Lobbying Code of Conduct and Register of Lobbyists
Possible Reforms

Submission of the Accountability Round Table

Introduction

The Accountability Round Table welcomes the review of the Lobbying Code of Conduct 2008, and the issuing of a Discussion Paper (the Paper) for that purpose.

A number of criticisms have been made of the Code's attempt to regulate the conduct of lobbying and lobbyists.[1] They include:

a) *Inadequate coverage :*
   i. *lobbying activity;* the coverage includes the lobbying activity of those who lobby for third parties but does not include that of "in-house lobbyists" in firms of accountants and lawyers, industry bodies, trade unions or the major commercial enterprises in the media, resources, transport and other major sectors of the economy
   ii. *the lobbied;* the coverage includes Ministers, Parliamentary secretaries, public servants and ministerial staff but it does not include shadow Ministers and Parliamentary Secretaries, members of other parties or independents or their personal staff.
   iii. *details of the lobbying activity;* there is no requirement to supply details of each act of lobbying; who was involved, where and when it occurred or the subject matter

b) Failure to require contemporaneous supply of information[2] of changes to required details.
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c) Inadequate limits on post-government employment:
   i. *People covered;* present limits apply only to Ministers, Parliamentary Secretaries, ministerial staff, officers above the rank of Colonel, agency heads, and persons at a senior executive level in the public service.
   ii. *Limit on activity;* restricted to matters in which they had "official dealings".
   iii. *Length of bans after ceasing to hold office;* Ministers and Parliamentary Secretaries, 18 months and, for the rest, 12 months in respect of "official dealings" in the previous 18 and 12 months respectively.

d) Secondary employment:
   There is little or no regulation of secondary employment of members of parliament.[3]

[1] See in particular: Report of the Senate Standing Committee on Finance and Public Administration, "Knock, knock....who's there?" (2008); Joo-Cheong Tham, *Money and Politics*; *the Democracy we can't afford*, UNSW Press 2010, Ch 8 and ICAC Issues Paper, 2010 *Lobbying in NSW*

[2] At present, within 10 business days of 30 September and 31 March and confirmation each year, within ten business days of 30 June, that details are up to date

On the other hand, there have been complaints about alleged adverse effects of the Code.

e) *Reporting:* the requirements are too onerous.
f) *Removal of lobbyists;* the penalty provided for breach of the Code by lobbyists is removal from the register after which they cannot practise as lobbyists
   i) *Procedural unfairness;* at best there is an informal promise to accord natural justice and the application of a standard of proof to reflect the seriousness of any allegation made
   ii) *Inadequate right of appeal;* there is only a possible limited right of appeal to the Ombudsman (re steps leading up to the removal from the Register) or a possible application to the Federal Court or High Court.[4]

g) Post-employment prohibitions;
   i. *Retrospectivity;* the prohibitions[5] would operate unfairly on ministerial staff and public servants because it would apply retrospectively to them.
   ii. *Unfair discrimination;* it has been argued[6] that the bans fail to have regard to the differences in job security and financial benefits, including superannuation entitlements, between public servants and ministerial staff
   iii. *Unfair Restraint of trade;* it has also been argued[7] that the private sector might be deprived of the expertise of vital individuals in circumstances where normal restraint of trade principles would not apply.

These criticisms reflect unstated assumptions about the relevant and appropriate policy objectives of the Code. The criticisms and other issues are discussed below. Before embarking on that, however, it is critical to identify what the policy objectives of the Code should be.

The stated policy framework

The Preamble to the Code states that its intention is to

1. promote trust and the integrity of government processes and
2. ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty.

Its stated underlying policy concern is that

[3] See Joo-Cheong Tham, op.cit., 226, 240, 250-1.
[4] See also Minority Report, p 19, para 1.3 and the concern there expressed about the arbitrary nature of the power given and the potential for abuse of it
[5] By the CPSU and USU; See Report, para 2.51 and 2.52, Majority Report
[6] By the CPSU; see Report, paras 2.48 – 2-56, Majority Report
[7] Ibid, by the ACCI, para 2.56

> "Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials"

Two matters identified as relevant to that respect and confidence are:

a) a public expectation that lobbying activities will be carried out ethically and transparently, and
b) that Government representatives who are approached by lobbyists can establish whose interests are represented so that informed judgements can be made about the outcome the lobbyists are seeking to achieve.[8]

The stated policy framework explains, in part, the limited scope of the Code. Those who argue for wider coverage and stricter conditions have wider policy objectives.

The Policy Issues

In formulating rules to regulate lobbying, the challenge is to address its problems and dangers without inappropriately hampering legitimate political freedoms.[9] Lobbying helps the represented to be heard. In its purest form, it enables relevant information and arguments to be marshalled and presented in such a way as to assist governments to reach decisions in the best interest of the community. In a time-poor and information rich world this can be of real help to government. It must also be remembered that lobbying is not confined to making representations for people seeking financial advantages or preference from government. It is conducted on a wide range of issues of policy including issues affecting all and for a wide range of people including the most disadvantaged in our community.

Joo-Cheong Tham has identified three key principles for distinguishing between legitimate and illegitimate lobbying

> " ... respecting political freedoms (including the freedom to influence the political process through lobbying), protecting the integrity of government (and preventing corruption[10]), and promoting fairness in politics"[11]

As he explains, lobbying should be regarded as illegitimate when it is

- not fully open (as to participants and/or content),
- is not focused on addressing the public interest, and/or
- undermines access to government by all because it involves unfair access and influence.[12]

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[8] Therefore it was not necessary to extend the Code to in-house government relations staff: Senator, the Hon. John Faulkner, Cabinet Secretary, Senate Hansard, 13 May 2008, p. 1510; and so fails to address public transparency and accountability, ICAC, op. cit. 20

[9] See discussion, Joo-Cheong Tham, *Money and Politics*; *the Democracy we can't afford*, UNSW Press 2010, 216 220, 246

[10] In referring to "corruption" in this submission our intention is to refer to conduct that puts particular interests (personal or political party) ahead of the public interest in response to an inducement or personal association.

