POLITICAL FINANCE & GOVERNMENT ADVERTISING WORKSHOP – 25 February 2006

Government advertising: Informational or self-promotional?

Graeme Orr, Law School
Griffith University

Introduction

Government advertising has dramatically increased in Australia and now represents a major issue for democracy. While government advertising may have legitimate information purposes it may also be abused to skew the playing field of electoral competition. In particular, the size, tenor and timing of recent advertising campaigns have become a cause for concern. These campaigns amount to large-scale, broadcast-driven advertising packages whose purpose is to market, in the sense of promote, often controversial government policies.[1]

The abuse of the budgetary discretion to advertise became particularly evident in the 2005 federal government campaign for the 'Work Choices' industrial relations changes. Its size (in the order of $45m in advertising placement alone, with more possibly to come) and saturation coverage made it an issue. But of more enduring and principled concern is the spectre of a government using taxpayer money to sell a legislative policy *in advance* of parliament having the chance to consider that policy.[2]

Such abuses are becoming even more obvious in the desperate attempts by the Beattie Labor government in Queensland to buy itself out of a political hole created by chronic problems in the public health system. Particularly egregious are advertisements, under the Premier's signature, blaming the federal government for a doctor shortage. No one could object to ministers bolstering their political position by disseminating such figures and accusations. The question is why traditional methods such as parliamentary statements and press releases and conferences – which involve

[1] For more academic analysis on this issue see: Sally Young, *Government Communication in the 21st Century* (CUP, 2006, forthcoming); Joo-Cheong Tham and Sally Young, *Political Finance in Australia: a Secret and Ossified System* (working title) (Democratic Audit of Australia, ANU, forthcoming 2006) ch 4. The present paper is an update on an Occasional Senate Lecture, 11/11/2005, forthcoming as 'Government Advertising, Parliament and Political Equality' in (2006) 45 *Papers on Parliament*.

[2] There was a precedent, in the pre-1998 election selling of the GST, a policy the Coalition would take to that election.

debating in domains that are equally accessible to all sides of politics – no longer suffice. Premier Beattie's advertisements attacking federal health funding invite an advertising response from the federal government, and so on, leading in theory to an infinite regress of advertisement and counter-advertisement until there is either no space left in the media or no money left in either treasury.[3]

The quest of the law of politics is for rules that promote political equality and deliberation over the law of the political jungle. Those two ideals should govern how we conceive of regulatory responses to government advertising. The necessity for greater accountability and some regulatory limits – whether on size or content - follows directly from those two principles. From political equality, because of the significant incumbency benefit gained from unrestrained government advertising, and because of the undermining of the principle of relative equality of political funding, enshrined particularly in the system of public funding of political parties in proportion to their electoral support. The need for regulation also flows from the ideal of informed deliberation, since one-sided discourse is no discourse at all.

The novel, if simple, proposal I make at the end of this paper is that if governments insist on mounting taxpayer funded campaigns to sell controversial policies – as opposed to simply provide information to citizens about their rights or obligations under such policies – then there should be 'yes' and 'no' campaigns, by analogy with referenda funding. The need for this is particularly acute in situations like 'Work Choices' where what is being sold is a mere, unlegislated proposal.

This paper, along the way, also considers the erosion of the distinction between descriptive language and rhetoric. There is also a brief account of the decision in *Combet v Commonwealth*, the High Court case challenging whether the IR campaign had been authorised by parliamentary appropriation. And as we go, I will sketch some modest solutions designed to advance political equality and deliberation:

1. an annual cap on spending on government advertisement campaigns,

[3] Less egregious, in principle if not in tone (given that the 'Work Choices' laws threaten the very existence of state jurisdiction in the IR field) were newspaper advertisements by some state governments responding to the federal 'Work Choices' campaign. See further below, n 64, and the advertisement reproduced in the text between nn 64 and 65.

2. that advertisements not be tagged with the nebulous and political term 'Australian Government, Canberra' but with the title of the responsible Minister or agency, and
3. the funding of contrary cases, particularly where governments insist on using public money to sell policies prior to Parliamentary consideration.

Government by PR

Advertising by governments has become a sensitive issue. Or rather, advertising *campaigns*, to *promote* government policies, are proving intractably controversial. This is far from a purely Australian concern: it has generated reports in New Zealand, and, in Canada, political corruption (including patronage and kickbacks) on a scale sufficient to help bring down the Liberal government.[4] What makes Australia a special case is the rampant nature of the spending involved, which has escalated since the early 1990s. Figures in the Tham and Young draft report suggests that per capita spending on government advertising in Australia is in a league of its own – twice that of any other country where governments feature in their nation's top 10 advertisers.[5] Even allowing for difficulties in aggregating reliable data on expenditure,[6] and factoring in the duplication inherent in a federal system, spending in Australia clearly outpaces comparable polities such as Canada and the US, even though those have significant sub-languages such as French and Spanish that would inflate their costs.

Concern lies not just with the size of the campaigns, but their timing, tenor and selectivity. Campaigns are not openly partisan – faces of Ministers and references to political parties would be avoided even if guidelines and ethics did not deter them, simply because in Australian electoral culture that would backfire as too blatantly an act of electioneering. Instead, governments pick feel-good policies or areas where they need to nullify weaknesses in their opinion-polling.

---

[4] Dubbed 'AdScam' and 'Sponsorgate', the Canadian scandal generated the Commission of Inquiry into Sponsorship Programs and Advertising Activities, under Justice Gomery: <http://www.gomery.ca/>.

[5] Tham and Young, above n 1, table 4.4.

[6] Itself a concern for transparency and accountability, as Sally Young has argued in various submissions. To give an example, tens of millions of dollars in campaign-related spending has not routinely been revealed in departmental disclosure of the costs of campaigns, because it has been treated as a 'consultancy' expense: Lara Sinclair, 'Coalition "Masking" Millions Spent on PR', The Australian, 24/1/2006 <http://theaustralian.news.com.au/printpage/0,5942,17917697,00.html>. Clearly the cost of a campaign includes the cost of scoping, design, production, placement and market research, as well as the raw expenditure on media.

