

Government Advertising, Parliament and Political Equality

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(Note to readers – copies of the slides/ads referred to appear at the end of this lecture)

Thank you for coming on this Remembrance Day anniversary. It is 90 years since Gallipoli and 30 years since Gough. Both were bloody battles marking heroic failures; both occasions of national myth-making. When you subtract the conservatives in Australia – who should be at the Cenotaph – and the leftists – who should be maintaining their aged rage – there's not much of a political middle left in Australia. Today's talk is firmly addressed to that middle ground.

My speciality is the law of politics. If 1915 reminds us that war is the failure of politics,¹ and 1975 that politics can be a kind of war, you might ask why I bother. Politics is a battle, and battles aren't susceptible to rules. But Quixotic though it may be, the quest of the law of politics is for rules that promote political equality and deliberation over the law of the political jungle.

Today's talk is about advertising campaigns promoting government policy, and concerns with them. We'll consider the erosion of the distinction between descriptive language and rhetoric. After that I will explain the tenor and ramifications of the decision in *Combet v Commonwealth*, the High Court case challenging whether the IR campaign had been authorised by parliamentary appropriation. And along the way I will propose some modest solutions designed to protect the cornerstone values of political equality and deliberation: an annual cap on government ad campaigns, and the funding of contrary cases where government insists on using public money to campaign on policies prior to Parliamentary consideration.

Advertising by governments has become a sensitive issue. Or rather, advertising *campaigns*, to *promote* government policies, are proving intractably controversial.

Now of course governing involves a lot of *routine* advertising, eg on recruitment, public events, or consultation – perhaps even on Senate lectures! And governments sometimes must advertise to *mobilise* public action, especially against threats. So we expect propaganda in times of national security or public health need. Here's a clear example from Mr Curtin: [Slide 2]² Okay, he forgot to authorise it; perhaps his face was his authorisation.³ And his guarantee that Sydney Harbour would be bombed was never fulfilled – least of all by Wellington bombers with Rising Sun insignia!

¹ Von Clausewitz hatched the expression, 'war is merely the continuation of policy by another means' as a half-truth, for dialectical purposes.

² Reproduced from *Griffith Review* (2005) p 32.

³ Today we might balk 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

In a liberal democracy, the effectiveness and legitimacy of such mobilisations can be problematic: witness the derision over by the government's terrorism mail-out featuring fridge-magnet, and the government's attack on 'nanny state' proposals by Mark Latham to promote reading to children. The alternative to vigilance-against-such-state-inspired-vigilance is the Singapore route, with government supported ventures like the 'Happy Toilets' campaign and the 'Singapore Kindness Movement'.⁴ Nonetheless, most government advertising in Australia for community service purposes is honest and unobjectionable.

Being told what to *think* may be as much a concern as 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 decade, it erodes political equality.

First, 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.⁵ Governments wield monopoly power over law-making and enforcement, and support this through compulsory taxation. Yes, they have an obligation 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.⁶ The flavour of this distinction is caught in the separation between public service values, and the politicised nature of ministerial staffers.⁷ 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. Advertising 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.

We live in an age of the permanent campaign and government by PR. 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 distinctions, consider the spate of Commonwealth Bills with sloganeering titles in recent years. The Workplace Relations (More Jobs, Better Pay) Bill of 1999 adopted the PR title of the Liberals'

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).

⁴ '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.

⁵ 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)

⁶ By 'partisan' here I simply mean the policy adopted by particular parties, especially when it is not subject to party consensus, ie it clashes with that of other parliamentary parties.

⁷ However much that distinction may be blurring in modern government: see eg, Pat Weller, *Don't Tell the Prime Minister* (2002).

election policy.⁸ The 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 beauties such as the Quieter Advertising Happier Homes Bill (ALP)⁹ and the Migration Amendment (Act of Compassion) Bill 2005 (Liberal back-bencher). The purpose is to put motherhood slogans into the mouths of the media, and through that, to lull the critical faculties of busy citizens. My favourite in this Orwellian word-game is the Occupational Health and Safety (Commonwealth Employment) (Promoting Safer Workplaces) Amendment Bill of 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 should be descriptive, rather than tendentious, to US practice.¹⁰

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.¹¹ 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. The United States limits terms to counteract incumbency benefits,¹² to restrain the power of money in politics. We are at risk of the same pathology, except through public rather than private monies.

