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14 March 2011

Dr David Solomon AM
Integrity Commissioner
PO Box 15290
City East QLD 4002

By email: integrity.commissioner@qld.gov.au

Strictly Private & Confidential

Dear Dr Solomon

***Integrity Act 2009* Lobbying Provisions Review**

We write in relation to the review currently being conducted into the operation of lobbying provisions contained within Chapter 4 of the *Integrity Act 2009* (the Act), and welcome the opportunity to provide comments on the matters that it raises.

By way of background, Government Relations Australia (GRA) is a professional bipartisan government affairs firm specialising in the provision of advice and assistance relating to Australian public policy and government relations. In providing these services, we enjoy relationships with companies, industry associations and not-for-profit organisations operating in a variety of industry sectors. The firm was established in 1994 and draws together a senior professional team with a diverse range of experience in areas such as public policy, business and diplomacy. GRA's network includes offices in Sydney, Melbourne, Canberra, Adelaide, Brisbane, Perth (through associated firm GRA Everingham) and Beijing.

In the attached submission, GRA has expressed its views with regard to certain elements that currently exist in Chapter 4 of the Act's present form and additionally, also canvas a number of applicable matters arising from the May 2010 NSW Independent Commission Against Corruption (ICAC) inquiry in relation to the *Issues Paper on the Nature and Management of Lobbying in NSW* and subsequent recommendations for reform.

Should you have any queries in relation to this submission, please do not hesitate to contact the undersigned on or GRA's Brisbane-based Director, Paul Bini on

Yours sincerely

Les Timar
Managing Director

Integrity Act 2009 Lobbying Provisions Review:
Government Relations Australia's Response

Part A: Chapter 4, _Integrity Act 2009_

1. *Part 1, s 41 (6) – incidental lobbying activities*

GRA recognises that the current regime of lobbying regulation in Queensland specifically relates to the activities of government relations practitioners ('lobbyists') and their contact with the state (and local) government.

GRA is of the view that the clearest and most cogent approach to this regulatory regime is for all third-party entities who conduct lobbying activities to be regulated. In this respect, provisions relating to entities that undertake lobbying activities in a manner which is considered "incidental" to their professional activities creates an exemption from regulation which is of questionable value.

Persons who deal with the Government on behalf of clients undertake their work in a very similar manner, whether they are part of a professional government relations services firm like GRA or a lawyer, town planner, accountant or business consultant. Where these persons conduct lobbying activities on behalf of a third party client, the Lobbyists Code of Conduct determines that they need to identify the person or company whose interests they are representing as well as the specific issue and intended outcome they are seek from government. In the present scheme however, certain entities are excluded under s 41 (6) of the Act if it is determined that they are carrying out "incidental lobbying activities", notwithstanding that the term "incidental" is ill defined and could be subject to abuse.

Although it is noted that s 41 (6) of the Act stipulates these "incidental lobbying activities" must be "occasional" and "incidental", these terms are very broad and highly susceptible to creative interpretation rather than perhaps a more cautious and risk minimising view. In further explanation, the term "occasional" may mean once a week while to others, it may mean once a year. The term "incidental" is also far from precise. In combination, it is a simple exercise to conceive of a situation where a third party client who considers that their professional or technical service provider has strong contacts and/or understanding of government – perhaps a legal practitioner or town planner formerly in government service – can be utilised to undertake work in a specified field and essentially, undertake work which has little or no differentiation from that which is undertaken by a professional government relations services provider.

It is perhaps instructive to consider that the history of the lobbying profession in the United States essentially grew out of the service extension of Washington DC based law firms.

In summary, it is of concern to the integrity of the current scheme of regulation that an entity could take a subjective view that because they are only 'occasionally' undertaking lobbying activities that are incidental to providing professional or technical services to a third party client, they will not need to comply with the provisions of the Act or Lobbying Code of Conduct. Essentially though, they may undertake the same work in very a similar manner to the work undertaken by a lobbying firm.

2. *Part 3, s 70 (1) – prohibited related lobbying activities*

GRA's understanding is that the policy basis behind these provisions, which effectively impose a restraint of trade by former senior government representatives after leaving government, is aimed at ensuring that when such a person leaves government, they are not in a position to use information gained in that context in an improper manner.

