Coalition Senators' Minority Report

Introduction

1.1 There is no question that ministerial probity and transparency are essential pillars of our democracy. The Coalition shares the view that public confidence in the integrity of government is vital to the effective functioning of our parliamentary system. But the Government has presented a proposal to create a register of lobbyists that is seriously flawed.

1.2 The register, as proposed, contravenes the principle of equality before the law by unfairly preferencing one sector of the business community over another. This partisan attempt to protect union political influence creates substantial legal loopholes that defeat the Government's professed purpose in this initiative. There is nothing in the Code's provisions that would prevent disgraced former WA premier Brian Burke from lobbying the ministerial wing of Parliament, provided that he was employed as an in-house advocate on the payroll of a union or corporation.

1.3 The Code invests the Cabinet Secretary and the Secretary of the Department of the Prime Minister and Cabinet (PM&C) with arbitrary power to exclude persons from the registry with few and onerous avenues of appeal. This would create the potential for partisan or personal abuse of this power that could have a chilling effect on the practical ability of citizens and groups to petition government for redress of grievances or in favour of their point of view.

Arbitrary powers of sanction

1.4 Clause 10.4 of the Code confers absolute power on the Cabinet Secretary to decide the fate of a lobbyist:

> 10.4 The Secretary:
>
> (a) must not register a lobbyist, a person who is an employee of a lobbyist or a contractor or person engaged by a lobbyist if the Cabinet Secretary, in his or her absolute discretion, directs the Secretary not to register the lobbyist or the individual, and
>
> (b) must remove from the Register a lobbyist or a person who is an employee of a lobbyist or a contractor or person engaged by a lobbyist from the Register if the Cabinet Secretary, in his or her absolute discretion, directs the Secretary to remove the lobbyist or the individual from the Register.[1]

1.5 While certainly not akin to a criminal finding of guilt, or even a civil finding of liability, exclusion from the register of lobbyists can have a profoundly pejorative impact on the livelihoods of those involved. Such a sanction should not be imposed

1 Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, May 2008, clause 10.4.

lightly. And yet the Government's proposal combines the arbitrary power to punish with a dearth of procedural protections that makes possible the partisan misapplication of exclusionary sanctions.

1.6 The Government may argue that it is appropriate to impose a higher standard of behaviour on lobbyists than is required by the bare bones mandate of the law. It may also contend that removal from the register of lobbyists cannot reasonably be compared to a judicial sanction and that, thus, conventional legal standards of due process and fairness are not required.

1.7 Assistant Secretary Mr David Macgill testified: 'it would be reasonable to assume' that the standard of proof required to condemn a lobbyist would be directly proportional to the severity of the allegations involved. 'I do not think' Mr Macgill added, that the evidentiary standard needed to prove a minor transgression 'would be as high as that needed to justify removal from the register.'[2] But reasonable assumptions and thoughts are no guarantee of substantive or procedural fairness. There is nothing in the text of the Code, or in the explanatory testimony of PM&C officials, that would prevent its exclusionary powers being used in a personally vindictive manner or to pursue partisan political advantage.

1.8 The concentration of such arbitrary power in the hands of two individuals creates substantial potential for abuse, especially when the senior of the pair is an elected member of parliament. The possibility of impropriety is exacerbated by the equivocal language used by PM&C officials in testimony before the Committee on the exclusion provisions of the Code.[3]

1.9 In essence, the Government is saying "trust us." But the principles of proper governance are rightly inimical to such informal and extemporised assurances because they provide no protection against official abuse.

1.10 And the avenues of appeal against such a decision would be limited and unduly onerous. The Commonwealth Ombudsman would only have the power to address fairness of the administrative process leading to exclusion, not the essence of the decision itself to exclude.[4] The primary source of redress against a decision to exclude, according to First Assistant Secretary Belcher, would be a financially onerous appeal to the High Court.[5] Mr David Macgill also pointed out the possibility

2 Mr David Macgill, Assistant Secretary, Parliamentary and Government Branch, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, p. 13.