Governments of both persuasions have abused their discretion in Australia: over \$1 billion spent on advertising by the Howard government,¹³ and over \$2 billion in a similar period by the combined state governments.¹⁴ That the federal government is nation’s largest advertiser, with individual states not far behind, is a concern in itself, given the dependency of media profitability on such advertising – thankfully however crude attempts by governments to intimidate particular media outlets by threatening to withdraw such largesse are rare.¹⁵

⁸ Similarly, today we have the Workplace Relations Amendment (Work Choices) Bill 2005 – ‘Work Choices’ being the PR title adopted to sell the policy, rather than a description of anything.

⁹ To set up an inquiry into the relative loudness of television advertisements!

¹⁰ 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).

¹¹ 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.

¹² Eg the President is limited to two terms.

¹³ Admittedly a deal of the expenditure is 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.

¹⁴ The Federal Minister put the states’ spending at \$2.15bn in the period 1996-2003: Senator 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).

¹⁵ *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’.

I do not pretend it is easy to draw rules that, in a vacuum, will neatly divide acceptable from unacceptable. But it doesn't take much context to know what is beyond the pale. Here is an egregious example from a self-confessed media tart, Queensland's Premier Beattie [Slide 3] A Martian could guess from this ad that the Beattie government faces a political firestorm over health. In fact, 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'. The announcement received plenty of media attention; but that wasn't enough for a PR machine eager to negate health as a negative. So we got a wave of promotional ads - as if happy but caries-threatened children will run off to lobby their local councillors!

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',¹⁶ not 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.¹⁷ 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 businesses in the case of apprenticeship funding, and 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, federally, the GST, 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 ads do not come out and tell employees a key aspect of the package is the removal of unfair dismissal rights. Rather, tucked away under headings such as 'Protection Against Unlawful Termination' we are told that 'businesses with up to and including 100 staff will be exempt from unfair dismissal laws'.

The Special Minister of State, in his response to a parliamentary inquiry,¹⁸ asserted that government ads had to be liberally authorised 'Australian Government, Canberra', to meet not just broadcasting law,¹⁹ 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 do 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. So I have called for a straight-

¹⁶ Parliamentary Committee guidelines, above n 3, p 4.

¹⁷ *Langer v Commonwealth* (1996) 134 ALR 400 at 411-412.

¹⁸ Senator 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 14 (submission 9A).

¹⁹ Which imposes obligations on the media, but only in relation to 'political matter': see *Broadcasting Services Act 1992* Schedule 2, cl 4.

forward approach, not based on content-restrictions alone: that is, for a legislated, annual cap on the executive's budget for campaign advertising.²⁰ For suggesting such husbanding of scarce taxpayer resources as a 'pocket money' approach, the Minister accused me of an 'offensive trivialis[ation]',²¹ saying I am part of an elite that reads newspapers or accesses the internet. 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 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.

I am *not* however advocating a Calvinist or Luddite approach. Minister Abetz is fond of declaring that the days of the town crier are long past. It is a soundbite he has delivered so successfully that he risks contradiction. His message has penetrated *sans* advertising. As a government minister, he is a town crier, whose message is amplified via privileged access to the media.

The metaphor of the death of the town crier however 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.²² An historian might trace the milestones of manipulation to Sir Joh Bjelke-Petersen's purchase of air-time for a puff television programme called 'Queensland Unlimited'. 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 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 being too post-modern, that in a consumer age, television advertising may be essential to keep politics 'sexy' and before otherwise disengaged voters, especially given compulsory voting.²³ 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, a rate that can compete with the blur of images and welter of words produced in an electronic age awash with consumption-driven marketing. Leftists who criticise government advertising on

²⁰ 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 14, (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.

²¹ Abetz, above n 18, p 7.

²² Sally Young, 'The History of Government Advertising in Australia', in Sally Young (ed), *Government Communication in the 21st Century* (Cambridge University Press, 2006, forthcoming).

²³ 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.

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.

