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Lobbying: Is registration sufficient?

***Dr David Solomon AM**, Queensland Integrity Commissioner*

> Lobbying is undertaken by many people in the community in relation to a broad range of matters. In effect, lobbying can be any communication by a member of the community seeking to express their views or interests to a government representative on a matter that is subject to a decision of the Government.
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> Professional lobbyists are a legitimate part of, and make a legitimate contribution to, the democratic process by assisting individuals and organisations to communicate their views on matters of public interest to the government, and so improve outcomes for the individual and the community as a whole.
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> The public has a clear expectation that lobbying activities will be carried out ethically and transparently, and that government representatives who are approached by lobbyists are able to establish whose interests the lobbyists represent so that informed judgments can be made about the outcome they are seeking to achieve.[1]

When lobbyists register in Queensland they are sent a copy of the Lobbyists Code of Conduct. The quotation above greets them. It appears to be meant to convey to them that the Government has a positive rather than a negative view of their activities as lobbyists. The second paragraph in fact expresses a relatively benign view about lobbying - it is legitimate, it assists the democratic process, it improves outcomes for the individual and the community. Indeed, this is quite a complimentary depiction of lobbying.

But there is a hint in the third paragraph that not everything about lobbying is necessarily beneficial. It warns that the public expects that lobbying will be carried out ethically and transparently, indirectly suggesting that there may be a risk that may not happen.

And the next paragraph, quoted below, explains why we have got to where we are now - the politicians (reacting no doubt to criticism or doubts about how well the public has been served by the lobbyists) have felt the need to actually regulate the system to try to ensure that the transparency that is required if lobbying is to live up to the positive image portrayed above, is a reality. It says

[1] Qld Lobbyists Code of Conduct, Preamble, p. 1

> The *Integrity Act 2009* (the Act) and this code ensure that contact between lobbyists, as defined by the Act, and government representatives is conducted in accordance with public expectations of transparency and integrity, and in the public interest.

The regulation of the lobbying industry - and I am referring here to the third party, professional lobbyists who are currently the only entities that the various Australian schemes are aimed at - has been quite light. Other than in Queensland that regulation has been achieved through administrative fiat - governments have created registers of lobbyists and imposed behavioural codes on those who register by requiring government officials and ministers and their staffers not to have any dealings with unregistered lobbyists. Queensland switched to a legislative scheme when it decided to expand the coverage of the ban on dealing with unregistered lobbyists to bring in local government and government owned corporations and also to make it illegal for lobbyists to receive success fees. The new government in NSW has similarly applied a legislative ban on success fees, and on lobbying by former Ministers and Parliamentary Secretaries for 18 months about matters where they had had official dealings, though at the time of writing it has not indicated whether it will extend the registration scheme (whether legislatively or otherwise) as recommended by the Independent Commission Against Corruption (ICAC). The Western Australian Government has said that it will introduce legislation covering lobbying and banning success fees before the end of the year.[2]

I will return later to the ICAC recommendations.

The "light touch" Australian approach to regulating lobbying may be contrasted with the far more intrusive and heavy handed regulation of lobbying that applies in the United States and Canada, both nationally and in most States and Provinces.

In this paper I propose first to set out some international comparisons and what might be described as best practice models. Then I will look at what Canada has been doing to regulate lobbying. Finally I will try to place the Australian experience and models in an international context. I should add that this paper is concerned only with the regulation of direct lobbying of government. It does not deal with other indirect but often effective forms of lobbying where organisations and other entities try to use the media and public opinion or the electoral process to try to influence government.

International regulation of lobbying

Before making any detailed comparisons of the various regulatory schemes that have been adopted elsewhere, it is important to recognise that those countries that do regulate lobbying are very much in the minority. Even among western democracies, relatively few countries have attempted to do so.

The OECD (Organisation for Economic Co-operation and Development), an organisation described by *The Economist* magazine as a “rich-country think tank”[3] has 34 members currently, of which only 8 have legislation or regulations concerning lobbying – Australia, Canada, United Kingdom, United States, Poland, Hungary, France and Israel. Additionally the European Parliament and European Commission have lobbying regulations. The OECD says that in Italy, Korea, Mexico, Chile, Norway, the Czech Republic and the Slovak Republic, draft laws on lobbying have been blocked in the legislative process.[4]

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[2] AAP report, 9 August 2011, quoting Premier Colin Barnett.

[3] The Economist, 27 August 2011, p. 15.

[4] “Transparency and integrity in lobbying”, OECD, January 2010 p. 2.

But there are, as indicated earlier, considerable differences between the regulatory regimes in (and within) those countries. Attempting to measure those differences involves imposing somewhat artificial values on the various characteristics of a regulatory system. It means listing all (or what are perceived to be the most important) of the possible ways in which lobbying activity might be regulated, disclosed and notified publicly. Foremost among those trying to evaluate the effectiveness of regulatory systems has been the Centre for Public Integrity (CPI), a Washington-based nonpartisan, nonprofit investigative news organisation, which publishes on the internet *iwatch news*, to report its own investigations and those of an associate, the International Consortium of Investigative Journalists (ICIJ). It first developed and published a scoring system in 2003, under the evocative title "Hired Guns"[5]. At that stage it was concerned only with comparing the lobbying disclosure regimes of the 50 US States. Recently the methodology has been adapted and applied internationally by a group of scholars based in Ireland. The analysis is based on scoring answers to a series of 48 questions directed at eight key areas of disclosure. Those areas are:

- definition of lobbyist
- individual registration
- individual spending disclosure
- employer spending disclosure
- electronic filing
- public access to a lobbyists register
- enforcement, and
- revolving door provisions (particularly cooling off periods).

