

The Senate

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Finance and Public Administration  
Legislation Committee

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Preventing the Misuse of Government Advertising  
Bill 2010

June 2010

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# Membership of the Committee

## 42<sup>nd</sup> Parliament

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### Participating Member for this inquiry

Senator Bob Brown	AG, Tasmania
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# Chapter 1

## PREVENTING THE MISUSE OF GOVERNMENT ADVERTISING BILL 2010

### Introduction

1.1 On 16 June 2010, the Senate referred the *Preventing the Misuse of Government Advertising Bill 2010* (the bill) to the Senate Standing Legislation Committee on Finance and Public Administration (the committee) for inquiry and report by 21 June 2010.

### Purpose of the bill

1.2 The purpose of the bill is to establish a legislative framework for accountability of expenditure on information and advertising campaigns undertaken by Australian government departments and agencies to 'ensure that the campaign advertising does not contain electoral matter'.<sup>1</sup>

1.3 The framework to be established by the bill:

- (i) provides the Auditor-General with the powers and functions to review and report on government information and advertising campaigns;
- (ii) establishes a process by which ministers and the Auditor-General report to the Parliament; and
- (iii) outlines the principles and guidelines governing the use of public funds for government information and advertising.<sup>2</sup>

1.4 The framework also provides for exemption from the guidelines in cases of national emergency.

1.5 The guidelines contained in the bill are based on the 2008 *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* (introduced by the current government but superseded by new guidelines in 2010) whilst incorporating key recommendations made by the Auditor-General in relation to the review of the guidelines conducted in early 2010.

### *Functions of the Auditor-General*

1.6 The bill provides the Auditor-General with new functions of reviewing government information and advertising campaigns with a cost in excess of \$250 000

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1 Preventing the Misuse of Government Advertising Bill 2010, *Explanatory Memorandum*, Outline.

2 Preventing the Misuse of Government Advertising Bill 2010, clause 3.

and reporting whether they comply with the principles and guidelines set out in the bill. The bill allows the Auditor-General to use the powers available under the *Auditor-General Act 1997* to undertake these new functions.<sup>3</sup>

1.7 A minister responsible for a campaign with expenditure of \$250 000 or less may ask the Auditor-General to review that campaign's compliance with the guidelines where the campaign is of a sensitive nature or the minister considers that such a review is appropriate.

1.8 The provisions of the bill also provide that the Auditor-General report to the minister and to the Parliament on each campaign. While the minister retains ultimate responsibility for the approval or rejection of a campaign, the process seeks to ensure that the public are fully informed of review and decision-making processes.

1.9 Clause 8 of the bill details the functions of the Auditor-General which include:

- (a) considering campaigns as specified in the guidelines;
- (b) reporting on compliance of campaigns with the guidelines;
- (c) reporting to each House of Parliament on matters connected to those guidelines;
- (d) providing advice to the minister and the Parliament on the operation of the guidelines and on any proposal by the minister to revise the guidelines; and
- (e) any other function necessary or convenient to enable the Auditor-General to undertake a function assigned to the Auditor-General.<sup>4</sup>

### ***Administrative process***

1.10 Agencies subject to the *Financial Management and Accountability Act 1997* must comply with the guidelines provided in the act 'whether delivered by the agency, third parties or jointly delivered', where the Commonwealth has committed to expenditure of \$250 000 or more.<sup>5</sup>

1.11 Government campaigns can be approved for launching by a minister when the chief executive of the involved agency certifies that the campaign complies with the guidelines and relevant government policy and, in case of campaigns in excess of \$250 000, the Auditor-General provides a report to the minister responsible for the

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3 Preventing the Misuse of Government Advertising Bill 2010, *Explanatory Memorandum*, Outline.

4 Preventing the Misuse of Government Advertising Bill 2010, clause 8.

5 Preventing the Misuse of Government Advertising Bill 2010, Guidelines on campaign advertising, administrative process, clause 5.

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agency undertaking the campaign on the proposed campaign's compliance with the guidelines.