3 See for example: *Committee Hansard*, 23 June 2008, pp 10–12 and 14–15.

4 Ms Barbara Belcher, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, p. 5.

5 Ms Barbara Belcher, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, p. 4.

of common law appeal to the Federal Court under Section 39B of the *Judiciary Act 1903*.[6]

1.11 Such avenues of legal recourse against a decision of the Cabinet Secretary or Secretary of PM&C to suspend or cancel a lobbyist's registration would involve substantial legal costs. Most lobbying firms are small businesses which would have no financial capacity to mount costly legal challenges.

1.12 It is all too easy to envisage a scenario in which the improper wielding of such arbitrary power would create a chilling effect on discourse and debate. And this disincentive to express views unpopular with government would apply exclusively to lobbying firms, and through them to their clientele of smaller businesses unable to afford in-house advocates. Public policy that is wise and well considered is dependent upon inputs from a wide variety of perspectives and interest groups. But by creating a regime that lends itself so readily to abuse, the Government's proposal could inhibit the practical ability of certain sectors of the community to petition government for redress.

Selective application

1.13 The preamble of the Code proclaims that 'respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials.' But the integrity of government is, in turn, dependent upon the perception that the law is being impartially applied without fear or favour.

1.14 The Government's proposed Code of Conduct does injury to that principle. The Code is worded in such a way that must inevitably give rise to the suspicion that its provisions were tailor-made to absolve the trade union movement from the requirement of adherence. Clause 3 of the Code exempts organisations wealthy enough to employ in-house government relations staff or lobbyists. And while this exemption would apply to large private sector corporations, it would encompass trade union representatives as well.

1.15 But any measure solely preferencing labour unions would be a blatant stratagem too transparent for the Government to get away with. And thus the Code brings large companies along in order to provide plausible cover for the Government's desire to exempt unions.

1.16 Clause 3 also contains a list of other groups that enjoy a similar exemption from the Code. These include: religious organisations, charities, non-profit groups, individuals making personal representations, trade delegations, doctors, lawyers or accountants.

1.17 As Senator Fierravanti-Wells pointed out:

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6 Mr David Macgill, Assistant Secretary, Parliamentary and Government Branch, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, p. 5

> I have a concern that the main players who do lobbying have been excluded. That really is the nub of the criticism of this code: that the main players, particularly unions, other industry bodies and other organisations are excluded. I quote again from the *Sydney Morning Herald* article:
>
> …unions, other industry bodies, churches and charities or corporate executives who are free to access … government figures without having to disclose their details or comply with the ethical standard.
>
> That really is of concern. I would like to understand what the thinking is for the government to specifically exclude such a large component of people who probably make up the most substantial entity of lobbying in this place.[7]

1.18 The only entities that would be forced to comply with the provisions of the Code would be commercial public affairs firms that lobby on behalf of third party clients. The clients of such public affairs firms are generally smaller companies and entities that cannot afford to retain their own in-house lobbyists.

1.19 Thus the selective application of the Code would create a two-tiered system that would bestow unfair advantage upon larger business entities over smaller ones. Companies sizeable and affluent enough to feature in-house lobbyists would enjoy an uninhibited scope of action.

1.20 But the ability of more modest companies to petition government would be limited by the fact that the private sector public affairs that represent their interests would be limited to the restrictive provisions of the Code. The unlevel playing field created by the Code is yet another manifestation of the Labor Government's bias against the small business sector.

1.21 The provisions of the Code are so badly worded as to potentially render it impotent in dealing with the very abuses it is intended to prevent. There is nothing to prohibit Brian Burke meeting with ministers and staff as long as he was employed in an in-house capacity.

Use of vague terms

1.22 The vague wording that pervades the text of the Code gives rise to potential restrictions on legitimate advocacy by lobbyists.

1.23 Clause 8.1(b) enjoins lobbyists to 'use all reasonable endeavours to satisfy themselves of the truth and accuracy all statements and information provided them to clients whom they represent, the wider public and Government representatives.' Clause 8.1(c) prohibits the making of 'misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to Government representatives, members of political parties or to any other person.' But 'misleading or deceptive conduct' that passes the threshold of illegality is already proscribed by Sections 51A, 52 and 53 of the *Trade Practices Act 1974*.