Each answer is given a point value. For some questions a positive answer is worth one point. For others there might be two, three or four points - the greater the level of disclosure, the more points are scored. The maximum score is 100. A pass mark is said to be 60.

An indication of the material the CPI wanted lobbyists to disclose is provided in this summary of its initial findings:

- Twenty-seven states received failing scores because their definitions of lobbying excluded some executive branch lobbyists; because of infrequent filing periods; because lobbyists are not required to itemize all expenses; because state agencies fail to provide totals of spending information by year, by reporting deadline or by industry.

- Fourteen states that squeaked in just above failing received low scores because of lax enforcement mechanisms and lack of "cooling off" laws that mandate a break in the time between a legislator leaving office and becoming a lobbyist.

- Nine states drew relatively satisfactory scores because they prohibit lobbyists from giving gifts to legislators and require both monthly spending reports and listings of bill numbers addressed by lobbyists. They also provide electronic disclosure and strong public access to reports.[6]

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[5] The CPI's methodology is available at http://projects.publicintegrity.org/hiredguns//default.aspx?act=methodology.

[6] iWatch news, http://www.iwatchnews.org/2003/05/15/5908/hired-guns-initial-report.

The Center also examined the statutes governing federal lobbyists and compared them to the states using the same criteria. The results were described by the Centre as discouraging—federal lobbying regulations would fall fourth-to-last in the Center's ranking, just ahead of New Hampshire, Pennsylvania and Wyoming, with 36 points. Federal lobbyists are not required to report gifts or other expenditure details, and there is no mandatory auditing or enforcement. At the federal level, more than 25,500 lobbyists spent at least $1.6 billion lobbying Congress in 2002, according to PoliticalMoneyLine, a Washington, D.C., research and consulting organization.[7]

As mentioned above, an attempt has been made to use this methodology to rank nations and states (including the Australian States). Raj Chari, John Hogan and Gary Murphy recently prepared a report for the European Commission for Democracy through Law (the Venice Commission) on "The legal framework for the regulation of lobbying in the Council of Europe member states". Published in May 2011, it includes a table providing the ranking of the various systems, including changes resulting from amendments to lobbying laws particularly at the federal level in both the United States and Canada. This is the table:

Table 1

Jurisdiction	Score	Jurisdiction	Score
Washington	87	Idaho	53
Kentucky	79	Nevada	53
Connecticut	75	Alabama	52
South Carolina	75	West Virginia	52
New York	74	CAN Fed (2008)	50
Massachusetts	73	Pennsylvania	50
Wisconsin	73	Newfoundland	48
California	71	Iowa	47
Utah	70	Oklahoma	47
Maryland	68	North Dakota	46
Ohio	67	Hungary	45
Indiana	66	CAN Fed (2003)	45
Texas	66	Illinois	45
New Jersey	65	Tennessee	45
Mississippi	65	Lithuania	44
Alaska	64	British Columbia	44
Virginia	64	Ontario	43
Kansas	63	South Dakota	42
Georgia	63	Quebec	40
Minnesota	62	Alberta	39
US Federal 2007	62	Taiwan	38
Missouri	61	Western Australia	38
Michigan	61	New Hampshire	36
Nebraska	61	US Federal (1995)	36
Arizona	61	Nova Scotia	36
Colorado	60	New South Wales	36
Maine	59	Tasmania	36

[7] ibid.

North Carolina	58	Victoria	36
New Mexico	58	South Australia	35
Rhode Island	58	Queensland	35
Montana	56	Wyoming	34
Delaware	56	Australia (Fed)	33
Arkansas	56	CAN Fed (1989)	32
Louisiana	55	Poland	27
Florida	55	EU Commission 24	
Oregon	55	France	20
Vermont	54	Germany	17
Hawaii	54	EU Parliament	15

Source: Authors' research and CPI research.[8]

The authors then outline a classification system of the different types of lobbying regulatory environments. These are the lowly regulated systems, corresponding with scores in their table below 30, medium regulated systems (scores between 30 and 59) and highly regulated systems (60 and above). This last category corresponds with the "pass" awarded by CPI, and, as they note, includes only US States.

This is a table they produced summarising the main elements of each of the different regulatory environments

Table 2: The Different Regulatory Systems

	Lowly Regulated Systems	**Medium Regulated Systems**	**Highly Regulated Systems**
Registration Regulations	Rules on individual registration, but few details required	Rules on individual registration, more details required	Rules on individual registration are extremely rigorous
Targets of Lobbyists Defined	Only members of the legislature and staff	Members of the legislature and staff; executive and staff; agency heads and public servants/officers	Members of the legislature and staff; executive and staff; agency heads and public servants/officers
Spending disclosure	No rules on individual spending disclosure, or employer spending disclosure	Some regulation on individual spending disclosure; none on employer spending disclosure	Tight regulations on individual spending disclosure, and employer spending disclosure
Electronic filing	Weak on-line registration and paperwork required	Robust system for on-line registration, no paperwork necessary	Robust system for on-line registration, no paperwork necessary

