outside of the regulated election period.
- (b) the Premier report to Parliament in response to any recommendations arising from the Auditor General's reviews of government advertising.

ART believes that that report sets a commendable benchmark for the regulation of Government Advertising in Australia generally including at the Commonwealth level. These

recommendations have not been enacted to date, except as Guidelines which make generally consistent provisions.²

ART also draws the Committee's attention to the provisions of the Australian Capital Territory Assembly (ACT) Government Agencies (Campaign Advertising) Act 2009 the provisions of which have parallels to the NSW Report recommendations. That Act provides a useful definition of party political advertising:

party political—something is *party political* if it is designed to promote the policies, past performance, achievements or intentions of a program or the government with a view to advancing or enhancing a political party's reputation rather than informing the public.

Government Advertising generally - Codification

ART argues that regulation of public advertising campaigns on behalf of government is required to prevent it being used for political party purposes. At the same time, any regulation must not leave government handicapped in defending the public interest against special interests and should entrench requirements that such advertising must:

- Be directly relevant to Government responsibilities and functions;
- Be in the public interest;
- Only occur in relation to matters affecting the public interest and within the powers of government and:
 - after Government has applied existing policy or adopted new or amended policy, &/or
 - after government policy has been adopted under existing powers, &/or
 - where those powers are inadequate, legislated for by parliament;
- Provide objective, factual and explanatory information, free from partisan promotion of government policy;
- Not be designed to promote the policies, past performance, achievements or intentions of a program or the government with a view to advancing or enhancing a political party's reputation rather than informing the public;
- If the budget for any particular campaign is in excess of \$250,000, be examined by an independent Campaign Advertising Reviewer for a compliance review;
- Provide that a campaign may proceed (including in emergencies) only after the Campaign Advertising Reviewer has certified that the campaign conforms with the provisions of the Act;

² Roth, Lenny (2011) *Government Advertising* NSW Parliamentary Library Research Service. Available from [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/GovernmentAdvertising/\\$File/e-brief.government+advertising.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/GovernmentAdvertising/$File/e-brief.government+advertising.pdf) (accessed 10 July 2011)

- Provide for the appointment of the Campaign Advertising Reviewer on the recommendation of the Joint Committee of Electoral Matters, which recommendation must be supported by at least two thirds of the members of that Committee;
- Provide that the Campaign Advertising Reviewer should have guaranteed tenure.³

Government Campaigns and campaign advertisements should be about the truth

Also relevant to accountability for advertising is the veracity of the information provided. The Bill should also address these matters; for otherwise it would be possible for governments to publish misleading advertisements. Accordingly, ART believes that this is an appropriate opportunity to address the matter.

Regulation of Others who engage in political advertising.

Would the regulation of government advertising in the manner discussed, without the like regulation of advertising by others involved in public policy debate, unfairly disadvantage government and so put the integrity of that debate at risk?

At first glance, the answer is that it obviously would do so. But closer consideration suggests that the issue is not that simple. Compliance by government should enhance the credibility of the government campaign. Further, if the government's opponents do not adhere to the same standards as those imposed on government but government does, that should become apparent and reduce the credibility of the campaign against the government. Further, the suggested controls of government campaigns should not prevent government responses directed to correcting any false and misleading statements by those campaigning against the policy proposals of the government.

While views may differ, we do not submit that the controls we propose should apply to all who are engaged in political advertising.

Election campaigns

Election campaign advertising, however, generally occurs over a short period of time and is already subject to controls to which all participants are subject. Currently, Commonwealth electoral law provides that it is an offence to do 'any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote.' This provision is not specific enough and has thus not been a significant enough protection of truth in our political debates.

Instead the rule used in the Trade Practices Act, that applies to corporations in their advertising and conduct, should equally be used in politics. That is political parties, candidates and other

³ Sampford, C 2010. Submission to NSW Electoral matters Committee

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organizations should not “engage in conduct that is misleading **or** deceptive **or** is *likely* to mislead **or** deceive.” The role of adjudicating such decisions should be referred to an independent body such as the Australian Competition and Consumer Commission (ACCC) or the Australian Electoral Commission (AEC).