7 Senator Concetta Fierravanti-Wells, *Committee Hansard*, 23 June 2008, p 10.

1.24 The Code seeks to proscribe speech that falls well short of the illegality threshold. This has worrisome ramifications for freedom of expression, particularly given that such censorship would be applied to the realm of political advocacy. Potential civil liberties concerns are exacerbated by the fact that the Code does nothing to provide concrete definitions of, and differences between, the categories of 'misleading, exaggerated or extravagant claims.'

1.25 PM&C was questioned on this issue during the hearings:

> **Senator FIFIELD**—I will move on to clause 8, on the principles of engagement with government representatives that lobbyists should observe, one of which is:
>
> (b) lobbyists shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided by them to clients whom they represent, the wider public and Government representatives—
>
> and following on—
>
> c) lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to Government representatives, members of political parties or to any other person …
>
> What criteria is PM&C intending to use to determine what constitutes a misleading, exaggerated or extravagant claim? Surely that is very much in the eye of the beholder. I am wondering what criteria you have in mind, because I would not envy you being required to police that requirement.
>
> **Ms Belcher**—No, we would not be able to, because that would be something that would have the potential to occur in the actual lobbying activity and PM&C would not be a party to that. I believe it would be for those being lobbied—that is, ministers or public servants—to make judgements. If, after they had seen a lobbyist, they came to understand that there had been exaggeration, then that is something that they could bring to the attention of the secretary or minister.[8]

1.26 The power to define these vague concepts would reside in the hands of ministers and their staff, who (apart from Department Liaison Officers) are partisan political actors. The looseness of the Code's verbiage creates a potential for subjective application and the danger of partisan or personal abuse.

Inadequate provisions

1.27 Clause 8.1(e) of Code appears designed to prevent lobbyists from petitioning ministers while misrepresenting or keeping secret the identity of the clients on whose behalf the representations are made. But the knowledge of an advocate's clientele is a central pillar of any effective appeal to government. Most ministers would be unreceptive to petitions made by a lobbyist on behalf of an anonymous client. It is

8 Senator Mitch Fifield and Ms Barbara Belcher, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, p 5.

highly implausible that such elisions or misrepresentations would occur on anything other than rare occasions. The section of the Code intended to deal with such an infrequent scenario represents policy overkill.

1.28 And yet the Code simultaneously encourages large private companies to camouflage their political advocacy activities by putting former politicians – who would be exempt – on their boards for lobbying purposes. This constitutes a loophole that completely subverts the purpose of the Code. One part of the Code goes to ridiculously disproportionate lengths to quash a rare form of subterfuge while excusing a deceptive ploy that is much more common.

Post-employment prohibitions

1.29 The Code also places prohibitions on post-government employment by staff that are both unfair and counter-productive. Clauses 7.1 and 7.2 forbid former staff members to 'engage in lobbying activities relating to any matter that they had official dealings with' for 18 months (ministerial staff) and 12 months (parliamentary secretarial staff) after leaving government service.

1.30 This provision ignores the protean realities of government that are marked by periodic reshuffles and portfolio changes. In the event of such a change of ministerial portfolio, a minister's subject matter expert staff members would be in serious jeopardy of employment disadvantage. They may not be able to gain a position with the incoming minister who could be arriving with his/her own staff, and yet they would be precluded from seeking employment in the government relations arena. As the Community and Public Sector Union notes in its submission:

> The nature of MOPS staff employment is fundamentally different to APS employment. MOPS staff employment is tenuous. There is no job security and under the MOPS Act Part III & IV staff can be terminated at any time.
>
> At the same time, if a Minister is demoted his or her employment continues, the DLO returns to the Department but the Ministerial Advisor has to find a new job to put food on the table.
>
> The effect of applying the post-separation employment on all 'government representatives' fails to acknowledge the disparate job security and superannuation entitlements that exist between Ministers, APS employees and MOPS staff.
>
> CPSU members are deeply concerned that their employment opportunities post-separation have been severely curtailed without their prior knowledge or agreement. Post-separation restrictions most commonly exist in the private sector and these restrictions on trade have been strictly defined at common law. They are a condition of employment at the point of accepting the job offer, detailed in writing as part of the employment contract, and are reflected in the remuneration package. The Lobbying Code of Conduct as it stands changes the employment conditions of ministerial advisors

> retrospectively, without individual agreement and in the absence of increased remuneration.[9]

1.31 The post-employment prohibitions also represent a retrospective change to the conditions of employment of MOPS staff.