[8] R. Chari, J. Hogan and G Murphy, "The legal framework for the regulation of lobbying in the Council of Europe member states", pp 25-6. http://www.venice.coe.int/site/dynamics/N_Search_ef.asp?L=E&Text=lobbying&S=0&C=0

Public access	List of lobbyists available, but not detailed, or updated frequently	List of lobbyists available, detailed, and updated frequently	List of lobbyists and their spending disclosures available, detailed, and updated frequently
Enforcement	Little enforcement capabilities invested in state agency	In theory state agency possesses enforcement capabilities, though infrequently used	State agency can, and does, conduct mandatory reviews/ audits
Revolving door provision	No cooling off period before former legislators can register as lobbyists	There is a cooling off period before former legislators can register as lobbyists	There is a cooling off period before former legislators can register as lobbyists

Source: Authors' research and Griffith, 2008: 8.[9]

Recently the ICIJ arm of the Centre for Public Integrity listed its wish list of characteristics it would want of a lobbying system in a perfect world. It did so when it published an investigation into lobbying activities that preceded the Copenhagen climate change talks, when it found a lack of credible data on lobbying activities. That prompted the wish list. It said:

> The idea behind a lobbying registry is that when an organization lobbies a legislative body or an executive agency, they are required to report the activity to a government entity responsible for making that information public. In a perfect world, the lobbying registry would include the name of the lobbying firm, the name of the client (frequently those names would be the same if a company handled lobbying in house), the name of the lobbyists, the specific issue of interest, how much the client spent on lobbying by specific issue, when the lobbying took place, the name of the lobbied party or at least the branch of government or agency name, and a little about the background of the lobbyists involved (most importantly, whether the lobbyist is a former government employee). Also useful would be whether the client is a parent company or subsidiary of another company. And all these data should be available in a format that is practical for independent researchers to download and analyze.[10]

As mentioned earlier, only about a quarter of the members of the OECD have attempted to regulate lobbying. Nevertheless the organisation has devoted resources to surveying those regulatory systems, and researching and developing guidelines for nations that want guidance in establishing their own systems. It has also surveyed the lobbying industry. It has produced two volumes of a book, "Lobbyists, Government and Public Trust." The first, published in 2009, "Enhancing transparency through legislation", reviews the experiences of OECD countries relying on research and consultations carried out through 2007 and 2008. The second volume, "Promoting integrity through self-regulation", was due to be published last year but is now scheduled to appear in October 2011. It

[9] ibid, pp 28-9.

[10] Investigation into climate change lobbying groups yields little transparency http://www.iwatchnews.org/2009/12/23/5474/global-lack-transparency December 23, 2009 Updated: 6:16 pm, August 3, 2011

examines regulation and self-regulation of lobbying. It includes chapters defining and examining lobbying, describing the role of professional lobbying associations, exploring various codes of conduct and examining specific codes in various countries, examining lobbyists' attitudes toward regulation and self-regulation, and exploring various options for enhancing transparency and accountability.

On 18 February 2010, the OECD Council (including Australia) approved the OECD Recommendation on Principles for Transparency and Integrity in Lobbying. This is the first international policy instrument to provide guidance for policy-makers on how to promote good governance principles in lobbying. The full principles as adopted by the OECD are in the Appendix. In summary they are:

1. Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.
2. Rules and guidelines on lobbying should address the governance concerns related to lobbying practices, and respect the socio-political and administrative contexts.
3. Rules and guidelines on lobbying should be consistent with the wider policy and regulatory frameworks.
4. Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.
5. Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.
6. Countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities.
7. Countries should foster a culture of integrity in public organisations and decision making by providing clear rules and guidelines of conduct for public officials.
8. Lobbyists should comply with standards of professionalism and transparency; they share responsibility for fostering a culture of transparency and integrity in lobbying.
9. Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance.
10. Countries should review the functioning of their rules and guidelines related to lobbying on a periodic basis and make necessary adjustments in light of experience.

Significantly, because the OECD is an international organisation, its list of principles takes account of the different governance arrangements and social, political and administrative cultures of member countries and others that might want to apply the experiences that the OECD has researched. That means the principles are far less prescriptive than the Centre for Public Integrity's best practice lists, that are directed towards regulating lobbying in an American context. However in another publication the OECD has listed the following summary of the elements of strong lobbying regulation. They are much closer to the views of the CPI and its ideal wish list quoted earlier.

Table 3: What are the elements of strong lobbying regulation?

Experience suggests that effective regulation will depend on the following elements:

- Definition of lobbyist and lobbying activities targeted by regulation are clear and unambiguous.

- Disclosure requirements provide pertinent information on key aspects of lobbyists and lobbying such as its objective, beneficiaries, funding sources and targets.

- Rules and guidelines set standards for expected behaviour, for example to avoid misuse of confidential information, conflict of interest and prevent revolving door practices.

- Procedures for securing compliance are framed in a coherent spectrum of strategies and mechanisms, including monitoring and enforcement.

