



## The Government Advertising Bill 2011

by Lenny Roth

### 1. Introduction

On 22 June 2011, the Premier, Barry O'Farrell, introduced the Government Advertising Bill 2011 in the Legislative Assembly. The aim of the Bill is "to restore integrity to taxpayer funded government advertising". The Bill has not yet been debated. This e-brief updates a May 2011 e-brief on [Government Advertising](#) by providing a summary of the Bill and a commentary on it, including comparing the Bill to models for regulating government advertising that have been adopted or proposed in some other jurisdictions.

### 2. Government Advertising Bill

The following is a summary of the main provisions of the [Government Advertising Bill 2011](#).

Government advertising campaigns: A government advertising campaign is defined in clause 4 to mean:

the dissemination to members of the public of information about a government program, policy or initiative that:

- (a) is funded by or on behalf of a government agency
- (b) is disseminated under a commercial advertising distribution agreement by means of radio, television, the Internet, newspapers, billboards, cinemas or other media.

Advertising guidelines: Clause 5 of the Bill requires the Minister to prepare guidelines for government advertising campaigns. According to the Premier's agreement in principle [speech](#):

The foundations of the guidelines to operate under the bill are the existing New South Wales Government Advertising Guidelines published as Premier's Memorandum 2010-08.

Cost benefit analysis and peer review: Under clause 7(1), if the cost of a campaign is likely to exceed \$1 million, the head of a government agency must ensure that a cost benefit analysis is carried out before the campaign commences.

Clause 7(2) states that, if the cost of a government advertising campaign is likely to exceed \$50,000, the head of a government agency must ensure that a peer review is carried out before the campaign commences.

Clause 7(3) provides that "the government advertising guidelines may include requirements for cost benefit analyses and peer reviews".

Compliance certificates: Clause 8 provides that a campaign must not be commenced unless the head of the government agency has given a compliance certificate for the

campaign. This is a certificate stating that the proposed campaign:

- Complies with the Act, regulations and guidelines;
- Contains accurate information;
- Is necessary to achieve a public purpose and is supported by analysis and research;
- Is an efficient and cost effective means of achieving that public purpose.

Independence of agency head:

Clause 9 states that the head of a government agency is not subject to a Minister's direction or control in determining or approving the method, medium or volume of any campaign of the agency; or in determining whether to issue a compliance certificate.

Prohibitions: Clause 6 contains three prohibitions in relation to government advertising campaigns including:

- (1) A campaign must not be designed so as to influence (directly or indirectly) support for a political party;
- (2) Material that is part of a campaign must not contain the name, or give prominence to the voice or any image, or a Minister, any other Member of Parliament or a candidate nominated for election;
- (3) Material that is part of a campaign must not contain the name, logo or any slogan of, or any other reference to, a political party.

The Bill provides that the regulations may make provision with respect to the matters that may be taken into account in determining whether a campaign complies with the above provisions;

and the circumstances in which a campaign is taken to comply with the prohibition in clause 6(1).

Breaches of prohibitions: Clause 11 provides that, if a campaign breaches any of the prohibitions in clause 6, the cost of the campaign is payable by the governing political party (or parties if there is more than one) at the time the campaign commenced, and may be recovered in a court of competent jurisdiction as a debt due to the Crown.

The Bill does not specify who has the responsibility of taking action to enforce breaches of the prohibitions in clause 6. However, it appears that the head of a relevant government agency will have this responsibility. This is apparent from clause 9(c), which states that the head of a government agency is not subject to the direction or control of any Minister in:

determining whether to take debt recovery action and the taking of debt recovery action against a governing party under Part 3.

Clause 13 allows a political party to apply to the Supreme Court for a review of its liability to pay the whole or part of the cost of a campaign.

Auditor-General reviews: Under clause 14, the Auditor-General must conduct a performance audit of the activities of one or more government agencies in relation to government advertising campaigns in each financial year. As part of an audit, the Auditor-General must determine whether an agency is:

carrying out campaigns effectively and doing so economically and efficiently and in compliance with this Act, the regulations, other laws and the Government advertising guidelines.

Clause 14(4) states that the Auditor-General may determine that the

content or other circumstances of a campaign constitute a breach of the prohibitions in clause 6. The Bill does not specify the implications of such a determination. However, the Premier's agreement in principle [speech](#) stated:

The evidence supporting the Crown's claim [against a political party for recovery of the cost of a campaign] may include a report or finding of the Auditor-General.

*Pre-election period restrictions:* Under clause 10, subject to certain exceptions, a government advertising campaign must not be carried out after 26 January in the calendar year in which the Legislative Assembly is due to expire and before the election of the Legislative Assembly in that year.

*Exemptions:* The Bill provides that a cost-benefit analysis or peer review may be carried out *after* a campaign commences if the head of the government agency is satisfied that the campaign relates to an urgent health or safety matter or is required in other urgent circumstances: clause 7(4). The same exemption applies in the case of a compliance certificate: clause 8(3). The Bill also states that regulations may be made to exempt a campaign, or a class of campaign, from the Act or the regulations.

### 3. Commentary on the bill

*Similarities with existing guidelines:* Some components of the bill are the same or very similar to the current guidelines on government advertising in NSW. For example, the Bill's requirements for cost-benefit analyses and peer reviews for campaigns exceeding a certain cost threshold are part of the current guidelines. In addition, the Bill's requirement for the head of a government agency to provide a compliance certificate in

relation to a campaign is very similar to a provision in the current guidelines.

