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AUSTRALIAN LOBBYING CODES OF CONDUCT CHALLENGES FOR REFORM

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1. INTRODUCTION

Lobbying is a fact of life and like one of the oldest professions it has been around since the start of civilisation.

Just like one of the oldest professions, professional lobbying is shunned and criticised. It is associated with vice and corruption, surreptitious behaviour, false claims and exploitation. To the average citizen it is generally considered distasteful and ruinous.

Just like the sex industry, it has proven difficult to regulate. Attempts to control it ignore the reality that a lot of people use these services, many high level people participate in the industry and derive immense satisfaction without any harm to the service providers and purchasers and the general moral fabric of society. Lobbying, like prostitution has become a much maligned term. Even the lobbying industry seems to avoid using it preferring instead the language of 'public affairs', 'consultants' and 'government relations'. Terms like 'Escort', 'massager' or 'fantasy artist' may equally work as well in describing some of the services that professional lobbyists provide.

However, unlike the sex industry and its battles with ignorance and morality, lobbying is far more acceptable and recognised as a legitimate form of business and part of day to day life in government.

Lobbying is regarded by many not only as an essential part of the democratic process but in many cases as a positive enhancement to government decision-making. It can do this by ensuring that arguments that are being put forward are well researched, clearly articulated and address relevant concerns. A good lobbyist knows who to talk to and how to put forward their position and present their case. Lobbying generally can assist government in consultation processes.

However, despite the general good character of lobbying, negative public perception remains.

Regulatory models in Australia and overseas for lobbying activities have been developed in response to these perceptions and aim to address corruption risks and scandal, while recognising the general value of lobbying to government and the community. The focus of this paper and the Australian regulatory approach is on professional lobbyists or advocates.

This paper explores what lobbying is, some of the public perceptions of corruption, who lobbies, the response in Australia to date and challenges for the future, particularly in an era of minority government where although the lobbyists and their clients are known the power brokers may not be.

2. WHAT IS LOBBYING?

Essentially, lobbying is about communicating and eliciting information. In a political context it involves applying influence on government to have some bearing upon the decision making process or final result. Lobbying may be informal or formal. It may be face to face through personal meetings, party conferences or other events. It may be in writing through direct and personal mail or a formal submission to government. It may be conducted indirectly through the media or a public event. The nature of the lobbying will depend on many circumstances, such as pre-existing relationships, the issues involved and the size, status and character of the parties.
There is a level of mutual interest and benefit in the relationship between lobbyists and government officials. Lobbying involves an exchange from which government can benefit by gaining -

1. information for policy design;
2. consent for policy clearance; and
3. cooperation for policy implementation [1].

It also has a role in the policy contestability process. In the 'olden days', government took its advice, almost exclusively, from its public service. In modern times, whether we like it or not, these traditional Westminster conventions are evolving and we see governments seeking opinion and advice from various groups. Lobbyists, in house or otherwise, have a legitimate and important role in providing an alternative or supplementary advice for Ministers and decision-makers.

2.1. Who lobbies and who gets lobbied?

The persons and organisations that lobby are varied and may be categorised as follows -

1. professional or third party lobbyists acting on a commercial basis for clients, sometimes on an unpaid basis
2. non-government organisations
3. government relations staff of corporations and other commercial entities (known as in-house lobbyists), together with their directors and other staff who lobby
4. technical advisers who may lobby as an aspect of their principal work for a client; for example, consultant town planners, architects, engineers, lawyers and accountants
5. representatives of peak bodies, industry associations and other types of member associations
6. churches, charities and social welfare organisations
7. community-based or grassroots groups, sometimes single-issue interest groups
8. members of parliament
9. local government

10. political parties
11. citizens acting on their own behalf or for the interests of their relatives, friends or their local communities [2].

The nature of the communication with government, and whom a lobbyist targets, varies. Some lobbyists deal directly with Ministers and Members of Parliament, others with ministerial advisers, heads of agencies or departmental staff.

An effective good lobbyist will generally have some experience in how government decision making works – they know the system and the players. Lobbying as a professional tends to attract people with backgrounds in politics, media, public service, policy development, industry, law and financial analysis. It can also attracts the zealots and aspiring political players who take on lobbying roles with high profile organisations or issues to further their career.

2.2. Why Lobby?

Senator Guy Barnett in his book *A Practical Guide to Lobbying* succinctly summarised the reasons people lobby –

1. To gain benefits or relief
2. To gain or retain an economic, environmental or social advantage, especially if such advantage is likely to be denied
3. To resolve problems that only government can fix [3].

The reasons or subject matter that people typically lobby government about can be extremely diverse. They may relate to a single issue that affects one person or a government approval that affects a group of people or entire community [4].

Professor John Warhurst describes political lobbying as -

> "...the process by which the non-government sector – business, interest groups, representative organisations – seek to influence government. It is an intervention in the policy-making process or in the wider democratic process." [5]

2.3. What lobbyists do?

There is no standard set of services offered by lobbyists or third party lobbyists. There are distinctions among 'lobbyists'. Some are employed in house for large organisations, commercial and not for profit bodies. Others are employed in specialist 'lobbying' or 'government relations' firms and are referred to as 'third party lobbyists'.

The following discussion is confined to what 'professional' lobbyists purport to do for their clients.
The main categories of professional lobbyist services are -

1. Research and analysis.
2. Providing advice as to a course of action - This may involve providing advice on how to form a lobby on a specific issue and activate members to represent themselves. It may also encompass preparing a client for a meeting with government. Advice or insight may be provided on government processes, such as policy development, budget and reporting cycles and the roles of various agencies.

3. Directing or conducting the petitioning of government -This involves gaining access, generally through face to face meetings with government, and how to engage government once inside the door.

