

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

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Overview

I thank the Committee for the opportunity to comment on the 'Preventing the Misuse of Government Advertising Bill'. This is the fourth such invitation and is my fourth submission (2001, 2004, 2005 and now). I have had much less time than usual to prepare this submission so I apologize for any typographical errors, infelicities of language and a failure to express myself clearly. I am also aware that I have not been able to think through all the issues covered here and hence am open to contrary argument and could well change my mind.

As I emphasised in the last mentioned submission, I am not responding in order to make partisan comments but to address a genuine problem arising from a temptation to abuse a power that goes directly to the heart of our democracy. "The main issue is not whether this or that politician has done the wrong thing in the past. That implies that the problem is a personal failing rather than a systemic risk. If the problem is seen as a personal failing of one person or one side of politics, then the ostensible solution is to change the personnel or the government... The problem with this position not only relies on a statistically unlikely distribution of virtue (i.e. all of it on one side of politics) but that it opens up the question: 'what would happen if the other side DID get into government?' I do not expect politicians on either side to be saints. I doubt that many of us would elect a saint even if he or she were to stand for office. The whole point of good governance is to try to create institutions that do not need saints to run them and can inspire public confidence despite the fact that they are run by mere mortals."

I submit that:

1. The risk of abuse of government advertising is universally recognized and there is virtually unanimous agreement that the risk has materialized (even if there is partisan disagreement of when and by whom).
2. The 2008 reforms were a very significant step forward.
3. The 2010 changes were mixed.
4. Neither addresses the kind of advertorial contest we are currently experiencing. In addressing such issues, 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).
5. This Bill seeks to strengthen the arrangements set out in 2008 but I would argue that this is achieved.

A universally recognized risk

In 2005, I argued that the problem of government advertising campaigns had been building for at least 30 years. The first government advertisement which caused me concern was one for the Australian Assistance Plan in 1975. If others were to see it now and compare it to campaigns over the last 20 years, they might accuse me of an overly sensitive ethical nose (and I would enter no defence to that charge). However, by 2005 the risk was universally recognized.

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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 materializing 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.”

Credibility and efficiency

I also noted “that there is a very important side effect of having an independent, highly credible body certifying the accuracy and non-partisan nature of the advertising. This will give the advertising campaign greater credibility and increase the likelihood that it will be accepted. It will also make it far less likely that the campaigns will be attacked as false – and if it is so attacked, the government can brandish the independent arbiter’s decision. This oversight will save time and money and increase the efficiency and effectiveness of the government advertising.”

2008 Reform

After 20-30 years of increasing expenditure on often questionable campaigns, I would be churlish not to acknowledge the significance of the 2008 reforms. I had argued strongly in favour of formal guidelines and an independent arbiter – but suggested a committee rather than the auditor general who was frequently recommended for the latter role. Guidelines need to be developed with experience (that is why they are guidelines) and these seemed to be a very good, first iteration.²

2010 Variations

The 2010 variations to process have been much criticized for removing the auditor general and substituting a committee appointed by the government. While it seems to me that the ANAO did a very good job for almost two years, my preference for an independent committee remains for the original reasons given and new ones. Accordingly, I offer no criticism of the switch from Auditor General to Committee but hold to my views about the appointment process for such a Committee.

The substantive content of the Guidelines were not significantly altered. As the Auditor General has pointed out in his letter to the Minister, the changes to the guidelines were limited and involved areas of greater and lesser specificity. Most will like some changes and dislike others. For myself, I liked some improvements for technical reasons (e.g. the exception clause for independent review changed ‘extraordinary’ reason to ‘compelling’ reason³). On the other hand, while Principle 3 remains just as strongly worded, I would have preferred the retention or refinement of the previous guidelines to assist in distinguishing whether campaigns promote political interests.

² Having worked with a colleague (Dr Round) to suggest guidelines, I can recognize the difficulties of designing these *ab initio*. I am happy to acknowledge that the 2008 version covered the advertising of Cabinet policy decisions that did not require further legislation in a way that ours did not.

