THE AUSTRALIAN GREENS
Submission to the Senate Finance and Public Administration Committees
Inquiry into the Lobbying Code of Conduct

Introduction

Lobbying in Australia has traditionally been a very intimate, secret affair. As one industry insider recently told *The Power Index*, "Lobbying should be quiet....You shouldn't see a lobbyist."[1]

The Australian Greens have a strong interest in strengthening the democratic system by making it the decision making process more transparent and accountable. In 2007, prior to the current scheme, Australian Greens Leader Bob Brown introduced the *Lobbying and Ministerial Accountability Bill 2007* to regulate the industry.

While we believe lobbying is a legitimate activity, the Australian Greens share the concerns of many that the current Lobbying Code of Conduct and Register is inadequate to meet public expectations that what happens behind closed doors between lobbyists and politicians is appropriately regulated and that the lobbying 'footprint' is clear for all to see.

Lobbying has grown enormously in Australia over the last two decades, becoming a multi-billion dollar a year industry.[2]

There is legitimate concern in the community that not everyone has the same opportunity to lobby decision makers and that those with the deepest pockets and the most power and connections are better able to influence policy making.

The public cannot be confident that decisions are being made on merit after considering a broad range of views, or because of relationships the public is not privy to.

Australian Greens Leader Senator Bob Brown in The Conversation commented that the power of lobbyists in Canberra is now 'prodigious'. In relation to the mining tax he said:

[1] http://www.thepowerindex.com.au/list-overview/the-world-of-lobbyists
[2] Julian Fitzgerald, "The need for transparency in lobbying", Discussion Paper 16/07, Democratic Audit of Australia, September 2008, p 2.

> '..it is terribly worrying and I think it is a huge threat to a democracy that three big mining companies could land in town last year and for the expenditure of $22 million, save themselves $1bn in taxes in the coming ten years…They do it through access".[3]

Corruption risks are real, as has recently been witnessed in three high profile US and UK lobbyist scandals. They can range from direct bribing of those with decision-making power to a culture of 'policy capture' where governments tend to favour lobbyists' interests over those of the community.

With the light off lobbyists in Canberra, or at the very best substantially dimmed, it is impossible to see who is gaining access to politicians and high level bureaucrats and whether deals are being done.

The Australian Greens believe the public has a legitimate right to know the 'who', 'what', 'where' and results of lobbying. The current system is not delivering this.

The Code, which is limited to third party lobbyists, has significant holes and lags well behind other schemes such as those in the US and Canada which have introduced and then refined them by further regulation.[4]

Tellingly, an international survey on lobbying regulation has found that less than a quarter of lobbyists in Australia judge that the current scheme helps ensure transparency.[5]

Internationally there has been increasing movement towards tougher regulation of lobbyists. The Organisation for Economic Co-operation and Development (OECD) has released a series of reports that provide a framework for the regulation of lobbying. Countries such as Canada, the United States, Poland, Hungary and France have responded to concern by developing significant lobbying legislation. [6]

The existing Code is based on the first scheme in Australia, introduced by the Western Australia government in response to the Brian Burke-Gille affair in 2006. The then Premier Alan Carpenter in his tabling speech characterised the Code as "…deliberately minimalist in approach."[7]

Professor John Warhurst described the Code in a submission to the 2008 Senate Inquiry as "...timid and narrow. The exclusions ... are very serious."[8] For example it:

- excludes in-house lobbyists and the lobbying directed at any MP
- fails to require the timely disclosure of the subject matter of lobbying
- lacks effective sanctions.

---

[3] The Conversation, "Bob Brown and the media: "I'll take them on…they've crossed the line", with Prof John Keane, http://theconversation.edu.au/bob-brown-and-the-media-ill-take-them-on-theyve-crossed-the-line-1607, June 2011, p 5.
[4] J Hogan, G Murpy and R Chari, "Regulating the influence game in Australia", *Australian Journal of Politics, and History*, vol 57, no. 1, 2011, p 109.
[5] Hogan, op cit, pp. 42.
[6] OECD, "Lobbyists, Government and Public Trust" (vol 1) 2009, p. 14.
[7] 20 March 2007.
[8] http://www.aph.gov.au/SENATE/COMMITTEE/fapa_ctte/lobbying_code/submissions/sub04.pdf, p 4.

The Australian Greens believe it is possible and desirable to strengthen the current scheme, without creating unreasonable barriers to groups participating in the democratic process.

