



AUSTRALIAN SENATE

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27 May 2008

Mr Stephen Palethorpe
Secretary
Standing Committee on Finance and Public Administration
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Palethorpe

INQUIRY INTO LOBBYING CODE OF CONDUCT

Thank you for your letter of 16 May 2008, in which the committee invites me to make a submission in relation to the inquiry into the Lobbying Code of Conduct which was tabled in the Senate by the government on 13 May 2008.

I hope that the following observations relating to subparagraph (b)(i) of the committee's terms of reference may be of some interest to the committee.

That provision of the terms of reference asks the committee to consider whether a consolidated version of the Lobbying Code of Conduct should apply to members of both Houses of the Parliament and their staff. This suggestion gives rise to several significant considerations.

The terms of reference suggest the *means* by which this may be achieved: a joint resolution of the two Houses. Such a joint resolution could apply a code to members of the two Houses as members, but would undoubtedly give rise to an argument that the Houses should not seek to regulate the internal deliberative processes of executive government, that is, the persons with whom ministers meet and confer for the purposes of their ministerial functions. This problem could be avoided by the Houses adopting a code in substantially the same terms as the code applying to ministers, and applying similar rules to members as members and to the lobbyists who deal with them. In other words, there would be two separate regimes, that applying to members of the Houses and that applying to ministers, albeit in substantially the same terms. In effect, there would be *three* substantially similar regimes: one for each of the two Houses and one for ministers, since each House must independently regulate the conduct of its members as that conduct affects its proceedings. This independence of the Houses is clearly mandated by section 50 of the Constitution, as well as other constitutional provisions.

Although there would be three separate but substantially similar regimes, it would obviously be necessary to have a system of joint registration of lobbyists: they would justifiably complain if they were required to undertake three different registration processes for three

different registers. The registration processes and the register would be joint in a sense not hitherto contemplated in Australia's system of government: the three parties to the joint process and register would be each of the two Houses and the executive government. It would be necessary to have some kind of joint office, probably involving existing office-holders from each of the three parties, to conduct the registration process and maintain the register.

Such an arrangement would give rise to the question of enforcement. Under the system announced by the government, enforcement can be achieved through the government's internal processes, ultimately relying on a collective decision by government not to deal with unregistered lobbyists and on the conventional powers exercised by the Prime Minister over ministers in relation to the performance of executive functions by ministers and their staff. Enforcement of the code as applying to members of each House could not depend on this vehicle, but would have to rely on the powers of each House to regulate the parliamentary conduct of its members and to enforce that regulation by its disciplinary powers over its members and its contempt jurisdiction.

To some extent, such a system would be similar to the requirements currently imposed by both Houses in relation to the declaration and registration of their members' interests, but a lobbying code of conduct would give rise to larger issues. The Houses would be regulating the communications between their members and other persons. The Houses have not previously sought to regulate such communications, and an argument would no doubt be raised that it is not proper for them to do so: surely, it could be argued, private members of the Parliament have a right to communicate with whomever they choose, just as they have the right to determine the sources of their information and the matters they will raise in the parliamentary forum. The registration and declaration of interests requires only disclosure; a lobbying code would involve prohibiting members from dealing with certain persons (unregistered lobbyists).

Such a significant step would require strong justification in terms of preventing covert influences on members of the Houses. That justification would have to be crafted into the relevant provisions to meet the test of section 4 of the Parliamentary Privileges Act. That section provides that an "offence against a House" (ie., a contempt) is constituted only by conduct that "amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member." This is a high threshold for conduct involving mere communication with a category of persons. Obviously this issue would assume greater significance if the lobbying code extended to persons and organisations who lobby on their own behalf.

The Houses, by such a scheme, would be setting down the path of detailed regulation of the external conduct of their members of the kind that other legislatures have adopted, such as the Houses of the US Congress with their detailed codes of ethics and developed (and much criticised) processes for enforcement.

The power of the Houses to discipline their members and their contempt jurisdiction may be regarded as blunt instruments to enforce a lobbying code, but this problem already exists in relation to the registration of interests. The only alternative would be to prescribe a joint lobbying code by statute and to provide for enforcement through the courts, by civil action or criminal prosecution. By making the whole scheme justiciable, such a course would

obviously be fraught with difficulties, and would involve a very large intrusion by the judiciary into the internal operations of the Parliament. The statute would have to survive constitutional challenge based on the freedom of political communication.

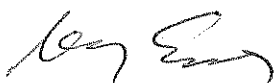
Enforcement of the code by the Houses themselves, however, is also bound to lead to the kind of difficult case issues that would arise if enforcement of the scheme were put into the courts. It is not implausible to envisage a member of a House, brought before the Privileges Committee of the House on a "charge" of dealing with an unregistered lobbyist, engaging in a great deal of disputation about the nature of the dealings, whether they really constituted lobbying, whether the other persons concerned were acting in the capacity of lobbyists or simply communicating with the member in some other capacity, and the nature of the communications, and so forth. The Houses could soon find themselves dealing with the kinds of complex cases which regularly arise in the Houses of the US Congress in relation to their members.

It is questionable whether the Houses could lawfully regulate the conduct of their former members, by prohibiting former members from engaging in lobbying activities for a period after they cease to be members. Such regulation would probably not meet the test mentioned. Serving members could be prohibited from dealing with such persons, but that would be another significant extension of the scope of the regulation of members.

The foregoing may be regarded as an argument against the extension of the code in the manner contemplated by the committee's terms of reference, but it is not intended to be so. These observations are intended simply to alert the committee to issues which may arise from such an extension.

I would be pleased to elaborate or add to these points if the committee so wishes. Please let me know if I can be of any further assistance to the committee in this inquiry.

Yours sincerely

A handwritten signature in black ink, appearing to read "Harry Evans". The signature is fluid and cursive, with a large initial "H" and "E".

(Harry Evans)