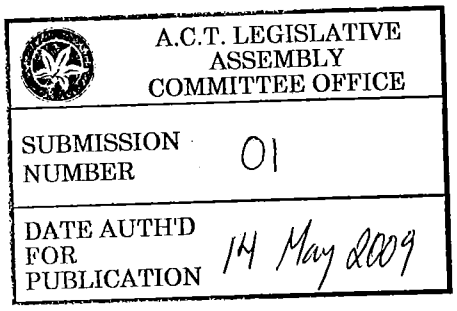
Submission to the Select Committee on Campaign Advertising
Government Agencies (Campaign Advertising) Bill 2008



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1. I commend the ACT Parliament for considering legislating on governmental campaign advertising. There is a problem with open slather government advertising in an age of government by PR and the permanent campaign. That much has become clear through numerous international and Commonwealth inquiries and controversies at Commonwealth and State level, and through a large body of media and academic critique (particularly the work of Dr Sally Young of Melbourne University).

2. The problem is twofold: (a) a risk to political equality and (b) degrading the currency of government information programmes, and indeed of public trust generally, by heightening cynicism.

3. The Bill at hand adopts a modified form of the recent Federal initiatives to subject larger campaigns to Auditor-General scrutiny, and to provide better reporting of the cost of campaigns.

   In the interests of accountability, clause 12 of the Bill might also require the responsible Minister to include, in the statement of costs, a summary of any market research undertaken in relation to (ie before, during or after) any campaigns over the $20 000 threshold.

4. The Bill provides for a long – 3 month – blackout on government campaigns prior to a general election. This is guaranteeable only in a truly fixed term electoral cycle. The ACT has something approaching that, except for s 16(1) of the Self-Government Act which is analogous with the States' powers to dismiss local governments. The Governor-General (presumably on the advice of the Prime Minister/Territories Minister) can call an early ACT election for incapacity to effectively perform, or grossly improper conduct.

   In the hopefully unlikely event of such a dissolution, technically government agencies will retrospectively be in breach of clause 14 of the present Bill. This may be a moot point. The blackout clause 14 is not remedial, except to the extent that if a government or agency ever deliberately flouted it, an MLA (subject to standing) might be able to seek an injunction restraining the advertising from carrying into the 12 week blackout period.

Standing is a difficult area when it comes to government expenditures (and one the High Court dodged in *Combet's case*). For the sake of clarity, the Committee might consider adding a clause at the end of the Bill stating that any MLA or the Auditor-General has standing to seek declaratory and injunctive remedies from the ACT Supreme Court for any likely or actual breach of clauses 10(1), 11 and 14.

5. The Bill in a second respect is a clear improvement on the Federal initiative. The guidelines to be promulgated under clause 13(3) will be much clearer and tighter. For instance in banning 'statements promoting the government's performance' and 'advertising techniques – eg jingles'. It will be interesting to see how 'advertising techniques' will be further defined: an advertising agency is nothing if not an expert in advertising techniques.

6. However there is a deeper question about the degree to which agencies (governmental and advertising) are willing to embrace an 'information only' approach. The Bill needs to be more nuanced in distinguishing campaigns to mobilise public action (sometimes necessary) from informational campaigns about government policies, programmes or legislated rights/obligations which have come to be misused to advocate and promote the government of the day.
   It is the latter which is the mischief of the bill, rather than the former.
   Related to this, the definition of 'government campaign' in s 8 presumes a model of 'dissemination ... of information ... about a government program, policy or matter which affects their ... entitlements, rights or obligations'. It must be intended to catch pure advocacy campaigns such as public health and safety, civic pride campaigns etc (otherwise the safety net of Auditor-General overview or the presumptive blackout would be bypassed). Yet the definition in s 8 isn't well worded to capture those campaigns, which might not be 'informational' at all, and certainly aren't related to 'information which affects ... entitlements, rights or obligations'.

   It is hard to imagine a public health, safety etc campaign running purely as an 'informational' exercise, without using 'advertising techniques' designed to create a mood, eg of fear or concern. Without that, the advertising is likely to fall flat, and fail in its purpose to modify behaviour. The core examples are public health campaigns – road, fire safety, anti-smoking, drinking. They must be a mix of informational claims (some of which may be controversial, eg 'speeding kills – stick to 50') and advocacy (eg emotive images of accidents).
   In saying this I realise there are cases at the margin that will be controversial: eg climate change commercials. Pure information, eg about government initiatives from an ETS down to grants for solar heating, can be presented in a purely factual way. But what if the threat is such that people need advocacy – including advertising techniques – to motivate them to take it seriously?

7. I have two additional recommendations. I have published arguments for them elsewhere, so I will only briefly seek to justify them here, but refer the Committee and its Secretary to those publications for more arguments.[1]

   (a) All government advertising should be tagged with the name of the relevant agency only, or there is none, one responsible Minister.

   (Justification: tagging advertising eg 'Australian Government' is an attempt to brand the government of the day – which most people see as the political executive. We see this clearly in the unnecessary tagging of non-controversial campaigns, eg fire safety. In truth, there is no legal entity of 'the Government' The purpose of tagging is formally responsibility, something that should be diffused to an actual person or agency.)

   (b) The Committee, if it believes the ACT has a problem with the partisan misuse or political equality effects of advertising, should seriously consider legislating an annual cap for total 'government campaign' advertising.

   (Justification: however tight the guidelines or zealous the Auditor-General, without a cap it will still be possible for a government to spend big on the selective promotion of feelgood programs or even advocacy campaigns on motherhood issues. Such advertising is, on the whole, wasteful of scarce public resources in any event. If an emergency arises and the Government has exhausted the cap, of course the Government can seek to extend the cap, but at least it has to argue the merits before the Assembly and hence the public).

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[1] G Orr, 'Government Advertising: Parliament and Political Equality' in Papers on Parliament (The Senate, December 2006) . G Orr, 'Government Communication and the Law' in S Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007) ch 2. G Orr, Submission to Senate Finance and Public Administration References Committee Inquiry into Government Advertising (July 2004) http://www.aph.gov.au/SENATE/COMMITTEE/fapa_ctte/completed_inquiries/2004-07/govtadvertising/submissions/sub02.pdf