Why this review?

This review arose as a result of a motion by the Greens Senator for NSW Lee Rhiannon. It was supported by the Coalition but opposed by the Gillard government.[9]

The Senate Standing Committee on Finance and Public Administration recommended that the same committee conduct an inquiry into the operation of the Code in the second half of 2009, as the sole recommendation of its 2008 review of the then draft Code.[10]
The government failed to initiate the review, arguing instead that it "will keep the operation of the Register of Lobbyists under review and, if necessary, will consider the need for any changes to the Code and the way the Register operates."[11]
The government argues it has reviewed the Code by holding a closed roundtable of selected lobbyists in March 2010 and the Department of Prime Minister & Cabinet issuing a discussion paper in July 2010[12]. It is disappointing that it remains unclear who attended the roundtable, and no submissions to the discussion paper were ever made public or a final report issued.

Very minor, largely administrative changes to the Code were announced by Special Minister for State Gary Gray in August 2011.[13]

Senator Ludwig argued, when Senator Rhiannon's motion was put, that reviews had occurred and changes made and that there is "to date no evidence of any problems with the operation of the code."

A similar case was put by Prime Minister and Cabinet in Senate Estimates in October 2011 where a representative argued the code was effective because there had only been one reported breach.[14] The Australian Greens believe this is a very weak criterion against which the effectiveness of a scheme, heavily criticised for its lack of depth and capture, should be measured.

The Gillard government, in opposing this inquiry and sidestepping its obligation to conduct a proper review of the Code as recommended in 2008, has shown itself to be wary of proper scrutiny of the delicate relationship between lobbyists and MPs.

This review provides a new opportunity to make the scheme more robust and useful. The Australian Greens urge the major parties to act ahead of the next corruption scandal

[9] Senate Hansard Thursday 24 November 2011.
[10] "Knock, knock…who's there? The Lobbying Code of Conduct," Senate Committee on Finance and Public Administration, September 2008, rec 1.
[11] Government Response to Senate Standing Committee on Finance and Public Administration Report, "Knock, Knock...Who's There? The Lobbying Code of Conduct", p 2.
[12] http://lobbyists.pmc.gov.au/discussion_paper.cfm
[13] http://www.smos.gov.au/media/2011/mr_332011.html The changes: require lobbyists to disclose on the register details of any former government representatives employed by their firm as lobbyists and streamline some of the regulatory and administrative arrangements for registration
[14] Exchange between Senator Rhiannon and Ms Renee Leon, Deputy Secretary (Governance) PM&C , Monday 17 October 2011, Finance and Public Administration Legislation Committee.

involving lobbyists, with an eye to the recent scandals engulfing the Cameron government involving former Defence Secretary Liam Fox and the Bell Pottinger Group and the Jack Abramoff affair in the US.

The Australian Greens' proposal

Establish an Office of the Commissioner of Lobbying

The Australian Greens believe oversight of lobbying should rest with an independent body similar to the Canadian Commissioner of Lobbying. This independent body would report direct to federal parliament and have auditing and investigative powers and a mandate to enforce a new Lobbying Act and Lobbyists' Code of Conduct.

Currently regulation of the scheme rests with the Executive. An independent authority, with the capacity and integrity to ensure regulations are applied equally to all concerned, will ensure decisions are not left to the discretion of political representatives.

The Office, based on the Canadian model, would ensure transparency and accountability in the lobbying of public office holders and contribute to confidence in the integrity of government decision-making. It functions would include maintenance of the register, compliance, prevention and education work. A similar model exists in QLD where the Integrity Commissioner administers the lobbyist registration scheme.

Provide a legislative framework

The Australian Greens support a legislative framework for the regulation of lobbying.

Creating a legislative framework would strengthen the regulation of lobbying, for example providing for appropriate sanctions and appeal rights. Overseas jurisdictions such as Canada as well as Western Australia, Queensland and NSW have taken this step.

It has been argued that a legislative structure may encroach on the separation of powers between the judiciary and the parliament and risks a constitutional challenge based on the implied freedom of political communication.[15] However this freedom is by no means absolute.[16]

Expand who is the subject of lobbying

The Australian Greens believe there is a strong case for expanding the target of lobbying from government ministers to include all MPs and Senators, including cross benchers and opposition MPs, as occurs in the US and Canada.