[11] Op. cit., 219

[12] Op. cit., 219 – 220; 230 – 237

Secrecy is a major concern because it makes it difficult for citizens to judge public officials and hold them to account. Secrecy also undermines the health of political parties because it centralises power in the party leadership. Further, secrecy creates opportunities for corruption and misconduct[13] and is a major factor in enabling unfair access and influence. [14]

The Code's stated policy framework should be supported, but it falls short of what is required.[15] In particular, it does not recognise the dangers inherent in significant developments that have occurred in the government lobbying industry in Australia and the way we are governed.

The development of the lobbying industry has occurred at the same time as

- the ever-increasing commercialisation of government services and projects and
- the growth in numbers and importance of the staff of ministers and parliamentary secretaries and their counterparts in the Opposition and other parties and their influence in policy decisions.[16]

It has also become common practice for lobbyists to recruit recently retired ministers, parliamentary secretaries, members of Parliament, ministerial staff and former public servants.[17]Large firms of accountants and lawyers and major corporations also recruit such people to assist them with their lobbying activities. In addition, success fees have been introduced for those engaged in lobbying.[18]

It is important to review the purposes of the Code in that context; particularly, the problems that it seeks to address and any other problems that it could and should address.

Formulating the Policy Framework

We suggest that the major concerns underlying the criticisms made of the Code are the potential in any lobbying system for increasing

a) unequal access to government,
b) distortion of the decision-making process[19] resulting in decisions that are not in the public interest, and
c) the risk of the corruption of government.

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[13] Op. cit., 221 – 222; Re corruption and misconduct see discussion at 224 -- 230

[14] Op. cit., 230 – 237; but not the only factor – see examples (231 – 234) of the access to political leaders enjoyed by, for example, business leaders and union leaders, the advantage of having the financial capacity to hire lobbyists (234-5) and the benefits of having the services of a recently retired public official (235-7)

[15] Similar limited statements are to be found in the NSWS Lobbyists Code of Conduct – see ICAC op.cit. 19

[16] The Canadian Act applies to the lobbying of all such persons; see Op. cit., Appendix A

[17] E.g. in NSW, the Register, as at Feb 2009, recorded that 49% of the 272 individual lobbyists (not including in-house lobbyists) had such a background. They included 22 former MPs (State and federal) and 112 former staffers; and 804 clients - ICAC op.cit. 11 and 12

[18] See generally, T. Smith, Corruption; *The abuse of entrusted power in Australia*, The Australian Collaboration (2010) 51 - 54

[19] This can result from the giving of financial incentives, creation of a sense of obligation from friendship and favours: ICAC, op.ci.14 and sources cited

We submit that those concerns are valid and need to be addressed. A clear statement in the Code of the intent to address those concerns will assist the formulation, and acceptance, of appropriate amendments to the Code. It will also assist compliance. The Code relies heavily on voluntary compliance.

An important factor in securing voluntary compliance with any rules is the legitimacy of those rules. That in turn will depend on understanding not only the rules and their purposes, but also the underlying values they serve and the fairness of any procedures.[20] Relevant to those matters are the ethical obligations of those who are likely to be lobbied: Ministers and parliamentary secretaries (and their shadow equivalents), members of Parliament, their staff and public servants.

They are in the position of fiduciaries who exercise a public trust[21]; for we entrust them with power to be exercised over us and thereby render ourselves vulnerable to the decisions they make in exercising that power. Further, as explained by the former Queensland Integrity Commissioner, Mr Gary Crooke

> "All the components of government property (whether physical, intellectual or reputational) are really no more, and no less, than the property of the community, the capital of which is held in trust by elected or appointed representatives or officials.
>
> The term capital is an amorphous one and includes all the entitlement to respect and inside knowledge that goes with holding a position in public administration.[22]

The powers given to those involved in government should be exercised on behalf of, and for the benefit of the community, not of those given the power, their political party or sectional or vested interests with which they may be associated or by which they may have been inappropriately influenced. Any system provided to regulate lobbying activity should respect, serve, and address the risks to, that public trust.[23]

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[20] See generally, Tom R Tyler, *Why do people obey the law?* Princeton University Press (2006)

[21] Op.cit. 59-60 and see Paul Finn (as he then was), 'A Sovereign People, A Public Trust' in Essays on Law and Government, (Australia) Law Book Company (Vol 1), 1995, p.1 and 'Integrity in Government' (1992) Public Law review 243; Report of the WA Inc Enquiry, 1992, paras 1.2, 3.1.7, 4.4; Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority', (2005-2006) 31 Queen's Law Journal, 259 ; Mary Wood, Advancing the sovereign trust of government to safeguard the environment for present and future generations', (2009) 39 Environmental Law 43; and discussion by Doyle, CJ of the trust principle in Question of Law Reserved (No.2 of 1996) SASR 63 referring to the offence of misconduct in public office as involving an 'abuse of the trust placed in the officeholder'. Also in the context of native title, see the discussion of the application of trust principles to native title issues, Toohey, J., in Mabo v Queensland (No 2) (1992) 175 CLR 1. As to the judicial power being held on trust see Gleeson, CJ, 'The rule of law and the Constitution', Boyer Lectures (2000) ABC Books, p.125

[22] Annual Report, 2007-2008,p7; cited by Joo-Cheong Tham, op.cit , p.89; Mr Crooke went on to say

> "The trust bestowed importantly includes an obligation to deal with government property or capital only in the interests of the community. As such, it is singularly inappropriate for any person to use it for personal gain."

[23] The relevance of these matters is partially recognised in the Discussion Paper in the discussion of professional development of those in lobbying including training in relevant ministerial and staff codes

These matters should be directly addressed in the Code. In Appendix A we have set out a revised Code in which we have attempted to do so.