- The organisational leadership promotes a culture of integrity and transparency in daily practice through regular disclosure and auditing to ensure compliance.[11]

The Canadian experience

If Australia is to benefit from international experience, it would seem that the country whose regulatory system is the most appropriate to examine is Canada. Like Australia it has a federal, Westminster system of government with a relatively disciplined party system. The second and third of those attributes are important. The United States does not provide a suitable basis for comparison because the members of its Congress are far more powerful, individually, (particularly, but not only, in that they play a greater role in shaping legislation and investigating and critiquing the governmment administration) and are far more independent of the executive government, than are the members of the Canadian or Australian parliaments. As a result, in comparison with Canada and Australia, in the United States a disproportionate amount of lobbying effort is directed at the legislative, rather than the executive branch of government. However it will be necessary, later, to take account of the increasing importance of independents or minor parties particularly in the Australian Parliament and in some of the States, resulting in heavier lobbying of Australian parliamentarians than used to be the case.

Canada's experience is instructive. I will be dealing here only with developments at the national level. Most of its provinces, however, have schemes that resemble the federal regulatory system.

Canada's regulatory system has gone through a number of changes, all of them increasing the degree of regulation and supervision of lobbyists and of those who they lobby.[12] The first Lobbyists Registration Act came into force in 1989. The law focussed primarily on the registration of lobbyists, and included just basic disclosure requirements. As well as third party lobbyists, the Act required the registration of in-house lobbyists – people who lobbied on behalf of corporations - and those employed in-house to lobby for non-profit organisations or associations. Corporations and organisations must register if lobbying "constitutes a significant part of the duties of one employee if they were performed by only one employee". The interpretation of that rule that has been adopted is that if an employee (or the equivalent of one employee) spends 20 per cent of their time lobbying over a one month period, that constitutes a "significant part" of their duties.

In 2005 an amended Act came into force. It significantly strengthened disclosure requirements. The definition of lobbying was broadened to include all relevant communications, deleting a requirement that those communication were made "in an attempt to influence" government. A Lobbyists Code of

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[11] "Transparency and integrity in lobbying", OECD, January 2010, p. 1

[12] The account of the Canadian system is based on information available on the Commissioner of Lobbying website, particularly the Commissioner's article, "Administering the Lobbying Act", a backgrounder, and her annual report for 2010-11.. http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/home

Conduct also was introduced. The office of the registrar of lobbyists, as it then was, established at this time an investigations directorate. As at the beginning of 2011 this had a budget of $C 1.2 million including salaries for the equivalent of nine full-time employees.

In 2008 the Lobbying Act came into force. It created the position of a Commissioner of Lobbying who is an independent agent of Parliament, has authority to enforce the Act and the Code and has significant investigative powers. Previous legislation had listed the Public Office Holders (POH) officers who might be lobbied. These were all officers or employees of the Queen in right of Canada, and included all Members of Parliament and their staff, all public servants (but not judges) and members of the armed forces and the Royal Canadian Mounted Police. The 2008 Act introduced the concept of a Designated Public Office Holder (DPOH) who were Ministers or their staff and very senior executives. Later, Members of Parliament and Senators were added to this list. Former DPOHs are prohibited from lobbying for five years.

Prior to 2008, lobbyists were required to update their registration every six months. Among the details they were required to record were who was paid to lobby for which firms, corporations, organisations or associations, which Canadian Government departments or agencies were being contacted, and what the lobby activities were about, including a general description of subject matter and details such as the names and descriptions of specific legislative proposals, bills, regulations, policies, programs of interest and grants, contributions or contracts sought.

Since 2008 lobbyists have been required to update the registrations each month if any information has to be corrected, additional information added or if the undertaking is terminated. But the most stringent requirement concerns communications with Designated Public Office Holders. Lobbyists are required to report on a monthly basis any oral and arranged communication with a DPOH, including the name of the consultant lobbyist or most senior officer in the corporation or organisation, the name of the DPOH, the subject matter of the communication and when it occurred.

The 2008 changes also increased the monetary penalties and potential jail terms for breaches of the Act and the ability to prohibited a person convicted from lobbying for two years. They also banned contingency fees for consultant lobbyists. This prohibition does not apply to in-house lobbyists.

As at 31 March 2011, the Canadian register contained the names of 823 consultant lobbyists, 2,489 in house lobbyists (organisations) and 1,805 in-house lobbyists (corporations). The average number of monthly communication reports filed is more than 1,100. The 2005 and 2008 changes caused the office to spend about $C 2 million on systems upgrades to cope with additional registration requirements. The annual budget on administration of the registry is about $C 1.5 million, including salaries for the equivalent of eight full-time employees, dedicated mainly to providing registration assistance for lobbyists. The annual cost of technical work to maintain and upgrade the system is $C 4-500,000.

Australia's regulatory systems

According to the table of CPI scores reproduced earlier, the changes Canada has made to its lobbying regulations have moved it from 32 to 50, from the lower end of the countries with medium regulated systems, to towards the top of that scale. The Australian federal score is 33, while the States range from 35 (Queensland and South Australia) to 38 (Western Australia) though I suspect that the recent legislative changes in Queensland would elevate it above WA. But generally, the Australian score are at the lower end of the scale of medium regulated systems.

Does it matter that Australia scores relatively poorly on the artificial, contrived scale? What the relatively low scores indicate is the need to look at just what we are trying to achieve with our registration systems, and what we need to achieve. For example, one of the features of highly regulated systems is spending disclosures. Are such disclosures really necessary in Australian jurisdictions where there are mostly tight controls and disclosure requirements on politicians and government representatives who might receive gifts and on the funding of election campaigns?

It is necessary to consider what the regulatory system is intended to achieve. And, a somewhat different question, what are the risks that the system is intended to eliminate or reduce.

