Australia's Transparency Deficit
Reforming Federal Lobbying Regulation

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Executive Summary

Whilst lobbying is a legitimate part of the democratic process and plays a meaningful role in representing interests to decision-makers, it has always sat uncomfortably with public expectations about fairness and transparency. As many countries throughout the developed world face crises of trust in the integrity of government, there has been an increasing push to establish frameworks which bring this traditionally private activity into the light, and Australia has been no exception.

State corruption scandals provided an impetus for the Federal Government to introduce the *Lobbying Code of Conduct* in 2008. Whilst, in focussing on the extraordinary circumstances unfolding at the time, this Code exclusively targets third party lobbyists, there has been a recognition amongst many scholars, lobbyists and government officials that the Code as it stands captures but a little of the activity going on behind closed doors.

In order to meet the public's expectation of transparency in decision making, whilst also respecting the need not to unreasonably inhibit political participation to the detriment of representation, there is a requirement for significant reforms in the current framework to ensure that there is a robust mechanism for bringing about the cultural change in decision-making that has simply not been hitherto delivered.

Australia would do well to learn of potential pitfalls in regulation from countries like Canada and the US, who are already significantly ahead in terms of their regulatory frameworks, as it is starting from a very minimal system. Simultaneous reform across three interdependent areas is required as a priority: scope, monitoring and enforcement. Australia must:

1. **Expand definitional scope of lobbying to include paid and unpaid in-house lobbyists and lobbying activity directed at any Member of Parliament;**
2. **Require the disclosure of the subject matter of lobbying in a timely manner in addition to current disclosure requirements;**
3. **Develop a robust capacity for financial, criminal and reputational sanction of lobbyists, with an additional capacity for lobbying prohibition particular to third party lobbyists.**

By reforming the current deficiencies of the Code in such a manner, there will have been a significant step towards transparency in service of the integrity of representative democracy in this country. That is not to say that ongoing work will not be required to address other concerns, indeed the

process of lobbying regulation is often a slow and painstaking one, requiring vigilance for loopholes that undermine the system, ingenuity in finding the best possible method of closing those loopholes, and prudence in knowing when the pursuit of transparency may be counterproductive to the higher goals regulation aims to achieve.

Australia's Transparency Deficit: Reforming Federal Lobbying Regulation

Chapter 1 Introduction

Whilst lobbying as an activity is widely recognised as a fundamental aspect of democratic participation, its tendency to occur behind closed doors creates a tension with a competing democratic right of public scrutiny.[1] The current lack of substantive transparency measures in Australia at the federal level does little to address this tension.[2] Any attempt to regulate lobbying must be mindful of this tension, and should seek an appropriate balance between transparency and participation in order to protect the integrity of our representative democracy. Our conceptions of democracy dictate what kinds of political activity are acceptable in our society, and what kinds of activity may be legitimately constrained.

In Australia, the system of representative democracy establishes chains of accountability that require the people to have a capacity to scrutinise their elected representatives in order to exercise their sovereignty.[3] As a result, political activity may be seen to attract a degree of impropriety when it seeks to influence public policy via methods which, intentionally or unintentionally, obfuscate the decision-making process. The democratic integrity of federal politics is therefore vulnerable, and will continue to be so, to the extent that there is a deficit between the expectations the public hold about their capacity to scrutinise, and the information that is available for them to exercise that right. This vulnerability is currently faced by many jurisdictions, and as such there has been considerable focus both nationally and internationally on increasing the transparency of the decision-making process.[4]

The current Australian lobbying framework centres on *the Lobbying Code of Conduct* (the Code). Introduced in 2008, the Code stood in stark contrast to the environment that had prevailed after the previous lobbying scheme

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[1] Organisation for Economic Co-operation and Development, Lobbyists, Government and Public Trust. (Paris: OECD, 2009) 18.

[2] John Warhurst, "Regulating Lobbyists: The Rudd Government's New Scheme [Revised and Updated Version of the Lobbying Code of Conduct: An Appraisal (2008).]," Public Administration Today July-Sept.16 (2008): 51-52.

[3] Richard Mulgan and John Uhr, "Accountability and Governance," Are You Being Served?: State, Citizens and Governance, eds. Glyn Davis and Patrick Weller (Crows Nest: Allen & Unwin, 2001) 153-54.

[4] See: Organisation for Economic Co-operation and Development, Lobbyists, Government and Public Trust. Also: Deirdre McKeown, Codes of Conduct in Australian and Selected Overseas Parliaments. (Canberra: Parliament of Australia, 2 June 2011).

was disbanded in 1996, leaving lobbying activity to occur effectively unchecked.[5] The current scheme is based around the framework established by Western Australia after the Burke-Grille affair in 2006, which has been used as a model for increasing transparency in state jurisdictions across Australia.[6]

The regulatory response to the Burke-Grille affair was to clamp down on the particular weaknesses exposed by the case, to the extent that Ministers were explicitly banned from meeting with Burke. More generally however, the incident concerned a consultant lobbyist engaged in corrupt lobbying practices with government ministers and officials. The federal scheme as a result targets only third party lobbyists, and as such has been criticised for its narrow scope.[7]

Under the provisions of the Code, a third party lobbyist who communicates with a Government representative "in an effort to influence Government decision-making", is a 'lobbyist' for the purpose of the framework, and as such must submit certain details about their business to the Register of Lobbyists.[8] The Code defines a 'Government representative' as:

> 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]

Whilst Government representatives are prohibited from "knowingly and intentionally" being lobbied by non-compliant lobbyists,[10] the Code and accompanying Standards of Ministerial Ethics act essentially as guidelines and have no substantive method of enforcement. The Secretary of the Department of Prime Minister and Cabinet *may* deny registration or deregister a lobbyist under certain circumstances, or *must* do so under the absolute discretion of the Special Minister of State for the Public Service

[5] John Warhurst, Behind Closed Doors: Politics, Scandals and the Lobbying Industry (Sydney: UNSW Press, 2007) 65.
[6] John Hogan, Raj Chari and Gary Murphy, "Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?," Journal of Public Affairs 11.1 (2011): 37.
[7] Marian Sawer, Norman Abjorensen and Phil Larkin, Australia: The State of Democracy (Leichhardt: The Federation Press, 2009) 200.
[8] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. (Canberra: DPMC, June 2011) s.3.
[9] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s.3.3.
[10] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s.4.1

and Integrity.[11] Whilst some, such as Tham, would argue that this sanction is a severe disincentive to deviance as Government representatives are theoretically prohibited from being a party to lobbying activity by non-compliant lobbyists,[12] others would argue that the Code's lack of teeth makes it likely that it would only be adhered to by those who would act ethically in any case, and that deregistration from such a system on the basis of existing non-compliance has little corrective value in and of itself.[13] Correspondingly, Warhurst has argued that the timidity of the framework raises questions as to how seriously it will be taken by those engaged in lobbying.[14] This criticism holds particular significance when the current framework is juxtaposed to 1983-1996 Australian lobbying scheme, which was unremarkably abolished after suffering from a lack of teeth, a lack of compliance, and a lack of relevance.[15]