We turn to a detailed examination of the provisions of the Code, including the criticisms referred to above and the specific matters raised in the Paper. In doing so we have had regard to the policy objectives and the need to address the dangers identified above, particularly, the potential in any lobbying system to

a) increase unequal access to government,
b) distort the decision-making process[24] resulting in decisions that are not in the public interest, and
c) increase the risk of the corruption of government.

In considering the approach to be taken, it must be remembered that there is no general national integrity commission that might reduce such dangers.

We have assumed that, as has been recently agreed by the parties and the independents, an office of Parliamentary Integrity Commissioner will be created and one of its functions will be to administer the Lobbyist Register.[25]

Issues

1. Coverage of the Code

(a) *The activity covered*. The Paper[26] refers to the fact that the Code

- exempts members of professions such as lawyers, doctors and accountants who make occasional representations to government on behalf of others incidentally to the provision of their services and
- does not apply to in-house government relations staff "as it is clear whose interests are being represented"

and then raises two issues:

i. Would an extension of the Code to in-house lobbyists provide any additional transparency?
ii. Could the ethical standards underpinning the Code apply more widely in the sector?

We submit that the Code' registration and disclosure requirements should apply to all engaging, directly or indirectly, for financial reward in lobbying activity[27] and so add to the transparency of the scheme and help to reduce the risk of corruption. This would also remove opportunities for professional lobbyists to avoid registration and any restrictions imposed by the Code – with similar benefits.

[24] This can result from the giving of financial incentives, creation of a sense of obligation from friendship and favours; ICAC, op.cit.14 and sources cited.
[25] Cl 20 of Agreement for a Better Parliament
[26] P. 9
[27] By that expression it is intended to cover professional lobbyists for third parties, in-house lobbyists (in business, law firms, accountancy firms) and organisations, and their representatives, who are pressing for action or decisions that will benefit their businesses, trade or union organisations

For the same reasons, the standards laid down in the Code should apply more widely to the same people and organisations.

(b) Definition of the lobbied ("government representatives")

To cover lobbying of government, the lobbying activity to be registered should include lobbying of MPs and statutory corporations, including their subsidiaries and their representatives and employees.[28] All are involved in the process of government and can influence government decisions. All are of interest at some time to lobbyists.[29]

(c) Information to be disclosed

The Code should require those lobbying to supply details of each occasion of lobbying, who was involved and issues the subject of lobbying.[30] To further aid transparency of lobbying activity and reduce the risk of corruption, minutes should be kept by the government representatives involved[31] and signed by them as a correct record. In addition, employees of government and government agencies should be required to

- receive and complete training in the lobbying process and their obligations
- obtain a clearance at a senior level for any meeting with lobbyists and ensure two other employees are present at such meetings,
- lodge the signed minutes with the head of the department or agency
- each quarter forward to the head of department or agency a list of such meetings

Further, anyone tabling a Bill should publish a list of meetings with people lobbying about the Bill. A similar approach should be required when Ministers announce government policy and decisions.[32]

The Paper[33] raises the question whether lobbyists should disclose on the Register of Lobbyists the details of any lobbyists who were Ministers, former ministerial staff or senior APS and ADF personnel.

The Paper notes that the Code, while imposing some restrictions on the lobbying activities of such persons, does not require disclosure of previous roles in the above areas. The paper argues that identifying such persons and the date when they left office would

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[28] See discussion ICAC, op.cit. 13; at a Commonwealth level such an approach would cover, for example, the Reserve Bank and companies in which it has an interest.

[29] As to extending the Code to impose obligations on members of each House. the then Clerk of the Senate, Harry Evans identified issues and possible solutions in his submission to the Senate Committee See Submission to the Senate Committee: http://www.aph.gov.au/senate/committee/fapa_ctte/lobbying_code/index.htm - in *Submissions received*

[30] This has been recommended in NSW(Parliamentary Committee and ICAC) and the UK; see Joo-Cheong Tham, op.cit.,249

[31] The NSW Legislative Council, General Purpose Standing Committee, Report No. 4, *Badgerys Creek land dealings and planning decision*, recommendation 9, cited ICAC, op. cit. 16 (It also recommended the presence of a third party government representative).

[32] See Discussion, Joo-Cheong Tham, above

[33] Issue 2, p. 6.Minutes should also be kept by the government representatives involved.

- "provide further transparency for prospective clients and government representatives about the background and credentials of lobbyists", and
- "go some way to addressing criticism of lobbyists perceived to be making improper use of contacts within government by ensuring that government representatives are aware of the background of lobbyists who contact them."

The Paper asks whether such a requirement for additional disclosure of the kind would "increase confidence in the operations of the lobbying sector?"

The Accountability Round Table strongly supports this proposal. In requiring public disclosure of the information, it removes an aspect of the secrecy that is the great friend of corruption and will help to discourage corrupt behaviour. Such disclosure is also vital if the Code's restrictions are to be enforced.

Any disclosure, however, must be prompt if it is to give transparency.

2. Timing of disclosures.

To provide transparency, the required information about the lobbyist seeking registration should continue to be supplied once a year but upgraded whenever any change occurs, the latter to be supplied within 1 working day and placed on the Register within a further working day. The latter requirement should also apply to any information about lobbying activitiy required to be provided to the register.

It will be argued by some that this is too onerous[34]. But without timely disclosure identifying who and what is involved, there will be no transparency. Will there be a burden? Won't those doing lobbying need to keep a diary recording the appointment, the people involved and what it is about for their own purposes? They are already required to inform the government representatives of the names of their clients and the nature of the matters that they wish to raise.[35] All of this material will probably be recorded and conveyed electronically. Bearing in mind the widespread use of electronic communication, there is no reason why the required information cannot be disclosed to the Register by all parties within the suggested time frame. With the use of modern technology and the Internet any burden should be slight.[36]

3. Limits on post-government employment

The Paper[37] raises the questions whether

(a)the ban on former Ministers and Parliamentary Secretaries undertaking lobbying activities should be extended from 18 months to 2 years, and on matters that they had official dealings in their last two years in office;and

[34] The Code requires the supply of the presently limited information within 10 days after 30 June, 31 March and 30 September , and changes to it within 10 days of the change (cl 5.4,5.5,5.6)
[35] Code, Clauses 8(e)(iii),(iv)
[36] See for example the Microsoft Office calendar sharing facility
[37] Issues 3 and 4, p7-8

(b)the ban on former Cabinet Ministers should apply to all matters, not just those matters where they had official dealings.