None of this however exempts governments from core strictures on their 'communication strategies'. Outside propaganda against genuine public order and health threats, their obligation 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 ad campaign [Slide 4] has been roundly condemned, both in scope and intention. The government has been vague about the cost, suggesting very fluid costings or evasion born of immodesty. An official told a Senate Committee the budget was \$55m;²⁴ the PM having said '\$30-\$40m';²⁵ before the Minister confirmed the higher figure.²⁶ Senior journalists have said: 'the expenditure of so much public money on what are really party political advertisements is disgusting' (Laurie Oakes),²⁷ that the government is 'beyond shame' (Michelle Grattan)²⁸ and that the size of the campaign is so 'obscene' it risks 'disappearing up its own fundamentals' (Glenn Milne).²⁹ Even conservative supporters of the IR proposals have attacked the campaign per se, labelling it 'an advertising rort ... a partisan ploy to prop up an unpopular policy' (*The Australian*, editorial)³⁰ and 'the greatest waste of money' (Jeff Kennett).³¹ Milne quotes an unnamed government member saying 'the campaign has been over the top ... an extraordinary display of hubris'.³²

That a government advocacy campaign may backfire is no surprise. Persuasive advertising is risky, for if you are trying to persuade people away from a negative view, by drawing attention to the issue you may reinforce those negative views. Worse, excessive advertising dwindles the stock of public trust upon which government depends. Does this mean that government ads that advocate policy are less of a concern for political equality? Not really. Australians' 'bullsh** detectors' may be more folk legend than reality. And such ads are not designed to sway the partisan, but influence the disengaged.

Was there a demonstrable need for an IR campaign? Certainly not the one that occurred. Awareness of the existence of the proposals was already very high: post-legislation information, especially targeted at workplaces, would have been entirely justifiable. Saturation bombing with tendentious television grabs was not. A proportionate response to correct specific misperceptions in the ACTU's ads may also

²⁴ 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 ads, \$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.

²⁵ *Parliamentary Debates*, House of Representatives, 1/11/2005, p 1.

²⁶ 'IR ads Minister puts Cost at \$55m', *ABC News Online*, 1/11/2005 <www.abc.net.au/news/newsitems/200511/s1495543.htm>

²⁷ Laurie Oakes, 'Exit Stage Right', *The Bulletin*, 12/10/2005.

²⁸ Michelle Grattan, 'Government beyond Shame over Ads', *The Age*, 14/10/2005, p 6.

²⁹ Glenn Milne, 'Ads Succeed in Scaring off the Workers', *The Australian*, 31/10/2005, p 8.

³⁰ 'Editorial: an Advertising Rort', *The Australian*, 31/8/2005, p 31.

³¹ Michael Gordon, 'Kennett Swipes Ads as "Waste of Money"', *The Age*, 13/10/2005, p 8.

³² Milne, above n 28. 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'.

have been justified in informational terms, and may have increased, rather than tarnished, trust in governmental information.

That said, it is undeniable that the newspaper ads have played an informational role. Internal critics wanted them to be simpler. External critics argue they gild the lily. Admen speculate they were designed not so readers would absorb so much newsprint, but that the motivation for 4 page spreads and the PM's signature [Slide 5] was to create the impression that the government is sincere and the package coherent. Perhaps the medium is the message.

My criticism of the newspaper campaign itself is less crude and twofold. One is that for all its informational value, it falls into the insincerity trap. The government does have a case that workplace deregulation *may* bring economic benefits:³³ but it has a duty to honestly reason that case. Its case rests on enhancing managerial power, with consequent vulnerability for some workers, yet it mentions neither of these, although they are central to its policy. The second problem with the newspaper ads is that they are an affront to Parliament.³⁴ What if Parliament chooses to amend the package? Will the government run 'addenda' ads by way of correction?

The packaging of the overall campaign is a giveaway. Why the neologised term 'WorkChoices'? Where did the urge to splice words together, Frankenstein-like, come from?³⁵ Where will it end? Will we, as with racehorse names, have to start recycling? Or will we end up renaming the armed forces 'SecureYou'? It made sense in the 1970s to rename the corporatised units 'Telecom' and 'Australia Post', as the old name, 'Postmaster General' was outdated. But do we believe ComCare is more caring than the older 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?³⁶ 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 values?