Recommendations

ART recommends that the Bill be amended to provide:

1. that public advertising campaigns on behalf of government must-
 - Be directly relevant to Government responsibilities and functions;
 - Be in the public interest;
 - Only occur in relation to matters affecting the public interest and within the powers of government and:
 - where Government has applied existing policy or adopted new or amended policy, &/or
 - after government policy has been adopted under existing powers &/or
 - where those powers are inadequate, legislated for by parliament;
 - Provide objective, factual and explanatory information, free from partisan promotion of government policy;
 - Not be designed to promote the policies, past performance, achievements or intentions of a program or the government with a view to advancing or enhancing a political party’s reputation rather than informing the public;
 - not be misleading **or** deceptive **or** likely to mislead **or** deceive.
2. that if the budget for any particular campaign is in excess of \$250,000,
 - it be examined by an independent Campaign Advertising Reviewer for a compliance review; and
 - that a campaign may proceed (including in emergencies) only after the Campaign Advertising Reviewer has certified that the campaign conforms with the provisions of the Act;
3. for
 - the appointment of the Campaign Advertising Reviewer on the recommendation of the Joint Committee of Electoral Matters, which recommendation must be supported by at least two thirds of the Members entitled to vote as members of that Committee; and
 - that the Campaign Advertising Reviewer should have guaranteed tenure;
4. that the ACCC or the Australian Electoral Commission have authority to act on any government or political advertising campaign during the election campaign period where

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it has reasonable grounds to believe that the campaign is misleading or deceptive or is likely to mislead or deceive.

ART also recommends that the Commonwealth Electoral Act 1918 offence of doing “any matter or thing likely to mislead or deceive an elector in relation to the casting of a vote” be amended to read “any matter or thing that is misleading or deceptive or is likely to mislead or deceive an elector in relation to the casting of a vote”

ART would be pleased to elaborate on any aspect of this submission.

Appendix A

Extract from the published guidelines of the Commonwealth Government

Information and Advertising Campaign Principles

The following five principles set out the context in which Australian Government campaigns should be conducted. They relate to when campaigns can be conducted, how campaign materials should be presented, and the legal and procurement responsibilities that need to be considered.

Principle 1: Campaigns should be relevant to government responsibilities

18. The subject matter of campaigns should be directly related to the Government's responsibilities. As such, only policies or programs underpinned by:

- legislative authority; or
- appropriation of the Parliament; or
- a Cabinet Decision which is intended to be implemented during the current Parliament
- should be the subject of a campaign.

19. Examples of suitable uses for government campaigns include to:

- inform the public of new, existing or proposed government policies, or policy revisions;
- provide information on government programs or services or revisions to programs or services to which the public are entitled;
- inform consideration of issues;
- disseminate scientific, medical or health and safety information; or
- provide information on the performance of government to facilitate accountability to the public.

Principle 2: Campaign materials should be presented in an objective, fair and accessible manner and be designed to meet the objectives of the campaign

20. Campaign materials should enable the recipients of the information to distinguish between facts, comment, opinion and analysis.

21. Where information is presented as a fact, it should be accurate and verifiable.

When making a factual comparison, the material should not attempt to mislead the recipient about the situation with which the comparison is made and it should state explicitly the basis for the comparison.

22. Pre-existing policies, products, services and activities should not be presented as new.
23. Special attention should be paid to communicating with any disadvantaged individuals or groups identified as being within the target audience. Particular attention should be paid to the communication needs of young people, the rural community and those for whom English is not a convenient language in which to receive information.
24. Imagery used in campaign materials should reflect the diverse range of Australians. There should be recognition of the full participation of women, Indigenous and culturally and linguistically diverse communities by realistically portraying their interests, lifestyles and contributions to Australian society.
25. Campaign materials should be tested with target audiences to indicate they are engaging and perform well against the objectives of the campaign.

Principle 3: Campaign materials should be objective and not directed at promoting party political interests

26. Campaign materials must be presented in objective language and be free of political argument.
27. Campaign materials must not try to foster a positive impression of a particular political party or promote party political interests.
28. Campaign materials must not:
 - a. mention the party in Government by name;
 - b. directly attack or scorn the views, policies or actions of others such as the policies and opinions of opposition parties or groups;
 - c. include party political slogans or images;
 - d. be designed to influence public support for a political party, a candidate for election, a Minister or a Member of Parliament; or
 - e. refer or link to the web sites of politicians or political parties.

Principle 4: Campaigns should be justified and undertaken in an efficient, effective and relevant manner

29. Campaigns should only be instigated where a need is demonstrated, target recipients are clearly identified and the campaign is informed by appropriate research or evidence.

- 30. Campaign information should clearly and directly affect the interests of recipients.
- 31. The medium and volume of the advertising activities should be cost effective and justifiable within the budget allocated to the campaign.
- 32. Distribution of unsolicited material should be carefully controlled.
- 33. Campaigns should be evaluated to determine effectiveness.

Principle 5: Campaigns must comply with legal requirements and procurement policies and procedures

- 34. The manner of presentation and the delivery of campaigns must comply with all relevant laws including:
 - a. laws with respect to broadcasting and media;
 - b. privacy laws;
 - c. intellectual property laws;
 - d. electoral laws;
 - e. trade practices and consumer protection laws; and
 - f. workplace relations laws.
- 35. Procurement policies and procedures for the tendering and commissioning of services and the employment of consultants should be followed and there should be a clear audit trail regarding decision making.