We strongly support the removal of any qualifications such as the "official dealings" qualification in any revised Code. They simply provide a loophole to be exploited by anyone who wishes to circumvent the Code.[38] That having been said, the proposal does not go far enough.

The Paper notes that

> "the current policy is aimed at preventing former ministers, parliamentary secretaries, ministerial staff, APS employees and ADF personnel from using knowledge about matters that they had official dealings with while in office if engaged as third-party lobbyists."

It goes on to state that criticism of former ministers has not been confined to their lobbying activities in areas relating to their portfolio responsibilities but has extended to them "making improper use of their contacts in government" as well as the use of knowledge acquired while in office. The proposal, it is said, would prohibit Cabinet ministers (and presumably Parliamentary Secretaries) from using their contacts within Government as well as their knowledge of government policies and plans in any subsequent career as a third-party lobbyist for the prescribed period.

The Paper asks the question whether

> "increasing the length and coverage of the ban [would] contribute to increased confidence in the lobbying industry by members of the public?"

We suggest that the limited time extension is unlikely to prevent the use of such knowledge, including contacts, or to increase public confidence in the operations of government. For the proposed regime proceeds on the basis that Ministers and Parliamentary Secretaries will retain their attractiveness to the lobbying industry to be engaged by it after a period of two years. That is likely to be so only if the knowledge, including contacts, acquired as a Minister or Parliamentary Secretary continue to be of value.

In any event, increasing confidence in the system, while an important concern, is an ultimate objective not an immediate one. It will occur as a result of changes to the Code which directly address the causes of any lack of confidence.

Lack of confidence flows from a number of fundamental flaws, namely, a lack of transparency and the fact that the present system

a) increases unequal access to government,
b) has the potential to distort the decision-making process and result in decisions that are not in the public interest, and
c) increases the opportunity to corrupt all those in government.

[38] Op.cit, 53-54

It can be argued that the understanding of government processes acquired by government representatives is not something generally found within a private sector organisation and is needed by them. But that is a difficulty shared by all. The problem is that such knowledge

"is likely to be accompanied by personal relationships and political influence" .[39]

Further, the Ministers and Parliamentary Secretaries will be engaged to lobby for what is in their client's interests whether it is in the overall public interest or not.

People who are entrusted by us with the power to govern for us, inevitably obtain that broader knowledge, including valuable contacts, to be used on our behalf. That knowledge is not generally accessible in or to the community they serve. While engaged in government they will be expected to use that knowledge on our behalf, not their own. Much of it will not be of a confidential nature but, because it will include knowledge of a kind which is not generally accessible, it can be of great value and importance to individuals, corporations or particular sections of the community who may wish to gain advantages for themselves from government action. As a result, those who leave their government engagement have an asset that they can use and will be able to benefit financially from that asset that was gained at our cost. They do not have to account to us for any part of such benefit. Further, on occasions, in their new employment, they will use that knowledge, gained while entrusted by us with the power to govern, to seek advantages for their new client or employer, which advantages will, on occasions, succeed because we lack that knowledge and, as a result, will carry a cost to us. There are presently no legal constraints on such conduct and the Code has been ineffective. Allowing such conduct to be unconstrained treats engagement in government as just another form of private employment. It is not and treating it as such damages the reputation of all in government and our confidence in them.

How are the particular flaws to be addressed? The lack of transparency can be addressed by using the present system of registration by lobbyists, extending it to all engaged in lobbying and requiring the supply of all required information to the Register within one working day of the relevant event occurring. In addition, the matters to be recorded in the register should be extended to include information of the date and time of any contact by a person engaged in lobbying, who was involved and the nature of the matters that they sought to raise with Government representatives.[40]

The other flaws (unequal access to government, potential to distort the decision-making process, and the opportunity to corrupt those in government) also require a direct response. An effective response would be to close the "revolving door"[41] between government and lobbyists.

Because of the seriousness of the issues, and the special nature of all forms of employment in government, a strong case can be made for a permanent ban on the engagement of anyone who has been involved in government in any form of direct or indirect lobbying activity. The fiduciary nature of the obligations on all in government requires a strict approach.

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[39] ICAC,op.cit. 21, citing the example of Messrs Burke and Grill and their use of their political links

[40] Clause 8 (e) (iv) already requires that information to be supplied to the person contacted. It can therefore easily be added to the information on the Register

[41] See ICAC, op.cit.21

At first glance this may seem harsh to people like ministerial staffers.[42] It has been argued[43] that they are in a special position because their employment is insecure. That is true, but they take up those positions knowing that they have no job security. Further, few workers in the community these days have job security. Even our top research scientists do not have job security.

If a total ban is thought to be too Draconian, or unfairly hampers legitimate political freedoms, an alternative would be to follow the Canadian approach: introduce a ban of 5 years with a right to seek exemption which may be given subject to conditions. The currently proposed Parliamentary Integrity Commissioner could perform that role.[44] A similar approach should be taken for those who have been engaged in lobbying who may wish to enter the public service or be employed as ministerial staff.

If such action is not taken, we are not being serious about addressing the risk of government corruption.

A contrary position was advanced by the ACCI in its submission to the Senate Committee in 2008. [45]

> 37. A legitimate and bona fide part of recruiting talented individuals to work (either as an employee or contractor) for ACCI or its members is to consider all persons with the highest aptitude, skill and knowledge. Such persons include former APS employees (and at all levels), and former Ministers and their advisors.
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> 38. The common law principles on restraint of trade state that, prima facie, unless it can be shown that the restraint of trade is reasonable, it will be held to be contrary to public policy and unenforceable.6
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> 39. ACCI questions whether it is necessary to impose, for example, a blanket 12 month post employment restraint on SES equivalent APS employees, which does not factor in their level of involvement in the "*matter that they had official dealings with in the last 12 months of employment*". It does not distinguish the level of involvement in a particular area, or whether they may have been recently appointed to SES level and for the most part, were involved in other matters.