But we should at least demand our language is descriptive, not spin-doctored. The term 'WorkChoices' spins like a top. As the Boeing dispute illustrates, even under current law, employees, even a majority, have no right to 'choose' to collectively bargain. Nor does choice occur in a vacuum - some employee's choices will be reduced, 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'. A recipient of arts funding, for example, is told that the 'Australia Council co-brands with the Australian

³³ 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.

³⁴ Curiously the government suspended the advertising once the bill reached Parliament – a rather formalistic step. Parliamentary consideration hardly renders an issue *sub judice*. Coincidentally, 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>

³⁵ The Germans love portmanteau words, but for descriptive purposes.

³⁶ 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.

Government’, so that the government insignia must appear everywhere, alongside the logo of the Council, 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, the executive of the day, 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.³⁷ That would also clarify responsibility – which is the legal purpose of such tagging –³⁸ to an actual entity. ‘The Australian Government, Canberra’ is not a legal entity.

We are reminded of this by the fact that Mr Combet sued something called ‘The Commonwealth of Australia’, as well as the Minister for Workplace Relations and the Minister for Finance. I will now try to explain that case, in brief, lay terms, although 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 IR ads.³⁹ In reality, the case was primarily a political gambit. Had the ACTU won, the practical effect would have been to embarrass the government, which to meet the debts and to continue its advertising, 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 ad campaign. The relevant portfolio allocation was [Slide 6]. The ACTU argued that none of the departmental outcomes or the supporting ‘portfolio budget statements’ mentioned anything approximating a campaign to advocate new policy, and that it contributed to none of the stated budgetary ‘outcomes’. Yet 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 incident of government, and that the budget allocations were broad enough to allow flexibility. If necessary they said, the IR ad 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 expenditures ‘managed’ by an agency or authority on behalf of the government, as opposed to those ‘controlled’ by the department.⁴⁰ The majority gave no clue as to what constraints, if any, limit ‘departmental expenditure’. To the minority, this leaves a lacuna in appropriations law. If ‘departmental expenditure’ is

³⁷ Orr, above n 20, pp 12-13.

³⁸ 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.

³⁹ 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.

⁴⁰ *Combet v Commonwealth* [2005] HCA 61, para 158.

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, and in a 'job description' based on the sorts of subject matters implied in the title of each portfolio, since the legislation administered by a department 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.⁴¹ 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.'⁴² Not that he would necessarily *approve* such advertising; just that 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.⁴³

You might disagree, but at least we 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.'⁴⁴ As a strong supporter of parliamentary sovereignty, the Chief Justice wishes to portray the budget papers as essentially the work of Parliamentary choice. Literally there is some truth to this: the House has the power to amend or reject, and the Senate can request amendments. But in substance he is ignoring the fact that the real power lies with the Executive. There is an uncanny parallel with the term 'WorkChoices' – whose choice is it really if most individuals are powerless relative to their employer (or, conversely, if small businesses are suborned by a union)?

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 rather, it is a *grundnorm*,⁴⁵ rooted in *realpolitik*. Perhaps it is, but it is also a constitutional problem if it threatens political equality. Which is where the High Court leaves us: with the executive's interest in incumbency benefits prevailing over other values, with virtually unlimited freedom to mount repeated, large scale advocacy campaigns whenever it 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'.⁴⁶ He does so by deferring to the 1965 Compact – an agreement between the Senate and House – which requires that appropriations for expenditure on 'new policies not previously authorised by special legislation' are not covered by the ordinary Appropriations Act.⁴⁷ The Compact was meant to ensure that expenditure on policies not yet presented to the Senate, not be

⁴¹ Befitting his reputation for succinct judgments built on a robust literalism.

⁴² *Combet* above n 39, para 29.

⁴³ *Ibid*, para 27.

⁴⁴ *Ibid*, emphasis added.

⁴⁵ That is, an unquestionable, grounding norm.

⁴⁶ *Combet v Commonwealth*, above n 39, paras 237-252, 261.