All in all, the following 1993 warning from the Queensland Electoral and Administrative Review Commission (implementing the anti-corruption agenda of the Fitzgerald Inquiry after the fall of the Bjelke-Petersen National Party government) is remarkably prescient**:**

> The possibility arises within the context of modern communications techniques that spending may become extravagant and directed towards 'corporate image building' and persuasion rather than the provision of factual and balanced information.[7]

Fitzgerald was commenting after an era in which Premier Bjelke-Petersen had pioneered some aspects of media manipulation in Australia, including paying for an advertorial style programme, over which his government had editorial control, called 'Queensland Unlimited'. That programme blended sunny promotion of Queensland as a business-friendly destination with promotion of his government and ministers. But Fitzgerald could also have been anticipating latter-day politicians, notably Queensland Labor Premier Beattie, who under opinion polling pressure has resorted to personalised, full-page advertisements, under his 'Smart State' banner, which work off the same formula of parochialism and shameless, broadly-targeted, self-promotion.[8]

Of course governing involves a lot of *routine* advertising, eg on recruitment, public events, and public consultation. And governments sometimes must also advertise to *mobilise* public action, especially against threats: thus we expect propaganda in times of national security or public health need. The following is a clear example from the World War II Labor government:[9]

---

[7] Electoral and Administrative Review Commission, *Report on Review of Government Media and Information Services*, April 1993.

[8] It is true that present parliamentary rules permit individual members from all sides to engage in similar self-promotion, through 'communication' allowances, for the printing and posting of boosterising direct mail and electorate newspapers. The key distinction with government advertising however concerns political equality: parliamentary allowances are available to government, opposition and independents alike, and are subject to an annual limit rather than unlimited discretion.

[9] Reproduced from *Griffith Review* (2005) p 32.

(Note that Mr Curtin did not authorise the advertisement; perhaps his face was his authorisation.[10] It might also be noted that his guarantee that Sydney Harbour *would* be bombed was never fulfilled – least of all by Wellington bombers sporting Rising Sun insignia! If nothing else, government advertising was more parsimonious and less slick in the pre-electronic era.)

In a liberal democracy, the effectiveness and legitimacy of such mobilisations can, nevertheless, be problematic. Widespread derision greeted the Commonwealth government's terrorism mail-out (featuring free fridge-magnet), and the same government attacked as 'nanny state' the proposals by former Labor leader Mark Latham to promote reading to children. The alternative to our being vigilant-against-such-state-inspired-vigilance may, I fear, be the Singapore model, where we find such government supported behaviour-modification programmes as the 'Happy Toilets' campaign and the 'Singapore Kindness Movement'.[11]

[10] Today we might baulk at images of politicians in government advertising (though they saturate mail-outs by parliamentarians). The Commonwealth Auditor-General recommended some restrictions on their use: ANAO, *Taxation Reform: Community Education and Information Programme*, Audit Report No 12, 1998, p 59 ('Auditor-General guidelines'). But the parliamentary committee endorsing those guidelines left out mention of restricting mug-shots: Joint Committee of Public Accounts and Audi, *Report 377: Guidelines for Government Advertising*, Sept 2000, p 6 ('Parliamentary Committee guidelines'). Nevertheless, Prime Ministers/Premiers seem sensitive to the issue and prefer addressing 'signed' letters to the public (in newspaper or direct mail form).

[11] 'Happy Toilets' involves the publicisation of rankings of public toilets on a five-star rating and followed a 'Toilets of Shame' campaign. As for the Kindness Movement, see Yeoh-En Lai, 'Singapore Aims to Modify Behaviour of its Residents', *Times Union*, 24/4/2005, A6. Note that Singapore is a city-state; our concern in Australia is with state and federal governments – ie those with broad legislative power – not local governments.

Fortunately, most government advertising in Australia for community service purposes is unobjectionable – though it is curious that recent campaigns, such as anti-smoking and bush fire awareness, have been tagged with government authorisations. Since they are clearly not political or electoral matter, tagging is not legally required. To the extent that accountability and the gravity of the message require some tagging, it is unclear why the former practice of running such advertisements through a specialised agency - such as the National Tobacco Campaign or Department of Emergency Services – is being abandoned,[12] except that the executive wishes to accrue the PR benefits for itself as a political entity and build the 'corporate image' of government as a whole.

But being told what to *think* is more troubling than being told what to *do*. This is where advertising to sell government policy is problematic, for two reasons. One is that it erodes important, traditional distinctions between government and citizen. The other is that, especially when done on the scale of the past dozen or so years, it erodes political equality.

First, consider the relationship of government to citizen. Governments don't exist to self-promote, however much, like any organisation, individual administrations have a will to perpetuate their power.[13] Governments wield monopoly power over law-making and enforcement, and support this through compulsory taxation. True, they need to inform people about legal rights and obligations. But the rhetorical art of advocating partisan policy is something properly left to political activity via the parliament and media.[14] The flavour of this distinction is caught in the separation between public service values, and the politicised nature of ministerial staffers.[15]

---

[12] See the examples in Graeme Orr, 'Government Communication and the Law' in Sally Young (ed), above n 1.

[13] This is an 'ought' claim: modern administrations are in fact heavily concerned with packaging and marketing themselves, especially through public resources. See, in the Australian context Greg Barns, *Selling the Australian Government: Politics and Propaganda from Whitlam to Howard* (UNSW Press, 2005).

[14] By 'partisan' here I simply mean policy adopted by particular parties, when it is not subject to party consensus, ie policy that clashes with that of other parliamentary parties.

[15] However much that distinction may be blurring in modern government: see eg, Pat Weller, *Don't Tell the Prime Minister* (2002).

The dark arts of advertising, as opposed to delivering simple and clear information, are problematic for governance because advertising is an irresistibly insincere medium. At its worst it is an attempt to buy image. Most advertising today exists to seduce the viewer, having evolved to serve the profitability of vendors in a competitive market. However much rules of strict ministerial accountability have decayed in the Westminster system, we expect 'the truth, the whole truth and nothing but the truth' from government. Advertising tends to insincerity, yet that is the quality we most want in government.