This argument is a frank acknowledgment of the marketable value of people who were in parliament or government positions for people in the business of lobbying government. But the argument put appears to proceed on the basis that the common law principles of restraint of trade (which apply in the employment market place to protect businesses being disadvantaged by competitors recruiting their staff) are applicable to recruitment of former parliamentarians and people in government. The argument does not consider the fact that this is not a market competitor situation. It involves recruitment of people

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[42] Currently the Code does not apply to ministerial staff below Adviser level

[43] Report, p22, Minority Report, para 1.30

[44] In Canada there is a Commissioner of Lobbying who performs that role: See Lobbying Act,s10.11 and 10.12

45 http://www.aph.gov.au/senate/committee/fapa_ctee/lobbying_code/submissions?

- from positions of public trust, and
- done to seek advantages in situations which will often involve lobbying for decisions which will favour the client's interests over the public interest using information, experience and contacts gained by the recruits when under a duty to act in the public interest.

These facts would provide a reasonable basis for the proposed 5 year ban. A procedure to allow exemptions subject to conditions can deal with cases where the restraint would be unreasonable in a particular case. Introducing other elements such as "official dealings" will only maintain an existing loophole. Including different ban periods for ministers, parliamentary secretaries, public servants and ministerial staff fails to recognise the reality that there will be people in each group with the extent of knowledge that would warrant a 5 year ban.

There would also need to be an appeal process for unsuccessful exemption applications (see below).

4. Other employment that should not be permitted[46]

(a) Lobbyists serving on government bodies

Various steps have been announced or taken in NSW, Queensland and Victoria ranging from regulation to banning registered lobbyists from serving on government bodies.[47] If the policy objectives advanced in this submission are accepted, a ban is the appropriate course.

(b) Recruitment into government of people who have been employed in lobbying

For similar reasons this also should not be allowed.

(c) Secondary employment of MPs

It is presently open to MPs to accept employment as consultants with companies with whom they had dealt when Ministers including specialist lobbyists.[48] For similar reasons, this also should not be allowed.

5. **Conduct of lobbyists that should be banned**

(a)Success fees

The recent phenomenon of success fees significantly increases the risk of corruption. They

> "pose a particular corruption risk as their existence may encourage lobbyists to disregard ethical standards or engage in corruption." [49]

Payment of success fees should be banned.[50] The seeking of success fees and the receipt of success fees should be listed amongst the activities which will result in removal from the Register. If we are serious about addressing the risk of corruption, we should also

[46] A related issue outside the ambit of the Lobbying Code is post-separation employment of Ministers, MPs and others in government with people and corporations not involved in lobbying. Similar issues arise and should be dealt with in a similar way, and for similar reasons.

[47] ICAC, op.cit. 23,24

[48] An example given by Joo-Cheong Tham (op.cit.226), is the former Deputy Prime Minister, Mark Vaile, taking up employment with a company he had dealt with as Minister of Trade

[49] ICAC, op.cit., 27

[50] As it has been in Queensland's Integrity Act 2009 and Canada's Lobbying Act 1985 (s 10.1(1))

ban any individual, directly or indirectly involved in lobbying, seeking or receiving success fees.

(b) Securing and providing benefits for government representatives

Helping members of parliament with fund raising[51] and making gifts[52] and giving other benefits to them and other government representatives is a classical way to build up a relationship, create a sense of indebtedness and achieve some influence. It raises the risks of corruption and unequal access and treatment. At best it creates a conflict of interests. Those engaged in lobbying government should not be allowed such opportunities.

6. Sanctions

The only sanction provided in the Code is loss of registration. Participants in the roundtable with the Minister raised the question of whether there should be graduated sanctions for breaches of the Code, such as warnings, with deregistration being reserved for the most serious misconduct.

The Paper asks whether more clearly defined sanctions would increase confidence in the operations of the Code and the Register.

The only formal punishment is removal from the Register. But the Secretary (in future the Parliamentary Integrity Commissioner) is given a discretion as to whether to impose that penalty. If the breaches be minor and/or unintentional, the Secretary would, in exercise of the discretion, be able to decline to impose the penalty of removal while at the same time warning the lobbyist.

Those who formulated the original Code were obviously attempting to approach the issues with a relatively simple and uncomplicated process. It may, however, encourage greater co-operation and compliance if the person with the authority to administer the Code also had a discretion to impose other penalties for breaches of the Code. But if that path is to be taken, consideration would need to be given to a statutory approach. For reasons stated below, we submit that that should be done in any event where it is legally possible.

7. Procedural Fairness

As discussed above, fair procedures will enhance the legitimacy of the Code and compliance with it. A document should be produced formalising the practice which was explained to the Senate Committee[53] and which would need to be applied by the new person in charge, the Parliamentary Integrity Commissioner. It will also be necessary to develop a simple appeal process. One option would be to allow appeals to the Administrative Appeals Tribunal.

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[51] Recommended by Queensland's CMC, ICAC op.cit.23
[52] Forbidden at a federal level in USA, ICAC op.cit.24
[53] Report, paras 2.21- 2.27

8. Legislation

Having regard to the policy objectives, it is critical that as many of the obligations to be specified be dealt with in legislation so that control of the system is controlled by the Parliament and not the Executive.

Most, if not all, of the above proposals, could be implemented in legislation that in terms seeks to regulate those engaged in the lobbying and those who wish to do so.[54] Criminal or civil penalties could be imposed for breach by them including for lobbying when not registered and breaches of the code of conduct obligations set out in the legislation.