1.12 The chief executive's certification will be published on the relevant department's website when the campaign is launched. Chief executives are responsible for ensuring that research reports for advertising campaigns worth \$250 000 or more are published on the agency's website following the launch of the campaign where appropriate, and details of advertising campaigns undertaken will be published in agency annual reports.<sup>6</sup>

1.13 The requirements for review and certification of campaign advertising are determined by the value of the campaign. The bill defines the value of the campaign as the budget for all campaign elements across all financial years and includes:

- market or social research consultants, public relations consultants, advertising agencies and/or other specialist consultants commissioned in the development of advertising material;
- production and placement of advertising in print, radio, digital, cinema, television or out-of-home media; and
- production and dissemination of other campaign materials.<sup>7</sup>

#### *Exemption from the guidelines*

1.14 The bill also provides for the exemption of information and advertising national emergencies from the guidelines. Subclause 6(2) of the bill provides that, in the event of a national emergency, the minister may seek to have the advertising campaign exempted by the Cabinet Secretary in accordance with clause 9 of the guidelines. The exemption for that advertising campaign will expire when the national emergency has ended. Subclause 6(5) sets out the requirement that the minister seek a review by the Auditor-General in relation to national emergency campaigns 'as soon as practicable' following the exemption.<sup>8</sup>

1.15 In his second reading speech, Senator Bob Brown stated the following in relation to the exemption process:

This provision removes all room for subjective interpretation and political expediency in the exercise of exemptions from compliance. The current guidelines which allow exemptions on the basis of 'a national emergency, extreme urgency or other compelling reason' allows broad interpretation

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6 Preventing the Misuse of Government Advertising Bill 2010, Guidelines on campaign advertising, clause 8.

7 Preventing the Misuse of Government Advertising Bill 2010, Guidelines on campaign advertising, clause 14.

8 Preventing the Misuse of Government Advertising Bill 2010, *Explanatory Memorandum*, Outline.

which demonstrably results in campaign which breach the clear and stated intention. This Bill closes that loophole.<sup>9</sup>

### ***Legislated process of revision of guidelines***

1.16 The bill also provides for a legislated process for the revision of the guidelines governing government advertising campaigns. Under provisions of the bill, the guidelines can only be revised by regulations following a process of public consultation. The proposed process would require the Finance Minister to publish a draft of the revised guidelines on the department's website; call for public submissions on the draft; consult with the Auditor-General; and, table a report on the consultation in each House of Parliament.

1.17 In the second reading speech, Senator Bob Brown stated that this provision:  
...makes sure that the revision process and the changes themselves are subject to public and parliamentary input and approval.<sup>10</sup>

### **Conduct of the inquiry**

1.18 The committee advertised the inquiry on the Internet and invited submissions from interested organisations and individuals.

1.19 The committee received four public submissions. A list of individuals and organisations who made submissions to the inquiry together with other information authorised for publication is at Appendix 1. Submissions may be accessed through the committee's website at: [http://www.apf.gov.au/senate/committee/fapa\\_ctte/index.htm](http://www.apf.gov.au/senate/committee/fapa_ctte/index.htm).

### **Evidence before the inquiry**

1.20 The committee was faced with an exceptionally short reporting timeframe, a fact reflected in the small number of submissions received. For this reason, and in acknowledging the wider contemporary debate around government advertising, the committee chose to consider all relevant public evidence on the matter.

1.21 Central to the bill, and debate which surrounds it, are concerns about the appropriateness or otherwise of the Auditor-General undertaking the oversight functions of proposed government advertising campaigns. Much of the debate has taken place in a number of different contexts, most recently, the Budget Estimates 2010–11 hearings of the Senate Finance and Public Administration Legislation Committee. The 2010 *Independent Review of Government Advertising Arrangements* addressed these matters as did the Auditor-General in a number of reports. The Joint Standing Committee of Public Accounts and Audit is currently conducting an inquiry

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9 Senator B Brown, *Senate Hansard*, 16 June 2010, p. 56.

10 Senator B Brown, *Senate Hansard*, 16 June 2010, p. 56.

into the role of the Auditor-General in scrutinising government advertising campaigns.<sup>11</sup> Given this fact, the report considers all such material where relevant.

## **Acknowledgement**

1.22 The committee thanks those organisations and individuals who made a submission.

## **Structure of the report**

1.23 The committee's report is structured as follows:

- Chapter 2 provides a brief historical overview of the guidelines governing government advertising and amendments to them; and
- Chapter 3 considers the evidence in support of and against the bill and provides the committee's concluding comments and recommendation.