Internationally there has been increasing movement towards transparency in decision-making. The Organisation for Economic Co-operation and Development (OECD) has released a series of reports attempting to provide a framework for the regulation of lobbying following intensifying concern about the conduct of lobbying activity, and countries such as Canada, the United States, Poland, Hungary and France have approved lobbying legislation.[16] Federal lobbying regulations in both Canada and the United States have been rated as some of the most highly regulated systems in the world, with their frameworks growing increasingly robust over time.[17] An international survey on lobbying regulations by Hogan et al. has found that roughly three quarters of lobbyists across a spread of low to highly regulated systems believed that regulations promoted transparency.[18] When compared internationally, Australia is unique in both these respects. Firstly, as Hogan et al. argue, Australia stands outside the trend of increasingly robust legislation as the only country to have introduced, abolished, and reintroduced lobbying regulation with a comparably narrow scope.[19] Secondly, it is distinguishable in that less than a quarter of lobbyists feel

[11] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s.10.2 and 10.4.
[12] Joo-Cheong Tham, Money and Politics: The Democracy We Can't Afford (Sydney: University of New South Wales Press Ltd, 2010) 244.
[13] Conor McGrath, "Towards a Lobbying Profession: Developing the Industry's Reputation, Education and Representation," Journal of Public Affairs 5.2 (2005): 130. Also: John Hogan, Gary Murphy and Raj Chari, "Regulating the Influence Game in Australia," Australian Journal of Politics & History 57.1 (2011): 107.
[14] Warhurst, "Regulating Lobbyists: The Rudd Government's New Scheme [Revised and Updated Version of the Lobbying Code of Conduct: An Appraisal (2008).]," 51.
[15] Warhurst, Behind Closed Doors: Politics, Scandals and the Lobbying Industry 28-29.
[16] Organisation for Economic Co-operation and Development, Transparency and Integrity in Lobbying. OECD, 2010) 2.
[17] Hogan, Murphy and Chari, "Regulating the Influence Game in Australia," 109.
[18] Hogan, Chari and Murphy, "Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?," 42.
[19] Hogan, Chari and Murphy, "Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?," 35; 37.

that the current incarnation of lobbying regulation helps to ensure transparency.[20] A history of timid approaches to regulation and underwhelming results in an era of increasing public demand for transparency in governance sets the context in which this report assesses Australia's lobbying framework.

This report will examine how the regulation of lobbying might be reformed to deliver practical progress towards transparency. Building off the broad framework for transparency and integrity in lobbying established by the Organisation for Economic Co-operation and Development, it will focus on what may be seen as the three core areas of a functioning regulatory system: scope, monitoring and enforcement.[21] It will argue that in order to deliver practical reform, one must consider how to provide the greatest benefits to our representative democracy by increasing the transparency of our political system without unreasonably inhibiting participation, and using this it will assess possible reforms that should hold the highest priority, and the pitfalls regulators may encounter, across the three areas.

[20] Hogan, Chari and Murphy, "Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?," 42.
[21] Organisation for Economic Co-operation and Development, Transparency and Integrity in Lobbying. 3-5.

Chapter 2 Reforming the Scope of Lobbying

The definition of 'lobbying' is critical to any framework attempting to regulate the activity, and the complexity of the task should not be underestimated. Without a broad definition, it is possible that a majority of the activity that should be captured will slip through, as is the case with the current federal definition of lobbyists as third party actors.[22] However by expanding the definition too far, one risks encroaching upon democratic interaction to an extent that would ultimately be counterproductive to the aim of representative government. Therefore, in considering the scope required, it is necessary to have a clear understanding of the aim sought by regulation. As has been established in the introduction, the overarching aim of regulation is to protect the integrity of representative government. Transparency protects integrity by helping to expose and combat both realities and perceptions of improper influence in decision-making by facilitating public scrutiny. However, transparency may also be seen as detrimental to representative democracy, and it is important to strike a balance to achieve the overarching aim.

Whilst too little transparency is conducive to improper influence and undermines public trust, too much transparency inhibits participation in the decision making process, and thus both are detrimental to the integrity of representative democracy. As Maskell argues, there has been recognition by the Supreme Court in the United States of the "inherently chilling" effect of disclosure regulation on political participation.[23] Whilst the US case is distinguishable in that rights such as freedom of speech and freedom of association are explicitly protected within the constitution, it is nonetheless relevant to the Australian situation that transparency measures inevitably act as a deterrent to participation to a greater or lesser degree.[24] This is arguably due to the fact that disclosure requirements increase the transaction cost of engaging in political participation, minimally by increasing the time burden of such activity, but perhaps also by exposing participants to challenge in a public forum, against which they may not have the fortitude to engage, regardless of the substance of their contribution. It is therefore important to consider what resources may be available to potential participants in the decision-making process when considering what sort of definitional scope for 'lobbying' is going to maximise the benefits provided through transparency, whilst minimising its detrimental impact on participation, to

[22] Warhurst, "Regulating Lobbyists: The Rudd Government's New Scheme [Revised and Updated Version of the Lobbying Code of Conduct: An Appraisal (2008).]," 51-52.
[23] Jack Maskell, Grassroots Lobbying: Constitutionality of Disclosure Requirements. Congressional Research Service, January 2007) 5.
[24] Maskell, Grassroots Lobbying: Constitutionality of Disclosure Requirements. 4.

provide the greatest overall benefit to our system of representative democracy.

This chapter shall examine the definition of 'lobbying' for the purposes of regulation, by looking at the advantages and disadvantages of taking a broad or narrow approach. It will examine reform in the three necessary tiers of the lobbying definition: who, doing what, to whom. I will argue firstly that the 'who' must be substantially expanded, beyond its current delimitation at third party lobbyists, to include all groups that would seek to influence the decision-making process. However, any expansion must stop short of individuals engaging with their representatives. Secondly, the scope of activity captured by the current framework should be clarified and assessed for potential weaknesses which may undermine enforcement in light of the experiences in jurisdictions such as Canada. Thirdly, I will argue that the scope of those considered lobbying targets should be expanded, from its current 'Government representatives', to include all Members of Parliament by virtue of the power they hold in decision-making, a power which in practice fluctuates but is quite prominent in our current political circumstances. Finally by addressing the concerns at each tier with reference to the aim of maintaining the integrity of representative democracy, I will propose that the best working definition of 'lobbying', to be used in the remainder of this report, is:

Any group which seeks to communicate with Government representatives or Members of Parliament with regard to 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, excepting those exemptions as outlined in section 3.4 of the Code.[25]

Who Lobbies?