Such legislation would be effective in practice, we submit, without imposing specific obligations on Ministers, Parliamentary Secretaries and members of both Houses. Parliamentarians are likely to be watchful to ensure that they deal with lobbyers who are complying with the law. They will not want the embarrassment of having participated in unlawful events.

A similar approach could be taken to enforcement of the post- employment limitations. Those ex-parliamentarians who wish to engage in the lobbying could also be the subject of legislation and made liable to criminal or civil sanctions. In addition, direct legislative action could be taken by amending the Public Service Act 1999 and the Members of Parliament (Staff) Act 1984 to address the obligations of public servants and ministerial staff. Issues of retrospectivity would need to be considered in any such legislation. But it will be relevant that the bans and limitations imposed under the present Code have been operating since 2008.

Other Matters

9. Differing requirements in the State Code/Registers

The Paper [55]asks whether there are concerns about managing the requirements of different jurisdictions.

A response is needed from those engaged in lobbying. As to uniform requirements around Australia, there plainly would be benefits provided that any uniform requirements reflect best practice.

10. Consequential changes

Any amendment strengthening the Lobbying Code of Conduct may need to be matched by amendment of the Codes of Conduct for ministers, ministerial staff and public

[54] It could include from the Code; an amended cl 4 to prohibit individuals engaging in lobbying activity when not registered and amended clauses 5 ,6, 8, 10

[55] P.9

officials. We note that there is no Code of Conduct for members of the Parliament. That needs to be addressed.

11. The creation of an industry association with:

a. Membership of the Association contingent on an ongoing professional education

b. Membership of the Association being a prerequisite to registration, or indicated on the Register of Lobbyists

The Paper[56] refers to overseas and Australian experience where such associations have developed and provide services such as the promotion of the lobbying industry and the encouragement of professional development. The Paper goes on to raise as an option that membership of an association of lobbyists, or other appropriate associations, be required as a pre-requisite for registration under the Lobbying Code. The Paper, however, states that it was not intended at that stage to require lobbyists to be members of an industry association. At the same time it noted that a national association could bring "positive outcomes" such as engaging "more effectively with Government to represent members' interests and to work towards preventing a "piecemeal" regulatory approach in individual states. Reference is also made to the scope for the provision of professional development which could include requirements to undertake training in the Lobbying Code of Conduct and other relevant codes such as the code for Ministerial Staff, the standards of Ministerial Ethics, Australian Electoral Commission donations and disclosure rules and public sector procurement and probity, training which could be required on an annual basis. Reference is also made to an alternative of "industry consultation groups" that could meet two or three times a year to work with government. The Paper then raises two issues for consideration:

- "How would the establishment of an industry association, including membership arrangements, the provision of training and associated matters be managed? Would it deliver increased professional standards for the industry?
- Would an 'industry consultation group' be a feasible alternative to an industry Association?"

Reality needs to be addressed. The lobbying industry is a fact of life. So too are industry associations. As the Paper notes, there is already in existence at least one body representing lobbyists, the Queensland Government Relations Professional Association (GRPA). It has a code of conduct for its members. The Paper also notes the existence of organisations such as Public Relations Institute of Australia (PRIA) which have lobbyists amongst their members.

On balance, we agree that Government should not require all those engaged in lobbying to be members of an industry Association. Rather, those engaged in lobbying should be obliged to provide information for the Register of Lobbyists about any professional associations to which they belong. Further, any lobbying associations that wish to engage with government in the interests of their members should be treated as lobbyists

[56] Issue 1, p4-5

under the Code. The Government should also introduce a system for the accreditation of associations under the Lobbying Code and include as one of the criteria for accreditation the adoption of appropriate codes of ethics and training programs. The content of such codes of ethics would need to reflect and serve the Lobbying Code. The Register should record whether the associations identified by the lobbyists are accredited ones.

Such an approach would be relevant to all aspects of the policy framework identified above and avoid unnecessary complication in the Code and its administration.

Conclusion

The foregoing proposals would significantly assist in increasing transparency and reducing the risk of corruption and distortion of the decision making process. It will be less successful in addressing the reality of inequality of access. Inevitably, those who are, or are seen to be, important and powerful will find it easier to gain access to government. But a system that is transparent will reveal that inequality and, with other reforms that are to be considered by the Parliament, such as those proposed for the parliamentary committee system, help to reduce the ultimate effect of that inequality of access.

We have attempted, in Appendix A, where possible[57], to suggest amendments[58] to the Code to reflect the proposals we have put forward. In addition, they include provisions articulating what we submit are the elements of the necessary policy framework and a provision directing the interpretation and application of the Code in accord with its spirit, intention and purpose.

We note that we have not addressed matters relevant to the concerns identified about the risks associated with lobbying but which cannot be addressed by modification of the Code; for example, factors such as political funding and the growth in the number and importance of ministerial staff and measures such as strengthening codes of conduct for government representatives, training and ensuring easy accessibility to the information on the Register.

It will be important to review the operation of any amended Code in 12 to 18 months after its commencement. No doubt further issues will arise. The present review commenced with the round table discussion involving the Minister and those involved in the lobbying industry. That was a practical and sensible approach, issues about the Code having been raised by the lobbying industry. As a result, however, the Paper focussed primarily on matters that emerged from that discussion. We suggest that consideration be given in any future review to round table discussion with people who are not engaged in lobbying and who are likely to bring a broader community, political and governmental perspective to the discussion; for example, people of integrity from the ranks of former Ministers, MPs and public servants and academic experts in the field.