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11 Joint Standing Committee of Public Accounts and Audit, *Role of the Auditor-General in scrutinising government advertising campaigns*, <http://www.aph.gov.au/house/committee/jpaa/govtad/index.htm> (accessed 16.6.10)



## Chapter 2

# OVERVIEW OF THE GUIDELINES ON CAMPAIGN ADVERTISING

2.1 This chapter provides an overview of the 2008 *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, the 2010 independent review of the guidelines, and the changes to the guidelines announced in March 2010.

### 2008 Guidelines on Campaign Advertising

2.2 Prior to the November 2007 Federal election, government advertising and information activities were coordinated by the Special Minister of State, who chaired the Ministerial Committee on Government Communications (MCGC). The MCGC approved the design and implementation of major and sensitive advertising and information campaigns.<sup>1</sup>

2.3 On 2 July 2008, the current Government released new advertising guidelines to govern the content and presentation of Commonwealth Government campaign advertising. The *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* (the 2008 guidelines), were based on those developed in 1998 by the Auditor-General which were later refined in a Joint Committee of Public Accounts and Audit (JCPAA) report of 2000. For the first time, government advertising on party lines was explicitly banned.

2.4 In line with the recommendations of the Senate Finance and Public Administration Committee's 2005 report on government advertising and accountability, the 2008 guidelines required that campaigns with expenditure in excess of \$250 000 (or other campaigns if requested by a minister) be reviewed by the Auditor-General before approval.

2.5 Under the guidelines, each advertising campaign had to be certified by the chief executive of the commissioning department or agency, and major campaigns had to be reviewed by the Auditor-General before the campaign was allowed to progress.<sup>2</sup>

2.6 Agencies subject to the *Financial Management and Accountability Act 1997* (the FMA Act) were required to comply with the guidelines which required that:

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1 Australian National Audit Office, *Campaign Advertising Review July 2009 – March 2010*, ANAO Report No.38, 2009–10, pp. 19–20.

2 Senator the Hon John Faulkner, Special Minister of State and the Hon Lindsay Tanner MP, Minister for Finance and Deregulation, *New Advertising Guidelines*, Joint Media Release, 2 July 2008, 22/2008.

- the chief executive of the agency undertaking the campaign has certified that it complies with the guidelines and relevant government policies; and
- for campaigns with expenditure in excess of \$250 000, the Auditor-General provided a report to the minister on the proposed campaign's compliance with the guidelines.

2.7 There were five guidelines, prefaced by a number of overarching principles and underpinned by supporting statements. The 2008 guidelines stated that:

1. campaign material should be relevant to government responsibilities;
2. campaign material should be presented in an objective, fair and accessible manner;
3. campaign material should not be directed at promoting party political interests;
4. campaign material should be produced and distributed in an efficient, effective and relevant manner, with due regard to accountability; and
5. advertising must comply with legal requirements.<sup>3</sup>

2.8 The Special Minister of State, Senator the Hon Joe Ludwig, commented during the 2010–11 Budget estimates:

I think the salient points are that before the last election we promised to cut the expenditure on government advertising, which we did significantly, and introduce new and higher accountability and transparency standards, which we have. We have a strong record in doing just that. We have introduced tough guidelines which banned political advertising, removed the ministers oversight of the framework, increased the reporting requirements and significantly reduced the cost.<sup>4</sup>

2.9 When approving the guidelines, the Government also agreed to review their arrangements in relation to the initiation, development and implementation of government advertising campaigns before July 2010. An independent review was subsequently commissioned by the Department of the Prime Minister and Cabinet and Department of Finance and Deregulation. Dr Allan Hawke was appointed on 27 January 2010 to conduct the review.<sup>5</sup>

### **Independent Review of Government Advertising Arrangements**

2.10 The terms of reference of the *Independent Review of Government Advertising Arrangements* (the Hawke review) included consideration of the effectiveness of the

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3 *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, June 2008, p. 1.

4 Special Minister of State, Senator the Hon Joe Ludwig, *Estimates Hansard*, 17.5.10, pp F&PA 22–23.

5 Special Minister of State, Senator the Hon J Ludwig, *Estimates Hansard*, 25.5.10, p. F&PA 5.

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current Government arrangements for government advertising including the role of the Auditor-General in reviewing proposed advertising material.