Some of the specific services provided by lobbyists -

1. Strategic advice service regarding government decision making and government processes, human resource management, investment and crisis or issues management
2. Research
3. Meetings with government and decision-makers on an ad hoc or issues basis
4. Media campaigns
5. Preparing submissions to enquiries or in response to government requests
6. Informing and influencing key decision-makers and elected representatives.

These services all seem fairly innocuous on paper, but given the heavy reliance on interpersonal relationships, networks and closed door meetings, some with more ready or favoured access, the public perceptions of corruption emerge whether justified or not.

3. PUBLIC PERCEPTIONS OF CORRUPTION ASSOCAITED WITH LOBBYING

Certain kinds of lobbying activity have contributed to public cynicism in the political process.

Firstly, there is a perception that commercial corporations and organisations have an advantage over an individual citizen and not-for-profit bodies. This relates to the amount of money they may be able to bring to bear on the political and decision-making process rather than the cogency of their case. Accessibility to decision-makers and politicians is often linked with money.

Secondly, there is a concern about the 'revolving door' i.e. the ability for some high level people to move to and from roles in industry on the one hand and to ministerial or senior official roles on the other, or vice versa. In Australia the focus is on government officials (elected and appointed) retiring from office and becoming lobbyists or consultants in the same policy field in which their previous career was based. Industry is seen as buying access through hiring these officials who may exert influence over their former colleagues by utilising their previous power and networks to obtain exclusive information or access.

Thirdly, there is discomfort with the use of 'lobbyists for hire' and the identity of their clients or interests. Private advantages are promoted at the expense of public interest [6]. This discomfort has grown to encompass concerns of secrecy about whom met with who about what and why – the secret deals behind closed doors.

3.1. Why do we care about these perceptions?

Whether or not these perceptions of corruption are indeed a reality is not the issue when it comes to dealing with lobbying.

We care because once citizens believe that a government is corrupt, that the very people who make the laws are crooked, and that government decisions are dishonestly made or influenced the belief in

the 'rule of law' will diminish and our way of life will permanently alter. In other words, if our leaders do not respect the system why should I? These attitudes can lead to a breakdown in our system of government where bribes, inducements and partiality become the norm and we return to a state of governance similar to the days of the rum rebellion.

A lack of transparency and secrecy simply feed fantasies of conspiracy theorists that attribute policy decisions they do not like to the nature of the process that produced them.

While lobbying has become a subject of suspicion and derision, which is occasionally found to be true in high profile cases, it is remains an important and valuable part of our democratic processes. Appropriate lobbying can enhance government decision-making by allowing those with an interest to contribute meaningfully. It can also improve the quality of information that is available to a decision-maker.

Effective regulation, standards and procedures can ensure accountability and transparency in decision-making. These are essential to reinforce public trust in the institutions of Government [7].

Given negative perceptions and scandals that have arisen in our recent history, Australia has found itself in a position where it has needed do something to address the negative perceptions of lobbying, reduce corruption risks and enhance transparency and trust in government institutions.

4. THE REGULATION OF LOBBYING IN AUSTRALIA

In 1993, following the scandal of the Combe-Ivanov affair the Commonwealth introduced a register of lobbyists. David Combe had been an Australian Labor Party national secretary from 1973 to 1981 and when he left office he set up a lobbying firm capitalising on his Labor Party connections and successfully sharing work with a Liberal Party aligned lobbying firm. His work and influence was largely considered uncontroversial until his connection to Valeri Ivanov, the first secretary at the Soviet Embassy was exposed and a 'reds under the beds' campaign took hold. The Commonwealth Government response to this incident was to introduce a code of conduct and lobbyist register. The main problem with the attempt to regulate was that the register was not accessible to the public. The Opposition (Liberal/National Party) coalition never really supported the scheme and it was their position that there should be a 'register of untrustworthy ministers' rather than a lobbyist register.

A review of the scheme in 1985 revealed that the scheme was honoured more in breach than observance [8]. Some months after the Howard Government took office the register was abolished.

It was not until 2006 that the impetus for another regulation scheme emerged, this time in Western Australia. This followed the Burke and Grills scandal. Brian Burke, the former Premier, and Julian Grills a senior Minister had set themselves up as lobbyists in 2001. Their actions were investigated by the Western Australian Crime and Conduct Commission (CCC). They were seen to be very privileged lobbyists with a seemingly inexhaustible supply of cross-party ministerial, public service, Cabinet and party contacts and confidential information. Their actions in respect of land development coupled with their untrammelled and extraordinary access to key areas of government were seen as an anathema to good governance and the principles of democracy. Association with

these two was at best described as a 'career limiting move' resulting is several ministerial resignations. Following a CCC public hearing the actions of senior public servants were examined.

In 2007, the Western Australian Carpenter Labor government then introduced a lobbying code of conduct and register to regulate the behaviour of lobbyists. Interestingly some commentators have concluded that even if the WA lobbyist register and code of conduct were in place earlier this would not have stopped Burke and Grills [9]. The Western Australian scheme has been minimalist in its approach, applying only to lobbyists representing third parties and targeting the conduct of Burke and Grills through its principles of engagement provisions namely -

1. Provisions that lobbyists do not engage in conduct that is corrupt, dishonest or illegal or threatening any detriment
2. Separating their personal activities or involvement with a political party from their lobbyist activities.

It should be noted that the Western Australian Lobbyist Code of Conduct does not contain post separation restrictions for Ministers or senior public executives.

In 2008 the Commonwealth introduced its Lobbying Code of Conduct and Register. The Register and code of conduct is loosely based on the Western Australian model with some additions, such as post separation provisions and 'good character conditions' for lobbyists seeking to register (i.e. no criminal convictions).

The Commonwealth Code of Conduct was reviewed in 2010 and a few changes were made regarding -

1. The acceptance of statutory declarations in electronic or facsimile form
2. Mandatory updates only required twice a year, not quarterly
3. Disclosure by registered lobbyists of their previous employment as a government representative defined to mean Minister, Parliamentary Secretary, former employee of a Minister or Parliamentary Secretary, Agency head, contractor or consultant for the Australian Government or member of the defence force.