As we are often reminded, we live in an age of the permanent campaign and government by public relations. Not all aspects of this are bad for democracy: government responsiveness to opinion polling can be a valuable form of democratic accountability. But to give a picturesque example of how spin-doctoring corrodes valuable public service distinctions, consider the spate of Commonwealth Bills with sloganeering titles in recent years. Take, for example, the Workplace Relations (More Jobs, Better Pay) Bill of 1999, which adopted the PR title of the Liberals' election policy.[16] Or consider how the various *A New Tax System Acts* spurned the term 'GST'. Not all such perversions are the fault of government; though we may be more forgiving of oxygen starved private members coming up with pearls such as the ALP's Quieter Advertising Happier Homes Bill[17] and the Liberal back-benchers' Migration Amendment (Act of Compassion) Bill 2005. The purpose of these titles, in each case, is to put motherhood slogans into the mouths of the media, and through that, to lull the critical faculties of busy citizens. The ultimate in this Orwellian word-game is the Occupational Health and Safety (Commonwealth Employment) (Promoting Safer Workplaces) Bill 2005 – it 'promotes' safer workplaces by protecting the Commonwealth, as employer, from ACT criminal manslaughter laws. We owe these distortions of the principle that legislation and its titling should be descriptive, rather than tendentious, to US practice.[18]

---

[16] Similarly, we now have the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) – 'WorkChoices' (the portmanteau term used in the advertisement campaign) being the PR title adopted to sell the policy, rather than a description of anything.

[17] To set up an inquiry into the relative loudness of television advertisements!

[18] Graeme Orr, 'Names Without Frontiers: legislative titles and sloganeering' (2000) 21 *Statute Law Review* 188; see also 'From Slogans to Puns: Australian legislative titling revisited' (2001) 22 *Statute Law Review* 160 (discussing the *Roads to Recovery Act 2000* (Cth) and US inspirations).

Political Equality and Government Advertising as an Incumbency Benefit

The threat of excessive promotional advertising to political equality is clear. Commonwealth government advertising in financial year 2000-01 – an election year - reached $156m. Yet public funding for the 2001 election was a quarter of that.[19] Public funding is meant to equalise the electoral playing field. It is democratic in that it follows the votes each party earns. Government advertising, in contrast, enures to the benefit of incumbent governments. They treat it as a spoil of office. Of course it is but one of a number of incumbency benefits – some problematic (such as excessive parliamentary allowances or unrestrained political donations) some inevitable (disproportionate media exposure) and some deserved (incumbents naturally prosper in times of prosperity). But it is not clear, either in principle or practice, why we would frame institutional rules to reinforce incumbency: the average government in Australia already receives three terms.[20] The United States, in comparison, sets term-limits on political office to counteract incumbency benefits,[21] primarily to restrain the power of money in politics. We are at risk of a similar entrenchment of incumbency but through public rather than private monies.

Governments of both persuasions in Australia have abused their discretion to advertise. The Howard government has spent well over $1 billion on advertising placement alone (ie including neither production and advertisement agency costs, nor related market research)[22]. The States, in a similar period, are estimated to have spent over $2 billion in total.[23] That the Commonwealth government is the nation's largest advertiser, with individual states not far behind, is a concern in itself, given the

---

[19] Source of advertising figure: annual reports collated in 'Federal Government Advertising', Parliamentary Library, Research Note No 62, 2003-04, table 1. Source of public funding figure: Australian Electoral Commission, *Electoral Pocketbook* (2002) p 57.

[20] This is the average since 1970: in truth, the average is higher today, as the 1970s were electorally more volatile, compared to the past 10-15 years.

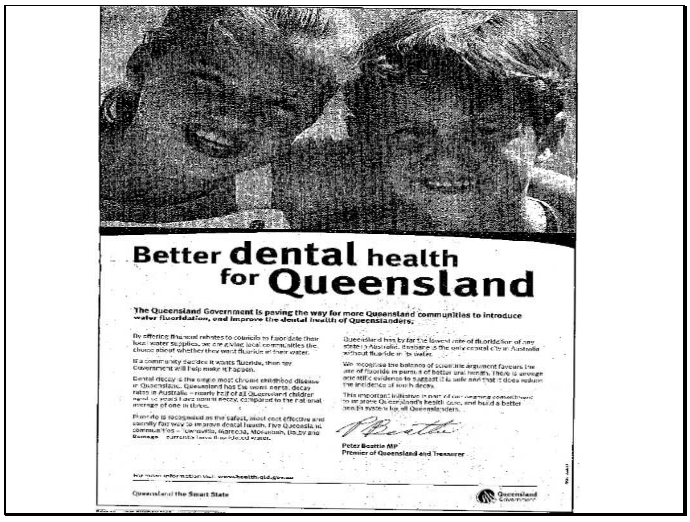
[21] Eg the US President is constitutionally limited to two terms.

[22] A figure of $1.014 billion is given as the 'central advertising system' 'media spend' between 1996-97 and 2003-04, in Senate Finance and Public Administration Committee, *Government Advertising and Accountability* (Report of December 2005) ch 2. This figure of course takes no account of the massive IR advertisement campaign of 2005. Admittedly a deal of the expenditure is also on uncontroversial campaigns such as defence force recruiting. On the other hand, the true figure may well be higher: reporting on 'communications' expenditure is loose and not well co-ordinated, stimulating complaint from the leading academic researcher in the field, Dr Sally Young.

[23] The Commonwealth Minister put the states' spending at $2.15bn in the period 1996-2003: Senator the Hon Eric Abetz, Submission to the Australian Senate, Finance and Public Administration References Committee', Inquiry into Government Advertising, 23/8/2004, p 1: <http://www.aph.gov.au/Senate/committee/fapa_ctte/govtadvertising/submissions/sublist.htm> (submission 9).

dependency of media profitability on such advertising. Thankfully, crude attempts by governments to intimidate particular media outlets by threatening to withdraw such largesse are rare.[24]

I do not pretend it is easy to draw rules that, in a vacuum, will neatly divide acceptable from unacceptable content. But it doesn't take much context to know what is beyond the pale. The following is an egregious example from a self-confessed 'media tart', Queensland's Premier Beattie:



A Martian could guess from this advertisement that the Beattie government faces a political firestorm over health. In fact, it has faced a firestorm over endemic failings in the public *hospital* system. Amongst other responses, it announced $6m in potential grants to local councils to fluoridate water: an inter-governmental matter, unrelated to hospitals, but promising good vibes on 'health'. This announcement itself received plenty of media attention; but that wasn't enough for a PR machine eager to negate health as a political negative. So Queenslanders endured promotional advertisements like these - as if happy but caries-threatened children were going to run off to lobby their local councillors to fluoridate their water! Those advertisements have since blossomed into a full-scale campaign, including television advertisements,

[24] More common is patronage. *New South Wales v Bardolph* (1934) 52 CLR 455 is an example of preferential placement of advertising, by an ALP government, in a 'labor weekly'. Similarly, federal governments of both political persuasions appear to rely unduly on advertising/PR consultants with close ties to the party in power.

designed to trumpet population growth in Queensland, and promote Queensland Health. Cleverly, this campaign has a dual purpose – ostensibly designed to attract staff back to Queensland Health, its scope and tenor are also clearly designed to reassure electors about their current government.