Third party lobbyists

Across various jurisdictions and throughout the literature on lobbying, a variety of actors are considered to be 'lobbyists'. These definitions vary widely in scope. Perhaps the narrowest definition limits the field of actors to those known as third party lobbyists or consultant lobbyists, as is the case in with the current Australian Lobbying Code of Conduct.[26] Third party lobbyists are those traditionally conceptualised under the term, the hired guns who help convey a third party's interests to representatives, most often for a fee.

[25] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s3.4.
[26] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s3.5.

Using the aim of increasing transparency without counterproductively inhibiting participation, it is clear that there could be substantial benefit to representative democracy by increasing the scope of regulation beyond the limits of third party lobbying. Limiting the scope of regulation to third party lobbyists ignores a significant portion of lobbying activity.[27] Whilst the focus on these actors appears to be a benchmark in regulatory systems, it does not address the influence of other paid actors such as in-house lobbyists, or those who may be working in a voluntary capacity in either a consultant or in-house fashion. Whilst it is difficult to estimate the size of this omission due to the current opacity of lobbying and disclosure, as Warhurst argues, significant lobbying actors that would be exempt under the current scheme include: "corporations, churches, unions and big national pressure groups like the Business Council of Australia, the Australian Medical Association, [and] the Australian Conservation Foundation".[28]

The Government's response to criticism of the narrow definitional scope is that the Code's primary intent is to allow *Government representatives* to know who they are meeting with and who is represented.[29] In the Government's view, as it should be clear whose interests in-house lobbyists represent, there is no benefit to transparency in extending the Code to include them.[30] However this is a dubious justification, as it appears to be inconsistent with the circumstances out of which the impetus for regulation arose, and it downplays the stated intention of the act. Further, as will be argued in the next chapter, the register as it stands does not ensure this aim is met, as it does not force the disclosure of the primary beneficiary behind the lobbying.

Impetus for the code

As it was briefly covered in the introduction, the impetus for the regulation of lobbying both federally and across many state jurisdictions was the Brian Burke scandal in Western Australia.[31] As a former Labor politician, Burke

[27] Warhurst, "Regulating Lobbyists: The Rudd Government's New Scheme [Revised and Updated Version of the Lobbying Code of Conduct: An Appraisal (2008).]," 51. Also: The Senate Standing Committee on Finance and Public Administration, Knock, Knock... Who's There? The Lobbying Code of Conduct. (Canberra: The Senate Standing Committee on Finance and Public Administration: Parliament of Australia, 2008) 22.

[28] Warhurst, "Regulating Lobbyists: The Rudd Government's New Scheme [Revised and Updated Version of the Lobbying Code of Conduct: An Appraisal (2008).]," 51-52.

[29] Australian Government, Government Response to Senate Standing Committee on Finance and Public Administration Report: Knock, Knock... Who's There? The Lobbying Code of Conduct. (Canberra: The Senate Standing Committee on Finance and Public Administration: Parliament of Australia, January 2009) 4.

[30] Australian Government, Government Response to Senate Standing Committee on Finance and Public Administration Report: Knock, Knock... Who's There? The Lobbying Code of Conduct. 4.

[31] Hogan, Chari and Murphy, "Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?," 37.

had used his influence within the Party and the Government to secure beneficial outcomes for his clients, with his and his partner's influence over the decision-making process apparently so considerable that Paul Keating had said of them: "They're like the wallpaper over there. You can't visit Perth without running into them".[32] Such circumstances arguably indicate that the Burke scandal arose because Government representatives knew the lobbyists *too well*, rather than not well enough. It would seem incoherent then to conclude that the primary aim of a Code catalysed by such a scandal would be ensuring *Government representatives* were aware of who was lobbying them, and requiring the disclosure of information that, it is not unreasonable to assume, would arise as a matter of course in any contact from which action was to be taken. Such a contention by the Government also seems to be at odds with the stated intention of the Code.

The Government's explanation for the limitation of the Code to third party lobbyists is arguably inconsistent with the stated intent of the framework. According to its preamble:

> 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.[33]

A justification based on the ability of Government representatives, who are already members of the decision-making process, to 'better' understand that process does not make public expectations of transparency the primary referent of the aim. Arguably to meet such an aim, the transparency measures must benefit of the *public's* capacity to scrutinise proceedings. As will be argued in the next chapter, the current disclosure requirements focus too heavily on basic information regarding the lobbyist for an average Australian to be able to come to an informed assessment off which to base her trust in the integrity of government. If we accept that the primary aim of the Code is, as stated, to benefit the public, then the Government's justification for limiting the Code to third party lobbyists must yield. The limitation of the Code not only undermines its own stated aim; it may also be seen to undermine the integrity of representative democracy by acting to unduly skew the costs of participation.

Skewed costs of participation

Limiting the scope of regulation to third party lobbyists may disproportionately target lobbying by small to medium groups as opposed to larger ones. The disparity of resources between these groups means that

[32] Warhurst, Behind Closed Doors: Politics, Scandals and the Lobbying Industry 58.
[33] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s.1.4.

those less able to maintain an in-house lobbying capacity, and therefore more likely to utilise a third party agency, face the increased participation costs of regulation. Conversely those with the resources to maintain an in-house lobbying capacity escape the costs imposed by regulation.[34] As a result, not only does a focus on third party lobbyists miss actors with a substantial capacity to influence policy processes, it also imposes a disproportionate burden on those who may have fewer resources available to present their interests to decision makers.[35] In the absence of a reasonable justification to limit regulation to third party lobbyists, and in light of the capacity of such a limitation to impose a disproportionate burden on participation, there is a substantial case for expanding the definition.

Expanding the scope to in-house lobbyists

Widening the definitional scope, in-house lobbyists are those who act on behalf of their own corporation or organisation. Jurisdictions such as the US and Canada make remuneration a necessary component of this class.[36] In terms of financial thresholds, Canada requires only that a lobbyist is to be paid or expects to be paid in excess of "reimbursement of reasonable expenses such as travel",[37] whereas the US system requires registration when expenses exceed US$11500 per quarter.[38] In conjunction with the financial threshold, both jurisdictions also have a workload threshold whereby, to be registrable, lobbying activity must exceed: the *equivalent* of 20 percent of the duties of a single paid employee over a monthly period, in Canada;[39] or 20 percent of the duties of a single employee in a three month period, *and* consist of more than one lobbying contact, in the US.[40] Whilst such an approach benefits transparency by increasing the extent of activity subject to disclosure regulations, it is problematic in that it appears to limit the scope without sufficient justification.

