

## Government Senators' Minority Report

1.1 The terms of reference for this inquiry originally asked the Committee to inquire into 'the level of expenditure on, the nature and extent of, government advertising since 1996'. These terms of reference were subsequently amended by an Opposition dominated Senate to restrict the inquiry into the expenditure, nature and extent of *Commonwealth* government advertising since 1996.

1.2 A serious and responsible inquiry into the nature and impact of information activities conducted at all levels of government in this country may have been a worthwhile exercise. While Commonwealth Government advertising amounts to some \$929 million between 1996 and 2003, in the same period of time State Government advertising collectively totalled more than \$2.15 billion. This is not the inquiry that the Opposition majority allowed.

1.3 Instead we have had an inquiry with arbitrarily restricted terms of reference, aimed at achieving a partisan report.

1.4 The inquiry received submissions from only 13 submitters (including submissions from the Special Minister of State and Department of Prime Minister & Cabinet), most of which were from academics or former public servants with transparent agendas. No overwhelming public concern was demonstrated.

1.5 It is also worth noting the conclusion to the inquiry. The Committee cancelled the final round of oral testimony on Monday 7 November 2005, as the questions to be put to departmental witnesses had been answered at the Senate Estimates hearings of the previous week.

1.6 For these reasons, Government Senators do not consider it necessary to comment in detail on the majority report. There are, however, four matters requiring discussion, in order to set aspects of the majority report in context. Those matters are:

- justification of expenditure on government advertising;
- costs of independent review;
- whether there is a need for a 'legislative base'; and
- comments by the Clerk of the Senate.

### **Justification of expenditure on government advertising**

1.7 Advertising to communicate with 20 million Australians is a relatively expensive exercise. Australians are faced with thousands of messages a day. Some of these are broadcast, some are narrowcast, but all have the characteristic of seeking to gain attention and consideration.

1.8 It is easy to focus on the quantum of expenditure rather than acknowledge the obligation upon governments to inform citizens of their rights and responsibilities, of their entitlement to benefits or of changes to government policy that will affect their

lives. It is also important to acknowledge the cost to the community of citizens not being informed of these things.

1.9 While much is made in the majority report of the cost of the recent WorkChoices advertising campaign, in fact by far the most expensive government information activity is the ongoing Defence Recruitment campaign. This is a campaign that has bipartisan support and was also at the top of Labor government advertising expenditure prior to 1996.<sup>1</sup>

1.10 All parties to the inquiry acknowledge the necessity for government advertising in relation to a range of issues. As Senator Abetz stated in his evidence to the inquiry:

*If you asked Australians in general, 'Do you like government advertising?' I dare say most of them would say, 'no'. I accept that. But if you then asked them, 'Do you support Defence Force recruitment?' they would answer, 'Yes, that is important'. If you asked, 'What about advising the community about superannuation initiatives?' they would answer 'yes'. If you asked, 'What about Quarantine?' they would answer, 'Oh, that's okay'. If you asked, 'What about people becoming citizens of the country?' they would answer, 'Oh, that is a very important thing'. If you asked, 'Do you think people should be told about the evils of domestic violence?' they would answer, 'Oh yes, absolutely'. Then if you asked, 'Which campaign would you not have run?' you would find that virtually all of the campaigns would have been run.'*<sup>2</sup>

1.11 Where there are differences of opinion over the value of particular campaigns, these are matters of judgement. Inevitably these judgements will be coloured by one's view of the value of the policies about which information is being given, or the benefits that are being introduced.

1.12 When an opposition consistently accuses a government of conducting illegitimately 'political' advertising campaigns, it may be evidence more of the policy and political vision of the opposition than of the character of the campaigns themselves.

### **Costs and practicality of independent review**

1.13 A number of submissions to the inquiry suggested that some provision for 'independent' review or adjudication of the 'political' content of government advertising campaigns should be made. This 'independent' scrutiny, it is argued variously, could be done by a separate specialist body, by the Auditor-General or an Ombudsman, or by a Parliamentary committee.<sup>3</sup>

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1 Dr Richard Grant, *Research Note No.62*, Parliamentary Library, 21 June 2004, p. 2.

2 Senator the Hon. Eric Abetz, *Committee Hansard*, 19 August 2005, pp 78-79.

3 See, for example, Professor Charles Sampford, *Submission 4*.

1.14 Government Senators acknowledge that there are aspects of government that are rightly subject to this kind of scrutiny, but there are three strong arguments against these proposals.

