

**Submission to the Senate Standing Committee on Finance and Public
Administration
Legislation Committee**

Inquiry into the Government Advertising (Accountability) Bill 2011

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**(a joint initiative of the United Nations University, Griffith, QUT, ANU, the Center for Asian
Integrity and Jindal Global University)¹**

Overview

I thank the Committee for the opportunity to comment on the ‘Government Advertising (Accountability) Bill 2011’. As with previous submissions made to this and other Committees (2001, 2004, 2005, 2010) the use of government funds in advertising campaigns may be fully justified in some cases but creates temptations to “abuse of power that goes directly to the heart of our democracy”.

This Bill seeks to prohibit (indeed criminalise) the use of public money for advertising unlegislated government policy. Two exceptions are provided: where expenditure is agreed by resolution of both Houses of Parliament to the expenditure; or, in a national emergency, when the minister has obtained the Leader of the Opposition’s consent to the expenditure.

While the governance of government advertising could be significantly improved (see my earlier submissions), I have severe reservations about this measure, particularly if pursued in isolation from other reforms to ensure a level playing field in which policy is debated with achievable levels of integrity.

1. Criminal sanctions are unnecessary and likely to be seen as over the top. A better and more traditional remedy for the expenditure of funds beyond power is to require the official who wrongly authorised them to pay. The party will pick up the tab – as well as extreme public embarrassment. Alternatively, the individual will be bankrupted and will thereby lose office.
2. While some government advertising of unlegislated policy is particularly egregious (particularly advertising just before an election for a policy that would only take effect if the government is re-elected), this draws the wrong line. Much government policy does not require legislation – either because it is part of the prerogative incorporated into the Federal Executive power or because it falls within executive powers granted by legislation. On the other hand, massive advertising for a policy that has been legislated may be a key plank in seeking re-election.
3. The most fundamental, and systemic, problem with government advertising has been the possibility of governments gaining an advantage in an unbalanced debate on policy. There has been reform of government advertising and this can go further. However, playing fields can be skewed from both sides and the risks from the corporate end are at least as great. One could imagine a scenario in which a policy was proposed and was subject to a massive negative advertising campaign by self-interested individuals or corporations to which the government could not respond because of this legislation. I would suggest that the Australian Parliament recognise and address four current problems of advertised policy debate and address them.

¹ Professor Sampford is Foundation Professor of Law (and was Foundation Dean of Law) as well as a Research Professor of Ethics at Griffith University. He is also a Research Professor of Law at QUT. He wishes to thank Dr Tom Round who worked with me on the 2001 submission and Carmel Connors and Melea Lewis (senior research assistants at the Institute) who assisted with research for this submission.

The four problems that need to be addressed are:

1. Unbalanced debate in which one side has greater spending power than the other. As indicated, the playing field can be tipped in both directions.
2. The high dollar cost of such advertising which either has to be sourced from government or from parties with a sufficient economic interest in the policy to pay for that advertising.
3. The nature of such advertising skews debates towards highly simplistic, emotive and truncated modes of debate.
4. The use of misleading and deceptive statements in such advertising. Reforms during the last parliament have sought to make government advertising more factual through vetting processes but corporations are absolved of their usual responsibilities because of a 'political' exception to their normal responsibilities on statements to the market and on misleading and deceptive conduct.

I submit that:

1. The risk of abuse of government advertising is universally recognised and there is virtually unanimous agreement that the risk has materialised (even if there is partisan disagreement of when and by whom).
2. Reform is needed that addresses the conduct of all relevant parties and ensures a reasonably level playing field (hopefully at improved levels of integrity and accountability for all who seek to fund political and policy debate).
3. Government campaigns should be subject to independent vetting with no exceptions (though there may be speedier processes for emergencies). So should those by corporations, unions and NGOs. This should either be through applying the same vetting process as government advertising, a similar vetting process or by changes to the Competition and Consumer Act 2010 (CCA) and reporting rules to subject 'political' statements to the same legal scrutiny as statements made in ordinary commerce.

I am more than happy to appear before the Committee to answer any questions or to expand on these issues further.