In 1979 a federal Committee of Inquiry into "Public Duty and Private Interest", chaired by Sir Nigel Bowen, Chief Judge of the Federal Court, wrote:

> Although the political and constitutional situation in Washington is sufficiently different to make any attempt to draw parallels with Canberra most unwise, the difficulties encountered in successive attempts to regulate lobbying in Washington suggest the unprofitability of starting down that path in Australia. **The Committee *recommends* that no special measures be taken in relation to lobbyists.**[13]

What changed? There can be no doubt that the amount and intensity of lobbying in Canberra (and elsewhere in Australia) has increased considerably since the Bowen committee made its recommendation. There are now many more professional, third party lobbyists, and considerably more industry and professional associations and not-for-profits who lobby MPs, Senators, Ministers and their staff and senior bureaucrats than there were 30 years ago. And there are significantly more large corporate organisations with in-house staff who are also involved in lobbying.[14]

But it was not any change in the quantity or quality of lobbying that prompted governments across the country (other than in the two Territories) to begin regulating lobbyists. It was political scandal. The first lobbying regulations and registration system were introduced by the Hawke Government in December 1983, following revelations of allegedly improper contacts between David Combe, a lobbyist and former national secretary of the ALP, and Valeri Ivanov, a first secretary in the embassy of the Soviet Union, and a suspected KGB agent.[15] The registration system was scrapped by the Howard Government when it came to office in 1996.

Another political scandal saw the revival of lobbying regulation, this time in a state – Western Australia. Years of allegations about the activities of former Labor Premier Brian Burke and his colleague, a former senior Minister, Julian Grill, culminated in an investigation by the Corruption and Crime Commission (CCC). The background to this, and to Western Australia deciding to introduce a lobbying register, was provided to this conference in 2007 by Allan Peachment, in a paper "Lobbying WA style: Influence without office or a partial capture of government?"

Western Australia's lead was followed by the Commonwealth and by the other States, all introducing similar administrative schemes. Queensland later strengthened its system by giving it legislative

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[13] Committee of Inquiry into "Public Duty and Private Interest", AGPS Canberra, 1979, p. 101.(Emphasis in original)

[14] John Warhurst, Behind Closed Doors, UNSW Press, 2007.

[15] Ibid, pp.22-30 for an account of the scheme, its beginnings and its end.

backing in the *Integrity Act 2009*, and extending it to cover local government. In Queensland some of the regulatory changes were associated with allegations that "Labor mates" had scored a half-million dollar success fee for lobbying.

In NSW reforms were sought because of the alleged influence of former federal Labor Minister and power broker Graham Richardson. In December 2009, the Independent Commission Against Corruption (ICAC) in NSW decided to investigate the then current lobbying regulatory system in that State to identify "corruption risks that might allow, encourage or cause corrupt conduct or conduct connected with corrupt conduct, and to identify any necessary changes to address these risks and thereby reduce the likelihood of the occurrence of corrupt conduct."[16] ICAC's report on its investigation into corruption risks in lobbying was published in November 2010.

The ICAC report said

> The evidence obtained by the Commission during the course of its investigation confirmed that there are widespread community concerns about lobbying, and that these have led to adverse perceptions as to the impact of lobbying on government decision-making.[17]

It pointed out

> Even without evidence of actual corruption, adverse perceptions can have a corrosive effect on public confidence in government. These perceptions, however, do not exist in a vacuum; they are created and reinforced by evidence of actual corruption in lobbying activity both within Australia and beyond. In other cases, evidence has emerged not of actual corrupt behaviour but of conduct that falls short of the standards of probity and ethical conduct expected by the broader community.
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> As with most activity involving interaction between private and public interests, corruption risks exist in lobbying, and these risks can lead to corruption. The risks also serve as a foundation for adverse community perceptions of lobbying. A regulatory scheme for lobbying, therefore, needs to address the relevant corruption risks.[18]

What were these corruption risks? ICAC identified eight separate risks that were identified in its investigation. These were

- Lack of transparency
- Inadequate recordkeeping
- Involvement in political fundraising
- Gifts and benefits
- Difficulty of access
- Former public officials acting as lobbyists
- Exploitation of privileged access.

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[16] Independent Commission Against Corruption (ICAC), "Investigation into corruption risks involved in lobbying", ICAC Report, November 2010, p.15.

[17] ICAC report, p. 17.

[18] ICAC report, p. 18.

ICAC developed its regulatory proposals to meet these potential problem areas. The features of its scheme are:

1. Communication protocols are established to ensure business procedures, venues and the attendance of appropriate personnel are adhered to during any lobbying activity.

2. Minutes of meetings and phone calls with lobbyists are made and retained as a government record, archived pursuant to the *State Records Act 1998* and available under the GIPA Act. Lobbying activity is published by agencies, departments and ministerial offices on their respective websites, as required by the GIPA Act.

3. Provision for standards of lobbying conduct is determined in an enforceable code of conduct.

4. Lobbying is not accepted by government representatives until a lobbyist meets the requirements of an online lobbyists register.

5. Lobbyists enter lobbying details online in the month and year that lobbying activity occurred, the name of the senior government representative lobbied, and, in the case of third party lobbyists, the identity of the client for whom the lobbying was done.

6. Restrictions are placed on post-separation employment of former government representatives with regard to lobbying activity.

