

Submission to the Senate Finance and Public
Administration Reference Committee

Senate Committee Inquiry into Government
Advertising and Accountability

Tony Harris
Professorial Fellow, Accounting and Finance
University of Wollongong

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Summary

There are two important problems with government advertising that the Commonwealth government or parliament need to address. The first is the practice of recent governments to use public moneys for advertising campaigns that advance non-government (that is, party-political) purposes.

2. The second problem is that considerable expenditure on government advertising would not meet one or more of the audit tests for efficiency, economy or effectiveness.

3. There is no debate that the latter matter falls within the mandate of auditors-general. However, the Commonwealth auditor-general apparently does not believe that he has a valid role to audit or comment on the former issue, on government advertising which is aimed at non-government purposes, until the government introduces policies which ban party-political or party-politically tainted government advertising.

4. This belief stems from a 1998 audit finding which, because it misconstrued legal advice, found that governments are entitled to spend public monies on advertising that canvasses its election promises. Because such advertising is seen as lawful, and because there are no government policies banning such advertising campaigns, the auditor-general is reluctant to criticise them on grounds that they are "inappropriate"

5. The Howard government seemingly supports this view of the auditor-general. The Department of Prime Minister and Cabinet also argues that debate on the appropriateness of what might be viewed as politically charged advertising should be left to the parliamentary and political processes. However, as subsequent, public legal advice made clear, this is a mistaken position.

6. Auditors-general may audit government expenditure for, and comment on, the legality of those expenditures. And although Australian courts are reluctant to "interfere" in matters of "government policy and administrative necessity" - including, it seems, on the extent to which government advertising meets government purposes - it is an accepted legal principle that a government may not use a valid power for improper purposes. Advertising political promises is not a valid purpose of a government. Accordingly, it is within the mandate of auditors-general to audit and comment on government advertising campaigns that address non-governmental purposes.

7. Such audits would involve auditors-general in politically contentious matters; however, if this mandate is not exercised, there is no other government office which will take on this role. Moreover, if auditors-general thought that they had to eschew areas of political controversy, they would be ignoring most issues that are amongst the most important to the parliament and the public.

8. To address the twin problems outlined above, it is recommended that for the next few election cycles the auditor-general audit the legality, economy, efficiency and effectiveness of government advertising campaign expenditures in the lead up to general elections. When it is necessary to ensure that audit intervention is timely, it is further recommended that, where the auditor-general has formed a prima facie view that a government advertising campaign is aimed at or includes party-political goals, he issue an announcement to that effect indicating his intention to conduct an audit to confirm or deny that view.

Government Advertising for Political Purposes

9. Recent audits of government advertising campaigns in NSW and Victoria and in the Commonwealth have concluded, to employ the views of the Commonwealth auditor-general, that there is a correlation between approaching general elections and the amount of expenditure directed to government advertising.

10. Even where Australian jurisdictions have fixed terms, such as in NSW, past governments have increased their advertising spending in the months leading up to elections. In the early part of the 1990s, the then NSW Opposition believed that the matter was so serious as to require legislation to establish a committee - it was to be comprised of the auditor-general, the ombudsman and the electoral commissioner - which would have the duty to examine all government advertising and to require government agencies to withdraw politically tainted advertisements. The legislation, although not accepted by the Fahey government, was proposed in identical terms in the second part of the 1990s by the new Opposition formed when the Carr government took office. The Carr government followed the precedent set by the former government and rejected the legislation.

11. The current NSW government has, as a matter of policy, banned unnecessary campaigns in the two months immediately preceding the general election, but this does not stop politically tainted advertising throughout the remainder of the government's term.

12. The most egregious recent examples of politically tainted advertising are the 1998 federal advertisements for the GST, just prior to the federal general election, and advertisements leading up to the 1995 NSW state general election.

