

# Chapter 3

## ISSUES

3.1 The primary focus of evidence in relation to the bill concerned the proposed scrutiny function performed by the Auditor-General. Whilst the 2010 *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* (the 2010 guidelines) replaced the Auditor-General as the scrutiny body with that of the Independent Communications Committee (ICC), the bill reinstates the Auditor-General in this role.

### **Evidence supporting the bill**

#### *Legislative framework*

3.2 Professor Graeme Orr supported the 'legislating of government advertising', underscoring that 'it is advisable to enact principled legislation to guide and restrain executive discretion'. He noted that the bill 'in essence, will give binding statutory force to the administration regime which the Rudd Government applied until early 2010'.<sup>1</sup> Adjunct Professor Tim Smith and Associate Professor Ken Coghill also commented that it is 'highly desirable that there be clear legislative provisions as to acceptable limits to the use of public funds for advertising by the executive government'.<sup>2</sup>

#### *Role of the Auditor-General*

3.3 In his submission, Professor Orr stated that Guideline 2 refers to the Auditor-General's report on a proposed campaign and noted that it would be wise 'in any principles-based legislation, to ensure that some independent vetting mechanism is required during the development of large campaigns'.<sup>3</sup>

3.4 The following discussion in support of the role of the Auditor-General as envisaged in the bill is drawn from comments made in other arenas. In a submission to the current JCPAA inquiry on the role of the Auditor-General in scrutinising government advertising campaigns, the Auditor-General acknowledged the risk in 'providing assurance in relation to campaigns ahead of their commencement' and that the Australian National Audit Office (ANAO) was 'conscious of these risks and have been managing them through our review procedures including specific inquiries of

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1 Prof G Orr, *Submission 1*, p. 1.

2 Prof T Smith & Prof K Coghill, *Submission 2*, p. 1.

3 Prof G Orr, *Submission 1*, p. 2.

departments and agencies, examination of documents, and by seeking the representation from Chief Executives'.<sup>4</sup> The Auditor-General further argued that:

From my perspective, there is no doubt that the involvement of the ANAO in reviewing the campaign arrangements prior to its launch has resulted in better outcomes than would have been the case had the ANAO not been involved in undertaking reviews at this stage.<sup>5</sup>

3.5 Indeed, the Auditor-General has argued that the involvement of the ANAO has resulted in 'better targeted and supported campaigns'.<sup>6</sup> In his submission to the committee, the Auditor-General commented that 'the framework introduced by the Government in June 2008 has been demonstrated to work effectively, albeit with scope for some improvement'.<sup>7</sup>

3.6 In response to the view that the Auditor-General's involvement in undertaking reviews of advertising campaigns made it difficult to then undertake performance audits, the Auditor-General argued that:

The benefit of our review activity is that it is much more timely than a performance audit in gaining access to information and personnel, and in providing feedback to agencies individually and collectively; on the other hand, reviews focus only on the Government's Guidelines and provide limited assurance due to time and resource constraints, and do not address issues that have even problematic under former arrangements, such as contract management and performance issues. Reviews and audits are complementary however, and performing reviews does not exclude the conduct of subsequent performance audits. Rather, the reviews provide information which allow better targeting of decisions.<sup>8</sup>

3.7 Moreover, in response to the Hawke review claim that the role the Auditor-General was given 'has undermined the proper accountabilities of Secretaries for managing their departments and the Auditor-General's proper place [in] the scheme of

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4 Australian National Audit Office, *Submission No. 2*, Joint Standing Committee on Public Accounts and Audit, Inquiry into the role of the Auditor-General in scrutinising government advertising campaigns, March 2009, p. 2.  
<http://www.aph.gov.au/house/committee/jpaa/govtad/sub2.pdf> (accessed 16.6.10).

5 Australian National Audit Office, *Submission No. 2*, Joint Standing Committee on Public Accounts and Audit, Inquiry into the role of the Auditor-General in scrutinising government advertising campaigns, March 2009, p. 2.