[15] Mr Harry Evans, former Clerk of the Senate, discussed in "Knock, knock…who's there?" Report of the Standing Committee on Finance and Public Administration, September 2008, p 12.

[16] David Rolph, Matt Vitins and Judith Bannister, Media Law: Cases, Materials and Commentary, Oxford University Press 2009, pp 270-271. In Lange v Australian Broadcasting Corporation it was found 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 reasonable appropriate and adapted to achieving that legitimate object or end".

The current scheme which regulates only lobbying of 'Government representatives'[17] wrongly assumes that it is the Executive that has hold of parliament and decision-making and that there will always be majority government and disciplined parties. This ignores the reality of our Australian political system where there can be factions within parties which attracts lobbying of all MPs (eg on same-sex marriage, refugees) as well as minority governments where independents and minor parties may be key to decision-making. The reality is that those with power to allow or disallow a bill to pass may be the target of intense lobbying.

Widen who is defined as a lobbyist

Expand the scope of lobbying to include corporations and organisations employing in-house lobbyists, many of whom are in a position to influence government policy.

The revised scheme should go beyond third party professional lobbyists to adopt the NSW Independent Commission Against Corruption's (ICAC) proposed definition of a "lobbying entity:

> "A body corporate, unincorporated association, partnership, trust, firm or religious or charitable organisation that engages in a lobbying activity on its own behalf".

This would require registration of industry peak bodies and most religious and charitable bodies and all corporations that lobby by use of their own in-house staff, including board members.[18]

Queensland Integrity Commissioner Dr David Solomon points out the definition echoes Canada's definition of in house lobbyists (organisations) and in house lobbyists (corporations).[19]

Limiting the code to third party lobbyists, or 'hired guns', is like using a butterfly net to capture a lion. It misses those such as in-house lobbyists in big corporations such as BHP Billiton and Telstra and interest groups such as the AMA, industry bodies such as the Australian Hotels Association, the Minerals Council of Australia or the Australian Industry Group, unions, churches, and not-for-profit community groups like GetUp!:

> "... if the point ... is to shed light upon those who seek to influence the government, then the federal lobbying code of conduct, as currently constituted, fails to fully do that. Many of the lobbyists active in Canberra, as well as many of those who are the focus of their lobbying, are being missed out entirely by the code, as it is currently constituted".[20]

The current government employs a jaundiced argument that the scheme does not need expanding because the Code's main aim is to allow government representatives to know who they are meeting with and who is represented. This ignores a key function of the

[17] Defined in the Code to include Ministers, parliamentary secretaries, ministerial staff, agency heads, public servants and members of the Australian Defence Force, cl 3.
[18] Dr David Solomon, *Lobbying: Is registration sufficient?*, APSAC Conference Paper, November 2011, p 12.
[19] Ibid p 12.
[20] Chari, Hogan and Murphy, "Regulating lobbying: a global comparison", Manchester University Press, 2010, p 94.

regulatory scheme: to provide transparency so the public can scrutinise how decisions are made.

ICAC takes odds with the argument that non-profit making peak bodies should remain beyond the reach of the scheme:

> "The difference in motive was claimed as a reason why the regulation of the lobbying of peak body organisations was unnecessary. This argument did not address the problem of undisclosed dealings, and the lack of public access to information and to decision-makers. It also did not address the existence of undisclosed opponents. There is no difference in principle, in method or in its effect between lobbying conducted by third party lobbyists and that conducted by any other entity seeking to persuade government of its view. All seek to use or have an effect on the resources or powers of government, all draw from the same group of methods and tactics to persuade government of the merit of their view, and most seek to make use of a friendly relationship."[21]

Canada and the US capture in-house lobbyists. To qualify they must be renumerated (eg in Canada they must be paid or expect to be paid in excess of "reimbursement of reasonable expenses such as travel") and meet a workload threshold (eg in Canada lobbying must exceed the equivalent of 20 percent of the duties of a single paid employee over a month).

Strengthen disclosure requirements

The Australian Greens believe the scheme should require the disclosure, in a timely manner, of when the lobbying occurred, who stood to benefit, who was lobbied, the subject matter of the lobbying and the meeting outcome.

Current disclosure requirements are very weak and do not allow the public to effectively scrutinise lobbying activities. The online lobbyist register does not detail when lobbying occurred, who stood to benefit, who was lobbied, what was the subject matter of the lobbying or the meeting outcome. There is no requirement to disclose the actual interest being represented.