13. The GST campaign concentrated on selling the government's intention, if re-elected in the 1998 elections, to introduce a GST, notwithstanding the Senate's stance that it would not agree to proposed GST legislation. The political import of that advertising is supported by documents which showed that the Commonwealth government reviewed each week the response of focus groups to the advertisements supporting the introduction of a GST. Immediately following the point where a majority of those in the focus groups supported a GST, write were issued for the general election.

14. Many auditors-general throughout Australia were concerned that the GST campaign could provide a precedent for any government to use public money to promote its political promises. Perhaps reflecting such concerns, the Commonwealth auditor-general conducted an audit on the GST campaign and asked the Australian Government Solicitor and a legal consultant whether the campaign breached provisions of broadcasting and electoral legislation. He was advised that they did not breach those laws. This opinion was misinterpreted by ANAO which took it to mean that the Community Education and Information Program - the title given to the 1988 GST advertising campaign - was a lawful use of public monies under other laws. Without separately examining those laws, the auditor-general concluded that the advertisements were lawful.

15. Subsequently, the Australian Government Solicitor prepared advice on another proposed advertising campaign which advice has been published. It found that, in the absence of legislative action, it is not proper for a government to expend money on an advertising campaign on proposed government policy.

16. This advice, if applied to the GST advertising would have led the federal auditor-general to conclude that that advertising was invalid. I have not been able to find any Australian National Audit Office statement that corrects its earlier erroneous audit findings on the GST advertising.

17. This AGS advice also calls into question that part of ANAO suggested guidelines for government advertising that allows government advertising to canvass "proposed government policies." Certainly, it would not be proper for such advertising to advocate a proposed policy, especially, but not only, when that advertising is conducted in an environment where there is a dispute between the two houses of parliament.

18. Advertising campaigns in NSW in 1994-95 did not involve proposed policy or promises. But they were aimed at obtaining a political advantage over other than the parties in government. The political content or direction of those advertisements was discovered after the general elections. An audit found that the advertisements were considered by focus groups centred on marginal electorates and that the government modified its advertisements to reflect the findings of those focus groups. Relevant government documents about the campaigns and the focus groups were classified as cabinet documents. This prevented their being subject to Freedom of Information applications and it also prevented the auditor-general from accessing those documents for the purpose of audit without the government's consent.

19. Among the recent and current crop of advertising undertaken by the Commonwealth, including advertisements on citizenship, apprentices, superannuation, travel smart, the environment, and domestic violence, the campaign on "Strengthening Medicare" stands out as having party-political characteristics that dominate the advertising. This can be seen from the title of the campaign which is aimed at convincing viewers that the government's policy improves Medicare. That theme is supported by advertising showing typical voters approving the government's changes to Medicare and by the

armour-plated surrounds to advertising headings (reminiscent, by the way, of the chains used in the above-mentioned GST advertising). Unless advertisements offer the alternative view, as occurs in advertising campaigns for changes to the Constitution, it should be adopted as a universal rule that all advertisements which aim to induce viewer (that is, voter) approbation should be ruled to be invalid.

20. There is nothing to prevent the federal auditor-general from auditing this crop of advertisements, announcing his intention to do so immediately, and alerting the public to any concerns he has about the timing of the advertising, the amount of advertising, and the party-political content of advertising. Indeed, by not doing so, the auditor-general will have allowed the government to misuse public monies for its own party-political advantage on the eve of a general election.

Efficiency, Economy and Effectiveness of Commonwealth Campaigns

21. The Department of the Prime Minister and Cabinet submission to this inquiry suggests that the effectiveness of federal campaigns is monitored by the sponsoring agency. However, it gives no indication of the results of that monitoring for any of the campaigns included in the \$929 million of federal advertising conducted since 1996-97. It is difficult to see how departments can objectively measure the effectiveness of campaigns such as on the proposed GST or on "Strengthening Medicare" without infringing on the prohibition set out by the Prime Minister's department against public servants being involved in political matters. It is also difficult for the public - on the information provided by departments on their web sites - to assess effectiveness.