Government advertising campaigns

I have submitted previously that there has been a growing problem of government advertising campaigns. The principal concern has been that governments use public money to skew debate in favour of particular policies they are advocating and in general in favour of the government and its re-election.

As we put it in 2005: "Government advertising need not be false or misleading to be problematic. It has a legitimate function in providing information on government policies to those who may be affected by them. However, it is capable of abuse if the main effect is to paint the government in a good light. Given that this is public money that is not available to the Opposition, this could constitute a particularly unfair advantage and provides a great temptation to any government. It may enable a governing party to entrench itself in power – using the fruits of past electoral victory (i.e. control over government resources) to perpetuate future electoral victories it would not have earned had the playing field been level."

In 2005, I argued that "the Parliament should treat the potential abuse of political advertising in the same way as corporations identify and deal with risk. Once a board has established a risk, its magnitude and its likelihood, then it is bound to consider what it can do to limit the likelihood of the most probably and serious risks materialising and the damage that would be done. While I am not going to say that governments and parliaments should always act like corporate boards, it is always worth considering how they would approach such problems."

The other side of the debate

Recent advertising campaigns over the mining tax and the more recent campaigns over carbon and tobacco have indicated they way that playing fields can be tipped by a range of different forces – including the application of corporate, union or even NGO resources. (While the last two have resources of a different degree of magnitude and often come in as counter-balances to other resources, they should never be ignored in considering whether the playing field is more or less level). It is reasonable to be concerned about large campaigns funded by self interested corporations that are not subject to any sanctions for misleading and deceptive advertising.²

The answer is not to weaken the accountability regime for governments but to:

- recognise the issue in the government accountability regime

² *Village Building Company Limited v Canberra International Airport Pty Limited* (No 2) [2004] FCA 133 per Finn J at [63].

- ensure that corporations and others are also subject to the same or different but relevant accountability regimes
- do so preferably by including all such statements in misleading and deceptive provisions of the CCA (formerly TPA) without the ‘political exception’ outlined by Justice Finn where “[o]ne may desire conduct in public and political debate to be not misleading or deceptive. Section 52 is not designed to secure that state of affairs.”³

There are strong arguments for such communication to be subject to some form of vetting or oversight.

1. Despite the legal authority, investors do not distinguish between what is formally reported to them and what is said in political or other debate. If investors did make that distinction it would be to discount the veracity of corporate leaders. This would be a pretty sorry judgement on their integrity.
2. Corporations claim deductions for corporate advertising and are, in a sense, spending public money.
3. They are also expending the assets of the ultimate owners of their businesses – shareholders and superannuants whose super funds have invested in those companies – a group that includes the majority of Australians
4. The greater credibility and hence efficiency of being able to claim that the accuracy of your advertising has been vetted by an independent body should be as important for a corporation as I have argued it is for government.
5. Unbalanced funding of different sides of a debate leads to distortions in the democratic process (see comments on “Markets and Democracy” in the Appendix below)

Such oversight could be provided in a number of ways;

1. Both government and corporate advertising are vetted by the same process (on the basis that public funds are involved in both through deductions and direct expenditure)
2. Disclosure rules and/or CCA (formerly TPA) are amended to void the distinction between political comment and comment in the course of trade or commerce.
3. Limit advertising of both kinds. Some might argue the value the public gets for its direct expenditure and tax deductions are not great
4. Provide funding for both.

The importance of independent vetting

I argued for this case on all four previous submissions. It might be worth reiterating some of those arguments.

“Government advertising has a clear *prima facie* ethical rationale. Governments make laws and other policy decisions that affect people’s lives. Most laws operate by communicating to citizens that if they act in certain ways, they will be individually rewarded or penalised. And voters in turn can hold the government accountable – collectively rewarding or penalising the government for acting in certain ways – only if they know what the government has been doing. As a result, citizens have a clear interest in being informed of their governments’ actions, even if this is funded by their tax dollars.