6 Australian National Audit Office, *Campaign Advertising Review 2008-09*, Overall conclusion, [http://www.anao.gov.au/director/publications/auditreports/2009-2010.cfm?item\\_id=91ACB58D1560A6E8AA2EC4FBC83E784B#91B1323B1560A6E8AAFA6A10C8F8445A](http://www.anao.gov.au/director/publications/auditreports/2009-2010.cfm?item_id=91ACB58D1560A6E8AA2EC4FBC83E784B#91B1323B1560A6E8AAFA6A10C8F8445A) (accessed 17.6.10).

7 Australian National Audit Office, *Submission 3*, p. 1.

8 Australian National Audit Office, *Submission No. 2*, Joint Standing Committee on Public Accounts and Audit, Inquiry into the role of the Auditor-General in scrutinising government advertising campaigns, March 2009, p. 3.

things'<sup>9</sup>, the Auditor-General held that the Hawke review 'seriously misunderstands the role of the Secretaries and the Auditor-General'.<sup>10</sup> In a letter to the Cabinet Secretary in March 2010, the Auditor-General argued that:

Secretaries have sole responsibility for certifying compliance with the Government's advertising guidelines; the role of my office is to report to the responsible Minister on whether anything has come to attention from our review of the certificate, and information supporting the certificate, to suggest that the relevant campaign does not comply in all material respects with the requirements of the advertising guidelines. The final decision on whether a campaign proceeds appropriately rests with the responsible Minister.<sup>11</sup>

3.8 Under the 2008 guidelines, Secretaries did have sole responsibility for certifying compliance (as they do under the 2010 guidelines). The evidence heard by Dr Hawke and by the JCPAA has revealed that secretaries may not have considered this to be the case in reality, despite what the guidelines state. Professor Orr stated that the ICC was appointed to take over the scrutiny role of the Auditor-General:

Possibly because the Auditor-General was building up too much expertise and it may have been felt that by some heads of departments that the Auditor-General was having too much weight and too much say in the crafting of campaigns.<sup>12</sup>

### ***Guidelines***

3.9 The guidelines proposed in the bill counter some of the concerns raised by the Auditor-General in relation to the 2010 guidelines of which the ANAO argued that a number of principles were 'less specific' than the guidelines contained in the 2008 version.<sup>13</sup> In his submission to the committee, the Auditor-General noted:

The Schedule to the Bill draws on the experience of the operation of earlier arrangements by addressing some of the practical issues that have arisen in areas such as the need for a clear definition of campaign advertising, that campaign information included the Chief Executives' certificate be

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9 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 3.

10 Mr Ian McPhee, Auditor-General of Australia letter to Special Minister of State dated 29 March 2010, *Campaign Advertising Review July 2009–March 2010*, ANAO Report No. 38 2009–10, Appendix 1, p. 42.

11 Mr Ian McPhee, Auditor-General of Australia letter to Special Minister of State dated 29 March 2010, *Campaign Advertising Review July 2009–March 2010*, ANAO Report No. 38 2009–10, Appendix 1, p. 42.

12 Heather Ewert, 'Rudd grilled over mining advertisements', *The 7.30 Report*. ABC TV, 31 May 2010, <http://www.abc.net.au/7.30/content/2010/s2914442.htm> (accessed 16.6.10).

13 Australian National Audit Office, *Campaign Advertising Review July 2009–March 2010*, ANAO Report No. 38 2009–10, p. 30.

published on the agency's website, and that campaigns include those conducted by third parties.<sup>14</sup>

### 3.10 The Auditor-General concluded:

While necessarily there will be judgments involved in assessing campaigns against the proposed bill and guidelines, the draft legislation builds on experience to date, and subject to [certain matters] provides a sound basis for Parliamentary consideration.<sup>15</sup>

## **Evidence not supporting the bill**

3.11 The Government's 2010 guidelines define campaign advertising, advertising campaign compliance and ICC reports must be published on the agency and ICC websites.

3.12 Clause 10 of the bill is an attempt to bind this Senate, any future Senate, and the House of Representatives, and any future House of Representatives, in relation to its plenary power over government advertising for all time. The Greens' bill purports to limit the powers of the Senate. The rights of the Senate cannot be given away. The Australian Constitution says that only the Australian people may determine, by peaceful referendum, whether the legislative powers of the Parliament including of this Senate, may be limited. To seek to pass a bill that strips this and all future Senates and Houses of Representatives has questionable Constitutional validity, threatening the doctrine of the sovereignty of the Parliament that underpins our entire system of democracy. This power, that the bill seeks to strip away, can only be given away with a referendum bill on this issue.