⁴⁷ Usually labelled Appropriations Act (No 1).

hidden in the ordinary Appropriations Act that the Senate cannot amend. Chief Justice Gleeson could reply that expenditure on *advertising* a new policy is not the same as expenditure to *implement* it: though the offence to the Senate is no less.

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 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.⁴⁸ Parliament often delegates power to the executive and the executive has some prerogative powers. But what we are dealing with in the IR and GST campaigns, are *pre-legislative* policies, and as McHugh and Kirby JJ said, the campaigns are far from being sketches of policy ideas, inviting public consultation. Rather they are rhetorical and argumentative campaigns in the same partisan mode as the ACTU's scare campaign.⁴⁹

But isn't the governmental lion entitled to respond, with lethal force if necessary, if it is attacked by the ACTU hyena?⁵⁰ The obvious retort is that the proper respondent to the ACTU was business, whether directly or by funding Liberal Party ads.⁵¹

Could it be that we critics 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.⁵² Presumably he meant to generate interest, possibly debate, as well as to smooth implementation. After all, Queensland and now New South Wales, albeit in small ways, have responded on the IR debate with some newspaper ads of their own: shouldn't we be glad that free speech is reigning? My first response is that more is not necessarily merrier, especially when taxpayers' money is involved: the Queensland ads, for instance, were risibly parochial [Slide 7]. Advertising may generate a pantomime wrestle - drivel rather than discourse - especially since, unlike commercial speech, there is no formal sanction for 'misleading or deceptive' political speech.⁵³ Second, it is purely coincidental that we have different parties in power at federal and state level, and the states' concerns with state power is only a sideline to the substance of the IR proposals.

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

⁴⁸ Oral argument in *Combet v Commonwealth* [2005] HCATrans 633 (29 August 2005) lines 3550-3578.

⁴⁹ *Combet v Commonwealth*, above n 39, per McHugh J at para 93 (describing the government's ads as 'feel good') and per Kirby J at para 181 (describing ads as 'not simply informative or descriptive' but 'argumentative ... rhetorical').

⁵⁰ The ACTU of course would say it is the sleeping lion, attacked first by the government's policy.

⁵¹ The BCA, representing major business CEOs, eventually undertook such a campaign: above n 33.

⁵² Oral argument in *Combet*, above n 45, lines 4551-4574.

⁵³ 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.

rather ‘pro’/‘con’, campaigns would be funded.⁵⁴ Campaigns in relation to policy debates would be monitored by parliamentary committees representing government and non-government positions (if any) on the issues in question. I am not advocating 50:50 funding: a straw-vote of parliamentarians would measure support for the policy, and funding be divided proportionally.⁵⁵

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 – except that 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 of indirect democracy. The key point is that both are acts of deliberative democracy, and at best government advertising should engage and inform public understanding and debate.

But the same 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 – it proposes policy and it would decide which issues of the day would benefit from advertising to stimulate wider public debate.

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 ads, in the interests of political equality, we need to ensure the resulting discourse is not one-sided.

⁵⁴ 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 federal government weighing in heavily on one side, or vice versa.

⁵⁵ 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.

Slide 1




Government Advertising, Parliament and Political Equality

Dr Graeme Orr
Griffith University Law School
Senate Occasional Lecture, 11 November 2005

Slide 2



Slide 3



Better dental health for Queensland

The Queensland Government is paving the way for more Queensland communities to introduce water fluoridation, and improve the dental health of Queenslanders.

By offering this vital rebate to councils to facilitate their local water supplies, we are giving local communities the choice about whether they want to fluoridate or not.

If a council is not ready to water fluoridate, then we will continue to support them to do so.

Dental decay is the single most chronic childhood disease in Queensland. Queensland has the highest dental decay rate in Australia - nearly 70% of all Queensland children aged 12 years have dental decay, compared to the national average of one in three.

Fluoride is recognised as the safest, most cost effective and healthy way to improve dental health. The Queensland Government is - on works, services, education, health and transport - currently in a period of renewal.

Queensland has a long history of leadership in water supply services. In 1968, it was the first state in Australia to introduce water fluoridation. In 1974, it was the first state to introduce water fluoridation to all Queenslanders.


We recognise the balance of social, economic and health factors that are in play in making a decision about water fluoridation. This is why we are offering this rebate to councils to help them make the decision that is right for their community.