1.15 Firstly, it naturally follows that if the basis of the criticism of campaign lies in the opposition to the policy being implemented itself, then it is doubtful that the existence of an ‘independent umpire’ would ameliorate the criticism. For instance, the 1998 CEP advertising has been subject to both political and academic criticism despite the Auditor General finding it to be legitimate.

1.16 Secondly, none of the witnesses or the Senators in the majority report have been able to provide clear, practical advice to public servants and officials as to what would constitute ‘political’ advertising. They have not solved the problem posed by Mr Petro Georgiou, MP, who wrote in his dissenting statement to the Joint Committee of Public Accounts and Audit report:

*In a highly combative political system, materials which are totally non-partisan are open to misrepresentation as party political; and the arrow points indicating the factors which are used to determine whether material can be perceived as ‘party political’ in this [JCPAA] report do not provide a sufficiently clear and objective basis for assessing whether or not such a perception is valid.<sup>4</sup>*

1.17 Thirdly, it must be acknowledged that prior scrutiny of each individual campaign would come at a high cost. There is additional monetary cost involved in funding an oversight body, there are costs in terms of reduced capacity to respond promptly and flexibly to the information needs of the community, and there are opportunity costs, especially for pre-existing institutions, in having to carry out these processes in lieu of their normal work.

1.18 For these reasons, Government Senators consider that the establishment of an oversight body should only be contemplated when the need for, and functioning of, such a body has been cogently established. This has not occurred.

1.19 The majority report contains no discussion and provides no evidence to suggest that any of the government advertising campaigns run since 1996 would not have been run had there been an independent overseer of proposed information activities. Given this, such a body would constitute an unnecessary additional layer of government.

### **Whether there is a need for a ‘legislative base’**

1.20 Some submissions to the inquiry claimed that it is illegitimate to conduct government information campaigns without a legislative base.

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<sup>4</sup> Joint Committee of Public Accounts and Audit, *Guidelines for Government Advertising*, Report 377, September 2002, p. 3.

1.21 There is no legislative base for many government campaigns, yet almost all of these are ‘non-controversial’: AIDS awareness, anti-domestic violence, anti-smoking, anti-binge drinking, anti-drugs, Australian citizenship, Defence Force recruitment, and healthy eating campaigns, for example.

1.22 Indeed, the need to advertise such things and even prospective legislation is explicitly recognised in both Australian National Audit Office and Joint Committee of Public Accounts and Audit recommendations:

*[G]overnment may legitimately use public funds for information programs or education campaigns to explain government policies, programs or services ... Examples of suitable uses for government advertising include to inform the public of new, existing or proposed government policies, or policy revisions;*<sup>5</sup>

1.23 Government Senators do not believe there is substance to claims of the requirement of a ‘legislative base’.

### **Comments by the Clerk of the Senate**

1.24 The most disappointing aspect of the inquiry, in the view of the Government Senators, were elements of the evidence of Mr Harry Evans, the Clerk of the Senate.

1.25 The Clerk made several submissions to the inquiry, in the course of which he deviated from his role as an independent procedural adviser to the Senate, to present highly contentious policy advice. Odgers Australian Senate Practice, edited by the Clerk, nominates the functions of the Clerk:

*The Clerk of the Senate is the principal adviser in relation to proceedings of the Senate to the President, the Deputy President and Chair of Committees, and senators generally... the departmental head of the Department of the Senate... [and] secretary and adviser to the Procedure Committee.*<sup>6</sup>

The Clerk is an administrator and technical adviser in relation to the procedures and prerogatives of the Senate. His role does not extend to advice on the relative merits of public policy.

1.26 The Clerk’s expertise and experience is vital to the stability and integrity of the legislative process. It is therefore a very serious matter when the Clerk raises allegations of government corruption which he can not substantiate. In particular, Government Senators were concerned about the following remarks made by the Clerk:

*The other problem which has been perceived in government advertising is the cross-subsidising of party-political advertising. It is suspected that advertising firms accept lower fees for advertisements paid for by the party in power with an assurance that more lucrative government advertising contracts will fall*

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<sup>5</sup> Joint Committee of Public Accounts and Audit, *Guidelines for Government Advertising*, Report 377, September 2002, p. 4, italics added.

<sup>6</sup> Odgers Australian Senate Practice (11<sup>th</sup> Edition).