[57] It has not been practical, for example, to suggest clauses covering accreditation requirements and sanctions. More information would be required for the former and the sanctions available will depend on whether the Code is legislated

[58] Additions in bold

Appendix A

LOBBYING CODE OF CONDUCT
2008

Contents Page No

1. PREAMBLE

Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and Government officials. **The ethical standards required of them reflect the fact that, as holders of public office, they are entrusted by the people of Australia with powers to be exercised on behalf of the people – a public trust. The people of Australia are entitled to expect that, as a matter of principle, they will act in the public interest and do so honestly and**

- **with due regard for integrity fairness, accountability and responsibility as required by this code,**
- **uninfluenced by fear or favour: in particular, uninfluenced by any expectation or intent that they or a political party or any donor to a political party or campaign will benefit or suffer as a consequence**
- **avoid extravagance and waste.** [59]

Lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the Government and, in doing so, improve outcomes for the individual and the community as a whole**. The lobbying of government, however, carries with it a serious risk of the corruption of government. It also creates the opportunity for unequal access to government and distortion of the decision-making process resulting in government decisions that are not in the public interest.**

In performing **the lobbying** role, there is a public expectation that lobbying activities will be carried out ethically and transparently, **in a manner consistent with the public trust obligations of Government representatives** and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.

[59] See the present Ministerial Code, ch 5; Ministerial Ethics

The *Lobbying Code of Conduct* is intended **to address the risks to good government arising from lobbying, to** promote trust in the integrity of government processes and **to** ensure that contact between **those engaged in lobbying** and government representatives is conducted in accordance with public expectations of transparency, integrity and honesty **and the due performance of the public trust vested in those representatives.**
Lobbyists and Government representatives are expected to comply with the requirements of the *Lobbying Code of Conduct* in accordance with their spirit, intention and purpose.

2. APPLICATION

2.1 The *Lobbying Code of Conduct* applies in conjunction with the Australian Government *Standards of Ministerial Ethics* and other relevant codes.
2.2 The *Lobbying Code of Conduct* creates no obligation on the part of a Government representative to have contact with a particular lobbyist or lobbyists in general.
2.3 The *Lobbying Code of Conduct* does not operate to restrict contact with Government representatives where the law requires a Government representative to take account of the views advanced by a person who may be a lobbyist.
2.4 The *Lobbying Code of Conduct* should be interpreted in accordance with its spirit, intention and purpose

3. DEFINITIONS

"Client", in relation to a lobbyist, means an individual, association, organisation or business who:
(a) has engaged the lobbyist on a retainer to make representations to Government representatives, or
(b) has, in the previous three months, engaged the lobbyist to make representations to Government representatives, whether paid or unpaid.
"Communications with a Government representative" includes oral, written and electronic communications.
"Government representative" means a Minister, a Parliamentary Secretary, **Members of Parliament** a person employed or engaged by a Minister or a Parliamentary Secretary **or Member of Parliament** under the *Members of Parliament (Staff) Act 1984*, an Agency Head or a person employed under the *Public Service, Act 1999,* or a member of the Australian Defence Force, a person engaged as a contractor or consultant by an Australian Government, **Commonwealth statutory corporations, including their subsidiaries, and their employees and agents.**

"Lobbying activities" means communications with a Government representative in an effort to influence Government decision-making, including the making or amendment of legislation, the development or amendment of a Government policy or program, the awarding of a Government contract or grant or the allocation of funding, but does not include:
(a) communications with a committee of the Parliament
(b) communications with a Minister or Parliamentary Secretary in his or her capacity as a local Member or Senator in relation to non-ministerial responsibilities
(c) communications in response to a call for submissions
(d) petitions or communications of a grassroots campaign nature in an attempt to influence a Government policy or decision
(e) communications in response to a request for tender
(f) statements made in a public forum, or
(g) responses to requests by Government representatives for information.
"Lobbyist" means

(a) any person, company or organisation who conducts lobbying activities on behalf of a third party client or clients or whose employees conduct lobbying activities on behalf of a third party client,
(b) members of professions, such as doctors, lawyers or accountants, and other service

providers, who make occasional representations to Government on behalf of others in a way that is incidental to the provision to them of their professional or other services.

(c) **any person, company or organisation, or the employees or members of such company or organisation, including charitable organisations, engaging in lobbying activities on their own behalf rather than for a client**.

but does not include:

(d) individuals making representations on behalf of themselves, relatives or friends about their personal affairs

(e) members of trade delegations visiting Australia

(f) persons who are registered under an Australian Government scheme regulating the activities of members of that profession, such as registered tax agents, Customs brokers, company auditors and liquidators, provided that their dealings with Government representatives are part of the normal day to day work of people in that profession, and

"Lobbyist's details" means the information described under clause 5.1.

"Secretary" means the Secretary of the Department of the Prime Minister and Cabinet.

4. NO CONTACT BETWEEN GOVERNMENT REPRESENTATIVES AND UNREGISTERED LOBBYISTS

4.1 A Government representative shall not knowingly and intentionally be a party to lobbying activities by:

(a) a lobbyist who is not on the Register of Lobbyists

(b) an employee of a lobbyist, or a contractor or person engaged by a lobbyist to carry out lobbying activities whose name does not appear in the lobbyist's details noted on the Register of Lobbyists in connection with the lobbyist, or

(c) a lobbyist or an employee of a lobbyist, or a contractor or person engaged by a lobbyist to carry out lobbying activities who, in the opinion of the Government representative, has failed to observe any of the requirements of clause 8.1(e).

5. REGISTER OF LOBBYISTS

5.1 There shall be a Register of Lobbyists that shall contain the following information:

(i) the business registration details, including trading names, of the lobbyist including, where the business is not a publicly listed company, the names of owners, partners or major shareholders, as applicable

(ii) the names and positions of persons employed, contracted or otherwise engaged by the lobbyist to carry out lobbying activities,

(iii) the previous employment of the persons referred to in (ii), including details of positions held as government representatives

(iv) subject to clause 5.2, the names of **the person or persons** on whose behalf the lobbyist conducts lobbying activities.

(v) representative and professional associations to which the lobbyist belongs

(vi)the following details of each occasion of lobbying activity;

- **(a) The date and place**
- **(b) The names of the people present or otherwise involved**
- **(c) The matters discussed.**

5.2 A lobbyist is not required to list a body corporate as a client on the Register if disclosure of the lobbyist's relationship with the body corporate might result in speculation about a pending transaction involving the body corporate and that transaction has not previously been disclosed by the body corporate in accordance with its continuous disclosure obligations under Chapter 6CA of the *Corporations Act 2001*. Where the lobbyist relies on this clause, they must advise any Government representative they are lobbying of such reliance and also the anticipated date when they will add their client to the Register and the Lobbyist must add the name of their client to the Register promptly once the market sensitivity has passed.