The 20 percent rule

The implementation of a 20 percent rule creates difficulties for monitoring, and loopholes undermining the spirit of the regulation. The notion that there

[34] The Senate Standing Committee on Finance and Public Administration, Knock, Knock... Who's There? The Lobbying Code of Conduct. 9; 22.
[35] Hogan, Chari and Murphy, "Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?," 45.
[36] Organisation for Economic Co-operation and Development, Lobbyists, Government and Public Trust. 51.
[37] Office of the Commissioner of Lobbying of Canada, Guides to Registration, 14 January 2011 January 2011, OCLC, Available: http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/h_nx00278.html#who, 20 September 2011.
[38] Office of the Clerk US House of Representatives, Lobbying Disclosure Act Guidance, 15 June 2011 January 2008, Office of the Clerk US House of Representatives,, Available: http://lobbyingdisclosure.house.gov/amended_lda_guide.html#section4, 15 October 2011.
[39] Office of the Commissioner of Lobbying of Canada, Guides to Registration.
[40] Office of the Clerk US House of Representatives, Lobbying Disclosure Act Guidance.

is a permissible amount of lobbying activity before one is subject to registration creates a significant grey area for monitoring insofar as non-compliant behaviour may be given the benefit-of-the-doubt and assumed compliant. For example, if a Government representative was approached by an unregistered lobbyist, they arguably have little capacity to establish that lobbying constitutes less than 20 percent of that individual's activities, particularly given the individual is not required to report their activities until such time as they exceed the threshold. As the Canadian Commissioner of Lobbying argues, this provision creates an unknown quantity which not only compromises the enforcement of regulation, but also renders the exemption's own goal of capturing 'significant' lobbyists whilst ignoring 'occasional' lobbyists incoherent.[41] This loophole also undermines the spirit of other segments of the act, as a former office holder would not violate post-separation employment restrictions provided they did not exceed the 20 percent rule.[42] Given Australia's current regulations hold similar prohibitions on post-separation employment, and that their spirit has already been circumvented under the current exemption for *all* in-house lobbyists, this loophole should not be overlooked.[43] The level of precision that would be required to allow an individual's work to be accurately quantified, combined with the level of disclosure that would be required to ensure compliance, necessarily including disclosure by those *not* eligible to register, would arguably make a 20 percent rule more of a burden than a benefit to any *coherent* system. The financial requirements of the US or Canadian models also risk undermining the coherency of an Australian system.

Financial thresholds for registration

Imposing a financial threshold to qualify as a lobbyist undermines the aim of transparency on the basis of an unjustified assumption of malignancy. If the aim of lobbying regulation is to provide the greatest benefit to transparency, then scrutiny should not be focussed on the search for the undue influence *of money*, but rather for undue influence. Noting the counterbalancing aim of not unreasonably inhibiting participation in the political process, the rationale for exempting unpaid lobbyists, as expressed by the Commissioner for lobbying, is that "it *might* limit Canadians' access

[41] Office of the Commissioner of Lobbying of Canada, Administering the *Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years. OCLC, March 2011) 15-16.

[42] Office of the Commissioner of Lobbying of Canada, Administering the *Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years. 16.

[43] See: Department of Prime Minister and Cabinet, Answers to Questions on Notice - Pm45: Government Communications Contract - Mr Marshall and Alcatel. (Canberra: Senate Finance and Public Administration Legislation Committee: Parliament of Australia, 2010).

to government decision-makers".[44] In assessing such an argument for exclusion from the scope of regulation one must decide what is to be considered a 'limitation' to participation, and whether or not that limitation is justifiable. In a US case concerning the Foreign Agents Registration Act, the federal district court found that it "neither limits nor interferes with freedom of speech" to require "persons carrying on certain activities to identify themselves by filing a registration statement".[45] Particularly when there is no financial bar to registration, it is dubious to suggest that such a requirement would suddenly dissuade groups, who have already organised around an interest on a voluntary basis, from participation. Even if it would do so to a degree, there is surely an onus on those arguing for an exemption to show why such dissuasion should be distinguished from someone who would otherwise engage in *paid* lobbying but for the burden imposed by registration. The aim of lobbying regulation is to increase transparency to guard against undue influence, without *unreasonably* inhibiting participation. As Graziano argues, "the pursuit of a cause does not in any way imply motivations that are more altruistic or disinterested than others".[46] It would therefore be a disservice to the right of public scrutiny to give unpaid in-house lobbyists an exemption to registration as a mere result of assuming altruism and caprice. There are limits however to how far transparency via lobbying regulation can reasonably go.

Individuals as lobbyists

By basing our definition of who lobbies solely on intent, we reach perhaps the widest possible scope for the term. Borrowing from Young and Everitt's definition of advocacy groups, a lobbyist may be thought of as anyone who "seeks to influence government policy, but not to govern".[47] Similarly, Nownes defines lobbying as "an effort designed to affect what the government does".[48] The common thread of both is that lobbying is the act of seeking to affect the decision-making process through an individual who has a direct say in that process. Such definitions, absent any further restrictions, would make the scope of lobbying so wide that it would capture not only third party and in-house lobbyists, but also individuals, perhaps as constituents engaging in the political process.[49] Whilst these three authors do in fact draw a line, at the very lowest point, between one individual

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[44] Office of the Commissioner of Lobbying of Canada, Administering the *Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years. 16. (Emphasis added)
[45] Maskell, Grassroots Lobbying: Constitutionality of Disclosure Requirements. 8.
[46] Luigi Graziano, Lobbying, Pluralism and Democracy (New York: Palgrave, 2001) 202.
[47] Lisa Young and Joanna Everitt, Advocacy Groups (Vancouver: UBC Press, 2004) 5. (Emphasis removed)
[48] Anthony Nownes, Total Lobbying: What Lobbyists Want (and How They Try to Get It) (New York: Cambridge University Press, 2006) 5. (Emphasis removed)
[49] Nownes, Total Lobbying: What Lobbyists Want (and How They Try to Get It) 6-7. Also: Warhurst, Behind Closed Doors: Politics, Scandals and the Lobbying Industry 65.

seeking to influence policy and two, in order to excise what could be thought of as the individual constituent from their definition, there is a lack of an explicit rationale for doing so.[50]

Nownes is most explicit in erring to provide a case for the exclusion of individuals, stating, during his definition of 'lobbyist': "It is tempting to define a lobbyist simply as 'someone who lobbies'… since not all of us are lobbyists, this simple definition will not do."[51] This again highlights the complexity of defining lobbyists, as whilst it may appeal to commonsense that there is a distinction between a third party lobbyist and an elderly gentleman making an appointment to speak with his MP about for instance, aged care, it is difficult conceptually to say that someone participating in lobbying activities is not a lobbyist. A further layer of complexity is added when one considers that the individual may be incredibly powerful; the 'commonsense' distinction arguably falters if the elderly gentleman in fact becomes Rupert Murdoch. It is at this level that the practical limitations of lobbying regulation become apparent.

