To the Senate Finance and Public Administration References Committee

The operation of the Lobbying Code of Conduct and the Lobbyist Register

Submission to the Committee by Michael Ahrens.

I am the Executive Director of Transparency International Australia. However at the moment I am making the submission personally.

My perspective comes without a public sector background.

In relation to lobbying it is important to devise and install workable checks and balances and strive for greater transparency in the interest of public integrity. TI has published on this topic and worked with the OECD on it. In 2009 the OECD published a set of principles, adopted by the OECD Council in 2010, to which it is important to refer.

Also I submit that the Issues Paper into the Nature and Management of Lobbying in NSW (May 2010) and the Report of the ICAC Commission (9 November 2010) are also very important references and commend them to the Committee

SUBMISSION OUTLINE

This submission is in four parts:

1. Why the need for greater transparency.
2. Deficiencies in the present Code and register
3. Money talks
4. How to renovate the present Code. A public online reporting system recommended

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1. Why the need for greater transparency

For a number of reasons it is important, not to simply consider the topic as only pertaining to lobbyists and the register.

Lobbying can of course take a myriad of forms and range from general issues of government structure and reform, to urgent requests for action on a specific current issue affecting the claimant or its. A revealing instance of the latter can be found in The SMH Business Day report on 5 July 2011 of the action taken by Macquarie Bank in relation to its problem in the financial crisis and the short selling of shares. A dinner function at the Bank with Minister Sherry seems to have had very fortuitous timing. I am not suggesting any wrongdoing at all in this. In fact if it had been totally open at that time of 'crisis' it would have been accepted as appropriate on all sides.

However in the frequent interplay between government and private interests, the possibility of corrupt dealings cannot be overlooked. The challenge is to adequately prevent that risk. This requires that no mechanism should be neglected which could enhance our prevention capability and use of available techniques.

Achieving greater integrity and accountability of government, an aspiration I submit we all should have, lies in improving the transparency of dealings with government. The is the path to minimising corruption risks. These are delineated in Section 8 of the ICAC Issues Paper into the Nature and Management of Lobbying in NSW (May 2010) referred to above.

It is not just that sunshine is the best disinfectant, though that embodies a key proposition. It is a matter, in this context, of raising the bar so that the reputation of the public sector as well as those engaged in lobbying can be improved. Those facets and the relationships should be in a much more open arena than now is.

2. Problems with the present Code and register

Section 10 of the 2010 Issues Paper produced by the ICAC, referred to above, makes salutary reading. It succinctly identifies 17 weaknesses in the regulatory system in NSW as at the end of 2009 which depends on a Lobbyist Code. All those matters should be considered by this Committee in relation to the present Commonwealth system.

The federal code only applies to a 'lobbyist' as defined:

" a lobbyist is any person, company or organisation who conducts lobbying activities on behalf of a third-party client…", not being for a friend or relative.

It requires such a person or firm to enter details of its clients and staff and keep such information up-to-date.

In any event Codes are only a start; a low-level response to the demand for transparency in government. Ethical underpinning is an essential factor in a culture of integrity and openness but one which needs constant watching. The present position is that many consider there is a considerable risk that this culture is not being sufficiently fostered. Close relationships, between those in powerful places in Canberra and those with barrows to push from time to time, are to an extent inevitable. What can be done is provide mechanisms to bring the loads in those barrows more into the open.

In my view the creation of a register, whatever the material in it, is but a first step towards making the system sufficiently transparent and in itself does no more than enable us to recognise who are the 'regulars'. However even the distinction between those who are classified as 'Lobbyists' for this purpose and for application of the Code is not a very useful one and requires review**.**

To me the attempt at distinguishing between a professional lobbyist on the one hand and a full time executive, accountant , lawyer or other employee of a corporate which engages **in**

lobbying ,on the other hand, is totally artificial and is difficult to overcome by a register. With the right background and experience the same services can be provided by a person wearing either cap. They do not need to be personally at the meetings with the government representative. Likewise it is important to recognise the importance of PR and media advisors and the connections with journalists. Such a lack of boundaries is intrinsic and bring attempts at regulation of one category but not another rather into disrepute. Where it has gone furthest, in Canada, I note that many of the administrators directly involved are sceptical of the effectiveness of regulation.

Those regular professional lobbyists who register are supposed to and do identify their clients, (presumably kept always up-to-date), but that does not

- identify which of those clients it is representing on a particular issue or
- when the lobbyist firm is acting on their behalf, how frequently or
- what fund raising activity it has engaged in for the party in power

The weaknesses identified under Section 10 of the ICAC Issues Paper are important and to the extent they apply to the regime in Canberra, show just how far the present system needs to be renovated.

Even if breaches of the Code of Conduct are enforced, that would not prevent the lobbyist from operating in the State sphere.

In my view there are 2 chief requirements for greater transparency in this context. The first may be more difficult to achieve than the second.

Firstly in line with the Canadian system, the 2010 report of ICAC recommends the expansion of entities required to register as lobbyists to all industry peak bodies, charities and corporations that lobby on their own behalf. In essence it would extend the requirement to all in-house activities.