The review also covered a number of issues that will be highlighted in the part of this paper that deals with the challenges of regulating lobbying.

The Commonwealth model has formed the basis of lobbying regulation in Victoria (2009), New South Wales (2009), South Australia (2009) and Tasmania (2009). Queensland initially introduced a similar model in 2009 which has been superseded by the regulation set out in its *Integrity Act 2009*.

NSW has also introduced some changes to its regulatory model following the Independent Commission Against Corruption *Investigation into Corruption Risks Involved in Lobbying* (November 2010) [10].

This paper examines common features of the Lobbying Codes of Conduct and the position in Queensland and recent developments in NSW. There are some differences which are touched upon in the following discussion.

4.1. Generic or central features of the Australian Lobbying Codes of Conduct

The context of the lobbying codes of conduct is conveyed in preamble discussions of the key democratic concepts of public confidence, public interest, integrity and transparency. The codes are largely "intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty" [11].

The codes essentially cover -

1. Those who conduct lobbying (third party lobbyists)
2. Lobbying activities (and exclusions)
3. Those who are the targets of lobbying (government representatives)
4. Post-employment provisions.

In the Australian codes of conduct the lobbyists targeted for regulation are those persons, companies or organizations who conduct lobbying on behalf of a third party client. There are a number of exclusions to what constitutes 'lobbying activity' for the purpose of regulation. There are three major categories of bodies who are excluded from regulation -

1. Charitable, religious and other organizations, whether or not in receipt of tax deductible status.
2. Those who lobby on their own behalf which includes professional associations, trade unions, guilds, peak bodies and interest groups
3. Those, such as lawyers and other professionals, who only lobby occasionally and/or incidentally to their professional work.

The underlying premise of the limitation to third party lobbyists is that the interests of individuals and organisations who employ in house lobbyists or advocate for themselves are known.

The exclusions from regulation also include activities associated with parliamentary committee work, the usual constituency work of Parliamentarians, petitions and public statements and campaigns.

As an example the Tasmanian Lobbying Code of Conduct provides for the following exclusions -

1. charitable, religious and other organisations or funds that are endorsed as deductible gift recipients
2. non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients
3. professional associations, guilds, trade or union bodies who represent a class of professions, tradespersons, employers or other workforce entities
4. individuals making representations on behalf of relatives or friends about their personal affairs
5. members of trade delegations visiting Tasmania
6. 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
7. 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. However, if a significant or regular part of the services offered by a person employed or engaged by a professional practice or other service provider involves lobbying activities on behalf of clients of that practice or service, the practice or service provider and the person offering those services must register and identify the clients for whom they carry out lobbying activities.

For the avoidance of doubt, this code does not apply to any person, company or organisation, or the employees of such company or organisation, engaging in lobbying activities on their own behalf rather than for a client, and does not require any such person, company or organisation to be recorded in the Register of Lobbyists unless that person, company or organisation or its employees also engage in lobbying activities on behalf of a client [12]."

Lobbying activities are those activities that involve "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 contact or the allocation of funding" [13]. Again the codes provide for a number of exclusions from the definition of 'lobbying activities'. 'Lobbying activities' do not include:

1. communications with a committee of the Parliament
2. communications with a Minister or Parliamentary Secretary in his or her capacity as a local Member of Parliament in relation to non-ministerial responsibilities
3. communications in response to a call for submissions
4. petitions or communications of a grassroots campaign nature in an attempt to influence a Government policy or decision
5. communications in response to a request for tender
6. statements made in a public forum
7. responses to requests by Government representatives for information

The exclusions are intended to ensure that the regulatory regime does not unduly interfere with democratic rights or impose impractical, unnecessary or onerous requirements.

Government representatives are the targets of lobbying. These are defined to include Ministers, Parliamentary Secretaries, ministerial staff, senior public servants and in the case of the Commonwealth members of the Australian Defence Force. Parliamentarians not holding executive Government office are excluded.

Other than Queensland, the lobbying of local government, state owned companies and government business enterprises is not regulated by the other State government codes. It is argued that the way in which local government is lobbied is different from state government and the registration of third party lobbyists may not be an effective anti-corruption tool or address the issue of 'covert relationships' that arise in land development applications [14].

Generally, the codes of conduct require that all third party lobbyists must register with the government if they wish to do government business. If they are not registered the government should not do business, or have contact, with them.

Registration requirements are fairly anodyne and include -

1. provide their business registration details including, if not a publicly listed company, the names of owners, partners or major shareholders
2. names and titles of employees who lobby
3. the names of clients for whom lobbying is undertaken.

These details are to be updated or confirmed as correct at regular intervals. Changes, such as new clients or employed lobbyists, need to be reported within defined timeframes. The Commonwealth previously required quarterly updates, but has since moved to a bi-annual reporting regime. Tasmania only requires updates twice a year.

The Register of Lobbyists is generally maintained by a central agency such as the Department of the Prime Minister and Cabinet (on behalf of the Commonwealth) and the Secretaries or the Director-General of Departments of Premier and Cabinet in some States (South Australian, NSW and Tasmania) or Public Sector Standards Commissioner (in Victoria and WA). The details are published online. A link to all the Lobbyist Registers and Codes of Conduct is provided in the references section of this paper [15].

Some categories of individuals with a criminal record are excluded from the lobbying register and lobbyists may be removed from the register for misconduct or the provision of inaccurate information.

The onus is on Government representatives to report breaches. The power to sanction is at the discretion of the Cabinet Secretary (Commonwealth) or a high ranking public sector office such as the Secretary of the Department of Premier and Cabinet or Public Sector Standards Commissioner (Victoria and Western Australia). Sanctions are absolute.