³ It is not the ordinariness or otherwise of the reasons but their strength.

A different scenario

These guidelines and processes were developed to address the concern that government funds might be used to assist the governing party retain power. They were not addressed to a situation where there are competing advertisements about government policy. As with all guidelines, they need to be developed to deal with situations which, if not novel, were not addressed in the original design of the approval process.

The previous and ongoing concern is to ensure that a more or less level playing field is not tipped on its end by the use of government funds to assist one party in a party political debate. However, 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). See comments on markets and democracy in the appendix.

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

- recognize the issue in the government accountability regime; and,
- ensure that corporations and others are also subject to the same or different but relevant accountability regimes.

More generally, the issue of government campaign advertising and non-government counter-campaigning between elections should be considered in relation to funding of election campaigns (which are on the agendas of many governments).

If I had time, I would like to make submissions on governance arrangements for situations like those we face today. However, I have not turned my mind to the issues of corporate funded campaigns of the kind we have today. I would previously have thought that corporations would have been constrained by the requirements of continuous disclosure. However, an article by Laura Tingle in the Australian Financial Review which alerted me to the views of the ACCC expressed in response to queries about alleged discrepancies between what companies had said to Parliament and to the public on the effects of the CPRS.⁴ The ACCC pointed out that the former were subject to Parliamentary Privilege and, in the latter case, the Federal Court had distinguished between political statements and statements in the course of trade and commerce. I find these arguments highly persuasive as a matter of current law. Even if another professor or barrister could mount stronger arguments, the Law would be in need of clarification.

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 “Democracy of dollar and democracy of the vote” below)

⁴ Letter of ACCC to the Australian Conservation Foundation, 20th August 2009

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 TPC are amended to void the distinction between political comment and comment in the course of trade or commerce.
3. Business is covered by disclosures to market and TPC
4. Limit advertising of both kinds. Some might argue the value the public gets for its direct expenditure and tax deductions are not great
5. Provide funding for both.

The parliamentary privilege point is, of course, very well taken. However, it is not a breach of parliamentary privilege to maintain a consistent line in what is said to parliament, public and market. I would not have thought many corporate executives would deliberately make false statements to the Parliament, however unlikely they are to be sanctioned by Parliament.

The importance of independent vetting

I argued for this case on all three 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.

...

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 of 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.

Politicians have a choice in the way they see their profession.

1. They believe that their own policies are right for the citizens who elect you and all you need is a level playing field to convince them.
2. You are either unsure that the policies are right for the citizens or believe that they cannot be persuaded without outspending your opponents by a significant factor.

Most politicians would enter politics with the first view. I hope that most still hold it and I think it is still true of the majority of politicians whom I know. If so, you should insist on a mechanism to minimize the likelihood of abuse, eschewing the use of government advertising to persuade citizens that your policies and/or performance is better than it was.”

I think that there are a lot more politicians on both sides of politics who share that view than did five or ten years ago.

Who should vet government advertisements and how should they be appointed

In our original submission in 2001, we recognized that statutory officers such as the Auditor General and the Ombudsman (whom Senator Murray wanted to include in a vetting Committee in his *Political Honesty Bill*) enjoy high levels of public trust. However, we argued that they “are still appointed by processes that the Executive Government ultimately controls. If these officers were given this added responsibility of vetting government advertising, it might tempt governments to appoint those who were seen as reliable or likely to have favourable views of their message. Moreover, the Ombudsman and Auditor-General are selected because they have skills specific to their roles – investigating maladministration and auditing public accounts, respectively. These skills do not necessarily make them also the best experts available for the different task of ruling on the fairness and propriety of Government advertisements.” Others have argued that the Auditor General’s principal role is subsequent vetting rather than prior approval. I would suggest that a committee of three should be appointed who have, collectively, knowledge of government administration, advertising and ethics (while eschewing the suggestion that the last cannot sit well with the first two forms of expertise). I will call it the Independent Government Communications Committee (IGCC) to distinguish the one proposed here for the ICC established by the government. In doing so, I am not suggesting that the current ICC does not have suitable membership for appointment by the alternative process suggested.