7. The regulation of political donations is reformed.

8. Limitations are placed on fundraising activity conducted by lobbyists.

9. Contingency and success fees are abolished.[19]

Not included in this summary by ICAC is what it acknowledged was the largest change to the current system.[20] This is the expansion of the entities required to register as lobbyists beyond third party professional lobbyists to include what ICAC described as a “lobbying entity”, defined as “A body corporate, unincorporated association, partnership, trust, firm or religious or charitable organisation that engages in a Lobbying Activity on its own behalf”. It said this would require all industry peak bodies and most religious and charitable bodies to register and in addition all corporations that lobby by use of their own in-house staff, including board members, would be required to register. Essentially ICAC’s “Lobbying entity” corresponds with Canada’s in house lobbyists (organisations) and in-house lobbyists (corporations).

ICAC dismissed the argument that lobbying by peak bodies was different from the profit-driven interests of the clients of third party lobbyists. It said

> 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

[19] ICAC report, pp 35-6.

[20] ICAC report, p. 49.

> 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. At present, none is required to make their activity public.[21]

The argument is put more bluntly by Joo-Cheong Tham, in his book, *Money and Politics, The democracy we can't afford*. In a chapter on "regulating lobbying" he argues there should be four aims for the regulation of lobbying.

> First, regulation should ensure that legitimate lobbying proceeds freely. Second, it should promote transparency and openness to those who are lobbied, as well as to the general public. Third, it should prevent lobbying-related corruption and misconduct. Finally, it should prevent unfair access and influence.[22]

Dealing with the limited registration schemes in Australia he says

> Here, we discover glaring weaknesses. Despite the various lobbyists' registration schemes, secret lobbying can still proceed apace: these schemes only apply to a particular group of lobbyists – commercial lobbyists – and even then they fail to provide full information about those lobbyists' activities. There is also a blasé attitude towards the risk of lobbying-related corruption and misconduct, with poor regulation of conflicts of interest and the absence of codes of conduct for lobbyists that have "bite". These regulatory defects increase the opportunities for lobbying involving unfair access and influence. This state of affairs throws up the real danger that legitimate forms of lobbying are edged out by their illegitimate rivals.[23]

And later

> From the perspective of countering secret lobbying, the restricted coverage of the various codes is not justifiable. As a general rule, transparency should apply to all lobbyists who may be able to influence policies and laws. This includes commercial lobbyists, in-house lobbyists, staff of trade unions, businesses and NGOs that regularly engage in lobbying, and powerful individuals such as Rupert Murdoch…[24]

Is registration sufficient?

I now return to several of the OECD's principles for transparency and integrity in lobbying. First, principle 4, "Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying." As explained in the accompanying commentary (see the Appendix below)

> Rules and guidelines should primarily target those who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However, definition of

[21] ICAC report, p. 37.

[22] Joo-Cheong Tham, *Money and Politics, The democracy we can't afford, UNSW Press, 2010, p. 238.*

[23] ibid, at pp 238-9.

[24] Ibid, at pp 247-8.

> lobbying activities should also be considered more broadly and inclusively to provide a level playing field for interest groups, whether business or not-for-profit entities, which aim to influence public decisions.

Contrary to the spirit of principle 4, we have not tried to establish a level playing field in our regulation of lobbyists. We have deliberately adopted a very narrow definition that is concerned only to require the relatively small number of professional third party lobbyists to register their names, their clients and some other details. By relatively, I mean relative to the number of organisations that actually lobby government. We exclude corporations lobbying on their own behalf. We exclude peak organisations lobbying on behalf of their members as a whole, or for a more limited number of their members. We exclude non-government organisations and other not-for-profits, including the churches.

Next, principle 5, "Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities." The commentary includes this statement

> To adequately serve the public interest, disclosure on lobbying activities and lobbyists should be stored in a publicly available register and should be updated in a timely manner in order to provide accurate information that allows effective analysis by public officials, citizens and businesses.

Our public registers of lobbyists do not satisfy the requirements of principle 5. They do not record lobbying "activities", only the names of some of those doing the lobbying and who has hired them. Other mechanisms may help overcome some of the inadequacies of the registration system, such as the use of Freedom of Information (in the Commonwealth and most States), the Right to Information (in Queensland), and the Government Information (Public Access) Act (in NSW). However the efficacy of this approach depends on the adequacy of record-keeping by government. The relevant information is simply not made available on a publicly available register allowing effective analysis by public officials, citizens and businesses.

Next, principle 6, "Countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities." The commentary includes this statement

> Government should also consider facilitating public scrutiny by indicating who has sought to influence legislative or policy-making processes, for example by disclosing a 'legislative footprint' that indicates the lobbyists consulted in the development of legislative initiatives. Ensuring timely access to such information enables the inclusion of diverse views of society and business to provide balanced information in the development and implementation of public decisions.

As noted earlier, in the United States a great deal of lobbying activity is directed at legislators. That is not the case in Australian jurisdictions. Our regulations are concerned with lobbying "government representatives". But in many Australian jurisdictions the "legislative footprint" referred to by the OECD should not be ignored. Where the Government has to rely on non-government members of a lower or upper house to pass its legislation those who hold "balance of power" positions are frequently targeted by lobbyists. There is a clear public interest in such contacts being properly recorded and made accessible to the public. In Australia the onus of making records of lobbying

contacts is on government representatives. This may be one area where it is the lobbyist that should be required to record and disclose such contacts.