There are general post employment separation provisions that apply to former Ministers and Parliamentary Secretaries who are prohibited from engaging in lobbying activities on any matter on which they had official dealings during their last twelve to eighteen months in office (the periods vary between the codes).

Most States, apart from Tasmania and WA, ban ministerial staff from taking up positions as lobbyists when leaving a Ministerial office for a period of 12 months. The Western Australia Code does not include any post employment restrictions for any public officials leaving office.

Finally, the codes set out 'principles of engagement', that is the ethical principles which should underpin lobbying activities. These include such things as –

1. Lobbyists must make full disclosure of their position on the register
2. There is a range of unacceptable conduct that is ruled out: any corrupt, dishonest, illegal or threatening behaviour
3. Lobbyists must attempt to be as accurate and truthful as is possible and must not misrepresent the nature and extent of their access to government representatives. In other words, boasting is out. Furthermore, lobbyists must strictly separate their lobbying activities from any personal involvement in political party activities.

Research has concluded that all Australian jurisdictions fall within a medium regulation category [16].

4.2. Queensland Integrity Act 2009

The Queensland *Integrity Act 2009* commenced on 1 January 2009. It is administered by the Integrity Commissioner and the registration of lobbyists is set out in Part 2 of the Act. It largely reflects the regulation set out in the codes. Like other States, registration requirements apply to 'third party lobbyists' who wish to engage with government representatives and officials.

Under the Integrity Act, lobbying activity is broadly defined as "contact [which includes that done by email, by telephone, in writing and face-to-face meetings] with a government representative in an effort to influence state or local government decision-making".

Again, like the codes, there are a number of exclusions to the definition of lobbying activity, including contact with a parliamentary or local government committee, contact with a parliamentarian or councillor in his or her capacity as a local representative on a constituency matter, and contact in response to a call for submissions. However, unlike the other states a key point of difference is that local government is included in the regulatory model.

The register is published on the Integrity Commissioner's website. The Act prescribes basic information that must be contained in the register.

The Integrity Commissioner can refuse to register a lobbyist and may cancel a registration. There is power for the Integrity Commission to issue a 'show cause' notice if the Integrity Commission is considering refusal of registration and provision for the applicant lobbyist to respond. Given the statutory basis for the decision to register or refuse to register there is arguably a judicial review remedy available to applicants.

The 'show cause' provisions are replicated for situations where the Integrity Commissioner may consider cancelling a lobbyist's registration. This ensures an element of natural justice in these decisions which is different from the codes in other states where the power to refuse to register and cancellation do not set out an opportunity for the lobbyist to make representations why the registration should be refused or cancelled.

Unlike the non legislative codes of conduct the Act provides an alternative to cancellation of registration. Section 66A provides that the Integrity Commissioner may decide to do one of the following -

1. Issue a warning to the registrant
2. Suspend the registrant's registration for a reasonable reason.

Again notice and 'show cause' notifications are incorporated into this provision which provide registered lobbyists an opportunity to explain any alleged wrong doing.

The Act also provides for the Integrity Commissioner to approve a lobbyist code of conduct, after consultation with a parliamentary committee. The code of conduct is similar to the other states with some differences such as–

1. the standards of conduct explicitly refer to declaring conflicts of interest and not placing a government representative in a conflict of interest or taking action that may constitute

improper influence on a government representative. The Act also included provisions about declaration of interest.

2. the standards also place an onus on lobbyists to inform themselves of Queensland Government and local government policies relating to gifts.

Another feature of the approved code of conduct is that not only must a lobbyist inform a government representative of their identity, client and nature of the issues there is a requirement that they disclose the reasons for the approach. This is slightly different to just naming the nature of the issue or interest. It encompasses why the lobbyist sees it necessary to meet with the government representative and possibly includes what they hope to achieve from the meeting or exchange.

Former senior government representatives are prohibited from carrying out a 'related lobbying activity' for a third party client within two years of leaving public office employment. A 'related lobbying activity' is one relating to the former senior government representative's official dealings as a government representative in the two years before leaving public employment. A former senior government representative means a chief executive or head of department (refer to the definitions at section 47 of the Act).

There are a number of penalty provisions set out in the Integrity Act, which do not feature in the non-legislative codes of conduct. These add weight and gravitas to the Queensland regulatory model.

The Integrity Act also bans success fees and places a penalty on lobbyists who receive or agree to receive such fees. A success fee is the amount of money that a client, e.g. a developer, agrees to pay a commission or bonus if their proposal is successful. Sometime they are referred to as contingency fees. The penalty for this behaviour is 200 penalty units which equates to $20 000.

Although there are no statutory reporting requirements in Queensland, the Integrity Commissioner has been seeking to enforce the provisions of the Queensland *Public Records Act 2001* which requires the recording of contact between government officers and lobbyists. In April 2011, the Integrity Commissioner published and circulated a memorandum from the State Archives Office emphasising that records documenting contact between public authorities and registered lobbyists are required to be retained. The Integrity Commission has been perusing the issue of recording meetings and contact between lobbyists and public authorities and considers that these 'contacts' should be published, in the spirit of open and transparent government, so that the community know who is meeting with who about what [17].

4.3. NSW latest developments

As mentioned above the NSW Independent Commission against Corruption conducted an Investigation into Corruption Risks Involved in Lobbying in 2010 and published its findings in November 2010. Following the findings and recommendations of the report, the NSW Government has made a number of changes to its lobbyist code of conduct and regulation. These include -

1. The introduction of the *Lobbying of Government Officials Act 2011* which makes it a criminal offence to pay or receive a success fee for lobbying. The NSW Government Lobbyist Code of Conduct has been amended to require the Director-General of Premier and Cabinet to

remove a lobbyist if they have been found guilty of an offence. The maximum penalty for a breach by a corporation is $55 000 and a breach by an individual is $22 000.