2.11 Dr Hawke was responsible for considering the effectiveness and efficiency of the current approval process for proposed advertising campaigns, including the administrative effort, timeframes and cost of current approval processes as well as the adaptability of the guidelines and associated arrangements to emerging issues.<sup>6</sup>

2.12 The Hawke review published its report on 26 February 2010. The eight findings of the review focused on concerns including the need for greater clarification in relation to definitions to assist in streamlining arrangements; greater flexibility to enable departments to deliver communications flexibly; and, the current governance arrangements which 'place the Auditor-General in a very difficult position in respect of conflict of interest'.<sup>7</sup>

2.13 The Hawke review provided eight recommendations to the Government including the:

- simplification and clarification of the guidelines to ensure appropriate checks and balances and revision of the threshold upwards to \$3.5 million;
- consideration of amendments to the guidelines be undertaken by a new review body;
- abolition of the Auditor-General's role in reviewing proposed advertising campaigns before their launch with the Auditor-General requested to conduct a performance audit on at least one campaign a year or the administration of the campaign advertising framework;
- establishment of an Independent Government Communications Unit or Inter-Departmental Committee on Communications to oversee operation of the guidelines to ensure compliance;
- establishment of a Strategic Communications Unit in the Department of the Prime Minister and Cabinet (PM&C) to provide whole-of-government professional communications policy advice and expertise to agencies;
- adoption of a number of reporting, accountability and transparency mechanisms including a request that the Auditor-General undertake a performance audit on at least one campaign a year, or the administration of the campaign advertising framework, and report to the Parliament;
- details of the transfer of functions and funding to be settled on a cost neutral basis between PM&C and the Department of Finance and Deregulation; and

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6 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, pp 6–7, <http://www.finance.gov.au/advertising/docs/Independent-Review-of-Government-Advertising-Arrangements.pdf> (accessed 15.6.10).

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

- timing and handling of the proposed changes to the guidelines and governance framework to be settled between the Prime Minister, Minister for Finance and Deregulation, and the Cabinet Secretary.<sup>8</sup>

2.14 The Hawke review proposed that the role of the Auditor-General revert to 'traditional areas of performance audit and review of government advertising campaigns'.<sup>9</sup> Dr Hawke offering two models of an alternative review mechanism to that of the Auditor-General for consideration:

In both models, Secretaries and CEOs would be responsible and accountable for decisions in relation to advertising campaigns, informed by the independent advice of an external review body on compliance with relevant aspects of the Guidelines. One model would establish an Independent Government Communications Committee (IGCC) of independent and reputable individuals (e.g. former senior public servants) with responsibility to oversee the operation of the Guidelines, review campaign development and advise chief executives on compliance with the Guidelines. Under this model, the existing Interdepartmental Committee on Communications (IDCC) would be abolished.

The second model would retain the IDCC, but it would be chaired by an independent person.<sup>10</sup>

2.15 The Hawke review stated that either of the proposed models would ensure that responsibility and accountability for campaigns would lie with chief executive officers (CEOs) and that in combination with a revision of the guidelines, the proposed arrangements would 'closely align with the directions of the Blueprint for the Reform of Australian Government Administration in relation to the responsibilities of Secretaries and the need to reduce internal red tape'.<sup>11</sup> Recommendation 4 stated that the proposed body would be responsible for:

- (a) overseeing the operation of the Guidelines to ensure compliance with their integrity and spirit;
- (b) providing advice to chief executives on compliance of proposed advertising activities with relevant aspects of the Guidelines, noting that there will be a degree of reliance on external expert advice;
- (c) providing publicly an assessment of a campaign's compliance with relevant aspects of the Guidelines;

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8 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, pp 5–6.

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

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

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

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- (d) reporting on activities undertaken under the Guidelines, including any trends or emerging issues; and
  - (e) considering and proposing revisions to the Guidelines as necessary in light of experience.<sup>12</sup>

2.16 In terms of the role of the ANAO, the Hawke review recommended (Recommendation 6(g)) that the ANAO undertake a performance audit on at least one campaign a year, or the administration of campaign advertising framework, and report its findings to Parliament.<sup>13</sup>

### **2010 Changes to the Guidelines on Campaign Advertising**

2.17 On 31 March 2010 the Government announced changes to the 2008 guidelines in response to recommendations of the Hawke review. The changes reflected the Government's outright support for six of the Hawke review recommendations and support for parts of two recommendations. The Government did not support Recommendation 5 regarding the establishment of a Strategic Communications Unit in PM&C, noting that the Communications Advice Branch in the Department of Finance and Deregulation currently provides the same functions.<sup>14</sup>