For the moment this area of contact with non-government legislators is an area where the Australian lobbyists regulatory system is completely inadequate.

Finally, principle 9, "Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance." It explains:

> Compliance is a particular challenge when countries address emerging concerns such as transparency in lobbying. Setting clear and enforceable rules and guidelines is necessary, but this alone is insufficient for success. To ensure compliance, and to deter and detect breaches, countries should design and apply a coherent spectrum of strategies and mechanisms, including properly resourced monitoring and enforcement. Mechanisms should raise awareness of expected rules and standards; enhance skills and understanding of how to apply them; and verify disclosures on lobbying and public complaints…
>
> Visible and proportional sanctions should combine innovative approaches, such as public reporting of confirmed breaches, with traditional financial or administrative sanctions, such as debarment, and criminal prosecution as appropriate.

Scrutiny of compliance is lacking or inadequate in the terms proposed by the OECD. There is no evidence in the Australian systems of a coherent spectrum of strategies and mechanisms, including properly resourced monitoring and enforcement. Nor do the various schemes have much to say about the investigation of alleged breaches, let alone public reporting of confirmed breaches. And for the most part there is no suggestion of adopting traditional financial or administrative sanctions, such as debarment, and criminal prosecution as appropriate, though removal of a lobbyist from the register is an option in most jurisdictions and in Queensland the Integrity Commissioner can also suspend a lobbyist for a limited time or issue a warning.

Measured against these principles, the Australia-wide approach to the regulation of lobbying must be given the "fail" mark that international researchers have suggested. Is registration of lobbyists sufficient? By international standards the answer has to be "no". Even by the relatively limited aims of ensuring that lobbying is conducted in accordance with public expectations of transparency and integrity,[25] the answer has to be the same. The schemes are too narrowly focussed on a relatively few professional lobbyists, they don't provide for adequate and timely disclosure of lobbying activity, they ignore the lobbying of non-government legislators and they contain no real mechanisms for supervision or policing and very few sanctions for breaches of the various codes and laws.

[25] The purpose of the lobbying provisions in the Queensland Integrity Act. See s. 4(b).

APPENDIX – OECD

Principles for Transparency and Integrity in Lobbying

Aim of the Principles

The Principles provide decision makers with directions and guidance to foster transparency and integrity in lobbying. Decision makers may use all available regulatory and policy options in order to select measures, guidelines or rules that meet public expectations for transparency and integrity.

Scope of the Principles

The Principles are primarily directed at decision makers in the executive and legislative branches. They are relevant to both national and sub-national level.

Definition of Lobbying
Lobbying, the oral or written communication with a public official to influence legislation, policy or administrative decisions, often focuses on the legislative branch at the national and sub-national levels. However, it also takes place in the executive branch, for example, to influence the adoption of regulations or the design of projects and contracts. Consequently, the term public officials include civil and public servants, employees and holders of public office in the executive and legislative branches, whether elected or appointed.

I. Building an Effective and Fair Framework for Openness and Access

1. Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.
Public officials should preserve the benefits of the free flow of information and facilitate public engagement. Gaining balanced perspectives on issues leads to informed policy debate and formulation of effective policies. Allowing all stakeholders, from the private sector and the public at large, fair and equitable access to participate in the development of public policies is crucial to protect the integrity of decisions and to safeguard the public interest by counterbalancing vocal vested interests. To foster citizens' trust in public decision making, public officials should promote fair and equitable representation of business and societal interests.

2. Rules and guidelines on lobbying should address the governance concerns related to lobbying practices, and respect the socio-political and administrative contexts.

Countries should weigh all available regulatory and policy options to select an appropriate solution that addresses key concerns such as accessibility and integrity, and takes into account the national context, for example the level of public trust and measures necessary to achieve compliance. Countries should particularly consider constitutional principles and established democratic practices, such as public hearings or institutionalised consultation processes.

Countries should not directly replicate rules and guidelines from one jurisdiction to another. Instead, they should assess the potential and limitations of various policy and regulatory options and apply the lessons learned in other systems to their own context. Countries should also consider the scale and nature of the lobbying industry within their jurisdictions, for example where supply and demand for professional lobbying is limited, alternative options to mandatory regulation for enhancing transparency, accountability and integrity in public life should be contemplated. Where countries do

opt for mandatory regulation, they should consider the administrative burden of compliance to ensure that it does not become an impediment to fair and equitable access to government.

3. Rules and guidelines on lobbying should be consistent with the wider policy and regulatory frameworks.

Effective rules and guidelines for transparency and integrity in lobbying should be an integral part of the wider policy and regulatory framework that sets the standards for good public governance. Countries should take into account how the regulatory and policy framework already in place can support a culture of transparency and integrity in lobbying. This includes stakeholder engagement through public consultation and participation, the right to petition government, freedom of information legislation, rules on political parties and election campaign financing, codes of conduct for public officials and lobbyists, mechanisms for keeping regulatory and supervisory authorities accountable and effective provisions against illicit influencing.

4. Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.

Definitions of 'lobbying' and 'lobbyists' should be robust, comprehensive and sufficiently explicit to avoid misinterpretation and to prevent loopholes. In defining the scope of lobbying activities, it is necessary to balance the diversity of lobbying entities, their capacities and resources, with the measures to enhance transparency. Rules and guidelines should primarily target those who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However, definition of lobbying activities should also be considered more broadly and inclusively to provide a level playing field for interest groups, whether business or not-for-profit entities, which aim to influence public decisions.

