Submission of the Accountability Round Table to the Senate Finance and Public Administration Committee's Inquiry into the operation of the Lobbying Code of Conduct and the Lobbyist Register.

Introduction

The Lobbying Code of Conduct has been an important first step towards achieving transparency, integrity and honesty in the conduct of lobbying. Has it achieved its objectives? Looking at the operation of the Code, we submit that it has fallen well short of that – one of the reasons being that the Code approach was used rather than legislation. While this may have been the best way to introduce regulation of lobbying, it is time to consider replacing it with legislation.

This Review by the Parliament provides an important opportunity to identify the changes required to achieve the Code's objectives.

In this submission it is proposed to assess the Code's operation against its stated objectives and recommend changes needed to achieve those objectives.[1]

The stated objectives of the Code

The Preamble to the Code states that its intention is to

1. "promote trust in 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."

The Code's stated underlying policy concern is that

[1] Another measure that can and should be applied is the OECD Guidelines approved by the OECD Council (which included Australia) on 28 February 2010 – *OECD Recommendation on Principles for Transparency and Integrity in Lobbying.* It is noted below.

> "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."

The Accountability Round Table submits that these propositions should have widespread support.

The state of trust in the integrity of government processes

Most members of the community would have difficulty trusting government processes because they have concerns about the integrity of those involved in those processes. This has been so for many years and is probably inevitable because of the corrupting influence of the pursuit of power, and the desire to retain it , and the constant challenge of the conflicting duties that all parliamentarians must address[2]. But modern trends in government and political processes have significantly increased the risks of unethical behaviour and corruption and so provided further reason to distrust the integrity of government processes . The trends include:

- The growth of a lobbying industry itself which has created a situation in which there is unequal access to government flowing from unequal resources and power, carrying with it the risk of distorting the decision-making process and of decisions that are not in the public interest;
- The practice of lobbyists charging and receiving success fees and making gifts, donations and giving other support to those in, or seeking, government;
- The so-called "arms race" in political expenditure and fund-raising which includes selling access to Members of Parliament;[3]

[2] Hon Fred Chaney, ART Inaugural Lecture, "Integrity in Parliament- where does duty lie" Melbourne University Law School, 11 October 2011`; www.accountabilityrt.org.; duties include the duty to oneself, one's family and supporters, party, parliamentary party, electorate, Parliament and , if a minister or shadow Minister, Cabinet or shadow Cabinet.

[3] The Recent Report of the JSCEM on Political Funding does not propose to stop this practice. The majority recommendation is to require disclosure of contributions made at fund-raising events. See JSCEM , Report on the funding of political parties and election campaigns" paras 3.73 -3.96, Rec 4. The Dissenting Report of 5 members of the Committee opposed any change on this issue. – p224-5.The Green's member recommended disclosure of donations,an annual cap of $1000.00, and donations limited to those from individuals. (p. 232-239)

- The ever-increasing commercialisation of government projects and the provision of government services to, and by, government;
- .The politicisation of the public service and the growth in numbers and importance of the personal staff of ministers, parliamentary secretaries, their counterparts in the opposition and other parties, and their influence in policy decisions;
- The "revolving door"[4] between parliamentarians, their staff and government employees, on the one hand and lobbyists and major corporations and their staff on the other;
- The secrecy of government and its control of information.

Each of these developments has had a significant negative impact on public confidence in the integrity of government processes. Each requires its own appropriate response. So far as the lobbying process is concerned, our response to date has been primarily the Code. Is it able to achieve its objectives? If not, unless appropriate steps are taken, we run the risk that its failings will only add to the lack of trust in the integrity of our government processes.

Deficiencies in the Operation of the Code.

a) ***Inadequate coverage***[5] ***:***

i) *TheLobbied.* 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.

In reality, "government processes" are not confined to the activities of ministers and their officers and the public service. The Parliament is also heavily involved in those processes through the non-government members playing their part in holding the government to account and the parliamentary committees reviewing legislation and policy and performing their accountability role. This role of the federal Parliament and its members is even more significant in the current hung Parliament. As a result, significant and different parts of the government processes can be, and are, the subject of extensive and intense lobbying which will not be subject to the Codes ethical and disclosure provisions. If the regulatory regime is to succeed in promoting trust in the integrity of government processes it must apply to the lobbying of all those involved in "government processes.