A case for exclusion

Extending the scope to include all those who 'lobby', broadly defined, is consistent with the aim of transparency, but may have a chilling effect on political participation. Whilst this criticism was insufficient in the case of in-house lobbyists to limit the scope of definition, the case of individuals lobbying government is distinguishable. Individuals do not necessarily have the support or resources available to those in organisations, and as such it is more plausible that the extra burden of regulation would inhibit an individual from writing a letter or speaking with an MP. Where there has been an insufficient impetus to build an organisation around comparable objectives, then it could be expected that the likelihood of a particular viewpoint being expressed to a decision-maker would be significantly diminished by comparison if the individual was dissuaded from participating. This is not to say that individuals should have a blanket exemption from transparency measures, merely that being included in a system which places a significant responsibility on the lobbyist may place an unreasonable burden on *these* actors. It may be helpful to conceptualise them as lobbyists in a broad sense who are exempt from lobbying regulation in deference to the counterbalancing aim of political participation, and whilst this may also allow certain powerful individuals to slip through, we must acknowledge, as Warhurst argues, that "some loopholes will never be fixed".[52]

[50] For example, Nownes, Total Lobbying: What Lobbyists Want (and How They Try to Get It) 7.
[51] Nownes, Total Lobbying: What Lobbyists Want (and How They Try to Get It) 7.
[52] Warhurst, Behind Closed Doors: Politics, Scandals and the Lobbying Industry 75.

The optimal scope for the 'who'

As a result, arguably the best results for the transparency of decision-making in Australia would be achieved by setting the scope of 'who lobbies' wide enough to capture third party lobbyists, and both paid and unpaid in-house lobbyists. Doing so enables public scrutiny to look at influence generally, without prematurely narrowing the field to areas assumed to be more suspicious, and resistant to the burden of regulation. Drawing the line at organised interests also has the benefit of protecting those individuals who are more vulnerable to the burden of regulation, though it may be of interest to examine possible ways transparency could still be pursued without compromising participation by these actors. Moving to the second tier of definition, it is important to consider what activities third party and in-house lobbyists must conduct in order to be considered a regulated 'lobbyist'.

What is Lobbying Activity?

Defining lobbying activity sets the boundaries of what types of action conducted by a lobbyist would require registration or reporting. Under the current Australian framework, lobbying activity is defined as:

> 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…[53]

Supplementing that definition, the Code defines 'communications with a Government representative' as including "oral, written and electronic communications".[54] The Code's definition includes a number of exemptions, primarily surrounding attempts to influence policy for which there are already degrees of transparency, for instance hearings of committees or statements made in a public forum.[55] In terms of reform potential, the definition is largely adequate for its purpose, however, based on international experience there is one issue with potentially significant impacts for monitoring and enforcement to consider regarding the interpretation of the stated necessary condition of any lobbying activity.

In an effort to influence

There may be considerable difficulty, both in terms of abiding by the Code, and sanctioning breaches of the Code, caused by the interpretation of the

[53] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s3.4.
[54] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s3.2.3.2
[55] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s3.4 (a), (b), (e).

requirement 'in an effort to influence'. Using Dahl's definition of influence, one would arguably have to show that a 'lobbyist' acted with intent to induce a Government representative to "act in some way they would not otherwise act",[56] in order to show they had breached the Code. Without a clearer understanding of the enforcement mechanisms that would apply, it is difficult to say what burden of proof would exist. In the current situation where the Special Minister of State holds absolute discretion,[57] the burden would arguably not be the same as if the framework included administrative or criminal penalties. Indeed, in Canada, the requirement that lobbying activities 'attempted to influence' was removed from the *Lobbyists Registration Act* in 2005.[58] In pursuit of criminal sanctions under Canada's scheme, the Crown Prosecutor had been forced to abandon a number of prosecutions due to the high standard of proof and the insufficiency of evidence, ultimately leading to a revision of the requirement under the act to communications "in respect of" registrable topics.[59] Similarly US legislation does not refer to attempts to influence.[60] In making a decision about the implications of the wording of the Code, it would be advisable to acknowledge the Canadian experience and seek legal advice particular to the Australian context to avoid unexpected difficulties in enforcement.

At Whom is Lobbying Targeted?

Finally, in determining the scope of regulation, it is important to consider whom lobbying targets, and whether those individuals are adequately captured by the code. As has already been covered, the current Australian framework limits the scope of targets to 'Government representatives'. The problem with such a definition is that it effectively limits the coverage of the Code to those lobbying the executive, presumably on the basis that in Australia's political history, the executive has for the most part held an iron grip on at least the lower house. However, returning to our aim of increasing the transparency of our political system without unreasonably inhibiting participation, there is a compelling case for expanding the scope of regulated lobbying targets to include all Members of Parliament.

Expanding lobbying targets to include Members of Parliament
Whilst the House of Representatives has primarily been held by a majority executive, the Senate has most often been subject to a balance of power

[56] (Quoting Dahl), Graham Wootton, Interest-Groups (New Jersey: Prentice-Hall Inc, 1970) 76.
[57] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s10.4.
[58] Office of the Commissioner of Lobbying of Canada, Administering the *Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years. 12.
[59] Organisation for Economic Co-operation and Development, Lobbyists, Government and Public Trust. 55.
[60] Gareth Griffith, The Regulation of Lobbying. NSW Parliamentary Library Research Service, June 2008) 11.

arrangement, giving significant power to independents and minor parties in the decision-making process.[61] Given that the Government can rarely guarantee passage through both houses in its own right, those with the power to allow or disallow passage can become the targets of very intense lobbying.[62] As former Senator, Andrew Murray has argued, in the balance of power, he has had carriage of decisions affecting tens of billions of dollars.[63] Given Australia's bicameral political structure, and the prominence of the Senate as a check on the Government's legislative autonomy, the failure to include Senators in the scope of regulation is a significant loophole from a strictly historical viewpoint. Looking at the structural makeup of the Australian system however, the decision not to include all Members of Parliament seems to illustrate a significant overreliance on the assumption of majority government and party discipline.

As current political circumstances demonstrate, a system of lobbyist regulation needs to be broad enough to encompass the flexibility of legislative decision-making. With a current minority Government relying on the support of crossbench independent and Greens MPs in order to pass legislation through the House of Representatives, a rare situation comparable to the Senate has unfolded. Given that the requirement to pass legislation in either House, however, is a majority vote, it is prudent to consider all possible formulations of a vote in order to determine where lobbying activity may occur, and as such, who should be included in the scope of regulation. As recent debate about asylum seekers has shown, it is by no means structurally impossible for the balance of power to be held by the opposition. Taking the issue of same-sex marriage, an authorised breakdown of party discipline in the form of a conscience vote would again change the targets of lobbying, and indeed individuals may even be targeted to break party discipline by crossing the floor. A system which focuses exclusively on Government representatives on the basis of an overreliance on the assumption of majority government and party discipline ignores the structural realities of our political system. Expanding the scope of regulation to encompass all parliamentarians however would give the regulatory framework the capacity to provide transparency through different permutations of decision making.