In contrast, in Canada lobbyists are required to submit monthly communication reports with details of who they met, date of the meeting and general subjects covered. In the UK the Prime Minister's website has a record of 'Who Ministers are Meeting'.[22] In NSW from July 2011 the NSW Department of Planning and Infrastructure has begun keeping a register on its website which lists contact between staff and registered lobbyists in relation to planning proposals.[23]

There should be clear direction on precisely what is required to ensure the disclosure is not so vague as to be meaningless.[24] It should include a general description and details (eg names and descriptions of specific legislative proposals, bills, regulations, policies, programs

[21] Quoted in Solomon, op cit, pp 12-13.
[22] http://data.gov.uk/whoslobbying
[23] http://planning.nsw.gov.au/?tabid=508
[24] Independent Commission Against Corruption, "Investigation into Corruption Risks Involved in Lobbying" Sydney, ICAC, November 2010, p 54.

of interest and grants, contributions or contracts sought). [25] A capacity should also exist for the regulators to demand further clarification of subject matter where existing provisions seeking specific information have not been met.[26]

Some argue that requiring this level of disclosure may inhibit frank exchange and that the disclosure of issues that are commercial-in-confidence may damage the interests of a lobbyist or client. Detailed minutes of meetings would however face existing, time limited, privacy and other legal protections.[27] There is an option for initial disclosure to be more limited, while supplementary disclosure could be more detailed after legitimate privacy concerns have become less important. The Australian Greens believe, however, that those seeking to withhold disclosure should be required to show a legitimate reason to keep information from the public.

The Greens www.democracy4sale.org project has sought to highlight the risks that political donations pose for impartial government decision making. The project is currently being expanded to allow the public to identify which companies represented by lobbyists on the Commonwealth and NSW lobbyist register also make political donations to political parties. This is something currently not possible on government websites but such transparency is important because many clients of third party lobbyists make large political donations.

Enhance compliance and review

The Australian Greens support: the proposed Commissioner for Lobbying receiving and investigating complaints; strengthened and meaningful sanctions applying to MPs, public servants and lobbyists and proper appeal rights (see above).

The current scheme is toothless, relying on guidelines with no clear enforcement framework. The onus is on Government representatives to report breaches and the power to sanction, or remove a lobbyist from the Register, rests with the Secretary of the Department of Prime Minister and Cabinet. There are no appeal rights or independent scrutiny of the decision. The Canadian and US lobbying legislation provides for large fines and criminal penalties for those breaching the code.

The Australian Greens support a range of financial penalties as well as criminal penalties for serious offences which apply to third party and in-house lobbyists. Consideration should be given to the capacity of a new Office of the Commissioner of Lobbying to publicly name those breaching the scheme in parliament.

Strengthen post separation employment provisions

The Australian Greens believe there should be a five year ban on ex-ministers working as lobbyists.

[25] Dr David Solomon, op cit, p 9.
[26] Organisation for Economic Co-operation and Development, "Lobbyists, Government and Public Trust", p 70.
[27] ICAC, op cit, pp 37-38.

The federal requirements lag behind jurisdictions like Queensland and South Australia which set the ban at two years. The revolving door provisions in Canada and the US are much stronger than in Australia. For example in Canada 'Designated Public Office Holders' (all MPs and Senators, their staff, very senior executives) face a ban of five years after leaving their positions, but the Lobbying Commissioner can exempt certain individuals (eg students employed in a Minister's office) and it does not stop individuals from working for non-profit organisations as long as their duties do not require them to lobby the government, or working for corporations if lobbying the federal government is not one of their main duties.

Ban success fees

The Australian Greens support a ban on the payment of success fees to lobbyists.

This will minimise the incentive created for lobbyists to use corrupt methods to achieve an outcome that will attract a bonus fee. Canada and the US prohibit lobbyists from receiving any payment that is in whole or in part contingent on the outcome of their lobbying. NSW and Queensland have both made it a criminal offence to pay or receive a success fee for lobbying.[28]

Note: The Australian Greens would like to acknowledge Joshua Bee's paper, "Australia's Transparency Deficit: Reforming Federal Lobbying Regulation" (October 2011), in preparing this submission. Joshua was an intern for Senator Lee Rhiannon, involved in the Australian National Internships Program, while researching the paper.

[28] The ban in Queensland came after a former QLD and Federal government minister were paid $500,000 for successfully lobbying to win a contract to build the Brisbane Airport Link tunnel.