2.18 The primary changes to the 2008 framework announced by the Government on 31 March 2010 included:

- replacing the 2008 guidelines with a revised set of guidelines;
- establishing an Independent Communications Committee (ICC) to replace the role of the Auditor-General, to review proposed advertising campaigns over \$250 000;
- a proposal that government request the Auditor-General to consider annual performance audits in this area; and
- abolition of the role of the Interdepartmental Committee on Communications (IDCC) in reviewing campaigns from a whole-of-government perspective.<sup>15</sup>

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12 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 5.

13 Dr A Hawke, *Independent Review of Government Advertising Arrangements*, 26 February 2010, p. 5.

14 Department of Finance and Deregulation, *Summary of Hawke Recommendations and Government Response*, undated, p. 2, <http://www.finance.gov.au/advertising/docs/Hawke-recommendations-and-Government-response.pdf> (accessed 17.6.10).

15 Australian National Audit Office, *Campaign Advertising Review July 2009–March 2010*, ANAO Report No. 38 2009–10, p. 12.

### ***Independent Communications Committee***

2.19 The Independent Communications Committee (ICC) was established to take over the role of reviewing compliance with the guidelines previously undertaken by the Auditor-General.<sup>16</sup>

2.20 Whilst the Hawke review had recommended (Recommendation 1(d)) that the threshold for chief executive certificates and independent review of proposed campaigns be revised upwards, the Government maintained the \$250 000 threshold contained in the 2008 guidelines.<sup>17</sup> Under the new guidelines, therefore, the ICC is now responsible to review all government advertising campaigns over \$250 000.

2.21 The ICC is responsible for considering proposed advertising campaigns for compliance with Principles 1 to 4 of the 2010 guidelines. The ICC is to provide a report on those considerations to the agency chief executive. The chief executive is then responsible for certifying that the campaign complies with the 2010 guidelines in full. This certification will be provided to the minister who may decide to launch the campaign. Under the 2010 changes, the ICC's report and the chief executive's certification are made publicly available via websites following the launch of the relevant campaign.<sup>18</sup>

### ***Exemptions***

2.22 Guideline 5, regarding exemptions, was also amended. Whereas the 2008 guidelines stated that campaigns can be exempted on the basis of a 'national emergency, extreme urgency or other extraordinary reasons the Cabinet Secretary considers appropriate', the 2010 guidelines state rather that:

The Cabinet Secretary can exempt a campaign from compliance with these Guidelines on the basis of a national emergency, extreme urgency or other compelling reason.<sup>19</sup>

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16 Special Minister of State, Senator the Hon Joe Ludwig, *New arrangements for government advertising*, Media Release, 31 March 2010, 20/2010.

17 Department of Finance and Deregulation, *Summary of Hawke Recommendations and Government Response*, undated, p. 1.

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

19 Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies, March 2010.

# 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.

# **REPORT OF COALITION SENATORS**

## **BACKGROUND & OVERVIEW**

In 1998, the Auditor General issued a set of draft Guidelines for Government Advertising.

These Guidelines were the subject of a review by the Joint Committee of Public Accounts and Audit in 2000.

They were further revised in 2008 as Government policy and were revised again in March 2010.

This Bill seeks to codify advertising guidelines, based on the 2008 iteration. Importantly, the changes which have taken place between the original 1998 draft Guidelines and the current Bill are quite significant.

The Bill also seeks to require the Auditor-General to assess all advertising material (above a spending threshold of \$250,000) prior to its publication or broadcast.

## **THE ROLE OF THE AUDITOR GENERAL**

This requirement upon the Auditor-General is both the core requirement of this Bill and its most contentious element.

Coalition Senators have genuine concerns with placing the Auditor-General in such a role.

Proponents of this Bill have not sufficiently addressed the concern that it may not be appropriate for the Auditor-General to be involved in the creation of a campaign, to approve a campaign and then retrospectively assess such campaigns through the process of performance audits.