Under Commonwealth Auditor-General guidelines endorsed by an all party-committee, but rejected by the Commonwealth Government, government advertising is only legitimate to serve a demonstrable need for information. That is, to mount 'information programs or education campaigns',[25] rather than to *promote* government policy. I recognise it is not always easy to segregate explanatory information from PR effect – as Justice Dawson said in Albert Langer's electoral case, it is not always possible to draw a clear line between selectively putting forward information, and advocating a cause.[26] The answer is to insist that governments be less selective in presenting information, and use less puffery and sloganeering.

The most obvious selectivity is in the campaigns themselves: popular measures are sold well beyond their target audience (eg well beyond businesses in the case of apprenticeship funding, and well beyond social security recipients in the case of 'work for the dole'). We can guess when a government's polling shows it is perceived negatively on an issue, for then we see an avalanche of advertising to soften those perceptions (witness, the Beattie health advertisements and, at a Commonwealth level, the GST, 'Strengthening Medicare' and IR campaigns). Yet major policy changes with widespread impact but little electoral salience are *not* blitzed in the media (eg changes in HECS fees and rules, which affected several million current and potential students and families). Selectivity also occurs in the content of particular campaigns. Thus the IR advertisements did not explicitly tell employees that a key aspect of the package is the removal of unfair dismissal rights. Rather, tucked away under headings such as 'Protection Against Unlawful Termination', readers were informed that 'businesses with up to and including 100 staff will be exempt from unfair dismissal laws'.

[25] Parliamentary Committee guidelines, above n 10, p 4.
[26] *Langer v Commonwealth* (1996) 134 ALR 400 at 411-412.

The Special Minister of State, in his response to a parliamentary inquiry,[27] asserted that government advertisements had to be liberally authorised 'Australian Government, Canberra', to meet not just broadcasting law,[28] but electoral law. That is an admission that some government advertising is 'electoral matter', ie 'matter intended or likely to affect voting at an election'. Yet the pure presentation of information about citizen's rights and obligations, if not done in an immodest manner, would never amount to 'electoral matter'.

I recognise that strict content rules are not easy to draw. Indeed I suggest they are somewhat beside the point. It is the *total* amount of spending on selective, large scale *campaigns*, and their *timing* (with spikes in election years) - as much as the tenor of the campaigns - that jeopardises political equality. As a result, I have called for a straight-forward approach, not based on content-restrictions alone: that is, for a legislated, annual cap on the executive's budget for campaign advertising.[29] For suggesting such husbanding of scarce taxpayer resources as a 'pocket money' approach, the Minister accused me of an 'offensive trivialis[ation]',[30] saying I am part of an elite that reads newspapers or accesses the internet. I confess that I did not realise that 'ordinary' folk needed the Chinese-water-torture of blanket television advertising. But surely having parliament setting limits on the executive, requiring the executive to prioritise advertising resources rather than enjoying unlimited discretion to succumb to self-promotion, is consistent with both the basic principles of parliamentary sovereignty and with liberal philosophy about the role and size of government. It may also assuage those 'ordinary' taxpayers who agree with the commentariat that expenditure on large-scale campaigns is out of hand.

---

[27] Senator the Hon Eric Abetz, 'Additional Submission to the Australian Senate, Finance and Public Administration References Committee', Inquiry into Government Advertising, 9/8/2005, p 8: see URL above n 23 (submission 9A).

[28] Which imposes obligations on the media, but only in relation to 'political matter': see *Broadcasting Services Act 1992* (Cth) Schedule2, cl 4.

[29] Graeme Orr, 'Submission to the Australian Senate, Finance and Public Administration References Committee', Inquiry into Government Advertising, July 2004, pp 10-12. See URL, above n 23, (submission 2). A cap, unless set risibly low, would meet the implied freedom of political communication: the government would still have freedom to disseminate information, it would just have to use its discretion in terms of large scale promotional campaigns. The governing parties and supporters would retain unlimited freedom to advertise, and the cap would be proportionate to fundamental interests, namely political equality and deliberation.

[30] Abetz, above n 27, p 7.

(An Opposition dominated Senate Committee, whilst agreeing with my diagnosis of the problem, recommended against caps, arguing that governments should retain power to unilaterally determine their advertising budgets.[31] This rather misses the point that all executive expenditure must be subject to budgetary constraints, and that since senior ministers now treat large-scale advertising campaigns as a political issue, abstracted from particular portfolio outcomes, Parliament should similarly treat them as a government-wide issue. There is no magic in the way that portfolios are carved up: campaign advertising, along with many 'whole-of-government' administrative services (ie much of the Ministry of State portfolio), are by definition discrete secondary functions, capable and suitable of being subject to expenditure limits.)

I am *not* however advocating a Calvinist or Luddite approach. Senator Abetz, when he was Special Minister of State, was rightly fond of declaring that the days of the town crier were long past. Indeed it was a soundbite he delivered so successfully that he risked contradiction. His message on that point penetrated *sans* advertising precisely because, as a government minister he *is* a town crier, whose message is amplified via privileged access to the media.

The metaphor of the demise of the town crier also neglects the fact that television came of age two generations ago: it is not a new medium. What *is* fairly new is the misuse of large-scale advertising campaigns by governments of both persuasions.[32] An historian might trace the milestones of manipulation to the Bjelke-Petersen government. Or she might highlight the desperate attempt by the Keating government to buy itself out of a hole by splurging on promoting its 'Working Nation' package. But such searching for original sin is fruitless.

Senator Abetz is right, the world has moved on from the days when everyman took a daily newspaper. As a teacher, I am acutely aware that my students draw ideas predominantly from electronic media. When the High Court struck down Labor's short-lived ban on paid, broadcast, election advertising, the flaw in its reasoning was to reason from a US style right to 'free speech' – Britain has a much broader ban, but is no less a representative democracy. The High Court should have reasoned, without

[31] Senate Finance and Public Administration Committee, above n 22, para 7.47-7.56
[32] Sally Young, 'The History of Government Advertising in Australia', in Sally Young (ed), above n 1.