### ***Role of the Auditor-General***

3.13 The bill provides for the Auditor-General to review government information and advertising campaigns in excess of \$250 000. Concerns regarding the Auditor-General fulfilling the scrutiny function in relation to proposed government advertising were raised in the Hawke review. Dr Allan Hawke stated in the review that the 2008 arrangements drew into question the 'independence of the Auditor-General and potential create conflicts of interest'.<sup>16</sup> He took the view that:

In order to protect its position, the Australian National Audit Office (ANAO) has had to adopt a highly risk-averse approach, placing a heavy (and unnecessary) bureaucratic and administrative burden on departments. In essence, the role that the Auditor-General has been given has

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14 Australian National Audit Office, *Submission 3*, p. 1.

15 Australian National Audit Office, *Submission 3*, p. 1.

16 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 3, <http://www.finance.gov.au/advertising/docs/Independent-Review-of-Government-Advertising-Arrangements.pdf> (accessed 15.6.10).

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undermined the proper accountabilities of Secretaries for managing their departments and the Auditor-General's proper place the scheme of things.<sup>17</sup>

3.14 Dr Hawke argued that whilst the primary role of the Auditor-General is to reach a view on whether the proposed campaign complies with the guidelines, 'the processes established by the ANAO result in intervention in areas clearly outside its expertise'.<sup>18</sup>

3.15 Findings of the review in relation to the role of the Auditor-General upheld the view that the current governance arrangements 'place the Auditor-General in a very difficult position in respect to conflict of interest'. In this regard, Dr Hawke stated that:

- (a) mechanisms to protect the independence of the Auditor-General (through processes and internal guidelines) have resulted in a highly risk-averse and conservative approach to Government advertising activity;
- (b) whether the Auditor-General can conduct regular performance audits of Government advertising effectively when he is bound up in the process of developing and approving campaign advertising;
- (c) the ANAO is venturing into areas outside its expertise and over-riding expert advice and communications research; and
- (d) the Auditor-General's role has the potential to undermine the proper accountabilities of Secretaries and CEOs for the management of their departments and agencies.<sup>19</sup>

3.16 Dr Hawke noted that in 2007 following the federal election, the Auditor-General raised concerns with the Prime Minister that 'whoever administers the guidelines could be drawn into a policy and political debate as an active participant in, and possible defender of, the processes of executive government'.<sup>20</sup> The Auditor-General proposed that a small independent committee assess proposals of compliance with the guidelines and that the ANAO conduct periodical audits to report on whether the arrangements were operating as intended.

3.17 In relation to the manner in which the ANAO approached its role, the Hawke review stated that:

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17 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 3.

18 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 15.

19 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, pp 21–22.

20 Mr Ian McPhee, Auditor-General, letter to the Hon Kevin Rudd MP, Prime Minister, 26 November 2007 cited in Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 15.

There is a school of thought that it is not the Guidelines that are the problem, but rather the way in which the ANAO has chosen to interpret them. So removing the Auditor-General from the decision-making process and substituting an independent review body may be sufficient to address the concerns that have been raised.<sup>21</sup>

3.18 Indeed, the Hawke review stated its support for the Auditor-General's proposal of an independent scrutiny committee whilst recommending that the ANAO focus on core areas of ANAO expertise, thereby removing the Auditor-General from the 'current position of actual or perceived conflict of interest'.<sup>22</sup>

3.19 The Special Minister of State, Senator the Hon Joe Ludwig, commented on the changes to the guidelines during the committee's estimates hearing of 25 May 2010 and stated:

The Auditor-General is also free to undertake an audit of any campaign or aspect of the government advertising framework and has been asked to consider undertaking at least one audit per year on a campaign or the administration of the framework. So the short answer is: it is not, no, and, yes, the Auditor still has a role.<sup>23</sup>

3.20 Professor Tim Smith and Professor Ken Coghill also commented that the 'role of the Auditor-General must be confined to auditing the process and must not extend to the approval of content'.<sup>24</sup>

3.21 Professor Charles Sampford noted that whilst the 'ANAO did a very good job for almost two years', his preference was that of an independent committee certifying the accuracy and non-partisan nature of the advertising. Professor Sampford took the view that such a body would give 'the advertising campaign greater credibility and increase the likelihood that it will be accepted'.<sup>25</sup> He further argued that:

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.<sup>26</sup>

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21 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 4.