In relation to peer reviews, it should be noted that the Bill does not contain a requirement which was inserted into the guidelines in 2010 (on the recommendation of the NSW Auditor-General), namely that, for advertising campaigns for whole of government initiatives the peer review panel must include "a reviewer independent of the public sector". As noted, however, clause 7(3) of the Bill states that the guidelines made under the Act "may include requirements for cost benefit analyses and peer reviews". As also noted, the Premier has said that the existing guidelines will provide the foundation for the new guidelines.

*Comparison with other jurisdictions:* If the Bill is enacted, NSW will become only the second Australian jurisdiction (after the ACT) to have enacted laws to regulate government advertising. In recent years, Private Members Bills have been introduced in some other jurisdictions but these Bills have not been passed. Outside Australia, at least one jurisdiction, namely, Ontario, Canada has enacted such laws. The various legislative models were discussed in the earlier [e-brief](#).

A key difference between the Bill and the legislative models adopted or proposed in other jurisdictions is that the other models require a person, or panel of persons, *who are not public servants*, to review government advertising campaigns prior to their launch to ensure that they comply with the relevant statutory standards or guidelines. For example:

- Legislation in the ACT provides for campaigns costing over \$40,000 to be reviewed by a person who must not be a

public servant, and whose appointment must be approved by the Legislative Assembly. The reviewer must report to the Minister on the campaign's compliance with the Act.

- Legislation in Ontario, Canada, requires the Auditor-General to review campaigns (there is no cost threshold) to ensure that they meet the standards set out in the Act. The Auditor-General engages external advisers to assist with this role.

The Commonwealth guidelines on government advertising also provide for pre-launch review of campaigns (over \$250,000) by an Independent Communications Committee (which comprises former public servants). The Committee is required to prepare a report to the head of the relevant government agency on compliance with the guidelines. Previously, the guidelines required the Auditor-General to review campaigns above the \$250,000 cost threshold.

The review processes in the Government Advertising Bill 2011 can be compared to these other models. While the Bill provides for a peer review to be conducted for campaigns costing over \$50,000, it does not require the peer review to be conducted by persons who are not public servants. Nor does the Bill require the peer review process to attest that the proposed campaign complies with the Act or the guidelines.

As noted, however, the Bill does require the head of an agency to provide a compliance certificate and the Bill states that the head of an agency is not subject to Ministerial control or direction. In addition, the Bill requires the Auditor-General to

conduct an audit of the advertising activities of one or more government agencies in each financial year.

Comparison with 2007 Bill: The Bill is different, in some significant respects, to a Private Member's Bill that was introduced by Mr O'Farrell in 2007. That Bill would have required the Auditor-General to review a campaign costing \$200,000 or more (though not necessarily before it was launched); and it would have given the Auditor-General the power to make certain orders, such as an order to stop the dissemination of a campaign that "is for political purposes and that does not comply with the guidelines".

Debate about Auditor-General's role: Since the 2007 Private Member's Bill was introduced, there has been some debate about whether it is appropriate for the Auditor-General to be involved in the *pre-launch* review of government advertising. As outlined in the earlier [e-brief](#), some reports, including a 2009 report of the NSW Auditor-General, have expressed the view that the Auditor-General should not have this role. Other reports have taken a different view, and so, it seems, has the Commonwealth Auditor-General.

Recovery of campaign costs from a political party: A unique feature of the 2011 Bill is the provision for recovery of the costs of a campaign that breaches a prohibition in clause 6. The costs may be recovered from the political party (or parties) in government at the time the campaign commenced. However, some issues arise in relation to these provisions.

First, the Bill does not make it clear who would have responsibility for making a decision that there has been a breach of a prohibition and for taking cost recovery action. It seems from

clause 9(3) that this responsibility will fall to the head of a government agency but it is not clear which one. Presumably, it would not be the head of the agency who issued a compliance certificate.

Secondly, while the Bill makes it clear that the head of an agency would not be subject to Ministerial control in relation to cost recovery action, public perception might be otherwise.

Thirdly, it could be argued that a political party should not incur any liability for the cost of a campaign until a court has decided that a prohibition has been breached. Under the Bill, it appears that a political party will incur liability for the cost of a campaign if the head of a government agency determines that a prohibition has been breached. It will then be up to the political party to apply to the Supreme Court for a review of its liability.

Fourthly, it is likely to be difficult for the Supreme Court to determine whether a campaign was in breach of the prohibition in clause 6(1): namely, that it was "designed to influence (directly or indirectly) support for a political party". The Court might be assisted, at least to some extent, if further criteria are outlined in the regulations. However, there is also an issue as to whether it is desirable for the Court to be deciding such matters.

By way of comparison, it can be noted that Mr O'Farrell's 2007 Bill would have given the Auditor-General the power to order a political party to repay the costs of a campaign which breached the guidelines.

Other comments: It is worth noting that some elements of the proposed regulatory framework will be outlined after the Bill has been debated. This

includes the government advertising guidelines (although the Premier has said that these will be based on the existing guidelines). The Bill also allows the regulations to outline the matters to be taken into account in determining whether the prohibitions in clause 6 have been breached.

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