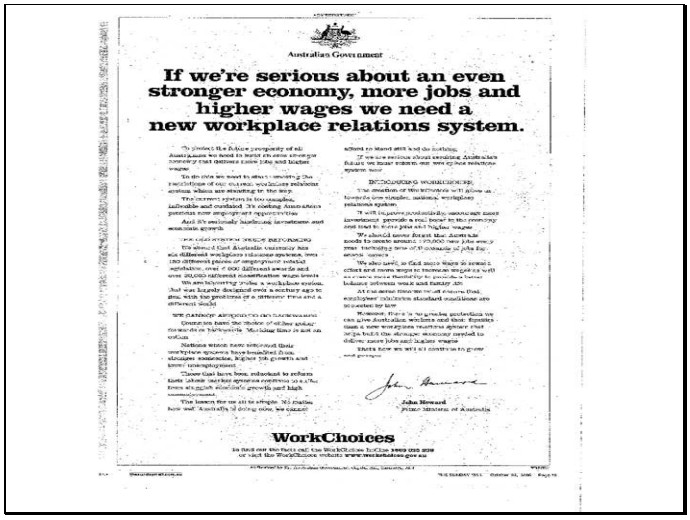
being too post-modern, that in a consumer age, television advertising may be essential to keep politics 'sexy' and before otherwise disengaged voters, especially in a system of compulsory voting.[33] I noted earlier that governments exercise monopoly powers; they do not however have a monopoly in the world of communication and so they need to present *information* through various media, at a rate that can compete with the blur of images and welter of words of an electronic age awash with consumption-driven marketing. Leftists who criticise government advertising on partisan grounds betray the progressive principle that governments have a central role to play in building society, just as conservatives who broach no caps on government advertising betray liberal principles about the size and purpose of government.

Yet none of these realisations exempt governments from the need for restraints on their 'communication strategies'. Outside propaganda against genuine public order and health threats, the obligation of governments is to present even-handed information about rights, obligations and institutions, not to tendentiously sell policies, least of all policies that require but have not yet received parliamentary attention.

The IR Campaign of 2005

The IR or 'WorkChoices' promotional campaign has been roundly condemned, both in scope and intention. Here is a sample of the federal government's full-page newspaper advertising, which supported a much glossier television campaign:

[33] I am not saying political advertising especially on television should be unlimited and remain free of 'truthfulness' standards: both may be needed in the interests of political equality and deliberation. But the High Court should at least have engaged Parliamentary concern over the cost of elections (and consequent potential for corruption) and the boorish nature of much political advertising.


Australian Government

If we're serious about an even stronger economy, more jobs and higher wages we need a new workplace relations system.

WorkChoices

The federal government was vague about the cost of the total campaign, suggesting either very fluid costings or evasion born of immodesty. An official told a Senate Committee the budget was $55m,[34] the PM having said '$30-$40m'.[35] The Special Minister of State subsequently confirmed the higher figure.[36] Senior journalists said that:

[34] David Humphries, 'Work Changes Blitz Hits $55m … and Counting', *smh.com.au*, 1/11/2005. The figure consisted of consisting of $44.3m on the advertisements, $8m on a call centre, and $2.6m on a booklet. The call centre faced flak in itself, as an expensive way of reading out paragraphs from the government 'WorkChoices' booklet for those who could not access it from the internet.

[35] *Parliamentary Debates*, House of Representatives, 1/11/2005, p 1.

[36] 'IR advertisements Minister puts Cost at $55m', *ABC News Online*, 1/11/2005 <www.abc.net.au/news/newsitems/200511/s1495543.htm>

- 'the expenditure of so much public money on what are really party political advertisements is disgusting' (Laurie Oakes),[37]
- the government is 'beyond shame' (Michelle Grattan)[38], and
- the size of the campaign is so 'obscene' it risks 'disappearing up its own fundamentals' (Glenn Milne).[39]

Even conservative supporters of the IR proposals attacked the advertisement campaign, labelling it:

- 'an advertising rort … a partisan ploy to prop up an unpopular policy' (*The Australian*, editorial)[40] and
- 'the greatest waste of money' (Jeff Kennett).[41]

Glenn Milne quoted an unnamed government member saying 'the campaign has been over the top … an extraordinary display of hubris'.[42]

That a government advocacy campaign may backfire is no surprise. Persuasional advertising is risky, for if you are trying to persuade people away from a negative view, by drawing attention to the issue you may only reinforce those negative views. Worse, excessive advertising dwindles the stock of public trust upon which government depends. This does not however diminish the political equality concerns with governmental advocacy advertising. The 'bullsh** detector' that is meant to be part of the Australian national character is more folk legend than reality. In any event, such advertisements are not designed to sway the partisan or the cynical, but to influence the disengaged, and thereby to purchase some political advantage over opponents of the policy.

Was there a demonstrable need for an IR campaign? Certainly not for the one that occurred. Awareness of the existence of the proposals was already very high: post-legislation information, especially an information booklet targeted at householders and workplaces would have been entirely justifiable. Saturation bombing with

[37] Laurie Oakes, 'Exit Stage Right', *The Bulletin*, 12/10/2005.
[38] Michelle Grattan, 'Government beyond Shame over Advertisements', *The Age*, 14/10/2005, p 6.
[39] Glenn Milne, 'Advertisements Succeed in Scaring off the Workers', *The Australian*, 31/10/2005, p 8.
[40] 'Editorial: an Advertising Rort', *The Australian*, 31/8/2005, p 31.
[41] Michael Gordon, 'Kennett Swipes Advertisements as "Waste of Money"', *The Age*, 13/10/2005, p 8.
[42] Milne, above n 39. In contrast, government backbencher Peter Slipper MHR complained that the campaign was 'ineffective', but one suspects he meant 'for the price, the rhetorical gains to the government have been muted'.

tendentious television grabs was not. A *proportionate* televisual response to correct specific misperceptions in the ACTU's advertisements may also have been justified in informational terms. Such a more modest campaign may have increased, rather than tarnished, trust in governmental information.