2. The discretion of the Director-General to remove lobbyists from the register in other circumstances such as: their behaviour has been inconsistent with general standards of ethical conduct; the lobbyists registration details are inaccurate; or there are other (unspecified) grounds for doing so.
3. Lobbyists are ineligible for appointment to Government Boards or Committees if the functions of the board or committee relate to any matter in which the lobbyists represented the interest of third parties or has done so in the 12 months prior to the board or committee appointment.

From July 2011, because property development is viewed as a high risk area for corruption, from 1 July 2011, a new protocol for managing contacts between staff of the Department of Planning and Infrastructure (NSW) and registered lobbyists about specific planning proposals and/or development matters will took effect. Under this protocol, registered lobbyists need to request a meeting in writing using a prescribed format (available from the Department of Planning and Infrastructure website). Once a request is received from a lobbyist, a confirmation email will be sent. Following this, a member of staff will be in contact to either make arrangements for the meeting or to advise that the request has been refused. Following any meeting it is the intention of the Department to publish a record of the contact on its website within 10 days. This public record will show the project, the registered lobbyist, the organisation represented, the date of the meeting, the subject matter and meeting outcome.

5. ISSUES AND CHALLENGES FOR REFORM

From the literature and Australian experiences it cannot be said that a regulatory system is a panacea for the problems and perceptions associated with lobbying. There is always opportunity to undermine the system and money, like water, will always flow. This is not to say that government should ignore the conundrums that lobbying raises – it can be of enormous benefit to communities and decision makers, but can be subject to abuse and deliver unfair advantages. Transparency of lobbying and proper access to information is a worthy and practical goal and cannot be achieved without some form of regulation [18].

The following part of this paper highlights some of the challenges with regulation and areas for reform. I do not attempt to solve these problems, but merely pass comment.

5.1. Harmonisation

Australia's federation is a marvellous but complex beast. The historical development of the regulatory models has grown from circumstances and political pressures arising in each of the states. To that end the codes and form of regulation vary slightly. As seen from the overview there are differences between the codes in the areas of -

1. Post employment prohibitions ranging from time limits of the exclusion, who is excluded (Tasmania does not include Ministerial advisers) and the inclusion of exclusions from Boards or Committees
2. Recording of meeting protocols

3. Reporting requirements
4. Offences provisions, such as success fees or failure to update or register details
5. What form a statutory declaration may take.

Some of the impediments or problems with harmonisation include -

1. The regulation may not recognise or address state level issues which do differ from state to state. NSW and QLD have identified risks of corruption with property developments and access to government decision makers, particularly large amounts of money changing hands. These are less so in a smaller states where problems may be more about the management of perceived conflicts of interest and issues where all the stakeholders in the policy process know each other.
2. The lobbyist codes are not stand alone instruments and they need to be read in conjunction with other guidelines such as codes of conduct for Ministers, political donation laws, criminal laws, the powers of various integrity bodies and record keeping requirements. To achieve full harmonisation this would also require some level or reform to all the laws, policies and guidelines that underpin the actions of those that interact with the third party lobbyists.
3. Who should investigate and sanction any wrongdoing? It may be considered unconstitutional or outside accepted concepts of the Westminster traditions for a national body to investigate and sanction a Minister from a state Parliament.
4. Who should administer and more importantly fund such a national scheme? Would registration fees need to be levied and would these be unfair to smaller single issue locally based lobbyist.

On the other hand harmonisation would provide a number of benefits -

1. It could provide a single registration system. That would be easier for the big lobbyist firms whose work spreads across states and the Commonwealth
2. It may just mean we adopt the same rules and therefore lobbyists, no matter where they are operating, understand their obligations.

5.2. Legislation of Code of Conduct

Legislation is a stricter form of regulation. Our North American cousins have adopted this approach and penalties apply as a deterrent to wrongful behaviour. It has been argued that lobbyist legislation would improve opened and accountability and minimise the risk of inappropriate advances by lobbyists [19].

Queensland has led the way in Australia and its experience will be monitored over time.

The benefits of legislation are that it provides powers in relation to -

1. The establishment and maintenance of a register
2. Compliance and audit
3. Sanction
4. Natural justice – providing registered lobbyists with the opportunity to respond to allegations of a breach

The inclusion of penalty provisions, i.e. the power to fine if a breach of the Act, can provide a powerful deterrent.

On the other hand sanctions can be achieved without a legislative basis. Arguably the administrative removal from a register can be just as detrimental to a lobbyist.

A non-statutory code on the other hand, is just a guideline and options to sanction misbehaviour may be limited because penalties are unenforceable at law and rights of review of decisions regarding registration are not clearly enshrined.

While an Act of Parliament provides for enforcement of a code of conduct through the courts, some have argued that application of a code through statute may be seen as an encroachment on the separation of powers between the judiciary and the Parliament. A statute may also be subject to a constitutional challenge based on the implied right to political freedom or communications [20].

5.3. Who is considered a lobbyist? Why do we exclude?

It is clear from the Australian approach to date, that not everyone who engages in lobbying is considered a lobbyist for the purposed of regulation. No Australian jurisdiction has attempted to control all activity of everyone who lobbies. The imposition of controls such as registration, compliance with a code of conduct and disclosure requirements must be balanced against undue interference with open access to government and government agencies.

It would appear that the rationale for the regulatory exclusions is that third party lobbyists have been or are perceived as a higher corruption risk than these other bodies. This is because they predominantly operate on a not for profit basis whereas third party lobbyists and their clients are motivated by making money and this has been the root of corrupt activity.

One of the reasons for introducing registers and codes of conduct has been to respond to the general criticism that lobbying occurs behind closed doors and results in special deals. The code also governs behaviour of both decision makers and those that lobby the decision makers.

However, many of the groups and organisations excluded from the regulatory regime do have special relationships with government. They also have access rights not normally granted to ordinary citizens and it is not always clear who their constituents are or the interests they represent. There is no difference in principle, method or in effect between lobbying conducted by a third party lobbyist or other entity seeking to persuade government of the merit of their view.