22. The campaign to increase public awareness of terrorism, best described by its slogan, "be alert but not alarmed" is assessed on the web site of the Department of the Attorney-General which says it "is probably one of the most recognisable Australian campaign slogans for many years." The department further adds that, at the time its assessment was prepared, the National Security Hotline - which required over \$8 million in 2002-03 and 2003-04 - received over 16,000 calls (since increased to 22,000 as at September 2003 and 28,000 as at March 2004). But neither of these indicators allows an accurate judgement of the success of the campaign.

23. "Not happy Jan" is also a well recognised advertising slogan, and it could be judged successful if the public remember the context of the advertising. But brand awareness is not a sufficient indicator of effectiveness for government advertising which aims to modify public behaviour. Moreover, the fact that the anti-terrorism campaign was well remembered does not indicate success if that was caused by cynicism or mockery. That there have been more than 28,000 in response to advertisements about the National Security Hotline is also not a sign of success if they were mostly irrelevant or harmful (in the sense of diverting resources) to the government's aims. Information suggesting that none of these calls has led to prosecution for terrorism, and that few, if any, calls

provided intelligence leading to terrorism charges indicates that the campaign was ineffective.

24. But the agency best placed to examine effectiveness of these campaigns is the Australian National Audit Office. It alone has access to all of the information needed to make an assessment and at the same time has the objectivity to make audit findings on this matter. Given the amount expended by the Commonwealth on advertising, and public concern over the amount and the aims of those campaigns, the ANAO should class such an audit as having a higher priority than some of the 130 or so potential and reserve audit topics which it has listed in its latest publication on its program for 2004-05.

Audit Mandate

25. While there is no debate that ANAO may conduct efficiency audits, there is concern that involving ANAO in politically contentious issues might sully its reputation for being apolitical. Even if that were so, ANAO has a duty to perform audits that are relevant to improving the legality and the efficiency, economy and effectiveness of government. ANAO may not validly question the merits of government policies, but it may - and must - examine their legality and their efficacy. Indeed, if ANAO avoided audits solely because they are controversial, it would be failing its duty.

26. The fact that ANAO undertook an audit on the "Community Education and Information Program" that the GST advertising campaign was called shows that this body is not avoiding its duty.

27. Moreover, if ANAO does not examine the legality and efficacy of government advertising, it is difficult to see what other agency or person will. The Commonwealth government has the constitutional responsibility to maintain the law, but there is no agency that has the mandate to audit other agencies legal compliance, except the Attorney-General. Neither The Australian Government Solicitor nor the Solicitor-General may provide advice in the absence of questions.

28. Attorneys-general have the theoretical power to tell other government ministers that their agencies have or appear to have broken the law, such interference in the affairs of these ministers would not be seen as politically sound. As a former federal attorney-general advised on a number of occasions, the holder of that office is a politician and the public cannot assume that the occupant will act other than in the government's best political interests.

29. It is also clear that the public service is not well positioned to act on their view that an advertising campaign is politically biased or is not for government purposes. For a start, those public servants intimately involved in the preparation of advertising campaigns are not legally trained and their views would have no standing. Secondly, as the submission from the Department of the Prime Minister and Cabinet makes clear, it is ministers who make the key decisions on advertising campaigns. That department

merely but rightly says it is “committed ... to the avoidance by public servants of any activity that is directed at the support of a particular political party.”

Recommendations

30. The above discussion suggests that it would be proper for the auditor-general to audit government advertising campaigns for their legality and their efficacy. Further, it is recommended that such audits be undertaken on advertising campaigns promoted in the approach to the next several general elections. If, before the audit has been finalised, the auditor-general formed the prima facie belief that the campaigns to be audited are not for government purposes - and are thus illegal - the auditor-general should issue a statement to that effect advising the parliament and the public that this interim judgement will be denied or confirmed by the findings of the audit.

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