GRA is of the view that there is a strong argument grounded in equity and the rule of law for restraint of trade periods of this kind to be as short as possible to achieve the public policy purpose sought. It is worth noting that where the courts have considered restraint of trade provisions, they have tended to read them down, meaning that they are interpreted in such a way that where alternative interpretations are open, the interpretation which minimises their impact will be preferred. Further, because restraint of trade provisions limit the capacity of an individual to work in their preferred field, the impact of the contractual provision is severely curtailed.

In GRA's view, it is important that government run a close ruler of fairness and equity over these provisions to ensure their impact is not unnecessarily onerous, as ought to be the case where government seeks to limit the capacity of individuals to function freely in society.

Section 7 of the Federal Lobbying Code of Conduct regulatory arrangements provides for the following post separation arrangements:

> *7.1 Persons who, after 6 December 2007, retire from office as a Minister or a Parliamentary Secretary, shall not, for a period of 18 months after they cease to hold office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office.*
>
> *7.2 Persons who were, after 1 July 2008, employed in the Offices of Ministers or Parliamentary Secretaries under the Members of Parliament (Staff) Act 1984 at Adviser level and above, members of the Australian Defence Force at Colonel level or above (or equivalent), and Agency Heads or persons employed under the Public Service Act 1999 in the Senior Executive Service (or equivalent), shall not, for a period of 12 months after they cease their employment, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months of employment.*

Such arrangements would both achieve the Queensland Government's policy objective while limiting the impact of an individual's freedom. Further, these provisions are consistent with the federal arrangements and are preferred.

Part B: Lobbyists Code of Conduct

1. Section 3: Standards of Conduct for Lobbyists

In relation to the Queensland Lobbyists Code of Conduct (the Code), GRA raises matters specifically in relation to s 3.1 (e) and (k).

In relation to 3.1 (e), it is pleasing that there has been consideration of the practicability of correcting information that has been provided to the Government. It does however, remain GRA's view notwithstanding this amendment which has been made to the previous draft, that the objective sought to be achieved in this provision is already adequately covered by parts 3.1 (a), (b), (d) and (f).

GRA also reiterates a range of circumstances where this provision is not considered practical in relation to the current form of the Code:

- Where the professional lobbyist ceases to be engaged by a client but where a material change comes to the attention of the lobbyists through other means e.g. industry contact, informal contact with the ex-client, communication of a peak body position etc.

- Information provided to government is often highly technical and specialised. Notwithstanding this, the current provision relies on the lobbyist to ascertain the accuracy of new and different information in making a decision as to whether to inform the government representative. In these circumstances, the lobbyist may be required to make their own lay assessment – or to provide the government representative with a qualified and uncertain correction/update.

- The Code requires the lobbyist to make a correction/update notwithstanding that the information they have received may be subject to a non-disclosure agreement or some other contractual arrangement. In these circumstances, the Code imposes an obligation on the lobbyist whilst providing them with no legal indemnity or other protection.

- This obligation would appear to cease once the government representative is no longer employed within government (or perhaps no longer works in the same part of government) as part 3.1 (e) would appear to only apply to informing the specific government representative whom the lobbyist believes is relying upon the information.

- In some circumstances, it may not be appropriate to contact a government representative. Such an example is where a probity regime is in place preventing those parties tendering to government (or their consultants) from contacting government.

In relation to part 3.1 (k), a lobbyist is required to advise a government representative "that they have informed their clients of any actual, potential or apparent conflict of interest", and that they have gained the "informed consent" of the client in relation to the same. This is a matter best left to an industry Code of Conduct setting or indeed, a firm's in-house Code of Practice. It is worth noting that GRA first published a Code of Practice in 1999 which stipulates the firm's policy in relation to conflict of interest (subsequently expanded).

GRA considers the inclusion of this provision in a legislated Code of Conduct inappropriate on two grounds. Firstly, the notions of potential, apparent or even perceived conflicts are often highly subjective ethical judgements in all but the clearest of circumstances. In GRA's view, it would be preferable to simply refer to "conflicts of interest".