The Auditor-General himself outlined these risks. Immediately after the election, in a letter to the Prime Minister, dated 26 November 2007, the Auditor-General wrote:

"Given the sometimes controversial history of government advertising there is a real risk that whoever administers the guidelines could be drawn into the policy and political debate as an active participant in, and possible defender of the processes of executive government. To preserve both the real and perceived independence of this office, I and my predecessors have actively sought placing the ANAO in such a situation."

We know from evidence in the JCPAA that the Prime Minister could not even be bothered to respond to this letter and, instead, pushed ahead with the 2007 Labor policy.

Instead, the Auditor-General proposed:

"a model involving a small independent committee with an executive or advisory role in relation to government advertising."

This would leave the Auditor-General free to pursue the traditional role of post-publication assessment of campaigns via regular performance audits.

The fundamental problem, however, remains unresolved. The Auditor General, under this Bill, is both decision-maker and auditor.

Furthermore, the use of the Auditor-General in this role does not necessarily guarantee the outcomes desired by the proponents of this bill.

In the JCPAA hearings regarding the 2008 Guidelines, the Audit-Office officials could only guarantee a 'limited' level of assurance, not even a 'reasonable' level of assurance of compliance with the Guidelines.

To more forensically investigate the advertising would put them in the position of being a decision-maker and thus voiding their own ability to engage in post-campaign performance audits!

## **THE CURRENT CRISIS – LABOR'S SPECTACULAR BACKFLIP**

This inquiry arises out of revelations that the Labor Party decided to bypass the Independent Communications Committee (ICC) in favour of a highly-politicised framework in the final months before an election.

In March and April 2010, the Government had engaged a research company to undertake fieldwork to identify understanding of tax reform in the context of the forthcoming release of the Henry Tax Review.

On 21 April 2010, the ICC was provided with a Communications Strategy for a proposed campaign. There was no indication, at any stage, that there was a particular urgency to this campaign. The ICC approved the Strategy and a Brief was issued to a number of advertising agencies, who were due to present their creative executions on 10 May 2010.

In the first week of May, the Government announced its response to the Henry Tax Review. At this stage there was only muted criticism of the Government's response in the media, with only two full-page advertisements critical of the Government's proposal appearing on consecutive days in the West Australian. There was no other paid advertising or no campaign of misinformation that justified seeking an exemption from the Guidelines.

However, the Treasurer, Mr Swan, hit the 'panic' button. On 10 May 2010, he wrote to the Cabinet Secretary, seeking exemption from the advertising Guidelines. That same day, the advertising agencies were scheduled to present their creative pitches to the Department of the Treasury officials. The agency selected, Shannon's Way, has a

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long and close association with the Labor Party, including being the agency for Labor election campaigns.

The following day, in the Federal Budget, the Treasurer announced that the communications campaign would have an appropriation of \$38.5m.

On 14 May 2010, the Department provided a brief to the Minister which included a draft letter to the Treasurer and a draft Statement to Parliament. The Cabinet Secretary then ‘sat’ on this brief for ten days.

On 24 May 2010, the Cabinet Secretary approved the request for exemption, citing ‘extreme urgency’ and ‘compelling reasons’. Mr Hawke has made it clear that the ‘compelling reasons’ justification was never intended to be used in this manner.

However, the notification to Parliament was deliberately delayed for another four days. It was only tabled on 28 May 2010 which was, notably, the day after the Senate Estimates hearing into government advertising had concluded.

However, the Cabinet Secretary laid an unintentional trap for the Treasurer. In his letter of 24 May 2010 to the Treasurer, he stated:

Despite the exemption, there are associated campaign processes which can be applied without any impact on the ability of the Government to quickly communicate important information relating to Tax Reform. I expect the Treasury to adhere to the intent of the Guidelines...

In that context, the Government Mining Tax advertising campaign fails to meet the conditions set. In the current Guidelines, it is clear:

18. The subject matter of campaigns should be directly related to the Government’s responsibilities. As such, only policies or programs underpinned by:

- legislative authority; or
- appropriation of the Parliament; or
- a Cabinet Decision which is intended to be implemented during the current Parliament should be the subject of a campaign.

The Mining Tax campaign does not meet any of the three criteria. It is not yet legislated for; there has been no appropriation for the Mining Tax; and the decision is not intended to be implemented in the current Parliament.

As such, the Treasurer is in breach of the Cabinet Secretary’s own conditional approval for exemption.