The not for profit and non- government sector is made up of secular, religious and special interest groups. It receives a great deal of funding from the government and is often a provider of services on behalf of government. If third party lobbyists are required to behave in a certain way, disclose information about their clients, in some cases meetings and be barred from sitting on boards because of their connection with a client or issue why do these rules not apply to other high profile lobbyists who have special access and relationships with decision makers? Are they not motivated by increasing power and resources as well as industry?

Is the public informed as to who the client base or interests are of the non-government body who may be excluded from registration?

Similarly in house lobbyists acting on behalf of private companies are not required to register or comply with the rules of engagement. If lobbyist regulation is to extend to disclosures and barring previous lobbyists working in government it seems unfair to exclude this group from the rules of engagement in the codes as well.

Maybe it is because we require a level of at least financial and performance disclosure from non-government not for profit bodies that are funded to provide a service. But there are aspects of the operations of some organisations (such as church groups or not-for-profits) that mean that it is not always clear what interests or client groups they represent.

The NSW Independent Commission Against Corruption report (November 2010) recommends an expansion of the current lobbyist definition to include peak bodies, trade unions and most religious and charitable organisations to register [21]. Many objected to such a change. Registration would entail disclosure of areas of interest and may be coupled with increased reporting requirements.

An alternative approach may be to require all in-house lobbyists of corporations to register and state their areas of interest. This would allow the public to see what companies have particular issues and whether any activity has occurred. This raises commercial-in-confidence issues for businesses which may wish to keep their business private. In addition, the reality is that businesses which lobby government do not just rely on their in-house lobbyists or public relations officers to undertake lobbying activities.

On the other hand if we include all bodies that lobby there are significant resource implications for the management of the registers. There is also an issue with sanctions. Removal or suspension from a register for an organisation that represents itself is less suitable. Any breach of the law, or a code of conduct, cannot generally any entity acting on its own behalf of its democratic right to access a Minister or the Government generally.

5.4. Disclosures and reporting

Currently, public disclosure of lobbying activity in Australia is limited to -

1. The name of the lobbyist company
2. The names and persons employed to carry out lobbying activities
3. Who they currently represent in a paid or unpaid capacity – some states like NSW include former clients of the past three months.

In general, when making a representation to government there is a requirement for the lobbyist to inform the government representative, but not the public -

1. That they are a lobbyist currently listed
2. They are making contact on behalf of a third party
3. The name of the third party
4. The nature of the third party issue

There are views that more information about lobbying activity be published [22] and that the following be posted, unless otherwise exempt on some public interest ground -

1. The date of the lobbying activity

2. The identity of the government representative lobbied – department, agency or Minister and the names of the officials
3. The name of the client for whom the lobbying occurred together with any interests which may or may not have derived a benefit of the lobbying activity.

Queensland requires that the lobbyist outline the reason for the approach and is moving toward enforcing public disclosure of the contact between the lobbyist and government representative. The Queensland Integrity Commissioner believes that this should form part of the official record which is open to the public.

NSW has introduced a format for land use planning meetings as outlined above. There is a requirement that a record of the contact will be published on the Department of Planning and Infrastructure website.

Many would see this as infringement on the rights of their clients to have private and confidential meetings with government representatives. A declaration of a subject matter or interest has the unfair effect of giving commercial opponents premature notice of a proposed project being put to government by a private entity. This could compromise the proposal or create public speculation that might be damaging to the development of the project or idea.

Certainly if full details of a meeting were to be published there are real concerns that discussion may be impaired and the frankness that goes with a private meeting would diminish to the point where the supply of any useful information to government would be impaired and would obstruct the proper flow of information and government business.

But the mere fact of publicising a meeting can result in tactical disadvantage to their clients as it exposes the position of the client. It also could result in innocuous or general descriptions being recorded as to the purpose of the lobbying contact.

There is probably some protection for the client in that records may be protected under freedom of information legislation, but there is still the exposure of having your client's issues and interests out there on the 'public' table.

There is also a flow on and increased cost of administration to process requests for further information about any meetings through freedom of information laws.

5.5. Financial disclosure

The American approach is that anyone who seeks to make representations to government on a bill or resolution must register. Registration also involves disclosure of expenditure on lobbying activity and financial transactions.

Should Australia adopt such an approach? It would certainly increase administration overheads of the lobbyist registers. There are equity considerations if such disclosure requirements only cover third party lobbyists. There are also commercial-in-confidence aspects to consider for the third party lobbyist and their client.

The issue may be better addressed through political donation laws. If there is concern that entities that can afford to hire third party lobbyists are buying access to government or favourable treatment by decision makers through donations to government or potential governments, then this is better dealt with through electoral reform.

Some states, such as NSW have already banned donations from alcohol, tobacco and gaming companies. But this was coupled with an increase in public funding of election campaigns.

5.6. Gifts and benefits

This is not a strong feature in the current codes, yet gifts and benefits can be seen as at least ways to curry favour with government representatives or as powerful inducements to act a certain way. The gifts may also be a conduit of access to a government representative.

Gifts and benefits may range from hospitality such as meals, entertainment or hosting a function to actual payment of money to access or influence a decision maker. At the serious end gifts may constitute the criminal offence of bribery. The provision of a gift or benefit such as tickets to the football or opera or an expensive meal can improperly influence a decision maker by having the decision maker feel indebted to provider of the gift or at the very least that the lobbyist is a 'mate' and his or her submissions on behalf of a client are treated in a superior fashion.

The codes of conduct could incorporate stronger terms about the offering, promising or giving of gifts, but how to describe a gift so it captures inappropriate influence is a difficult thing. Clearly large scale payments should be prohibited, but should low level incidental hospitality be included in such prohibitions? There are varying views.