[4] See ICAC, Issues Paper, 2010 *Lobbying in NSW*
.21

[5] " *Lobbyists, Government and Public Trust, Vol 1, Increasing transparency through legislation,*OECD 2009,p14; "Where transparency and integrity are the principal goals of legislation, effectiveness is best achieved if definitions are broad and inclusive, and the theatre of lobby activities is also defined broadly and inclusively

ii) *The Lobbyers.* The coverage includes the lobbying activity of those who lobby professionally for third parties but does not include that of professional "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.[6]

This gap in coverage has apparently resulted in people and organisations turning to the "in-house lobbyist" approach rather than engage tghird party lobbyists

b) Disclosure requirements.

i) *Frequency.* The recent changes to the Code retained the obligation to provide details of changes to lobbyists details to be made as soon as practicable and within 10 days after the change occurred but the requirement for quarterly updates of the lobbyists details has been reduced to twice a year. The justification for this approach was the streamlining of regulatory and administrative arrangements for registration. It means, however, that the provision of changes of details to the Register may be "overlooked" for up to 6 months and transparency in that area reduced.

ii) *details of the lobbying activity;* there is no requirement to supply details of each act of lobbying to the Register; who was involved, where and when it occurred or the subject matter. As a result, citizens, business, civil society organisations and the media are unable to scrutinise lobbying activities.[7]

This failure to require the supply of details of each act of lobbying to the Register for publication by it detracts significantly from the Code's attempt to bring transparency to the process and as a result compromises the objectives of the Code.

iii) *Disclosure of former "government representatives"* [8]. The other recent major change, intended to "enhance openness and transparency"[9], is to require lobbyists to disclose on the Register details of any former government representatives

---

[6] OECD Council, Recommendations on Principles for Transparency and Integrity and Lobbying, Appendix 1, Summary of Principles;

1. Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies

[7] OECD, op. cit., Appendix 1, Summary of Principles:

"5, Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.

. 6. Countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities"

[8] Code para 3.3 "Government representative" means a Minister, a Parliamentary Secretary, a person employed or engaged by a Minister or a Parliamentary Secretary under the Members of Parliament (Staff) Act 1984, an Agency Head or a person employed under the Public Service Act 1999, a person engaged as a contractor or consultant by an Australian Government agency whose staff are employed under the Public Service Act 1999 or a member of the Australian Defence Force.

[9] See media release 1 August 2 011;

employed by their firm as lobbyist and when they became a former government representative (5.1 (a) (iii) This has strengthened the Code and was supported by the ART in the government's 2010-2011 review. But the definition of "government representatives" continues and so limits the value of this provision.

(c) Challenges to the integrity of the lobbying process

i) *Lobbying success fees still allowed.* The availability of success fees for lobbying creates temptations when provided to those engaging in the lobbying activities to use whatever means to achieve a successful outcome. They

> "pose a particular corruption risk as their existence may encourage lobbyists to disregard ethical standards or engage in corruption." [10]

ii) *Gifts, donations and other support from lobbyists to those in, or seeking, government allowed.* Helping members of parlia***m***ent with fund raising[11] and making gifts[12] and giving other benefits to those involved in governments is a classical way to build up a relationship, create a sense of indebtedness and achieve influence. It increases the risks of corruption and unequal access and treatment. At the very least it creates conflicts of interests. Those engaged in lobbying government should not have such opportunities.

These practices threaten the reality and appearance of the integrity of government processes contrary to the public expectations of integrity and honesty.

(d) ***Inadequate limits on post-government and parliamentary 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.

iv. *Secondary employment:* It is presently open to MPs to accept employment as consultants with companies with whom they had dealt when Ministers including specialist lobbyists.[13]

The "revolving door" phenomenon adversely affects community trust in the integrity of government processes." [14] The Code attempts to address this matter in the context of

[10] ICAC, op.cit., 27
[11] See Recommendation by Queensland's CMC, ICAC op.cit.23
[12] Forbidden at a federal level in USA, ICAC op.cit.24
[13] 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

lobbying but it inevitably falls short in promoting trust in the integrity of government processes because it does not apply to all involved in government processes, does not apply to employment in in-house lobbying and operates for only a short period and applies only in respect of matters in which the limited class of people had "official dealings". As it stands it allows, for example, former ministers to lobby in areas relating to their former portfolio responsibilities and to make extensive use of their contacts in government as well as the use of knowledge acquired while in office as long as they did not have "official dealings" for the period specified in the particular matter the subject of the particular lobbying activity. The provision can be easily avoided. In addition, it does not look good to see former Ministers and staffers move straight from those positions to employment with corporations which provide services to government or whose activities are directly affected by government decisions, however careful the former minister or staffer might be to ensure that they have not compromised their integrity and will not do so. Community perceptions are critical to the promotion of trust in the integrity of government processes.

iii) Enforcement and Sanctions

The sanction for breaches of the Code is the loss of registration of the lobbyist and the persons concerned. The discretion to take away the registration is given to the Secretary of the Prime Minister's Department and the Special Minister of State. (Clause 10). A failure to supply the required confirmations and statutory declarations within the require time results in the registration lapsing (5.5- 5.7).