What appears clear is that the Guidelines, which had already been weakened by the March 2010 changes, were still too restrictive for Labor’s wish to use taxpayers' funds for partisan political advertising.

The Labor Government clearly felt that, in the run up to an election, they needed to run an aggressive, partisan campaign and wanted complete control over the nature and content of that advertising.

## **CONCLUSION**

While the conduct of the Labor Party in regard to government advertising has shown an unparalleled hypocrisy and disregard for honesty and integrity as well as the Parliament (particularly the Senate Estimates process), the proposal to place the Auditor-General at the centre of approval for future campaigns does not address the problems outlined.

The Auditor-General's independence is of paramount importance to the statutory responsibilities of that office.

To place the Auditor-General at the centre of decision-making will potentially risk the perceived independence of the office and also put at risk the ability of the Auditor-General to undertake performance audits on behalf of the Parliament.

Coalition Senators believe the Auditor-General's paramount role is as outlined in the Audit Act, to audit the finances and performance of the Commonwealth. This includes advertising campaigns, and the assessment of compliance with the Guidelines. This role can potentially be strengthened with a requirement for such an assessment within a short time period from the commencement of the relevant campaign.

Coalition Senators do not support the proposed Bill.

**Senator Scott Ryan**  
**The Liberal Party of Australia**  
**Senator for Victoria**

**Senator Helen Kroger**  
**The Liberal Party of Australia**  
**Senator for Victoria**

# **SENATOR BOB BROWN**

**AUSTRALIAN GREENS**

## **DISSENTING REPORT**

The Committee, in its concluding comments and recommendation on The Preventing the Misuse of Government Advertising Bill 2010 fails to acknowledge the widespread community concern about this critical issue. The report documents the historical concerns and various attempts to address the issue of transparency and accountability in the expenditure of public funds through government information and advertising campaigns. The recent public outcry over the government's \$38 million mining tax advertising campaign is testament to the depth of concern on this issue. This Bill is a necessary step in enshrining accountability and integrity mechanisms in law, to provide certainty and clarity to governments and to assurance and confidence in the community that these practices will be properly implemented and scrutinised.

The recommendation by the Committee that the Bill not proceed contradicts the evidence of the four expert submissions which all welcomed the Bill for establishing clear legislative provisions around the use of public funds for government advertising. Each submission noted that the Bill incorporated important changes to strengthen the original 2008 guidelines based on experience of the past two years in which the process had been operational.

While the submissions varied in their view of the role of the Auditor-General in the Bill, there is agreement that the Auditor General had a key role to play in the review of government information and advertising campaigns and their assessment against the guidelines.

The Auditor- General's submission in particular made a number of relatively minor technical amendments to the Bill for greater clarity and transparency in the process, which the Greens will move when the Bill is debated in the Senate. Other submissions have identified minor elements of the Bill which require rewording for clarity which will also be incorporated.

I draw attention to the important issue of corporate 'political' advertising and the use of tax-deductibility claims by corporate advertisers. I have raised concerns elsewhere that under the current arrangements tax payers are effectively funding both the government and corporate advertising campaigns on the mining tax to the tune of millions of dollars. I argue that under these circumstances, corporate advertisers should be subjected to the same regime of accountability and scrutiny that is required of government advertising expenditure.

I note that Professor Charles Sampford highlighted the need for a similar legislative approach as outlined in this Bill to apply to corporate advertising. On pages 3-4 of his submission, Professor Sampford noted that:

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

- Recognise 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."

He further adds:

"there are strong arguments for such communication to be subject to some form of vetting or oversight...[that] corporations claim deductions for corporate advertising and are, in a sense, spending public money" in addition to expending the assets of their shareholders. And that "unbalanced funding of different sides of a debate leads to distortions in the democratic process."

Professor Sampford proposed that oversight of the corporate advertising could be provided in the following 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 (trade practices code) 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 the 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

I propose that the Bill is adopted and the issue of corporate advertising is given urgent consideration by the Government to ensure that democracy is not undermined by the continuation of business as usual.

**Senator Bob Brown**  
**Leader of the Australian Greens**

# **APPENDIX 1**

## **Submissions received by the Committee**

### **Submissions**

- 1 Associate Professor Graeme Orr
- 2 Adjunct Professor Tim Smith and Associate Professor Ken Coghill
- 3 Australian National Audit Office
- 4 Professor Charles Sampford