But at the same time, government advertising also offers strong temptations for abuse. Like other actions of the executive branch of government, it is normally authorised and approved (or at least subject to veto) by Ministers. Yet Ministers are also parliamentary candidates representing a particular political party; they would find it highly useful, if they could get away with it, to have their party-political advertising (praising their own party and/or denigrating their opponents) paid from public funds, leaving more in their party’s own coffers. This is objectionable because it creates an uneven ‘playing field’ that distorts, or even short-circuits, the electoral responsibility on which parliamentary democracy depends. A party might get re-elected, not because it has governed in ways the voters approve, but simply because it has governed. Electoral success can easily become self-perpetuating, because the Opposition cannot match the advantage given by millions of government advertising dollars. So ‘quarantining’ public funds from party-political use is essential to ensure a reasonably equal electoral contest. And even apart from the undue advantage such advertising gives one party, it is likely that its genuine informational value is inversely proportional to its propaganda value, making it, at best, a waste of public funds.

³ *Village Building Company Limited v Canberra International Airport Pty Limited* (No 2) [2004] FCA 133. See section 18 Australian Consumer Law in Schedule 2 CCA for current legislative provisions relating to misleading and deceptive conduct which are materially the same for corporations.

There are some decisions that cannot be safely left in the hands of politicians. The core idea of democracy is that the people delegate executive and/or legislative power to politicians whom the electors believe will best use that power to serve electors' interests. It is in the interests of governments to use that power in ways that will earn approval and convince a majority that it is the better choice. However, there is always a temptation to use governmental power to secure re-election by avoiding or distorting that choice. The crudest form of avoiding that choice involves a cancellation or postponement of elections. However, there are many other means of avoiding that choice – distorting electorates and electoral boundaries, manipulating electoral practices and electoral machinery, using governmental power to silence opposition or promote government policies. The temptation is so great that it might seem that only strong laws will suffice. Certainly there is a need for clear constitutional provisions, electoral laws with teeth, and independent electoral commissions with clear procedures for calling elections and counting the votes. There is a need for clear legal rules on electoral advertising, election funding and government advertising.

Politicians in a democracy are members of a very important public profession. Politicians seek to articulate policy choices and put them before the people. If they believe that their policies and the general philosophy underlying it are correct, they should be proud to do so and to believe that those public values and public policies deserve to be chosen on their merits by their fellow citizens. To seek to win by other means discredits those values and policies and dishonours their profession.”

APPENDIX: Markets and democracy (as included in my submission in June 2010)

In modern liberal democracies, the majority of citizens value both democracy and the market, and there is popular commitment to the belief that politics should be dominated by democratic principles and the economy should be dominated by market principles. While both democracy and the market are built on the single principle of individual choice, they involve two fundamentally different counting principles for evaluating choices. The principle for democracy is “one vote one value;” the principle for the market is “one dollar one value.” The eternal temptation is for those who have accumulated dollars in the market to use those dollars to influence those decisions that are supposed to be governed by democratic principles – from funding political campaigns to outright bribery. This is related to the concern to which this Bill is addressed that those who control government dollars may be tempted to turn dollars that belong to those they represent into votes. The reverse concern is that those who have accumulated votes may seek to convert it into dollars for themselves or their parties (corruption) or for their constituents (the traditional concern of the wealthy against government welfare provision). Accordingly, defining and policing the boundaries between the market and democracy is a perennial problem in modern liberal societies committed to both democratic and market principles. It gives rise to some of the most difficult and controversial issues in liberal democracies – several of which have been on display in recent times:

- campaign funding
- political advertising
- lobbying
- subsequent employment of MPs
- privatisation and PPPs
- zoning decisions
- media.⁴

Recognising these pressure points between markets and democracy has two consequences:

1. Unless we want to abandon either the market or democracy (and there are very few who would abandon either now), these pressure points will remain and integrity systems must watch out for the interaction.
2. It will generally be better to structure the interaction in ways that reduce the pressure giving less work for the integrity system to do.

It should be emphasised that the interaction need not be toxic but can be highly beneficial (including informed policy making, efficiency and greater knowledge and debate about governmental decisions). Well designed integrity systems help ensure that interactions between market and government institutions promote good governance rather than undermine it.

Integrity systems as a risk management strategy

The point of integrity systems is not to stop the misuse or abuse of government power or other wrong doing. If that were our primary goal, it could easily be achieved by abolishing government. Though anarchists have traditionally argued for that outcome, the majority have wanted government for the benefits it can deliver to the people it claims to serve and have been prepared to take a risk that the powers delivered to government are used.