That said, it is undeniable that the IR newspaper advertisements played an informational role. (Internal critics wanted them to be simpler precisely because they thought them too detailed to do the job of persuading rather than informing). External critics argued that the advertisements gilded the lily. More perceptively, advertising professionals speculated that the 4 page-spreads were designed not because the average reader was expected to absorb so much newsprint. Rather, the spreads, featuring with a signed 'letter' from the PM, were intended to create an impression that the government was sincere and the package coherent: ie to convey an image rather than informational content. Perhaps the medium *is* the message.

My criticism of the newspaper campaign is less crude, and twofold. First, for all its informational value, it falls into the insincerity trap. The federal government *did* have a case that workplace deregulation *might* bring economic benefits:[43] but it had a duty to honestly argue that case. Its case rests on enhancing managerial power, with consequent vulnerability for some workers, yet neither of these factors were mentioned, despite their centrality to the policy. The second problem is that the advertisements were an affront to Parliament.[44] The policy was subject to heavy amendment by Parliament: some 337 amendments in all were brokered with or introduced by the government. Should the government have run 'addenda' advertisements by way of correction and addition?

The packaging of the overall campaign was, in itself, a giveaway, in particular the neologised term 'WorkChoices'. From where did the urge to splice words together,

---

[43] Although Treasury made no study of economic impact of the Bill as a whole (merely possible employment effects under various scenarios): Mark Skulley and Tracy Sutherland, 'Builders to Defy Ban and Rally', *The Australian Financial Review*, 7/11/2005, p 5.

[44] Curiously the government suspended the advertising once the bill reached Parliament – a rather formalistic step. Parliamentary consideration hardly renders an issue *sub judice*. Coincidentally (or in 'tag-team') at the same time, the Business Council of Australia launched its advertising campaign in support of the IR package: <http://www.bca.com.au/content.asp?newsID=99262>

Frankenstein-like, come from?[45] Where will it end? Will we, as with racehorse names, have to start recycling? Or will we perhaps end up renaming the armed forces 'SecureYou'? It may have made sense in the 1970s when old names such as the 'Postmaster General's Department' became technologically outdated, to name the corporatised replacements 'Telecom' and 'Australia Post'. But do we really believe 'ComCare' is more caring than the old workers' compensation boards?

This is not just a dispute about words. Language often masks ideology. Why did 'labour law' and 'employment law' evolve to replace 'master and servant' law?[46] Why did the government in 1996 move from 'industrial law' with its musty connotations of factories and awards, to 'workplace relations', except to convey a focus on individual workplaces and HRM (human resource management) values?

We should at least demand our language be descriptive, not spin-doctored. The term 'WorkChoices', however, spins like a top. As the year-long Boeing versus AWU (Australian Workers' Union) dispute illustrates, even under current law a majority of employees has no right to 'choose' to collectively bargain. Nor does choice occur in a vacuum - some employee's choices will be reduced by the 'WorkChoices' changes, as they will no longer be bargaining for equal or over-award conditions, but to maintain conditions.

Seemingly petty things can be revealing. When government is driven by image over information - and public relations over public service - it is no surprise to see governments at all levels engaging in 'branding'. The ACT administration is adopting a new official crest; what we once called a 'coat of arms'. The Chief Minister's office sees it in more corporate language:

> There is no additional expenditure involved with the introduction of this *brand*. It will simply replace the old *logo*.[47]

---

[45] The Germans love portmanteau words, but for descriptive purposes.

[46] Because 'master/servant' reflected the common law's focus on the employer right to control, itself a hangover from feudalism. 'Labour law' focused on the collective protection of employees; 'employment law' focused on the individual aspects.

[47] Ben Doherty, 'It's your Government … in Royal Blue, Black and White' The Canberra Times, 22/2/2006 <http://canberra.yourguide.com.au/detail.asp?story_id=457400&class=News%2D+Local> (emphasis added). The 'branding' of governments can be linked to a general move in marketing from a

Similarly, a recipient of arts funding is told that the 'Australia Council co-brands with the Australian Government', so that the government insignia must appear everywhere, alongside the logo of the Arts Council, which is an independent funding authority. If the purpose is to remind all concerned that the Council is not a charity, why not just say: 'This project is partly funded by Australian taxpayers'?

But that would not achieve the feelgood effect of branding the 'Australian Government', a term that in common parlance represents a political entity. It is understood by ordinary people as referring to the executive of the day - the Cabinet or governing party - rather than the apolitical and enduring entity we used to call the Crown. For this reason, I have advocated that government advertising be authorised not by a brand, but by an office: the title of the responsible minister or agency.[48] That would also clarify responsibility – the legal purpose of such tagging -[49] to an actual entity. 'The Australian Government, Canberra' is not a legal entity.

***Combet v The Commonwealth*: the IR Advertising Case**

We are reminded of this nicety of legal teminology by the fact that in challenging the IR advertising, the trade union movement's secretary, Mr Combet. sued something called 'The Commonwealth of Australia', as well as the Minister for Workplace Relations and the Minister for Finance. In this section of the paper I will try to explain that case in brief and lay terms. Readers should note, however, that the judgments are 125 pages (nearly double the 'WorkChoices' booklet!) and the underlying law of appropriations is arcane.

In legal terms, the ACTU (with the support of an ALP shadow minister) sought to restrain the Minister for Finance from approving payment of the government's initial

---

focus on branding to advertising, something that is being pushed in the political, and not just commercial, spheres: see Andrew Hughes, 'The Branding of Political Parties – a Case Study Approach', *Australian and New Zealand Marketing Academy Conference*, Victoria University of Wellington (2004).

[48] Orr, above n 29, pp 12-13.

[49] That is, to have someone publicly accountable for the political content, but also formally traceable in case of breach of laws such as defamation, copyright.

IR advertisements.[50] In reality, the case was primarily a political gambit. Had the ACTU won, the practical effect would have been to embarrass the federal government. To meet the debts and to continue its advertising, the government would have had to approach Parliament for a special appropriation for the campaign.