As a result, it is up to those who are lobbied to police the system and enforce it. The instrument they are given is a blunt one. Unless the breach is in fact very serious, or there is a significant pattern of non-compliance, it is unlikely that registration will be taken away. The Secretary and Special Minister of State who exercise the discretion will also always be open to challenge on the basis of possible lack of independence and impartiality because they or their colleagues are parties in the "government processes" the subject of lobbying.

The Effect of the deficiencies in the Scheme on its objectives

Promoting the integrity of government processes

[14] 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

Because of the limits to its coverage, its disclosure requirements, its regulation of post-government and parliamentary employment, and the opportunities and temptations that exist for the avoidance of its regulation and the corruption of government processes, this objective is not being met.

Ensuring the transparency, integrity and honesty of contact between lobbyists and government representatives

For the same reasons, the Code also falls well short in its transparency objective. It also leaves at serious risk the integrity and honesty of contacts between those in lobbying and those involved in the processes of government.

WHAT CHANGES ARE REQUIRED?

Legislation?

We submit that some of the major limitations of the Code identified above have been the inevitable consequence of using a Code. It does not operate as a legal instrument but spells out the intentions and expectations of the government of the day about the appropriate approach to the conduct of lobbying that government. Under such an approach, it is not possible to have an enforceable system which applies to all parliamentarians and their staff. A non-legislative approach also limits the sanctions that can be imposed for breaches of the code leaving the blunt instrument of withdrawal of registration as the only feasible sanction. That reality may also be part of the explanation for the Code not extending to all lobbying activity but only that of lobbyists for third parties.

A legislative approach would remove the need for such limitations. It would also have other benefits. It would place responsibility for the design and ultimate control and enforcement of the system with the Parliament rather than the Executive. Day-to-day responsibility for the administration and monitoring of the system could be vested in an independent parliamentary officer such as the proposed Parliamentary Integrity Commissioner. This would "promote trust in the integrity of government processes" and assist in meeting "public expectations of transparency, integrity and honesty.

What changes should be included in any such legislation?

The response to that question will depend in part on

- the importance attached to the integrity of government processes, and .

- how one views the nature of the roles of Ministers, parliamentary secretaries, shadow ministers and parliamentary secretaries, members of Parliament, and all their staff and those individuals employed in the public service and public corporations.

The powers given to those involved in government processes are given to 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. They are in the position of fiduciaries who exercise a public trust[15]; for we entrust them with power to be exercised over us and, as a result, 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.[16]

Any system provided to regulate lobbying activity should respect, serve, and address the risks to, that public trust.[17]

We submit that the following reforms are needed.

---

[15] 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

[16] 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."

[17] 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

Specific reform proposals

1. Coverage of the Code

(a) *The activity covered.* The 2010 Discussion Paper[18] stated that the Code "does not apply to in-house government relations staff "as it is clear whose interests are being represented". That is a curious justification for the exclusion of in-house lobbyists altogether from the Code's operation because that concern is only a small part of the concerns sought to be addressed by the Code.

We submit that any registration and disclosure requirements should apply to all engaging, directly or indirectly, for financial reward in lobbying activity[19] and so add to the transparency and integrity of the scheme. This would also remove opportunities for professional lobbyists to avoid registration and any restrictions imposed by the Code – with similar benefits.

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 all MPs and their staff, public servants and statutory corporations, including their subsidiaries and their representatives and employees.[20] All are involved in the process of government and can influence government decisions. All will be of interest at some time to lobbyists.[21]

2. Required Disclosures

(a) Information to be disclosed

---

[18] P. 9

[19] 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

[20] 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.

[21] 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*

The Code should require those lobbying to supply details of each occasion of lobbying, who was involved and the issues the subject of lobbying.[22] To further aid transparency of lobbying activity and reduce the risk of corruption, minutes should be kept by the government representatives involved[23] 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.[24]

The amendment to the Code requiring lobbyists to disclose on the Register of Lobbyists the details of any lobbyists who were Ministers, former ministerial staff or senior APS and ADF personnel should be retained but be extended by the proposed extended definition of "government representatives".