Second, it propounds a scheme under which communication protocols are established under an enforceable code to ensure that details of lobbying with senior government representatives are kept. The lobbyist is obliged to enter such details of when and with whom they met. [See ICAC Report November 2010 pages 35-6, 49]

3. Money talks

Ability to afford to pay fees for high-priced lobbyists is one issue. That is the problem of unequal access to government which in turn usually means that less well endowed can plainly be at a severe disadvantage. It is not just a matter of who you know; it is unfortunately also a matter of unequal representation, even corporate or union high-jacking of elected officials, which in a democracy is worse than the acknowledged unequal power of

access to the courts by reason of wealth. Amelioration of this imbalance is sought by engaging the media in many cases, as is commonly seen.

The close- even tight- relation between party fundraising and corporate lobbying is of course fairly obvious in many contexts. Hence as part of disclosure of lobbying activity, due recognition of that relationship militates in favour of a published on-line report of private political party and candidate donations above a $1,000 threshold especially linked to the lobbying and to pre-election periods. This does not imply that the linkage of money and political favours should be viewed as inevitable at all. But it is important not to peer through rose coloured glasses. I am told that an important part of the role of a lobbyist is to organise fund-raising events.

In relation to the vexed question of political party financing I refer to "*Money and Politics: the democracy we can't afford"* 2010, by Joo-Cheong Tham of Melbourne University Law School. It is included in the long list of 10 finalists in the 2011 redesigned John Button Prize for public policy.

While one can recognise the difficulty which will be encountered in overhauling the present system we have of funding candidates and campaigns with fair treatment of minor parties, at least without bi-partisan agreement, the issue should continue to be tackled. In my view we can and should at least require that all significant donations be disclosed by parties and parliamentarians on a current basis. Not just semi-annually or at the end of the year. The NSW government is taking a lead in this with the bans imposed to strengthen the limited ban on donations by property developers imposed by the previous government in that State.

The related question of gift giving, whether to the official or to a related third party, seems much more like a bribery issue and such gifts should be banned.

On the corporate side TI makes the valid point in its 2009 paper on this topic that it is important that corporate lobbying activities and political donations be a matter requiring board approval and not a matter of executive discretion**.**

4. **<u>To make lobbying more transparent. A public online reporting system</u>**

My submission is that it is the shroud of secrecy as much as the connections that have lead to suspicion and distaste in the public mind. Removing that cause of the negative implications of lobbying ought to be a priority.

As was said in the 2009 OECD report, these meetings, whether casual or formal should accord with the highest standard and bear the closest scrutiny.

As far a lobbying activity is concerned, a system of on-line reporting of lobbying ought to be instituted so that on a real time (current) basis the fact of instances of lobbying with Ministers, parliamentary secretaries and heads of departments, by whom, with whom and

the general nature of the issue raised, is put up on the site administered by the Prime Ministers Department or independently.

I submit this is the next and necessary step to take in the Federal sphere**.**

Contrast the secrecy here in most cases with the transparency that is inherent in Parliamentary inquiries – where all submissions and meetings with citizens and associations and lobbyists groups making the submissions are very transparent. I would submit the onus is for government to show what modifications to that benchmark are justified to enable the system to be workable for day to day government when the same process (submissions and meetings) is applying to decision makers like Ministers.

With software now enabling a good search mechanism under any of these headings available to the public, such minimum disclosure should be valuable to all stakeholders.

In the interest of transparency, I submit that the onus is now upon those who would oppose implementing this reporting. The reform proposal would not involve more paper work for the lobbying party-unlike what apparently happens in Queensland- and ought not to create the sort of 'regulatory thicket' referred to in the 2009 OECD report.

One significant advantage is that the difficulty of trying to distinguish between types of lobbying and lobbyist is removed; all would be covered. It would also not require a judgement call as to whether the fact of the meeting being revealed was of value to the public

I would require some discipline to log in. No more, however, than the taking of notes of the meeting than is required at present and thus not be a barrier to legitimate lobbying**.**

I appreciate that some suspect that lobbying with mid level officials could result in illegitimate preferences being given, perhaps even corruptly so. Control of any such abuse seems to me to be a matter for the Prime Minister and heads of department to enforce, rather than overburdening a public reporting system.

Where otherwise confidential information is disclosed at the meeting, a reference to that ought to be included also on the website without delay. I do not see the need to make a distinction as to timeliness between different types of information, but as to what is material the test might be along the same lines as for listed companies, is it 'price sensitive' and could it be justified before an Estimates Committee that it is kept under wraps when it has been disclosed to someone of privileged status able to profit from it.

I would not claim that this proposal is all that is needed. The point raised in the ICAC report of November 2010 as to claims of commercial confidentiality by parties to a public contract is definitely another area which deserves attention**.**

Recommendation

Consistent with the standards of transparency that apply to Parliamentary Inquiries, and in the case of representations made directly to Ministers, Parliamentary Secretaries, and senior executives of the public service, and where these relate to policy or other major decisions by the government, that an online running list be made available, and kept up to date on a weekly basis: covering:

- **The name of the person or group making the representation (and in the case of a lobbyist, the client or clients they represent in that instance)**
- **The policy issue or major decision for which the representation is being made.**

Michael Ahrens