

THE LOBBYING CODE OF CONDUCT

The Rudd government's attempt to register lobbyists has taken a significant further step.¹ The Cabinet Secretary, Senator John Faulkner, released an exposure draft of the proposed Lobbying Code of Conduct on 2 April.² This development fulfilled an election promise, though it has emerged a little later than promised. This reflects both the complexity of the issue, the size of the task and the congestion the new government is facing as it deals with a multiplicity of issues and a crowded agenda. Before Christmas, in early December, the government had begun to tackle the problem and prefigured some of the themes in a new chapter on Standards of Ministerial Ethics for the Guide on Key Elements of Ministerial Responsibility, last issued in December 1998.³

Lobbying regulation is an issue of considerable international concern. It is one of those issues that bother governments of all persuasions across the world, but dealing with it adequately is generally regarded as unfinished business.⁴

There has been a previous register of lobbyists in Australia, though for some unaccountable reason Faulkner claims it as the first formal lobbyists register ever adopted by a federal government. Therefore, "because the Government is breaking new ground in this area"⁵ it has released an exposure draft for comment by all interested parties by 16 April. Just a fortnight has been allowed for such comment which is insufficient for a full discussion.

The previous scheme introduced by the Hawke Labor government in 1983, after the so-called David Combe affair, was only dispensed with by the new Howard government in 1996. The Howard government stood by its stance and refused to ever consider a new scheme. But in 2004 a previous Leader of the Opposition, Mark Latham, did promise to regulate lobbying as part of his policy on open government.⁶

The key intervening event since then has been the lobbying scandal in Western Australia involving the former Labor Premier, Brian Burke, and his associates Julian Grill and former Liberal Senator Noel Crichton-Browne.⁷ This scandal has been investigated by the state Crime and Corruption Commission and so far has claimed the scalps of several ministers and senior public servants. It has led to a new lobbying register adopted by the Carpenter Labor government in Western Australia and Senator Faulkner claims that the new Commonwealth code "follows closely the model adopted by the Western Australian Government".⁸ This revelation suggests that the government may not have looked much further to the various international models available.

Exposure Draft

The context of the code is conveyed in the Preamble discussion of the key democratic concepts of public confidence, public interest, integrity and transparency. The code "is 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".⁹

The scope of this code is laid out in the crucial and contested definitions of four elements: those clients who hire lobbyists, those who conduct lobbying, lobbying activities, and those who are the targets of lobbying.

The clients are those who engage a lobbyist on a retainer. In a crucial distinction this excludes the principals and the staff of organizations and/or firms. Such lobbyists are commonly known as commercial or independent lobbyists. Brian Burke is a prime example, though atypical because of his methods.

In turn lobbyists are those persons, companies or organizations who conduct lobbying on behalf of a third party client. There are three major sets of exclusions. The first involves charitable, religious and other organizations, whether or not in receipt of tax deductible status. The second involves all those who lobby on their own behalf. The third involves those, like lawyers and other professionals who only lobby occasionally and/or incidentally.

The 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 contract or the allocation of funding”.¹⁰ The exclusions are again important and include activities associated with parliamentary committee work, the usual constituency work of parliamentarians, petitions and public statements and campaigns.

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

All lobbyists so defined must register with the Government if they wish to do government business. If they are not registered the government will not do business with them. They have to provide their business registration details including, if not a publicly listed company, the names of owners, partners or major shareholders, as well as employees who lobby and the names of clients for whom lobbying is undertaken. These details are to be updated quarterly.

The Register of Lobbyists will be maintained by the Department of Prime Minister and Cabinet and published on its departmental website. 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. Government representatives must report breaches. The discretion of the Cabinet secretary in these matters will be absolute.

Former Ministers and Parliamentary Secretaries will be prohibited for 18 months from engaging in lobbying on any matter on which they had official dealings during their last eighteen months. The same is true for ministerial staff, but only for a period of 12 months

in both instances. These prohibitions will only apply from 1 May 2008 so will not apply to the ministers, parliamentary secretaries and ministerial staff of the previous government.

Finally, the code lays down 'principles of engagement'¹¹, that is the ethical principles which should underpin lobbying. Lobbyists must make full disclosure of their position on the register. There is a range of unacceptable conduct that is ruled out: any corrupt, dishonest, illegal or threatening behaviour. 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 political party activities.

Responses

The exposure draft has received a mixed, but largely positive reaction, from political opponents, the lobbying industry and the media. Criticism has been largely quibbles rather than full-frontal dissent. Only the occasional commentator has asked probing questions and demanded stronger action.¹²

Headlines have ranged from the general "Tough new rules for lobbyists"¹³, to a focus on exemptions such as "Unions, churches free from disclosure rules"¹⁴ and "MPs escape scrutiny by lobbyist code".¹⁵ The inevitable connection made to Brian Burke has brought a defensive response from the minister that he would never gain registration.¹⁶

Senator Mike Ronaldson, Opposition Special Minister of State Spokesman, had some quibbles about Faulkner's powers, but his main response was that the proposed code was "a reasonable first draft and broadly sensible"¹⁷, while the Democrats' Senator Andrew Murray, an expert in this field, was welcoming, though some of his praise was faint: "It's better than anything we've ever had before, because we've had nothing before".¹⁸

Major third party lobbyists, such as Bruce Hawker of Hawker Britton, likewise described the draft as a reasonable document.¹⁹ Lobbyists generally don't see the code as much of an imposition, just as they were not bothered by the scheme in operation between 1983 and 1996. They welcome the recognition and legitimacy that tends to follow such government attention.