Although the case was argued against the backdrop of the centuries old tension between executive and parliament over control of the treasury, for precedential purposes it was framed as a fairly limited question of statutory interpretation. That question was whether the 2005 Budget covered expenditure on an IR advertisement campaign. The relevant portfolio allocation was as follows:

Appropriations Act (No 1) 2005 (Cth) Schedule 1

Employment & Workplace Relations Portfolio 05-06

	Departmental outputs	*Administered expenses*
OUTCOME 1 Efficient and effective labour market assistance	$1.2bn	$1.9bn
OUTCOME 2 Higher productivity, higher pay workplaces	$140m	$ 90m
OUTCOME 3 Increased participation	$ 72m	$560m

The ACTU argued that none of the three departmental 'outcomes', let alone the detailed accompanying 'portfolio budget statements' mentioned anything approximating a campaign to advocate new policy, and that such a campaign contributed to none of the stated budgetary 'outcomes'. In contrast, in other areas, the budget statements specifically set aside monies for advertising and communication strategies. The government, in its defence, argued that advertising was a normal

[50] Either by a declaration that such approvals were not lawfully authorised by the existing Appropriation Act (ie the 2005 budget), which the Minister would have been honour bound to abide by, or an injunction actually restraining him.

incident of government, and that the budget allocations were broad enough to allow flexibility. If necessary they said, the IR advertisement campaign could be fitted under the flexibly vague outcome of 'Higher productivity, higher pay workplaces'.

A majority of 5-2 agreed with the government. But 4 of them did so for narrow reasons that surprised, even blindsided, observers and participants alike. The 4-judge opinion used very fine distinctions to argue that 'departmental items' did not have to be linked to outcomes at all; only 'administered items' did. The distinction they said was between 'administered items' as expenditures 'managed' by an agency or authority on behalf of the government, and 'departmental expenditure', which was 'controlled' by the department.[51] The majority gave no clue as to what constraints, if any, would limit 'departmental expenditure'. To the minority, this leaves a lacuna in appropriations law. If 'departmental expenditure' is at large, this raises the spectre of billions of dollars being subject neither to input or outcomes limits. Presumably the limits, if any, must be set outside the budget process, perhaps in a departmental 'job description' based on the sorts of subject matters implied in the title of each portfolio. Even the list of legislation administered by a department cannot serve the task, as it cannot delimit the field into which new policy measures may stretch.

Chief Justice Gleeson's separate reasons, in support of the government's case, are considerably more credible and transparent.[52] Whereas the majority's method seems driven by a desire to escape the inescapable, namely confronting the controversial policy questions surrounding the limits of government advertising, the Chief Justice addresses them head on. 'Persuading the public ... of the merits of government policy may be as important to successful formulation and implementation of policy as the drafting of advice and legislation.'[53] Not that Gleeson CJ would necessarily *approve* such advertising; rather, under present arrangements, it is a matter for political rather than legal sanctions. As long as budget outcomes are not so abstract as to be meaningless, it is up to Parliament to insist on more specific and transparent budgetary drafting if it so wishes.[54]

---

[51] *Combet v Commonwealth* [2005] HCA 61, para 158.
[52] Befitting his reputation for succinct judgments built on a robust literalism.
[53] *Combet v Commonwealth*, above n 51, para 29.
[54] Ibid, para 27.

One could disagree, but unlike the 4-judge majority opinion, at least one can engage with the Chief Justice's reasoning. My concern is with his statement that budgetary drafting, including the vague 'outcomes' style of drafting, represents Parliament's '… *choice* as to the manner in which it identifies the purpose of an appropriation.'[55] As a strong supporter of parliamentary sovereignty, the Chief Justice wishes to portray the budget papers as essentially the work of Parliamentary choice. There is some literal truth to this: the House has the power to amend or reject, and the Senate can request amendments. But he is ignoring the substance of the fact that real power lies with the Executive. There is an uncanny parallel with the term 'WorkChoices'. Parliament tends to be subservient to the Executive in the way most individuals are powerless compared to their employer.

The unstated assumption in the Chief Justice's reasoning is that Executive control of Parliament, especially the House, is not a matter for judicial notice or concern. Or rather, it is an inescapable *grundnorm*,[56] rooted in *realpolitik*. Perhaps it is, but it is also a constitutional problem when it threatens political equality. And this is where the High Court leaves us: the executive's interest in incumbency benefits prevails over other values, with virtually unlimited executive freedom to mount repeated, large scale advocacy campaigns whenever the executive so desires to assuage, or massage, community concern or opinion.

In a rich dissent, Justice Kirby devotes considerable attention to the underlying questions of policy, principle and constitutional balance. He concludes that *no* promotional advertising of pre-legislative policy fits the constitutional expression 'the ordinary annual services of the Government'.[57] He does so by deferring to the 1965 Compact – an agreement between the Senate and House – which declares that the ordinary Appropriations Act does not cover appropriations for expenditure on 'new policies not previously authorised by special legislation'.[58] The Compact was meant to ensure that expenditure on policies yet to be presented to the Senate would not be hidden in the ordinary Appropriations Act that the Senate cannot amend. In answer to Justice Kirby, one could retort that expenditure on *advertising* a new policy is not

[55] Ibid, emphasis added.
[56] That is, an unquestionable, grounding norm.
[57] *Combet v Commonwealth*, above n 51, paras 237-252, 261.
[58] Usually labelled as the Appropriations Act (No 1).

the same as expenditure to *implement* it. However the offence to the Senate is no less, and such a retort contradicts Chief Justice Gleeson's claim that advertising is an *aspect* of policy formulation and implementation.

Justice Kirby's judgment would have rendered the IR campaign, like the pre-1998-election GST campaign, unlawful without special appropriation. He would not bar a government mounting such campaigns, but he would require them to openly cost and justify them, ahead of time, to the Parliament. This approach would ensure some of the parliamentary oversight that I seek in advocating a special annual appropriations bill to cap expenditure on large-scale, especially electronic, campaigns.