Recommended definition

The Code's current definition of lobbyist is inadequate to meet the aim of meeting public expectations of transparency. Having had consideration of the possible chilling effects of over expansion, it is proposed that the

[61] J. Warhurst, "Locating the Target: Regulating Lobbying in Australia," Parliamentary Affairs 51.4 (1998): 543.
[62] Senator Bob Brown, Parliamentary Debates. The Senate, (13 May 2008) 1514.
[63] The Senate Standing Committee on Finance and Public Administration, Knock, Knock... Who's There? The Lobbying Code of Conduct. 14.

following definition would provide practical reform towards transparency, and overall would contribute to the integrity of representative democracy in Australia: Any group which seeks to communicate with Government representatives or Members of Parliament with regard to 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, excepting those exemptions as outlined in section 3.4 of the Code.[64] Whilst this definition substantially expands the scope, without a meaningful capacity to monitor there will be little real benefit to transparency.

[64] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s3.4.

Chapter 3 Reforming the Capacity to Monitor

Monitoring lobbying activity not only provides the substantive 'window' of transparency through which trust in the integrity of government, and conversely the detection of impropriety, may occur, it also fosters a capacity for greater participation in the political process. There is a perception by many that there are vested interests influencing the decision-making process with resources that far surpass the capacity of regular citizens, and that the unlevel playing field that results undermines the concept of merit-based decision making.[65] Unfortunately, as those such as Tham argue, inequality in resources is a structural issue in our society, making it unlikely that we will ever have a completely level playing field.[66] Acknowledging that reality, it is still incredibly useful to have some idea of how unlevel the playing field is, and indeed, for that information to be of any use, one must know whether or not there is a game on at all.[67] A robust monitoring framework must, as a minimum, allow actors to see whether or not a decision is taking place in a particular area, and give some idea as to the nature of the lobbying that has taken place to allow for an assessment of process. This section seeks not to make suggestions as to what would be the best mechanism within current Australian laws and administrative bodies to implement a monitoring system, but only to outline the qualities it may have and issues needing consideration.

Disclosure Requirements

Disclosure provisions set out the minimum requirements as to what must be made publically available. Both Australia and Canada maintain online registers through which this information can be viewed. Currently, the Lobbying Code of Conduct specifies that a third party lobbyist must disclose:

> (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… and if so, the date the person became a former government representative; and

[65] See: Sawer, Abjorensen and Larkin, Australia: The State of Democracy 148-49. Also: Carmen Lawrence, Railroading Democracy (Canberra: Australian National University: Democratic Audit of Australia, 2007), 3.
[66] Tham, Money and Politics: The Democracy We Can't Afford 253-54.
[67] Tham, Money and Politics: The Democracy We Can't Afford 231.

(iv) … the names of clients on whose behalf the lobbyist conducts lobbying activities.[68]

Arguably these provisions deliver little transparency to average Australians, or even those who are reasonably well informed about particular policy areas. They provide no clear indication of when lobbying activity may have taken place, or who stood to benefit, and absolutely no indication of who was lobbied, or what the general subject matter of the lobbying was.

Whom, When and on What

The disclosure of whom was lobbied, when and on what subject matter allows others to determine what areas are being contended, and as a result to both monitor and participate in the decision-making process. There is a significant risk when this sort of information is not disclosed that decisions may be made before potential participants realise that there is an opportunity to influence, or that there were hitherto undisclosed opponents.[69] As Tham argues, when lobbying occurs in secret and is not apparent until after a decision has been made, then the integrity of representative democracy is compromised, as when only a limited number of parties have been able to express their viewpoints and indeed to challenge the assertions of others, then it is dubious to assert that the decision has been made in the public interest.[70] In order to avoid such an outcome, disclosure should provide details as to who was lobbied and on what subject matter *within a timely period*, as it is, for example, little use to the outcome to have such information disclosed every six months if a decision is made over three. Under the Canadian model, once registered, lobbyists must complete monthly communications reports when there has been contact with a Designated Public Office Holder, with conditions as to registration after initial contact varying between consultant and in-house lobbyists.[71] Such a model would seem to allow lobbyists with interests in particular subject matters to make their own representations in a timely fashion, whilst also reducing the burden of regulation during periods in which lobbying activity is not occurring. Whilst beneficial, the disclosure of subject matter has been the subject of particular criticism.

Disclosure of subject matter

Disclosure of the subject matter of lobbying has been criticised as breaching the privacy of lobbying. Submissions to the NSW Independent Commission Against Corruption (ICAC) during a 2010 inquiry into corruption risks argued that forcing the disclosure of particulars in meetings may inhibit

[68] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s5.1 (a). (Emphasis added)
[69] Tham, Money and Politics: The Democracy We Can't Afford 231.
[70] Tham, Money and Politics: The Democracy We Can't Afford 220-21.
[71] Office of the Commissioner of Lobbying of Canada, Guides to Registration.

frank exchange, as ideas may be unduly conflated and scrutinised as policy proposals, or the disclosure of commercial-in-confidence issues may damage a lobbyist's or client's interests.[72] It would be beneficial to distinguish between degrees of disclosure regarding subject matter to assess this claim. Arguably if we are speaking of subject matter in its more abstract sense, taking a form which would enable another interested party to know that there is activity on a particular topic without necessarily knowing the nature of that activity, then it should not unduly compromise the interests of the disclosing party. If however we are speaking of more detailed minutes of meetings, then as the ICAC acknowledged, existing legal protections and *time limited* privacy protections for those conversations should apply.[73] It is possible then that initial disclosure could be of a degree adequate to combat negative outcomes for participation whilst protecting the privacy concerns of lobbyists and the lobbied, whilst supplementary disclosure would facilitate the longer term aims of scrutinising the nature of the activity after those legitimate privacy concerns have passed. In the interest of establishing a culture of transparency however, there should be an onus to show that there is a legitimate reason to withhold disclosure, rather than making it a default position. Perhaps as a result of the desire to maintain as much privacy as possible, requiring the disclosure of subject matter has also been criticised for only inspiring compliance to the letter, not the spirit, of regulation.