Whether financial disclosure would address the potential corruption issue of providing gifts and benefits is arguable as largesse can be hidden through creative accounting. Also the gifts may not come from the lobbyists but be direct from the client. The disclosure of the client's financial information and making the clients is far more problematic.

Controls on public officials accepting gifts and benefits is already commonplace in the public sector. It is generally done through existing mechanisms such as Ministerial or public service guidelines on receipt of gifts, disclosure registers and other public service codes of conduct. This would seem the more appropriate way to regulate this behaviour – the onus being on the recipient to report the acceptance of the gift or benefit. The difficulty for Ministers and to a lesser degree other government representatives will always be in what capacity the gift is accepted – as Minister, party official or private individual. If in doubt the benefit should be reported.

5.7. Payment of success fees

As seen above two states have banned the payment of success fees (New South Wales and Queensland). These are seen as a corruption risk because an unscrupulous lobbyist may be encouraged to use corrupt means to gain a favourable lobbying outcome in order to obtain a bonus payment.

However performance bonuses are utilised in many occupations and contingency fees are commonplace in the legal profession. Regulation of the behaviour of a lobbyist can be done through the rules of engagement i.e. how a lobbyist interacts with a government representative.

The monitoring or audit of organisations is difficult to police unless there are stronger financial requirements and coercive powers that can extract information about a lobbyist's terms of employment, pay details and general financial situation.

5.8. Who should administer a register?

There has been some concern that the central agencies that currently administer the lobbyist registers may be too close to government.

The enforcement of registration requirements and sanctions is crucial to the operation of the schemes. Whether these functions would be better situated in an agency or body more removed from the government of the day is a question that has arisen.

The Integrity Commissioner in Queensland administers the lobbyist registration scheme in that jurisdiction. This model provides some separation from government agencies, like Premier and Cabinet or Prime Minister and Cabinet and further removes any appearance of private influence on government. Many heads of these types of agencies do have contact with lobbyists, third party or others, and there is always the risk of 'regulatory capture'.

The 'bread and butter' business of integrity agencies is encouraging and auditing compliance with codes of conduct and ethical behaviours. Therefore they may be better placed to deal with the operation of lobbyist registers, including audits and investigations. Tasmania will in the near future refer its Lobbying Code of Conduct to its (fairly new) Integrity Commission for review and recommendation. One of the issues to be referred will be the administration of the Lobbyist Register.

5.9. Post separation employment: Government Representative to Lobbyist

Currently Western Australia does not include any prohibition of post separation employment and there are varying time periods for restrictions. NSW does not have restrictions on former Members of Parliament or staffers becoming lobbyists, but there is a requirement to consult the NSW Parliamentary Ethics Adviser about taking up such a position. Tasmania excludes Ministerial advisers from its Lobbying Code of Conduct post employment prohibitions.

However, it would seem that many support some employment restrictions for Ministers, Parliamentary Secretaries, Ministerial advisers and senior public servants, but there are variances in the time that they should apply.

It is argued that two corruption risks arise from former public officials, Ministers, their staffers and senior bureaucrats becoming lobbyists. The relationships they developed with other public officials and decision makers may be used to gain an improper or corrupt advantage. Further they may use confidential information to which they previously had access to in order to gain an advantage.

The evidence supporting these propositions is mixed. Many officials once leaving public office are bound by confidentiality clauses embodied in instruments of appointment, oaths of office or general codes of conduct. At a political level many former relationships are unlikely to have any bearing on decision making processes and the currency of these contacts and any information they once had access to diminishes over time.

Relationships can endure after leaving office or employment and post separation or cooling off periods and provisions cannot regulate human behaviour.

While restrictive trade covenants may be common in private sector employment contracts, they must be reasonable and take into account the length of service, seniority, experience and the like. It seems that post employment bans for Ministers and very senior public officers (such as heads of agency) are acceptable because there are perceptions that it is unfair to be able to use influence, knowledge and power gained in previous jobs. However, there is less support for post employment prohibitions being applied to ministerial advisers or less senior public servants.

There has been criticism about the application of the post employment restrictions on ministerial staff. The Commonwealth Code includes a retrospective element and this was widely criticised at the time of introduction [23].

The most significant concern was levelled at the application of the post employment prohibitions to ministerial staff. They were considered to be unfairly treated given the disparate job security and superannuation entitlements that exist between Ministers, public servants and ministerial advisers.
In the Commonwealth context the Community and Public Sector Union noted that neither the *Members of Parliament (Staff) Act 1984* nor their members of parliament (staff) collective agreement contained any reference to post employment prohibitions. It was contended then that a separate code of conduct be applied to Ministerial advisers and staff.

Application of post-separation bans to senior government officials and indeed ministerial advisers could also stymie the job market both in government and in the private sector. Fresh approaches and exchanges of ideas and skills between government and non government sectors are important for the economy. Placing employment bans on senior public servants and ministerial advisers would at a personal level limit the ability of talented people to move on and improve their skill sets and employment opportunities. At a broader level it may stifle development and innovation because public servants may be barred from seamlessly moving into private enterprise. It could also have a negative impact on people prepared to take up employment opportunities in the government sector because they may be discouraged by the prospect of being subject to a future employment ban. If senior executives or ministerial advisers move to jobs that involve lobbying they will be captured by registration requirements. Accordingly, the Government, Ministers and public will be duly informed of their identity and the interests they represent.

In this debate, restraint of trade for employees and recruiting agencies (the employers) alike is a source of concern. Prima facie if it can be shown that the restraint to trade is unreasonable then prohibitions may be found to be contrary to public policy and unenforceable. However, whether anyone (employee or employer) would take on the expense and time of such a challenge is difficult to foresee.

In smaller jurisdictions these restrictions can have real and even detrimental effects on the career choices for people. Ministers who have had a number of portfolios during the course of their parliamentary careers and staffers who have been initially seconded from the public sector are most at risk. These people can find it particularly hard to obtain appropriate employment after a time in public office.