The line that Kirby J draws around policy that is not yet approved by Parliament is not just a formal nicety to avoid the executive massaging popular opinion or (as he and McHugh J put it) pressuring parliament.[59] Parliaments often delegate power to the executive and the executive has some prerogative powers – in that way, some legal policy is validly made without reference to Parliament. But what we are dealing with in the IR and GST campaigns, are *pre*-legislative policies, and as McHugh and Kirby JJ said, these campaigns were far from being sketches of policy ideas inviting public consultation. Rather they were rhetorical and argumentative campaigns in the same partisan mode as the ACTU's scare campaign against IR reform.[60]

Encouraging Informed Debate – a Referendum Model

A supporter of the IR advertising campaign might ask, 'Isn't the governmental lion entitled to respond, with lethal force if necessary, if it is attacked by the ACTU hyena?' The ACTU of course would argue that the union movement was attacked first, and advertised simply to defend itself against legislative policy that was inherently anti-union. (Better examples of government policy being pre-emptively attacked through lobby-group advertising come from the Whitlam era, especially the Australian Medical Association's $2m campaign to derail the Medibank proposals, and the insurance industry's $150 000 attack on the (never enacted) plans for a

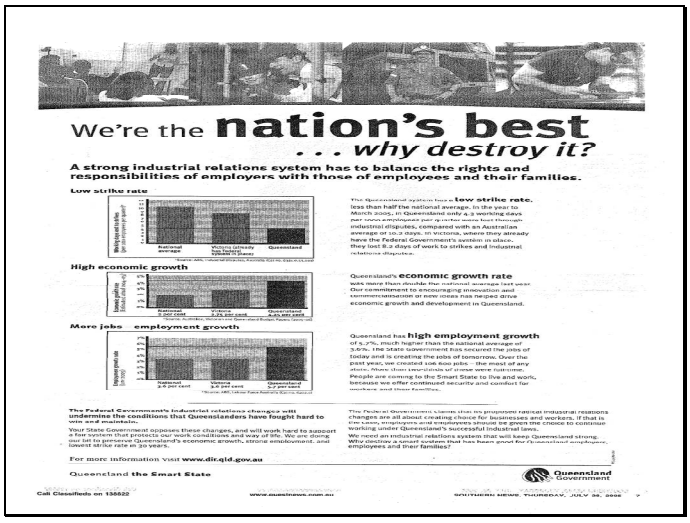
[59] Oral argument in *Combet v Commonwealth* [2005] HCATrans 633 (29 August 2005) lines 3550-3578.

[60] *Combet v Commonwealth*, above n 51, per McHugh J at para 93 (describing the government's advertisements as 'feel good') and per Kirby J at para 181 (describing advertisements as 'not simply informative or descriptive' but 'argumentative … rhetorical').

government insurance corporation.)[61] Regardless of who struck whom first, the obvious response, in the IR case, is that the proper respondent to the ACTU advertisement campaign was business, whether directly, or indirectly by funding Liberal Party advertisements.[62]

Could it be that critics, like me, of governmental use of public monies to campaign for government policy are just scared of debate via advertising? Justice Callinan, in oral argument, suggested that whenever the executive wanted to advertise, it could as part of its policy armoury.[63] Presumably he meant hat governments could advertise to generate interest and debate, as well as to smooth implementation. After all, Queensland, New South Wales and Victoria, albeit in small ways,[64] responded to the IR debate with some newspaper advertisements of their own. Is this not evidence of speech reining freely?

Hardly. First, more is not necessarily merrier, especially when taxpayers' money is involved. The Queensland advertisements, for instance, were risibly parochial, as the following demonstrates:



[61] See Michael Sexton, *The Great Crash: the Short Life and Sudden Death of the Whitlam Government* (Scribe 2005) p 166.

[62] The BCA, representing major business CEOs, eventually undertook such a campaign, encompassing television, radio, magazine, newspaper and billboard advertising: see above n 44.

[63] Oral argument in *Combet*, above n 59, lines 4551-4574.

[64] Victoria for example declared expenditure of just $55 000: see The Hon Rob Hulls MLA, Evidence to Senate Education, Workplace Relations and Education Legislation Committee, Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005, 14/11/2005, p EWRE29.

Second, advertising tends to generate a pantomime wrestle - drivel rather than discourse – this is especially so since, unlike commercial speech, there is no formal sanction for 'misleading or deceptive' political speech.[65] Third, it was purely coincidental, in the IR example, that Australia had different parties in power at federal and state level, and that the states' could claim concern with their jurisdictional autonomy, when in truth, that is a second order issue compared to the Labor states opposition to the substance of the IR changes.

If we want, in the interests of deliberative democracy, to invest public money in rhetorical advertising to stimulate public interest and debate on issues of the day, there is a simple model we can follow. It is the referendum model, where 'yes' / 'no', or rather 'pro'/'con', campaigns would be funded.[66] Campaigns promoting policy debates could be monitored by parliamentary committees representing government and non-government positions (if any) on the issues in question. Note that I am not advocating 50:50 funding: a straw-vote of parliamentarians could measure support for the policy, and funding be divided proportionally.[67]

My proposal to adopt a referendum funding model is particularly directed at promotional advertising of pre-legislative policy. That, after all, is what a referendum is about – albeit it is a matter of constitutional policy leading to a change in legislative form of the Constitution, rather than a matter of amending general legislative policy. It makes no difference that a referendum is, in form, an exercise in direct democracy and examples like the pre-legislative advertising of the GST and IR policies a matter for representative democracy. The key point is that both are acts of deliberative

[65] Only South Australia and the Northern Territory have anything approximating a 'truth in political advertising' law, and then only in relation to certain election advertising. And, recently, the commercial media dropped its self-regulatory scheme to hear complaints of misleading political advertising – leaving political advertising almost totally unrestrained in either amount or content.

[66] I discuss referendum law, including campaigning, in 'The Conduct of Referenda and Plebiscites: a Legal Perspective' (2000) *Public Law Review* 117 especially at 123-124 (funding) and 127-128 (advertising). The only flaw in the referendum funding model is that it puts no constraints on governments at different levels: eg if applied to a state policy debate, it would not inhibit the Commonwealth government weighing in heavily on one side, or vice versa.

[67] There could be a multiplier – eg $1.50 to the government's position versus $1 to the counter-position – if it were felt that the government as government deserved a louder voice.

democracy, and at best government advertising should be aimed at engaging and informing public understanding and debate.

The same referendum funding principle could be applied to any large-scale campaign to promote policy, with a multiplier (so the government's voice was accorded greater weight). The government would always remain the initiator – after all it proposes policy and it would decide which issues of the day would benefit from advertising to stimulate wider public debate.

In conclusion, I make this proposal in the spirit of the 'second best', since I suspect we won't be able to wean governments from the addictive desire to engage advertising agencies to promote controversial policy. But if, as a polity, we want to *publicly fund* soundbite and banner advertisements, in the interests of political equality, we at least should ensure that the resulting, publicly-funded discourse is not one-sided.