



14 August 2013

Senator Nick Xenophon
Senator for South Australia
Parliament House
CANBERRA ACT 2600

Dear Senator Xenophon

The *By boat, no visa* advertising campaign – caretaker period

I am writing in response to your letter of 12 August 2013 about the continuation of the Australian Government's *By boat, no visa* advertising campaign during the caretaker period. Aspects of the campaign were discussed in my earlier correspondence of 1 August 2013, including its exemption from the Government's own *Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies* (Guidelines).

The Department of the Prime Minister and Cabinet's (PM&C) June 2013 *Guidance on Caretaker Conventions* (Guidance) summarises the caretaker conventions at paragraph 1.3 as follows:

During the caretaker period, the business of government continues and ordinary matters of administration still need to be addressed. However, successive governments have followed a series of practices, known as the 'caretaker conventions', which aim to ensure that their actions do not bind an incoming government and limit its freedom of action. In summary, the conventions are that the government avoids:

- making major policy decisions that are likely to commit an incoming government;
- making significant appointments; and
- entering major contracts or undertakings.

Further, the Guidance observes at paragraph 1.4 that:

There are also established practices associated with the caretaker conventions that are directed at protecting the apolitical nature of the public service and avoiding the use of Commonwealth resources in a manner to advantage a particular party. The conventions and practices also aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election campaign.

Section 6 of the Guidance elaborates on the issue of ‘avoiding APS involvement in election activities’. In respect to government advertising and information campaigns, the Guidance observes at paragraph 6.1.1 that:

The Department of Finance and Deregulation and PM&C reviews all advertising campaigns at the beginning of the caretaker period and recommends whether those campaigns should continue or be deferred. Bipartisan agreement is sought for campaigns that are to continue. Campaigns that highlight the role of particular Ministers or address issues that are a matter of contention between the parties are normally discontinued. Campaigns that are of an operational nature, such as defence force recruiting campaigns or public health campaigns, usually continue.

The Guidance is available at http://www.dpmc.gov.au/guidelines/docs/caretaker_conventions.pdf

In a ministerial statement dated 9 August 2013, the Special Minister of State (SMOS) announced that he had approved continuation of the *By boat, no visa* campaign during the caretaker period and the reasons for his decision. On 9 August 2013 the SMOS also provided a written direction to the Secretary of the Department of Finance and Deregulation (Finance) and the Secretary of the Department of Immigration and Citizenship (DIAC). The Minister for Immigration and Citizenship also provided a direction to the Secretary of DIAC. The ministerial directions indicated that the *By boat, no visa* onshore campaign, and a number of related offshore campaigns, should recommence immediately. The Finance direction is available at http://finance.gov.au/about-the-department/media-centre/secretary/media-releases/2013/docs/letter_from_smos.pdf while the DIAC directions are available at http://www.immi.gov.au/about/_doc/tony-burke-direction-to-resume-campaign.pdf and http://www.immi.gov.au/about/_doc/mark-dreyfus-ceo-certification.pdf

I understand from the SMOS’ correspondence to the Finance and DIAC Secretaries of 9 August 2013 and correspondence from the Leader of the Opposition to the Secretary of the Department of the Prime Minister and Cabinet of 9 August 2013 (referred to below), that in the course of a consultative process the Opposition Leader supported continuation of the offshore components of the campaign but not the continuation of the DIAC onshore component.

In considering the import of paragraph 6.1.1 of the caretaker Guidance referred to above, I note that the advice refers to bipartisan agreement for campaigns being ‘sought’ rather than obtained, and that campaigns relating to contentious matters are ‘normally discontinued’, leaving scope for some to be continued. I also note that in correspondence dated 11 August 2013 with the Leader of the Opposition about the application of the caretaker conventions to the contentious elements of the *By boat, no visa* campaign, the Secretary of PM&C advised that:

Decision makers, including Ministers, are not prevented from making decisions, as the conventions are not legally binding. The Department [PM&C] does not have the power to enforce the observance of the conventions.

The correspondence is available at <http://www.dpmc.gov.au/media/docs/2013-08-09-Letter-to-Secretary.pdf> and <http://www.dpmc.gov.au/media/docs/2013-08-11-Letter-to-Mr-Abbott.pdf>

These circumstances demonstrate the latitude the Government has when it comes to mounting advertising campaigns. The Government establishes the advertising Guidelines, then is able to exempt their application, and furthermore is able to rely on the flexibility provided for in the caretaker Guidance and the non-binding character of the caretaker conventions as the basis for advertisements continuing at this time. The current arrangements rely on the Government acting in the public interest in deciding whether advertising campaigns should continue during the caretaker period including their frequency, but there is nothing to stop other factors informing the decision to continue with campaigns. If a stronger regime is required, then more stringent advertising guidelines or a legislated basis for the arrangements would need to be considered.

I trust this information is of assistance.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ian McPhee', with a stylized flourish at the end.

Ian McPhee
Auditor-General