Secondly, in GRA's view, the provision inappropriately requires that government representatives be informed about matters which are likely to be beyond the reasonable scope of their responsibilities. In effect, the provision places a burden on the government representative well beyond what might often be considered a reasonable part of their responsibilities.

2. Greater consistency

GRA has undertaken work on behalf of its clients in all nine Australian jurisdictions. At present, lobbyist regulation is in place in all states as well as federally. While there is close commonality in approach and model of regulation in all of these jurisdictions, there are different requirements, forms, procedures and timeframes in place. Given the relatively small size of the sector (compared, say, to the legal or accounting professions) and the very small differences in place in each jurisdiction, there is a very strong case for uniformity and the ease with which it could be achieved.

GRA requests the initiation of a process aimed at achieving national uniformity across the jurisdictions where lobbyist regulation is currently in place. Further, a uniform approach could extend to a situation where all register amendments and updates could be entered on a single web site. This approach would significantly reduce practitioner compliance costs and the cost to government of providing for the lobbyist registration process.

Part C: Applicability of the NSW Independent Commission Against Corruption (ICAC) recommendations for reform

GRA notes the Integrity Commissioner intends to take into account a report made by the NSW ICAC in November 2010 in relation to lobbying in the state, including the 17 recommendations for reform, as part of this review. We take the opportunity to express our view, below, on the ICAC recommendations at both a general level and then in relation to those particular recommendations requiring comment in a Queensland context – we do not comment on those that have already been implemented in Queensland.

At a high level, it is important to recognise the essential difference in models being implemented in Queensland and those that being considered – and have been recommended – by ICAC in NSW. Subject to any exclusions, the ICAC approach would require all non-government sector entities seeking to have contact with the NSW Government to be registered and fulfil a range of reporting requirements, with general public disclosure of the content of this contact. The framework currently in place at the Federal and Queensland levels (and, indeed, in other Australian states) is seeking to achieve the public policy objective of ensuring professional services practitioners representing third parties to government do so in manner that is transparent to the government decision-maker and observant of basic ethical standards. The framework recommended by ICAC is aiming to achieve a different public policy objective – namely, to ensure that the fact and content of all non-government contact with government officials is recorded and publicly accessible.

It is GRA's view that the ICAC approach represents regulatory over-reach and that the public interest benefits emanating from this approach will be outweighed by the costs. However, if Queensland was to move to implement the substantial disclosure and publication requirements advocated by ICAC, then an essential corollary to this approach would be to expand coverage to all non-government groups contacting government. As ICAC appears to have accepted, to limit substantially expanded regulation simply to professional advisers to third parties would fail to achieve the public policy objectives sought and strongly disadvantage one sub-group which communicates with government.

In taking the position that the existing Queensland approach (and that taken in the Federal and other state jurisdictions) should be favoured, GRA also believes that it would be a useful extension of the current arrangements to ensure that basic ethical standards apply to all of those who engage with government as part of their professional activities (i.e. a consultant or any kind or an 'in-house' practitioner in a corporation or industry group), and that reasonably defined cooling off periods for ex-government personnel should apply similarly broadly. A system with these characteristics represents an appropriately balanced regulatory outcome that is neither so light touch as to lack substance or heavy-handed to the point of being unduly burdensome (on either industry or government).

Were the NSW ICAC approach to be adopted in Queensland, it would massively increase the regulatory burden on both the Government and non-government sectors. It would also extend the field of regulated government lobbying activity to essentially every person who has contact with government from the non-government sector. It would undoubtedly have a significant impact upon general Government resourcing and administration and impose a significant compliance burden in maintaining key aspects of the lobbying regulatory system. GRA is of the view that it is difficult to justify this expense and additional regulatory burden.

An additional key concern that arises from ICAC's recommended approach relates to the capacity of government to continue to freely and constructively interact with the non-government sector. It has been said many times by government officials, including Premiers, that government does not know how to do everything and that it is important to tap into the rich seam of ideas and innovative approaches which reside with the private sector. Indeed, this interaction and engagement has resulted in the lowest cost possible to the taxpayer for the delivery of government services in many circumstances.