The Accountability Round Table strongly supports this amendment. 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.

(b) Timing of disclosures.

To provide transparency, the required information about the lobbyist seeking registration should continue to be supplied once a year confirmed quarterly 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 activity required to be provided to the Register.

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

[23] 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).

[24] See Discussion, Joo-Cheong Tham, op.cit above.

It will be argued that this is too onerous. But without timely disclosure identifying who and what is involved, there will be no real transparency and no "level playing field". Will there be a burden? Won't those doing lobbying need to keep a diary recording the appointment, the people involved and what the lobbying 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.[25] 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.[26]

3. Limits on post-government employment

(a) ***"Official Dealings".*** For the reason already advanced this exception should be removed. We note that the 2010 Discussion Paper noted 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."

If that is so, the objective there stated falls far short of the objectives stated in the Code; for the exception damages rather than promotes respect and trust in government and its processes and fails to address the public expectation of transparency, integrity and honesty in dealings by lobbyists.

(b) The period of disqualification

The understanding of government processes acquired by government representatives is not something generally found within a private sector organisation and is needed by it. But that is a difficulty shared by all. The fact is, however, that such knowledge

> "is likely to be accompanied by personal relationships and political influence" .[27]

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

[25] Code, Clauses 8(e)(iii),(iv)
[26] See for example the Microsoft Office calendar sharing facility
[27] ICAC,op.cit. 21, citing the example of Messrs Burke and Grill and their use of their political links

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, obtained at the community's cost, that they can use to obtain a personal financial benefit. They do not have to account to the community 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 for all, to seek advantages for their new client or employer. Such approaches will, on occasions, succeed because we lack that knowledge and, as a result, will carry a cost to us. Further, the former 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.

There are presently no legal constraints on such conduct. 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.

Because of the seriousness of the issues, and the special fiduciary 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 warrants a strict approach.

But it has been argued that people like ministerial staffers[28] should be treated differently because their employment is insecure[29]. Plainly, their employment is insecure, but they take up their positions knowing that they have no job security. Further, they are not alone. Few workers in the community today have job security. Even our top research scientists do not have job security. Having to work outside politics and government carries with it a potential long term benefit for staffers, particularly if they have political ambitions, because it will give them experience in the world of non-politicians.

Should the disqualification period for Ministers, for example, be extended only a little – say to 2 years? But that is unlikely to prevent the use of such knowledge, including contacts and will not increase public confidence in the operations of government. For such a limited extension assumes that Ministers 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

[28] Currently the Code does not apply to ministerial staff below Adviser level
[29] Report, p22, Minority Report, para 1.30

only if the knowledge, including contacts, acquired as a Minister or Parliamentary Secretary continue to be of value. The period needs to be substantially longer.

If a total ban is thought to be too Draconian, or to 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.[30] 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 significant action is not taken, however, we are not being serious about promoting trust in the integrity of government processes or ensuring, as is the public expectation, transparency, integrity and honesty in dealings between lobbyists and government representatives.

We note that it has been argued that to ban such employment even for 12 months would be contrary to the principles of restraint of trade. ACCI in its submission to the Senate Committee in 2008 argued that [31]

> 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.
>
> 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
>
> 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 to 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 private employment market place to protect businesses being unfairly disadvantaged by their market competitors recruiting their staff)

[30] In Canada there is a Commissioner of Lobbying who performs that role: See Lobbying Act,s10.11 and 10.12
[31] http://www.aph.gov.au/senate/committee/fapa_ctee/lobbying_code/submissions

are applicable to recruitment of former parliamentarians and people in government positions. The argument does not consider the fact that this is not a market competitor situation. It involves recruitment of people

- 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.

Viewed, however, as a "restraint of trade" situation, those facts would provide a reasonable basis for the suggested 5 year ban. A procedure to allow exemptions subject to conditions can deal with cases where the restraint would be unreasonable to an individual in a particular case and not justifiable in the public interest. 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 and connections that would warrant a 5 year ban.

4. Other employment that should not be permitted[32]

(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.[33] Applying the objectives of the Code, a ban is the appropriate course to follow.

(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.[34] For similar reasons, this also should not be allowed.

[32] 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.

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

[34] 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

5. Practices of lobbyists that should be stopped

(a)Success fees

Payment of success fees should be banned.[35] 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 ban any individual, directly or indirectly involved in lobbying, seeking or receiving success fees and provide appropriate penalties..