The Canadian experience has highlighted the potential for requiring the disclosure of subject matter to be met with unconstructively vague responses. It would probably surprise few to learn that the University of Calgary lobbied on the subject matter of "post-secondary education",[74] and it illustrates, as the ICAC argued, the importance of specifying precise descriptions of what is required to ensure meaningful disclosure.[75] Noting the difficulties inherent in seeking the disclosure of subject matter, ICAC ultimately determined that such information was not required in any case as "it is the enquirer who defines the subject by searching the name of a player in a project of their interest".[76] This rests however on the problematic assumption that all those who would wish to view information regarding lobbying should already have an understanding of who the players are in any particular field.

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[72] Independent Commission Against Corruption, Investigation into Corruption Risks Involved in Lobbying. (Sydney: ICAC, November 2010) 37-38.
[73] Independent Commission Against Corruption, Investigation into Corruption Risks Involved in Lobbying. 37-38.
[74] Organisation for Economic Co-operation and Development, Lobbyists, Government and Public Trust. 69.
[75] Independent Commission Against Corruption, Investigation into Corruption Risks Involved in Lobbying. 54.
[76] Independent Commission Against Corruption, Investigation into Corruption Risks Involved in Lobbying. 54.

If one accepts that decision-makers have a responsibility to conduct public business in a transparent fashion, then they necessarily have a responsibility to provide a means for scrutiny which does not rely on external resources to be even minimally intelligible. Therefore subject matter should be seen as an integral part of monitoring, and there must be a capacity for those charged with the oversight of the monitoring system to demand further clarification of subject matter where existing provisions for specific information have not been adhered to, in order for lobbying regulation to be able to meet its aims.[77] There must also be a greater capacity to understand whose interests are being served.

Disclosure of the actual interest represented

There is currently no requirement for the actual interest being represented to be disclosed on register, undermining both the capacity of those lobbied to know who they are dealing with, and the ability of the public to scrutinise access and influence. The Code defines a client as:

> 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.[78]

Canada's framework has a similar conception of 'clients' of third party lobbyists, and the Commissioner of Lobbying has reported a trend whereby other lobbyists are being sub-contracted in order to obscure the interested party.[79] When it is considered that a number of front companies could be used for different lobbying contacts, it is clear that unless there is some requirement for the primary interest to be disclosed then it would become incredibly difficult if not impossible to track the amount of lobbying activity that an organisation is engaging in. As such, the public's capacity to determine the level of access any particular interest may have is severely compromised.

Minimum Level of Disclosure

Whilst a robust capacity to monitor may do little to alter an unlevel playing field, it has a capacity to open the processes of decision-making to public scrutiny.[80] The current level of disclosure provides little assistance to the average Australian trying to come to some sort of informed conclusion

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[77] Organisation for Economic Co-operation and Development, Lobbyists, Government and Public Trust. 70.
[78] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s3.1.
[79] Office of the Commissioner of Lobbying of Canada, Administering the *Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years. 15.
[80] Lawrence, Railroading Democracy, 6.

about what issues and interests are being dealt with by at any given time. At a minimum, the system must be reformed to provide information as to the subject matter of lobbying, both to allow people with a potentially competing interest to be heard, and to fulfil the decision-makers responsibility of conducting public business in a transparent manner. Whilst the concerns of lobbyists and the lobbied must be taken into account so as not to inhibit participation, at the same time there must be a realisation that once the immediacy of those concerns diminishes, privacy should give way to a culture of disclosure. We must also learn lessons from comparable systems such as Canada to pre-empt weaknesses that we too might face, in order to ensure that as many avenues for circumventing the spirit of the act are closed as is possible.

Chapter 4 Reforming the Capacity for Enforcement

Enforcement is a crucial area of reform if lobbying is to be brought out from behind closed doors in Australia and instead take place in a culture of transparency. As was argued in the introduction, the current Code lacks the teeth required to deter anyone who may see a benefit to straying outside of the lines. Relying on cultural change to combat deviant behaviour is putting the cart before the horse; it was an unsuccessful strategy from 1983-1996,[81] and there is little reason to think it will be successful now. Cultural change will only come about if regulators incentivise that change by imposing the sanctions necessary to increase the cost of deviant behaviour.[82] The first step to showing that regulators are serious about cultural change is to depoliticise the application of the regulatory framework. To prevent a selective application of the framework, it ought to be removed from the oversight of the executive and entrusted to an independent authority, with the capacity and integrity to ensure that the regulations are applied equally to all parties concerned, instead of being left to the ultimate discretion of a political representative.[83] In terms of what types of sanction might be applied, it is important to consider how different options may impact on representative democracy in Australia, and whether or not different actors should be subject to the same punishments. As the Clerk of the Senate, Harry Evans, raised in his submission to the 2008 Inquiry into the Code, the prohibition of Members of Parliament being lobbied by unregistered lobbyists may, depending on how it is policed, conflict with section 50 of the Constitution, regarding the independence of the Houses of Parliament.[84] As there is, at the time of writing, an inquiry underway about how a uniform Code of Conduct may apply to all Parliamentarians, I will not address the particulars of enforcement on the side of the lobbied.

Distinguishing Breaches

Drawing a distinction between a breach of the monitoring framework, and a breach of the broader principles of engagement between lobbyists and the lobbied, helps to group offences which may be best addressed by direct sanctions and offences which are better dealt with by public opinion. Breaches of the monitoring framework, for example providing inaccurate information or failing to register, are offences which are relatively simple to adjudicate and sanction provided the requirements are clearly expressed in the legislation. The primary consideration for reform in these more

[81] Lawrence, Railroading Democracy, 4.
[82] Warhurst, Behind Closed Doors: Politics, Scandals and the Lobbying Industry 76-77.
[83] Tham, Money and Politics: The Democracy We Can't Afford 248-49.
[84] Harry Evans, Clerk of the Senate, Submission 2: Inquiry into the Lobbying Code of Conduct. (Canberra: The Senate Standing Committee on Finance and Public Administration: Parliament of Australia, 2008) 1.

objective cases is whether or not there should be varying sanction structures for third party and in-house lobbyists.