1. Recommendation 2: model policy and procedure for government

Subject to the specific comments, below, provided that care is taken in the specification and implementation of recommendation 2 to ensure that overly-detailed prescription is avoided, GRA considers that it represents a sensible reform. However, in GRA's view, recommendation 2 in combination with recommendations 3 and 4, would result in the extensive and active release of information related to communications with government, thereby creating a very significant increase in the administrative burden involved in government interacting with the private sector. At the least, this is likely to result in significantly increased cost and time associated with government engagement for both the public and non-government sector. At worst, public officials will simply avoid interaction with the private and other non-government sector in view of the time and cost burden involved if such interaction was undertaken, for which they are unlikely to be sufficiently resourced. Equally, the non-government sector will be less inclined to engage with government on a pro-active basis, particularly where they are bringing innovative thinking to the table and where these ideas have a competitive or commercial value.

In relation to recommendations 2 (a) and (b), it is GRA's view that this is already effectively provided for by the Register of Lobbyists.

In relation to recommendation 2 (c), it would defy common-sense to prohibit meetings in non-government locations – there are entirely valid and appropriate circumstances where value is added by reason of a meeting occurring in a non-government location, for instance, to demonstrate a technology, manufacturing or commercial process or product. In GRA's view, meeting guidelines of a general nature are appropriate providing that government officials are entrusted with a level of discretion and judgement about the best location and circumstances in which to meet a person seeking to engage government. In GRA's view there is a strong public interest in government officials gaining the opportunity to observe the operations of private companies first-hand and to travel freely in the communities which they may be required to regulate or provide services to.

In relation to recommendation 2 (d), we believe that this is probably best left to the individual government representative's discretion. A guideline which makes a prescriptive direction around the level of government representation and the number of persons required to meet a lobbyist is likely to be difficult to interpret, unlikely to be appropriate in all circumstances, more focused on process rather than community or taxpayer benefit, and may ultimately cause government officials to consider that meeting with private sector representatives creates a level of administrative burden and complication which is best avoided. Further, such a guideline might undermine the basis of, and in some cases be inconsistent with the operation of, section 72 of the Act, which is designed to leave it up to the government representative to decide whether they will meet with a non-government party.

Again, there is a significant risk that this kind of guideline would result in a preference to not meet with non-government parties on the part of government representatives, despite the significant value that might be delivered to government as a result of the meeting.

In relation to recommendations 2 (e) and (f), it is entirely common sense for officials to make relevant notes of meetings with parties external to government, but any guideline should be relatively general in nature so as to avoid a 'one size fits all approach' and impose a significant additional burden on government officials. In GRA's view, the decision as to the specific details of meetings to be recorded is best left to the government representative, and that the purpose of such notes should primarily focus on the usefulness of those notes for the ultimate business of government.

2. Recommendations 4 and 5: release of lobbying information for public access

GRA is of the view that it is not in the public interest for all interactions between government and the non-government sector to be publicly released. Recommendation 5 in particular runs the risk of stifling interaction between the non-government and government sectors, creating

unnecessary and unjustifiable additional costs as well as opportunity costs for both government and the private sector.

Policy around intellectual property protection may provide a useful parallel here. While there would clearly be a benefit to the community if all intellectual property currently in existence were free, this would unfortunately also stifle innovation. This is because the means of providing a payback to the creator of intellectual property is a guarantee of legal protection and exclusive ownership once certain conditions had been satisfied. In relation to lobbying activity, full release of the content of communications with government would mean that a new idea, approach or way of doing things which would likely ultimately benefit government, the taxpayer and the community, might not be brought forward because of the risk that it would be shared by government with competitors through public access release.