This important initiative is part of our ongoing commitment to improve Queenslanders' health care, and build a better Queensland for all Queenslanders.

G. Beattie
G. Beattie MP
Premier of Queensland and Treasurer

For more information visit www.health.qld.gov.au

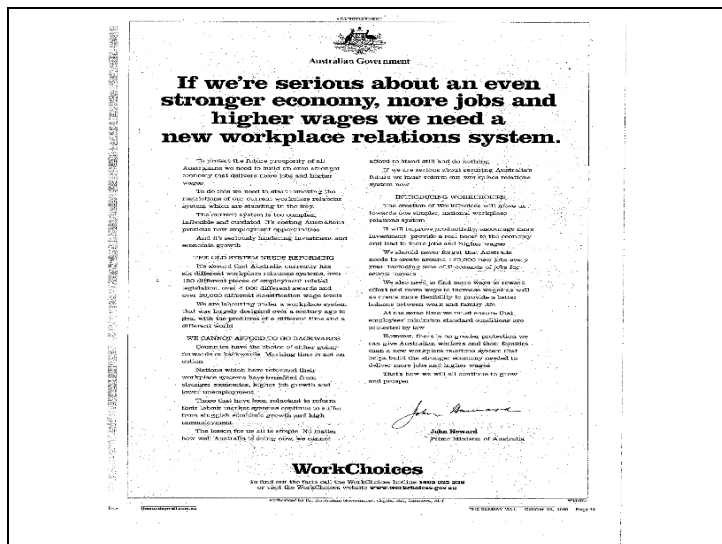
Queensland the Smart State



Slide 4



Slide 5



Slide 6

| Griffith UNIVERSITY | | |
|---|----------------------|-----------------------|
| Appropriations Act (No 1) 2005 Schedule 1 Employment & Workplace Relations Portfolio 05-06 | | |
| | Departmental outputs | Administered expenses |
| OUTCOME 1 | | |
| Efficient and effective labour market assist. | | |
| | \$1.2bn | \$1.9bn |
| OUTCOME 2 | | |
| Higher productivity, higher pay workplaces | | |
| | \$140m | \$90m |
| OUTCOME 3 | | |
| Increased participation | | |
| | \$72m | \$560m |

Slide 7

We're the nation's best . . . why destroy it?
A strong industrial relations system has to balance the rights and responsibilities of employers with those of employees and their families.

Low strike rate
 The Queensland system has a **low strike rate**, less than half the national average. In the 1990-2000 March year, Queensland had a 3 working days per 1000 employees per quarter strike rate through industrial disputes, compared with an Australian average of 6.5 days. In addition, unions have already won the Federal Government's system reform. They lost a 2 year strike to unions and industrial relations disputes.

High economic growth
 Queensland's **economic growth rate** with more than double the national average and our commitment to encouraging innovation and commercialisation of new ideas has helped drive economic growth and development in Queensland.

More jobs = employment growth
 Queensland has **high employment growth** of 3.2% each year, more than the national average of 2.4%. The State Government has created the jobs of today and is creating the jobs of tomorrow. Over the past year, we created 60,000 jobs - the most of any state. More than 80,000 of these were full-time. People are coming to the Smart State to live and work, because we offer protected security and comfort for workers and their families.

The Federal Government's industrial relations changes will undermine the conditions that Queenslanders have fought hard to win and maintain.
 Your State Government opposes these changes, and will work hard to support a fair system that protects our work conditions and way of life. We are doing our best to preserve Queensland's economic growth, strong employment, and lowest strike rate in the world.

For more information visit www.dir.qld.gov.au
Queensland the Smart State

Call Queensland on 1300 30 30 30 www.queensland.com.au **Queensland Government**

QUEENSLAND NEWS, THURSDAY, JULY 26, 2007

Slide 8

Griffith UNIVERSITY

Proposals

- Parliament to set annual cap on government campaign advertising – no spiking in election year.
- Referendum model – ‘pro’/‘con’ cases in proportion to parliamentary support – especially for pre-legislative policy.
- ‘Tagging’ – ads authorised by responsible Minister or semi-autonomous agency.