Definitions should also clearly specify the type of communications with public officials that are not considered 'lobbying' under the rules and guidelines. These include, for example, communication that is already on public record – such as formal presentations to legislative committees, public hearings and established consultation mechanisms.

II. Enhancing Transparency

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

Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny. It should be carefully balanced with considerations of legitimate exemptions, in particular the need to preserve confidential information in the public interest or to protect market-sensitive information when necessary.

Subject to Principles 2 and 3, core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process. Supplementary disclosure requirements might shed light on where lobbying pressures and funding come from. Voluntary disclosure may involve social responsibility considerations about a business entity’s participation in public policy development and lobbying. To adequately serve the public interest, disclosure on lobbying activities and lobbyists

should be stored in a publicly available register and should be updated in a timely manner in order to provide accurate information that allows effective analysis by public officials, citizens and businesses.

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

The public has a right to know how public institutions and public officials made their decisions, including, where appropriate, who lobbied on relevant issues. Countries should consider using information and communication technologies, such as the Internet, to make information accessible to the public in a cost-effective manner. A vibrant civil society that includes observers, 'watchdogs', representative citizens groups and independent media is key to ensuring proper scrutiny of lobbying activities. Government should also consider facilitating public scrutiny by indicating who has sought to influence legislative or policy-making processes, for example by disclosing a 'legislative footprint' that indicates the lobbyists consulted in the development of legislative initiatives. Ensuring timely access to such information enables the inclusion of diverse views of society and business to provide balanced information in the development and implementation of public decisions.

III. Fostering a Culture of Integrity

7. Countries should foster a culture of integrity in public organisations and decision making by providing clear rules and guidelines of conduct for public officials.

Countries should provide principles, rules, standards and procedures that give public officials clear directions on how they are permitted to engage with lobbyists. Public officials should conduct their communication with lobbyists in line with relevant rules, standards and guidelines in a way that bears the closest public scrutiny. In particular, they should cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse 'confidential information', disclose relevant private interests and avoid conflict of interest. Decision makers should set an example by their personal conduct in their relationship with lobbyists.

Countries should consider establishing restrictions for public officials leaving office in the following situations: to prevent conflict of interest when seeking a new position, to inhibit the misuse of 'confidential information', and to avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post.

8. Lobbyists should comply with standards of professionalism and transparency; they share responsibility for fostering a culture of transparency and integrity in lobbying.

Governments and legislators have the primary responsibility for establishing clear standards of conduct for public officials who are lobbied. However, lobbyists and their clients, as the ordering party, also bear an obligation to ensure that they avoid exercising illicit influence and comply with professional standards in their relations with public officials, with other lobbyists and their clients, and with the public.

To maintain trust in public decision making, in-house and consultant lobbyists should also promote principles of good governance. In particular, they should conduct their contact with public officials with integrity and honesty, provide reliable and accurate information, and avoid conflict of interest in

relation to both public officials and the clients they represent, for example by not representing conflicting or competing interests.

IV. Mechanisms for Effective Implementation, Compliance and Review

9. Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance.

Compliance is a particular challenge when countries address emerging concerns such as transparency in lobbying. Setting clear and enforceable rules and guidelines is necessary, but this alone is insufficient for success. To ensure compliance, and to deter and detect breaches, countries should design and apply a coherent spectrum of strategies and mechanisms, including properly resourced monitoring and enforcement. Mechanisms should raise awareness of expected rules and standards; enhance skills and understanding of how to apply them; and verify disclosures on lobbying and public complaints. Countries should encourage organisational leadership to foster a culture of integrity and openness in public organisations and mandate formal reporting or audit of implementation and compliance. All key actors – in particular public officials, representatives of the lobbying consultancy industry, civil society and independent 'watchdogs' – should be involved both in establishing rules and standards, and putting them into effect. This helps to create a common understanding of expected standards. All elements of the strategies and mechanisms should reinforce each other; this co-ordination will help to achieve the overall objectives of enhancing transparency and integrity in lobbying.

Comprehensive implementation strategies and mechanisms should carefully balance risks with incentives for both public officials and lobbyists to create a culture of compliance. For example, lobbyists can be provided with convenient electronic registration and report-filing systems, facilitating access to relevant documents and consultations by an automatic alert system, and registration can be made a prerequisite to lobbying. Visible and proportional sanctions should combine innovative approaches, such as public reporting of confirmed breaches, with traditional financial or administrative sanctions, such as debarment, and criminal prosecution as appropriate.

10. Countries should review the functioning of their rules and guidelines related to lobbying on a periodic basis and make necessary adjustments in light of experience.

Countries should review – with the participation of representatives of lobbyists and civil society – the implementation and impact of rules and guidelines on lobbying in order to better understand what factors influence compliance. Refining specific rules and guidelines should be complemented by updating implementation strategies and mechanisms. Integrating these processes will help to meet evolving public expectations for transparency and integrity in lobbying. Review of implementation and impact, and public debate on its results are particularly crucial when rules, guidelines and implementation strategies for enhancing transparency and integrity in lobbying are developed incrementally as part of the political and administrative learning process.[26]

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[26] http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=256&InstrumentPID=250 &Lang=en&Book=False