It is also in the practical public interest that the private sector, in regulated industries for example, is able to freely and frankly communicate with government. Indeed, in GRA's view it is best practice that this occurs in a relatively proactive and open manner rather than at the legislated minimum requirement. This kind of informal communication does not obviate the need to comply with legislative requirements, but is in addition to these requirements. Examples might include advice to government about economic conditions including the impact of certain government activity on a company's or sector's trading and performance; early warning about an arising community issue; technical or technological developments or trends; opportunities for innovation or cost savings; the availability of critical supply of essential products or materials; or even the perceived or suspected inappropriate behaviour of a individual, public official or competitor. A noteworthy example of the importance of the private sector being able to freely share information with Government relates to the Federal Government's handling of the Global Financial Crisis and ensuring the capacity of the Australian banking sector to continue to operate. A deep, ongoing and integrated understanding of the hour-to-hour functioning of the sector was critical to an effective and successful Government response. Under the terms of these recommendations, the free flow of this information would have been profoundly limited by questions of the public release of commercial-in-confidence information, with likely disastrous and far reaching implications. Indeed it would be difficult to justify to shareholders the release of highly confidential, market sensitive data to Government in circumstances where that information was highly susceptible to full public disclosure.

Where an interlocutor with government, whether it be a Third Party Lobbyist[1] or Lobbying Entity[2] would prefer to avoid the risk of release of certain comments or information or indeed, where an honest statement to government, subsequently released publicly created the risk of a public or market interpretation that was against the company's interest, information would simply not be brought to the Government's attention.

Under the arrangements proposed by the ICAC recommendations, there is a distinct possibility that companies would profoundly limit their contact with government to specific legislated requirements at the last possible moment. The net effect would be the lost opportunities for the people of Queensland due to the lack of willingness of the private sector to fully engage with government.

While we note that disclosure would only occur where there was no overriding public interest against it, in GRA's view this ex post facto characterisation by a government official will provide very little comfort to the non-government sector and will not mitigate the risk of substantially reduced communications with government.

In terms of the regulations currently in place in Queensland, GRA is of the view that they do not currently operate in a manner that creates an unacceptable risk of private and commercial-in-confidence information provided by a lobbyist to government being released, and therefore the current arrangements should be preferred.

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[1] Ibid
[2] Ibid

3. Recommendation 6: development of a new Code of Conduct for lobbyists

GRA's views on this recommendation are contained in Part B 1 and 2 above.

4. Recommendation 8: two panel register of lobbyists

In relation to Recommendation 8, as is apparent from GRA's general comments on the ICAC recommendations we do not agree with the proposal to expand the reach of the current regulatory system either in terms of parties covered or disclosure/publication requirements.

However, if Queensland was to consider implementing a system following ICAC on expanded disclosure and publication requirements, GRA would concur that such obligations must logically apply to all non-government parties seeking to contact and influence government. We are not persuaded as to the rationale behind the creation of two 'panels' – one for Third Party Lobbyists and another for Lobbying Entities. While on our reading of the evidence presented to ICAC in its hearings some industry groups felt uncomfortable about the characterisation of their activities in seeking to influence government policy as 'lobbying', the fact is that there is nothing intrinsically different in the activity whether the representation is being made by an organisation with the assistance of a third party advisor, by a company in its own right, by an industry peak body, or by a community or not-for-profit group.

Were it to be the case that lobbyist regulation was expanded to involve broad public release of lobbying activity for third party government relations practitioners only, this would be a significant incursion on the competitive neutrality for the companies that wish to engage third party advisers. Companies that choose to engage third-party rather than "in-house" resources do so for sensible and appropriate commercial reasons. As far as possible, government regulation should be structured to avoid a lack of competitive neutrality in relation to this decision. In this regard, GRA reiterates its response to the Integrity Commissioner of 25 February 2010, in relation to a similar proposition for active release of the activities of third party lobbyists, but not for what the ICAC recommendations refer to as "Lobbying Entities":

> *...where only third party lobbying activity is captured, organisations that choose to engage a third party professional lobbyist are placed at a disadvantage and much higher risk of release of their commercial-in-confidence information when compared to those who have an in-house lobbying capacity.*[3]

Recommendation 8 would operate to significantly expand disclosure of contact by non-government parties with government. In combination, recommendations 4 and 8 appear to be intended to create the opportunity for the release of records and details relating to a "Lobbying Activity"[4]. In the Queensland context, this is again likely to stifle the willingness of the private sector to interact with government and indeed, the implementation of these recommendations would enable applications for release of documents on the basis of little other than curiosity, creating public expense and administrative burden with questionable community benefit.