The restrictions can often ignore the legitimate reasons why these individuals may become lobbyists and the value they provide. Their knowledge of government and political processes is extremely valuable to the private sector, non for profit bodies and government.

5.10. Post separation employment: Lobbyist to Government Representative

The Australian codes of conduct focus on government officials becoming lobbyists when leaving office, but there is little attention given to lobbyists who move into public life and the influence their previous roles may have on their decision making responsibilities.

Lobbyists often use their lobbying activities to move from the private world, not for profit organisations and peak bodies to politics and public office, particularly board appointments. They too bring to their public roles confidential information, contacts and interests gained through their previous professional lobbyist life. Some lobbyists use their time as a lobbyist to gain a personal profile that will gain them pre-selection for a chance at political office.

The Sydney Morning Herald in September 2011 reported on the appointment of a hotel industry lobbyist to a $55 000 a year position with the powerful Casino, Liquor and Gaming Control Authority. Normal government probity and appointment processes would have been followed in order to make such an appointment, including consideration by the NSW Cabinet [24].

However, the issues of whether these appointments give the previous employer or client the ability to gain an advantage or special access to government remain real concerns to the community. How to sensibly regulate this 'revolving door' moving into government faces the same challenges as Ministers and senior officers leaving office. There is a requirement for some rules to be in place to address the use of confidential information, trade secrets and declare conflicts, but it should not hamper people's career paths, the transfer of skills across to and from the government and non-government sectors. There are also legitimate reasons why these appointments or pre-selections may be made.

5.11. Government representatives

Traditionally in the Westminster system of government, the Minister is ultimately responsible for the operation of an agency. The head of an agency is responsible for ensuring that proper advice is given to a Minister and that the Government's agenda is implemented by the public service. Lobbyists may be able to advocate a position with senior public servants or other officers but the ultimate decision makers are the Ministers or Cabinet who formally receive advice, including recommendations, from their heads of agency.

In an era of minority government, power does not always reside in the government. There are independents and other parties that form alliances or coalitions so that a government may be

formed in the lower house of parliament. In bicameral legislature we have also seen the rise of independent upper houses so the government of the day relies on an agreement with non-government members to secure the passage of legislation and support for policies.

A criticism of the codes is that they do not cover all Members of Parliament. It would seem that there is merit in expanding coverage to all Members of both Houses of Parliament, including backbenchers who have access to caucus or power brokers within their own parties. Lobbying of the opposition parties and independent members is an important process in democracy. It is particularly significant in a number of circumstances such as the lead up to an election, conscience votes and in votes and motions where non-government members hold the balance of power.

In the Tasmanian context, commentators have noted the power of the Legislative Council given the important role that it plays in the passage of legislation, it would seem appropriate that a code of conduct should apply to all Members of Parliament in both Houses.

For example in Tasmania, during 2007 there was some criticism around a former Member of the Legislative Council Tony Fletcher's role in lobbying or advising the Legislative Council about the pulp mill. Mr Fletcher is a former Member of the Legislative Council and was employed by Gunns Pty Ltd as a 'political consultant' to assist Members of the Legislative Council understand the pulp mill industry. There have of course been other former Members of Parliament on both sides of the political divide who have set up consultancies after leaving Government and used their networks and knowledge in assisting clients. It would seem reasonable that persons (or consultancies) who work for others are open about the interests and the clients that they may be representing through their networking, advisory or promotional work in a political context [25].

If a proposal to include all Members of Parliament was accepted, a joint registration or single process should be adopted to reduce the regulatory burden on lobbyists required to register. The code would also need to be adopted in a code of conduct for Parliamentarians.

There has been resistance from Members of Parliament who consider that it would be unconstitutional for the Executive to try and regulate and interfere with the free performance by a Member of his or her parliamentary duties [26].

6. CONCLUSION

While Australia does not have the strictest regulation in the world, it has attempted to regulate the conduct of the 'hired guns' of the bodies that can afford to use them. The rationale for regulation is based on an open and transparent government agenda, i.e. government itself and the public need to know who is lobbying the government as decision making and legislative reform must serve and be seen to service the public, not sectional, commercial or private interests [27].

There is room for improvement in the regulatory models. The following issues have been touched upon in this paper -

1. equity of who should abide by the standards and prohibitions
2. how to properly deal with breaches

3. how to balance private and commercial-in-confidence interests with an a climate of disclosure.

Whether legislation is the answer is only part of the solution. There are other aspects of the machinery of government that support best practice between lobbyists and government -

1. standards and codes of conduct applying to Ministers, Members of Parliament and public servants about appropriate behaviours - the worst case examples of lobbying while tending to focus on the lobbyist often forget the contribution and maladministration of the government representative in allowing the undue to corrupt a decision or process
2. freedom of information laws and the resourcing of open and transparent government agendas – there is no point having open disclosure if government cannot appropriately report and protect information
3. proper employment practices that are built on merit and do not favour connections rather than punishing skilled people who wish to contribute to public life and commercial practice at different points of their career.

Any change will bring with it added administration and cost for government and the lobbyists. These additional costs need to be measured in terms of value for money and effectiveness – will they actually improve transparency and enhance Government decision making for the cost of regulation and administrative burden that rules impose on Government and lobbyists.

This paper has hopefully provided a snapshot of the Australian attempts to regulate its lobbyists as well as set out some challenges for future regulation. How codes of conduct will evolve in the future will be the basis for another paper at another time.

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New South Wales	http://www.dpc.nsw.gov.au/prem/lobbyist_register
Queensland	http://www.integrity.qld.gov.au
South Australia	http://www.premcab.sa.gov.au/lobbyist/
Tasmania	http://lobbyists.dpac.tas.gov.au/
Victoria	http://www.lobbyistsregister.vic.gov.au/lobbyistsregister/
Western Australia	http://www.lobbyistsregister.dpc.wa.gov.au

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