Evaluation

The Faulkner code has a number of strengths and is a distinct improvement on that introduced by the previous Labor government. For a start we are now in the on line age. This will be a transparent rather than a closed register. Furthermore it will contain greater detail and be updated more frequently. Rather than being located in a bureaucratic backwater like the Department of Administrative Services, it will now be in PMC and have the clout that goes with that positioning.

The attention given to limiting the lobbying activities of previous ministers and their staff is to be welcomed. The 'revolving door' needs more attention. The same is true for integrating the code of conduct with the Standards of Ministerial Ethics.

Evaluated on its own terms the potential problem of lack of teeth and lack of real sanctions remains. It is an open question whether it will be taken seriously by those involved. The problem in the past has been that, in the face of mixed feelings about lobbying within government and parliament, the need for regulation of lobbyists has not been taken seriously. Most lobbying is after all unremarkable professional work and quite benign 'business as usual' in Canberra. The culture of the political world has not embraced reform though the public has demanded it. Even though it is true that Brian Burke prospered in an environment that operated without a lobbying code, there was no shortage of other relevant codes of ethical conduct that should have prevented the abuses that occurred in Western Australia. Reaction by government insiders at the Commonwealth level remains to be seen.

Evaluated more broadly, however, the code is timid and narrow. The exclusions noted above are very serious. Third party lobbyists are only one element of the whole lobbying industry.²⁰ They are technicians like lawyers and accountants who perform a fee for service. So a code of conduct that excludes many of the bigger players in the industry who lobby on their own behalf, like corporations, churches, unions and big national pressure groups like the Business Council of Australia, the Australian Medical Association, the Australian Conservation Foundation and so on, offers only very partial coverage.

There is an argument for the type of narrower focus encapsulated in the government's plans. The administrative costs and the burdens on the industry, for instance, are limited in this approach. This may make the package seem to be achievable. Perhaps politics is the art of the possible after all.

But whether the aim of the exercise is a more ethical industry or transparency in government or an even playing field in policy-making and politics a limited scheme runs the risk of being set up to fail.

These bigger issues are unlikely to find favour with the government in the short time now available for discussion and critique. Responses to the draft are likely to concentrate on evaluating the proposal on its own terms and attempting to fine-tune it by incremental suggestions. But there is a lot to be said for a broader discussion of the issues involved. Later amendments may be possible. The experience in other countries, like Canada, is that lobbying regulation needs to be continually tightened and broadened as further weaknesses are discovered.

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¹ Department of the Prime Minister and Cabinet, Exposure Draft: Lobbying Code of Conduct, April 2008

² Senator John Faulkner, Media Release, Register of Lobbyists, 2 April 2008

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- ³ Kevin Rudd, Standards of Ministerial Ethics; K. Murphy and A. Stafford, “Code sets rules for Rudd team”, *The Age*, 7 December 2007
- ⁴ J. Greenwood, “The Regulation of Lobbying”, *Special Issue of Parliamentary Affairs*, 51 (4), October 1998; M. Malone, *Regulation of Lobbyists in Developing Countries: Current Rules and Practices*, Institute of Public Administration, Dublin, 2003
- ⁵ Faulkner op cit
- ⁶ For general surveys see J. Warhurst, *Behind Closed Doors: Politics, Scandals and the Lobbying Industry*, UNSW Press, 2007; J. Fitzgerald, *Lobbying in Australia*, Rosenberg, 2006.
- ⁷ Warhurst op cit, pp 50-64
- ⁸ Faulkner op cit
- ⁹ Department of Prime Minister and Cabinet, op cit, p 1
- ¹⁰ Ibid, p 2
- ¹¹ Ibid, p 4
- ¹² J. Waterford, “We need to know who is blowing into the ear of government”, *The Canberra Times*, 5 April 2008
- ¹³ A. Fraser, “Tough new rules for lobbyists”, *The Canberra Times*, 3 April 2008
- ¹⁴ M. Davis, “Unions, churches free from disclosure rules”, *Sydney Morning Herald*, 3 April 2008
- ¹⁵ S. Ryan, “MPs escape scrutiny by lobbyist code”, *The Australian*, 3 April 2008
- ¹⁶ M. Hawthorne, “‘No way’ Burke could list as lobbyists”, *The Australian*, 2 April 2008
- ¹⁷ Quoted in Hawthorne op cit
- ¹⁸ Quoted in Ryan op cit
- ¹⁹ See Fraser op cit
- ²⁰ Warhurst op cit, pp 7-11