Varying sanction structures

Financial and criminal penalties may reasonably be applied to both third party and in-house lobbyists without necessarily compromising the capacity for political participation. In Canada, lobbyists who fail to register, or who make false or misleading statements in their disclosures may be subject to criminal penalties up to a fine of CAN$200 000 and/or two years imprisonment.[85] Whilst such penalties are substantial, the Commissioner argues that the absence of an intermediate administrative monetary penalty system reduces the flexibility of enforcement, often leading to less serious transgressions only being dealt with by way of education.[86] Noting that weakness, a range of financial penalties could be introduced in Australia, in conjunction with criminal penalties for serious offences, and these could be applied to both third party and in-house lobbyists to give teeth to regulation and dissuade deviant behaviour. In-house lobbyists however should be distinguished from third party lobbyists when we consider the application of a sanction prohibiting lobbying, such as that included in our current code.[87]

Prohibition sanctions and freedom of communication

Whilst it may be practical to sanction third party lobbyists via a prohibition on lobbying, sanctioning in-house lobbyists in the same way arguably infringes on the implied freedom of communication. Third party lobbyists are distinguishable in that they are representing another party's interests, whereas in-house lobbyists are essentially participating in self representation. Whilst Evans argued in the context of the current Code that a prohibition on communications with unregistered lobbyists (third party) may impinge on the freedom of political communication,[88] arguably it would only do so in the context of in-house lobbyists. Whilst the High Court of Australia has recognised since 1992 an implied right to freedom of communication arising from the Constitution, this freedom is not absolute.[89] It was found in *Lange v Australian Broadcasting Corporation* that the freedom would not invalidate a law provided: 1) that "the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government…"; and 2) "that the law is reasonably appropriate and adapted to achieving that legitimate object or

[85] Office of the Commissioner of Lobbying of Canada, Guides to Registration.
[86] Office of the Commissioner of Lobbying of Canada, Administering the *Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years. 33-34.
[87] Independent Commission Against Corruption, Investigation into Corruption Risks Involved in Lobbying. 39-40.
[88] Evans, Submission 2: Inquiry into the Lobbying Code of Conduct. 2-3.
[89] Katharine Gelber, "Citizens Engaging Government," Government Communication in Australia, ed. Sally Young (Cambridge: Cambridge University Press, 2007) 270-71.

end."[90] Given that a ban on non-compliant third party lobbyists aims to protect the integrity of representative and responsible government, and does not inhibit the represented interest from participating itself, it would be difficult to see how such a prohibition would not meet those tests. In contrast, where an organisation is prohibited from representing itself, and does not necessarily have the capacity to engage alternative representation, it is easier to see how such a prohibition may fail those tests. The final disincentive which may be considered for breaches of the monitoring regime by all lobbyists is also that which may be most applicable for offences against the higher principles of the act, public reporting.

Reputational sanction

The difficulty inherent in pursuing breaches of the principles of lobbying regulation makes public reporting and shaming a desirable sanction. As has already been argued in chapter two regarding 'effort to influence', the use of subjective terminology in regulation significantly increases the difficulty of enforcement. As such, broad statements of principles that lobbyists are expected to abide, such as using "all reasonable endeavours to satisfy themselves of the truth and accuracy" of statements and information, or "not making misleading, exaggerated or extravagant claims" about their access, are not conducive to direct sanction.[91] Canada has thus far addressed this issue by distinguishing between breaches of the *Lobbying Act*, which deals with monitoring mechanisms, and breaches of the *Lobbyists' Code of Conduct*, which deals with ethical standards.[92] Those who breach the Canadian Code are named publically in reports to Parliament. The Commissioner has argued that such reports have a limited corrective impact, and that the application of financial penalties for breaches of the Code should be considered.[93] It has also been argued by McGrath that public disclosure of unethical behaviour may be seen as a competitive advantage by some potential clients willing to pursue less than scrupulous methods.[94] Whilst both these points may be valid, it is important to note that with such information available to all, MPs may become less willing to meet with lobbyists who have been named, and the media would no doubt be keeping an eye on who is meeting with whom, such that, to an as yet unknown degree in the Australian context, public opinion would make decisions about what is and is not appropriate in these more subjective areas.

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[90] David Rolph, Matt Vitins and Judith Bannister, Media Law: Cases, Materials and Commentary (South Melbourne: Oxford University Press, 2010) 39.
[91] Department of Prime Minister and Cabinet, Lobbying Code of Conduct. s.8.
[92] Office of the Commissioner of Lobbying of Canada, Lobbyists' Code of Conduct, 6 November 2009 2009, OCLC, Available: http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/h_nx00316.html, 15 October 2011.
[93] Office of the Commissioner of Lobbying of Canada, Administering the *Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years. 34.
[94] McGrath, "Towards a Lobbying Profession: Developing the Industry's Reputation, Education and Representation," 130.

Arguably it would be worthwhile to examine how such a system plays out in Australia prior to embarking down the substantially more difficult path of regulating breaches of principle.

A Robust Enforcement Mechanism

In reforming enforcement, whilst the role of education and self-regulation is important, an underlying system of enforcement is a necessary element for catalysing cultural change.[95] A dual structure of direct sanctions, whereby all lobbyists would be subject to financial and criminal penalties, with third party lobbyists also being subject to lobbying prohibition, would provide a robust mechanism for discouraging breaches of monitoring requirements. This could also be supplemented by the scheme of public reporting recommended for breaches of the more subjective lobbying principles, allowing public scrutiny to judge non-compliant lobbyists.

[95] Organisation for Economic Co-operation and Development, Lobbyists, Government and Public Trust. 89-90.

Chapter 5 Conclusion

The objective of this report was to identify possible reforms across the areas of scope, monitoring and enforcement, which might deliver practical progress towards transparency. In order to meet the criteria of practical reform, changes had to promise to provide the greatest benefit to transparency without unreasonably inhibiting participation, thus providing an overall benefit to the integrity of representative democracy in Australia. What is apparent on examination of the potential pitfalls across the three areas is that selective reform in any one area would most likely be insufficient to meet the goals that have been set; there must be reform across the board, as each section is dependent on the others. Whilst **the definitional scope of lobbying should be expanded to include paid and unpaid in-house lobbyists and activity directed at any Member of Parliament**, such a reform merely leads to a larger list of unhelpful names if it is not accompanied by meaningful disclosure, and will expand the potential for non-compliance and the development of irreverence for the framework if it is not accompanied by a robust capacity for enforcement. **There should be a requirement to disclose the subject matter of lobbying in a timely manner** to combat secret lobbying and allow those with interests in the area to make representations before decisions are made. However without an expanded definitional scope, a significant portion of lobbying activity will be exempt, and without robust enforcement the culture of privacy will render such disclosure vague and meaningless. Finally, **there should be a capacity for financial, criminal and reputational sanction of lobbyists, with an additional capacity for lobbying prohibition particular to third party lobbyists.** Such a capacity would give the regulatory framework the teeth necessary to discourage non-compliant behaviour and would act as a foundation for cultural change towards transparency. However without the change in definitional scope, a significant portion of activity would again be missed, and without changes to monitoring, the capacity of enforcement is compromised by an inability to detect actual interests and reputational sanction is largely made impotent by an absence of meaningful material with which the public may scrutinise conduct. By learning from international examples such as Canada and the US, Australia may avoid many of the pitfalls experienced in what has been a slow process of destroying loopholes, and fine tuning monitoring and enforcement. In doing so we may hopefully avoid the stagnation of the Code in its current state, and the eventuality that its lack of teeth and minimal contribution towards transparency sees it sink, like its predecessor, unnoticed into irrelevancy.

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