This curiosity is likely to extend to private sector competitors who might seek strategic release of details on their opposition's engagement with government purely in the pursuit of reaching their own strategic commercial objectives. This would be an entirely perverse outcome as commercially sensitive information would be far less likely to be provided to government, especially in the event where the initial meeting with government might have been for the purpose of bringing concerns around industry practice to the attention of government. The net effect to government would be a severe limitation on the willingness of the private sector to share information, intelligence, data, etc. with them in the very circumstances where this information could create significant value and public benefit outcomes.

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[3] GRA letter to the Integrity Commissioner: Submission to the Integrity Commissioner's Draft Lobbyists Code of Conduct and related issues, 25 February 2010.
[4] Page 49, Ibid

Recommendation 8 also seeks to impose an obligation on Third Party Lobbyists to enter the details of entities related to the client company which might derive benefit from the outcome of a lobbying activity. This is an impractical obligation to place on a Third Party Lobbyist who, in many contexts, would simply not be able to make an accurate or definitive judgment in this respect. Equally, it makes little sense that Lobbying Entities would not be required to make the same disclosure, especially given that this information may be more readily available to them (ie. in a corporate group/related entity situation).

5. Recommendation 10: lobbyists' prohibition on gift giving or other benefits

There are a range of limitations on the receipt of gifts by government officials. Section 3.1(m) of the current Queensland Lobbyists Code of Conduct requires lobbyists to "inform themselves of the policies of the Queensland Government and local governments restricting the acceptance of gifts by officials." In GRA's view, it would create an impractical level of complication and a lack of clarity were it effectively legislated (through inclusion in a mandatory Code of Conduct) that the limitations on gift giving were to be different depending on from whose hands the gift was being offered. Indeed, this restriction is further complicated as it would apply to both a Third Party Lobbyist and their client. It is unclear whether it would apply also to a Lobbying Entity.

A further issue relates to cultural sensitivity. It is the case that some cultures, for example the Chinese culture, considers the giving of often modest gifts an integral part of doing business and maintaining business relationships. By prohibiting gift giving, rather than continuing to appropriately manage gift giving in a way that is consistent with good governance, government would likely be displaying, to some degree, a lack of cultural awareness and sensitivity.

Given the established practice and limits on the giving of gifts already in place and operating effectively in Queensland, a different approach would be overly complicated and of little or no benefit.

It is unclear whether the intent of recommendation 10 is to directly or indirectly prevent a lobbyist or their client offering government an opportunity that might constitute a political benefit. For example, where a lobbyist or their client during their discussions with Government in relation to a new project wishes to make government aware of significant new employment and skills opportunities for a local community, it might be considered worthwhile for government to be involved in an announcement in an effort to publicise the new project. It is unclear whether this political benefit would constitute an issue in relation to recommendation 10.

6. Recommendation 11: post-separation limitations

GRA contends that it is reasonable and appropriate for former government personnel to become professional government relations practitioners (whether working as a consultant with third parties or 'in house'), provided there is an ethical and balanced approach to post-separation activities in accordance with known, clear standards.

GRA believes that the arrangements put in place by the Australian Government under its Lobbying Code of Conduct are appropriate and impose the minimum infringement on personal freedoms in order to achieve the objective of preventing the inappropriate use of government information in post-separation lobbying activities.

In this respect, GRA notes the reasonably common occurrence of movement between the public and private sectors in relation to other professional services disciplines such as law, town planning, management consultancy and indeed, general management. In GRA's view, it is important and desirable that there is a transfer of skills between the public and private sectors (in both directions) such that there is the encouragement of new thinking and methods to the benefit of both, and ultimately in the public interest. For example, it is particularly the case in relation to the delivery of large projects that it is in the Government's and taxpayers' interests that skilled

private sector professionals transfer into government with minimal risk preventing them from returning to their former profession which may have a significant government facing component.

If it was to become the case that employment in government service (whether as an elected representative, adviser or government official) had the consequence of substantially constraining future career options, this may act as a disincentive to such employment in the first place which would then ultimately be of disadvantage to the people of Queensland.

In GRA's view, the provisions recommended in the ICAC report, which are consistent with the model at federal level, are preferred to the more onerous provisions currently in place in Queensland.