*their way. In effect, the expenditure on the government advertising projects subsidises the party-political advertising of the government party. This is tantamount to corruption.*<sup>7</sup>

1.27 In oral and written evidence to the Committee, the Clerk claimed that in referring to these perceptions and suspicions he was not himself supporting these allegations, but merely reflecting concerns that had been raised in the Senate chamber. The Clerk did not provide references in his written submissions to support the claim that he was merely repeating assertions made in the Senate. Nor was the material to hand:

*Mr Evans - We could go through an exercise of assembling all the references in the literature to support that statement. I hope you do not ask me to do that, but I could.*<sup>8</sup>

1.28 Upon request the Clerk did submit Hansard references in support of his assertions. He referred the committee to 25 speeches made in the Senate. All were by Labor Senators: ten from Labor Senator Robert Ray, nine from Labor Senator John Faulkner, and the remaining six from other Labor Senators. Despite the partisan nature of the evidence, the Clerk denied this was an issue:

*I have collected a select set of twenty-five speeches in the Senate referring to alleged improper awarding of government contracts to who also had contracts with the government political party. At least seven of these make a direct allegation of cross-subsidisation or other fraud in the awarding of the contracts. They will be familiar to anyone who has followed the proceedings in the Senate in recent years. Again I emphasise that my submissions in no way rely on their truth, and the fact that they were made by Opposition senators is not to the point. Their existence represents the problem.*<sup>9</sup>

1.29 After the Clerk's allegations had been rebutted by the Special Minister of State, the Clerk wrote:

*I could also have pointed out that cross-subsidising is not tantamount to corruption, but is corruption. That term could also be applied to the use of public funds for party-political advertising even in the absence of cross-subsidising.*<sup>10</sup>

1.30 Government Senators do not believe that the Clerk could be unaware of the political implications of those two statements, given the context of the debate between the Government and Opposition in relation to advertising.

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<sup>7</sup> Mr Harry Evans, *Submission 6*, p. 2.

<sup>8</sup> Mr Harry Evans, *Committee Hansard*, 19 August 2005, p. 20.

<sup>9</sup> Mr Harry Evans, *Submission 6a*, pp 1-2.

<sup>10</sup> Mr Harry Evans, *Submission 6a*, p. 2.

1.31 In the same submission the Clerk directly impugned the honesty of the Special Minister of State:

*The louder they talk of honour, the faster we count our spoons.*<sup>11</sup>

Government Senators are concerned by the Clerk's allusion to the Minister's character. The significance of this statement may be seen in the fact that this was not simply a line delivered in the cut-and-thrust of oral questioning. It was a considered statement, placed in a written submission to the Committee. The Clerk's actions in impugning the integrity of a Senator are not consistent with the Clerk's obligation to avoid the perception of partiality and to be seen to serve all Senators equally.

1.32 During oral evidence the Clerk also questioned the capacity of the High Court to consider Constitutional matters:

Senator Fifield - *You have offered quite a bit of advice in relation to constitutional law as well in these proceedings. What is your background in constitutional law? Do you have a law degree, Clerk?*

Mr Evans - *No, I do not, which is a great assistance in assessing constitutional questions. The Senate and its committees have found, over many years, that the worst people to talk about large constitutional issues are people who have done law degrees.*<sup>12</sup>

The Clerk provided his own constitutional advice as to whether monies for the WorkChoices campaign were legally appropriated.<sup>13</sup> The High Court has subsequently rejected, by a 5-2 majority, the Clerk's interpretation.<sup>14</sup>

1.33 Government Senators respect the role of the Clerk as a procedural adviser to the Senate and Senators. They do not believe there is a role for the Clerk as an adviser on either policy or public administration.

1.34 Government Senators consider that the intervention of the Clerk in relation to these matters was unwise, outside his remit and needlessly opened the Office of the Clerk to allegations of political partiality.

**Senator John Watson**  
**Deputy Chairman**

**Senator Mitch Fifield**

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<sup>11</sup> Mr Harry Evans, *Submission 6b*, p. 2.

<sup>12</sup> Mr Harry Evans, *Committee Hansard*, 19 August 2005, p. 19.

<sup>13</sup> Mr Harry Evans, *Submission 6b*, p. 1; and *Submission 6c*, passim.

<sup>14</sup> *Combet v Commonwealth of Australia* [2005] HCA 61 (21 October 2005).