5.3 A lobbyist wishing to conduct lobbying activities with a Government representative must apply to the Secretary to have his or her lobbyist's details recorded in the Register of Lobbyists.

5.4 The lobbyist shall submit updated lobbyist's details to the Secretary in the event of any Change, **including additions, to the lobbyist's details within one working day** after the change occurs.

5.5 The lobbyist shall provide to the Secretary within 10 business days of 30 September, 31 January and 31 March of each year, confirmation that the lobbyist's details are up to date.

5.6 The lobbyist shall provide to the Secretary, within 10 business days of 30 June 2009 and each year thereafter, confirmation that the lobbyist's details are up to date together with statutory declarations for all persons employed, contracted or otherwise engaged by the lobbyist to carry out lobbying activities on behalf of a client, as required under paragraph 10.1.
5.6A.
5.7 The registration of a lobbyist shall lapse if the confirmations and updated statutory declarations are not provided to the Secretary within the time frames specified in clauses 5.5 and 5.6.

6. ACCESS TO THE REGISTER OF LOBBYISTS

6.1 The Register of Lobbyists shall be a public document that is published on the website of the Department of the Prime Minister and Cabinet.

7. PROHIBITION ON LOBBYING ACTIVITIES

7.1 Government Representatives who cease their government engagement after 1 July 2008 shall not **engage,directly or indirectly, in lobbying activities unless they apply for and are given exemption by the Parliamentary Integrity Commissioner, who may attach conditions to any such exemption.**
7.2 Goverment reprsentatives shall not be employed directly or indirectly by any company, organisation or person that has or wishes to have dealings with the government.
7.3 Lobbyists shall ensure that former government representatives have complied with 7.1 and 7.2 before they are engaged or employed by them.

8. PRINCIPLES OF ENGAGEMENT WITH GOVERNMENT REPRESENTATIVES

8.1 Lobbyists shall observe the following principles when engaging with Government representatives:
(a) lobbyists shall not engage in any conduct that is corrupt, dishonest or illegal, or unlawfully cause or threaten any detriment.
(aa) without limiting (a), lobbyists will not, directly or indirectly;
(i)attempt to obtain, accept, or receive any form of consideration for their services that is related in any way to the success of those services,
(ii) provide any benefit of any kind to government representatives.
(bb) without limiting (a)lobbyists will not seek or accept appointment to any government body or to any corporation or organisation receiving public funds or providing public services.
(b) lobbyists shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided by them to clients whom they represent, the wider public and Government representatives
(c) lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to Government representatives, members of political parties or to any other person
(d) lobbyists shall keep strictly separate from their duties and activities as lobbyists any direct or indirect involvement on behalf of a political party, and
(e) when making initial contact with Government representatives with the intention of conducting lobbying activities, lobbyists who are proposing to conduct lobbying activities on behalf of clients must inform the Government representatives:

(i) that they are lobbyists or employees of, or contractors or persons engaged by, lobbyists
(ii) whether they are currently listed on the Register of Lobbyists
(iii) the name of their relevant client or clients, including a client whose identity is not required to be made public under clause 5.2, and
(iv) the nature of the matters that their clients wish them to raise with Government representatives.

9. REPORTING BREACHES OF THE CODE

9.1 A Government representative who becomes aware of a breach of this Code by a lobbyist shall report details of the breach to the Secretary.

10. REGISTRATION

10.1 The Secretary shall not include on the Register the name of an individual unless the individual provides a statutory declaration to the effect that he or she:
(a) has never been sentenced to a term of imprisonment of 30 months or more, (b) has not been convicted, as an adult, in the last ten years, of an offence, one element of which involves dishonesty, such as theft or fraud, **and**
(c) has not been removed from the register and has not been a party to actions inconsistent with the Code.
10.2 The Secretary may remove a lobbyist or a person who is an employee of a lobbyist, or a contractor or person engaged by a lobbyist from the Register of Lobbyists if, in the opinion of the Secretary:
(a) the conduct of the lobbyist or of the employee, the contractor or person engaged by the lobbyist to provide lobbying services for the lobbyist has contravened any of the terms of this Code
(b) the registration details of the lobbyist are inaccurate
(c) the lobbyist fails to answer questions within a reasonable period of time relating to the lobbyist's details on the Register or the lobbyist's lobbying activities (in particular questions relating to allegations of breaches of the Code) or provides inaccurate information in response to those questions, or
(d) the registration details have not been confirmed in accordance with the requirements of clauses 5.5 and 5.6.
10.3 The Secretary shall not remove a lobbyist or a person who is an employee of a lobbyist, or a contractor or person engaged by the lobbyist from the Register under clause 10.2, unless the Secretary has advised the lobbyist or the individual concerned of the reasons why he or she proposes to remove the lobbyist or individual concerned from the Register and given the lobbyist or individual concerned an opportunity to state why the proposed course of action should not be followed.
10.4 The Secretary:
(a) must not register a lobbyist, a person who is an employee of a lobbyist or a contractor or person engaged by a lobbyist if the Cabinet Secretary, in his or her absolute discretion, directs the Secretary not to register the lobbyist or the individual, and

(b) must remove from the Register a lobbyist or a person who is an employee of a lobbyist or a contractor or person engaged by a lobbyist from the Register if the Cabinet Secretary, in his or her absolute discretion, directs the Secretary to remove the lobbyist or the individual from the Register.
10.5 The Cabinet Secretary shall not issue a direction under clause 10.4 to the Secretary unless the Cabinet Secretary has advised the lobbyist or the individual concerned of the reasons why he or she proposes to issue the direction and given the lobbyist or the individual concerned an opportunity to state why the direction should not be issued.