Integrity systems can be seen as a form of risk management. One of the most important drivers of integrity system reform should be the identification of integrity risks. It is not necessary to prove that the risk has materialised (though this will provide conclusive evidence of the existence of the risk) for us to take action.

Like all insurance, there will be costs. Integrity measures utilise money and talent. While almost always ensuring better decisions and avoiding corrupt decisions, they may make decisions slow or timid or even stall decision-making completely in ways that prevent public agencies from providing the benefits they claim to deliver as surely as if they were acting corruptly.

Some important insights flow from this:

1. Like all risk management, you should look at the probability of the risk and the seriousness of the risk as well as the costs of insurance.
2. Similar to insurance, the cost of integrity measures is real but is generally a small proportion of the total.

⁴ Media institutions who face particular dilemmas because they are, simultaneously, key elements of an effective democracy and, for the most part, commercial entities seeking success in the market. They play an essential role in the formation of public opinion and the influence on personal choices. Yet most of them are commercial enterprises seeking not only readers, listeners, and viewers but also advertising revenue, favourable government decisions about media policy, and, where they own non-media assets, favourable policies on those issues as well. There is an oft-stated concern is that those commercial activities and interests in the market might distort the role that media institutions play in the formation of public opinion and, consequentially, in our democracy. There is the opposite concern that the privileged access that media corporations will gain from politicians seeking a good press may skew decisions politicians have to make in a way that distorts or even undermines markets.

3. The purpose of the 5 percent investment is to ensure that we get the other 95 percent.
4. But if extra integrity measures eat into the 95 percent without significantly reducing risk, they are either not worth it or the integrity measures have been poorly designed.
5. Similarly, if the extra integrity measures mean that we start getting a lot less for that 95 percent, they are either not worth it or the integrity measures have been poorly designed.
6. Even if the risk has materialised, it does not necessarily require action if the risk is proven to be very rare or that it has been dealt with effectively.
7. However, confidence in integrity measures is important so that sometimes we may engage in integrity measures to ensure confidence. This is related to another point – that risk can never be fully quantified and, in human systems, a risk that is not addressed may encourage behaviour to exploit that risk. For these reasons, it is rational to err on the side of over insurance rather than under-insurance.

Government advertising reform has contributed to Australia's integrity system. More can be done.

Risks in corporate campaigns

The danger is, of course, that corporate funded campaigns allow the effective exchange of dollars for votes. Some will argue that regulation of non-government advertising conflicts with freedom of speech. Money may make speech more effective in communication but money is not speech. Indeed, given that the distribution of dollars is uneven (and will always be so in a market economy), money will privilege some speech over other. Accordingly, campaign financiers cannot claim a human right but assert a privilege

There are rights involved: the rights of citizens to be presented with alternative principles and programs by those who seek their votes so that they can exercise their voting rights. Political parties have a duty to present those alternative principles and programs (and, incidentally, to do so honestly). If they are forced to seek funding from those who are duty bound to push particular interests, then there is a temptation for both sides to exchange dollars for principles and for the programs advocated by one of both parties to reflect the interests of those who fund it. A similar danger is generated in third party advertising – during election campaigns or at other times.

Risks in union and NGO campaigns

The resources are much more limited and tend to operate as counter weights (indeed unions see themselves as counterweights in bargaining power between employees and employers). However, this will not always be the case. The question is always one of balance – does their contribution make the political playing field more or less level.

The position of unions is somewhat different to corporations and is complicated by the relationship that most have with the Australian Labor Party. However, the principle is similar. Union officials are entrusted with union funds to further the interests of their members. It would be hard to argue that supporting the ALP is contrary to the governance arrangements of the unions that were involved in creating the ALP and constitutionally associated with it. However, the fact that union officials are not acting contrary to their stated principles does not deal with the fact that they, like corporations, are going to attempt to convert dollars into votes by funding the party whose policies they prefer.

We should aim to ensure that the playing field is level without great discrepancies in the dollars put into seeking votes. We should also aim to ensure that the funds by governments, parties, corporations, unions and NGOs. Like most governance issues and most governance reforms, this will not happen overnight but we should work towards it.