(b) Securing and providing benefits for government representatives

For reasons already discussed, those engaged in lobbying, should not help members of parliament by fund raising[36] and making gifts[37] and giving other benefits to them and other government representatives. Such conduct should not be allowed.

6. Sanctions

Participants in the Roundtable with the then Minister, Mr Ludwig raised the question whether there should be graduated sanctions for breaches of the Code, such as warnings, with deregistration being reserved for the most serious misconduct. Criminal or civil penalties could be imposed for breach by lobbyists including for lobbying when not registered and breaches of the code of conduct obligations set out in the legislation.

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 the power to impose other penalties for breaches of the Code, including criminal penalties. But if that path is to be taken, legislation will be required.

Conclusion

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.[38]

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

[35] As it has been in Queensland's Integrity Act 2009 and Canada's Lobbying Act 1985 (s 10.1(1))
[36] Recommended by Queensland's CMC, ICAC op.cit.23
[37] Forbidden at a federal level in USA, ICAC op.cit.24
[38] 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

complying with the law. They will not want the embarrassment of having participated in unlawful events. It would be very valuable to have a person available to advise, such as the proposed Parliamentary Integrity Commissioner.

As to the 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. They should also have access to the Parliamentary Integrity Commissioner for advice. 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.

Any legislation, or 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 officials. We note that work is proceeding on a Code of Conduct for members of the Parliament.

Appendix A: the Lobbying Code

LOBBYING CODE OF CONDUCT 2011

1. PREAMBLE

1.1 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.
1.2 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.
1.3 In performing this role, there is a public expectation that lobbying activities will be carried out ethically and transparently, 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.
1.4 The *Lobbying Code of Conduct* 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. 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.

3. DEFINITIONS

3.1 “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. 3.2 “Communications with a Government representative” includes oral, written and electronic communications.

3.3 “Government representative” means a Minister, a Parliamentary Secretary, a person employed or engaged by a Minister or a Parliamentary Secretary under the *Members of Parliament (Staff) Act 1984*, an Agency Head or a person employed under the *Public Service Act 1999,* a person engaged as a contractor or consultant by an Australian Government agency whose staff are employed under the *Public Service Act 1999* or a member of the Australian Defence Force.
3.4 “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. 3.5 “Lobbyist” means any person, company or organisation who conducts lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client, but does not include:

(a) charitable, religious and other organisations or funds that are endorsed as deductible gift recipients;
(b) non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients;
(c) individuals making representations on behalf of relatives or friends about their personal affairs;
(d) members of trade delegations visiting Australia;
(e) 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
(f) 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 firm of lawyers, doctors, accountants or other service providers involves lobbying activities on behalf of clients of that firm, the firm 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 or clients.
3.6 “Lobbyist's details” means the information described under clause 5.1.

3.7 “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:
(a) in the case of a person, company or organisation who conducts lobbying activities, or whose employees conduct lobbying activities on behalf of a client with a Government representative:

(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) whether a person referred to in clause 5.1(a)(ii) above is a former government representative (as defined in clause 3.4), and if so, the date the person became a former government representative; and

(iv) subject to clause 5.2, the names of clients on whose behalf the lobbyist conducts lobbying activities.
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 to the lobbyist's details as soon as practicable and within 10 business days after the change occurs.

5.5 The lobbyist shall provide to the Secretary within 10 business days of, 31 January 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.

5.7 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 Persons who, after 6 December 2007, retire from office as a Minister or a Parliamentary Secretary, shall not, for a period of 18 months after they cease to hold office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office.

7.2 Persons who were, after 1 July 2008, employed in the Offices of Ministers or Parliamentary Secretaries under the *Members of Parliament (Staff) Act 1984* at Adviser level and above, members of the Australian Defence Force at Colonel level or above (or equivalent), and Agency Heads or persons employed under the *Public Service Act 1999* in the Senior Executive Service (or equivalent), shall not, for a period of 12 months after they cease their employment, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months of employment.

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;

(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 personal activity or 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; and

(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. 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 Special Minister of State for the Public Service and Integrity, 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 Special Minister of State for the Public Service and Integrity, in his or her absolute discretion, directs the Secretary to remove the lobbyist or the

individual from the Register. 10.5 The Special Minister of State for the Public Service and Integrity shall not issue a direction under clause 10.4 to the Secretary unless the Special Minister of State for the Public Service and Integrity 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