22 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 15.

23 Special Minister of State, Senator the Hon Joe Ludwig, *Estimates Hansard*, 25.5.10, p. F&PA 4.

24 Prof T Smith & Prof K Coghill, *Submission 2*, p. 1.

25 Prof C Sampford, *Submission 4*, p. 5.

26 Prof C Sampford, *Submission 4*, p. 4.

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## Other matters

3.22 Professor Orr commented on the problem of the unlimited capacity or size of campaigns and selectivity which create obstacles. He noted that 'a bill like this' may only indirectly address those problems 'to the extent that the Auditor-General may unfavourably comment on the need for a campaign or the estimated cost and choice of media'.<sup>27</sup>

3.23 Professors Smith and Coghill noted a number of matters:

- that legitimate government advertising (for example, advertising job vacancies, invitations to tender) should not be interfered with and should be exempted from the provision of the bill, except for those special categories subject to regulation;
- the bill should provide a clear definition of those special categories subject to regulation;
- the bill should provide a clear definition of those special categories of government advertising which are not permitted to be funded by government; and
- the bill should provide a clear definition of the process to be followed to determine whether the content of particular proposed advertising falls within the definition of those special categories of government advertising subject to regulation;
- in relation to the national emergency exemption, approval process provisions but not the content provisions, should be restricted for a limited, reasonable and non-renewable period during which the Parliament can be called to sittings to debate the emergency and give specific authority for further related government advertising; and
- the guidelines should not be liable to amendment by regulation, only by act of Parliament.<sup>28</sup>

## Committee comments and recommendation

3.24 The Preventing the Misuse in Government Advertising Bill 2010 inquiry received only four submissions from involved stakeholders and individuals. In the committee's view, this number is more a reflection of the short reporting timeframe rather than that of the level or scope of public interest in the issues surrounding government advertising and the use of public funds therein.

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27 Prof G Orr, *Submission 1*, p. 1.

28 Prof T Smith & Prof K Coghill, *Submission 2*, pp 1–2.

3.25 The committee appreciates that advertising by government has long been a sensitive issue and notes the comments by Professor Orr that 'the threat of excessive promotional advertising to political equality is clear'.<sup>29</sup>

3.26 The committee recognises the importance of independent and transparent mechanism to oversee and report on compliance with the *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*. The committee appreciates that the independent review of Dr Allan Hawke was commissioned to consider the appropriateness and clarity of the 2008 guidelines and the effectiveness and efficiency of the current approval process.<sup>30</sup> It acknowledges that the 2010 guidelines enact recommendations of the Hawke review, notably the introduction of an alternate, independent and transparent process for oversight of and reporting on compliance to the guidelines, thereby enabling the Auditor-General to revert to traditional areas of performance audit and review of government advertising campaigns.

3.27 The committee considers that the 2010 guidelines meet the requirements of transparency and rigour with regard to the oversight of proposed government advertising.

### **Recommendation 1**

**3.28 The committee reports to the Senate that it has considered the Preventing the Misuse of Government Advertising Bill 2010 and recommends that the bill not proceed.**

**Senator Helen Polley**  
**Chair**

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29 Dr G Orr, *Government Advertising, Parliament and Political Equality*, Senate Occasional Lecture, 11 November 2005, p. 3,  
[http://www.aph.gov.au/Senate/pubs/occa\\_lect/transcripts/111105.pdf](http://www.aph.gov.au/Senate/pubs/occa_lect/transcripts/111105.pdf) (accessed 18.6.10).

30 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, Terms of Reference for this Review, 26 February 2010, p. 6.