However, consistent with my earlier views, I would argue that the committee should not only have a guaranteed tenure (as in the case of the Auditor General) but include individuals chosen by a process that has, as far as possible, bi-partisan credibility. My preferred model has been one in which the relevant members are appointed on the recommendation of a majority of a relevant parliamentary committee that includes both a member of the government and a member of the opposition (as is required of some statutory officers). While this ensures bi-partisan credibility and avoids governments appointing their own individuals, it can give rise to ‘hold-out’ tactics by oppositions. This is where some hard headed ex-politicians might be of great help in identifying the kinds of tactics that would be employed under such circumstances and means by which such tactics could be defeated or marginalized. One possible process could be as follows. The government nominates two people whether jointly or sequentially. If the opposition vetoes both, they can give reasons and the government can respond – something that will tend to expose blatant examples of governments who put up ‘yes men’ or oppositions that block worthy candidates. The government could then nominate a third person (something that would tend to encourage oppositions to avoid hold-out tactics with reasonable candidates). I put this forward as a tentative approach to stimulate thought.

Some detailed comments on the Bill

I cannot analyze this Bill in detail but I do offer the following comments.

1. Title. Philosophically, I would prefer that a Bill such as this be called: *'The Promotion of Integrity in Government Advertising Bill'*. I have long argued that the primary concern is good governance rather than the prevention of abuses that constitute bad governance (including abuses and misuse of power). If our only goal was to avoid the abuse of government power then it would be logical to seek to abolish government. While this approach is popular with traditional anarchists of the left and more recent anarchists of the right, most of us want governments for the ways they can serve the community and for that reason entrust our governments with powers. Governance structures should be principally devoted to ensuring that public authorities use their powers for the public ends determined by democratic processes. However, in recognition that power once given can be abused, a necessary corollary is that our governance structures identify and address risk of abuse.
2. Auditor General. As argued since 2001, I would suggest that an Independent Government Communications Committee (IGCC) appointed on the recommendation of a suitable Parliamentary Committee would be preferable for the reasons given. I do not suggest that the Auditor-General would be, or was not previously, able to perform the functions listed in clause 8. Nor do I suggest that the current members of the ICC would not be suitable candidates for the IGCC.
3. The Schedule that incorporates guidelines into law. I would always be careful about too much detailed regulation in a new field. While the processes for approval of government advertising could benefit from a legislative base, it might be better for the guidelines to be developed more organically. The more independence and credibility the IGCC has, the more we can entrust them with the interpretation of the guidelines themselves and make suggestions for their refinement when difficult cases arise. The requirement for public consultation in the development of those guidelines is welcome. However, I would initially suggest that the guidelines be amended by a relevant government minister and reported to a suitable Senate Committee. If the amendments have not been made with the support of the IGCC there is likely to be widespread criticism. After the guidelines had been further developed, they might then be incorporated into regulations.
4. In order to allow the IGCC to interpret the guidelines, I am happier with 'should' rather than 'must' in the text of the guidelines listed in the Schedule.
5. Clause 9 of the Schedule limits exemptions to national emergencies. I would argue that there may be times when there are 'compelling reasons' for either expediting or suspending the process. However, I am tempted to suggest that the IGCC itself accepting that the reasons were compelling (the Government would still sign off on 'national emergency').
6. The IGCC should be tasked with developing expedited review procedures that can deal with the kind of campaigning we have here.
7. In cases where prior approval is not possible either because the expedited process has not yet been established or because even that is too slow for effective communication, the IGCC have the role of assessing the campaign subsequently and reporting to Parliament. This actually carries a risk for government so that it may well prefer the expedited or normal routes.

APPENDIX: Markets and democracy

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
- privatization and PPPs
- zoning decisions
- media.⁵

Recognizing 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 materialized (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 utilize 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.

⁵ 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.

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.
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 materialized, 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 Labour 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.