Confusion over Q&A

1.32 There is some ambiguity as to whether the question and answers section on the PM&C website forms part of the Code.[10] Evidence presented to the Committee did not resolve whether the Q&A formed a formal part of the Code or whether it was only guidance but not part of the Code itself:

> **SENATOR FIFIELD**—Would it be fair to say that the questions and answers did, in effect, form part of the code?
>
> **Ms Belcher**—Certainly, they provide the guidance on how to abide by the code.
>
> **Senator MOORE**—In the official Public Service way we talk, the Q&A would act as a quasiguideline.
>
> **Ms Belcher**—Yes, we would regard the Q&A as guidelines.
>
> **SENATOR FIFIELD**—A lobbyist could look at the code itself, in the absence of the Q&A , and say, 'I have satisfied the code.'
>
> **Ms Belcher**—That is right.
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> **SENATOR FIFIELD**—So the Q&A does, in effect, form part of the code. Do you think the code itself needs to make reference to the Q&A so that there is a direct link between them?
>
> **Ms Belcher**—Yes, we can certainly make that link on the website so that it is quite obvious.
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> **SENATOR FIFIELD**—I must say I think that could provide an opportunity, or an out, for some lobbyists, to say, 'I have observed the code without reference to the Q&A.'[11]

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9 Community and Public Sector Union, *Submission 9*, p 5.

10 Department of the Prime Minister and Cabinet, *Australian Government Lobbyists Register: Questions and Answers*, May 2008. http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=faq (accessed 3 September 2008.).

11 Senator Mitch Fifield, Senator Claire Moore and Ms Barbara Belcher, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, p. 15.

1.33 Thus the question arises whether a lobbyist could conform with the letter of the Code but not comply with guidance in the Q&A, yet still argue that they were in full compliance with the Code.

Wider application to non-executive parliamentarians and staff

1.34 In his submission to the Committee, Mr Harry Evans, the Clerk of the Senate addressed the proposal that the application of the Code be broadened to encompass all Members of Parliament and their staff. Mr Evans explained that Constitutional restrictions would mandate the creation of 'three separate but substantially similar regimes,' one for either House of Parliament, and a third for ministers.[12]

1.35 And in pointing out the practical need for a joint registration of lobbyists, Mr Evans noted that this would involve a joint capacity 'not hitherto contemplated in Australia's system of government: the three parties to the joint process and register would be each of the two Houses and the executive government.'[13]

1.36 But the enforcement of such a broader scheme would be problematic, according to Mr Evans' submission. A program to regulate the rights of members and their staff to communicate would be unprecedented in the history of Australian democracy. And the enforcement power would rely on the 'blunt instrument' of their contempt jurisdiction. And cases would likely involve:

> ...a great deal of disputation about the nature of the dealings, whether they really constituted lobbying, whether the other persons concerned were acting in the capacity of lobbyist or simply communicating with the member in some other capacity, and the nature of the communications and so forth.[14]

1.37 An alternative enforcement mechanism could be created through the codification of the lobbying code in statute. But, as Mr Evans noted, 'such a course would obviously be fraught with difficulties and would involve a very large intrusion by the judiciary into the internal operations of the Parliament. The statute would [also] have to survive constitutional challenge based on freedom of political communication.'[15]

1.38 The legal ability of both Houses to regulate the conduct of their former members was also called into serious question by Mr Evans' submission: 'Such regulation would probably not meet the test mentioned. Serving members could be prohibited from dealing with such persons, but that would be another significant extension of the scope of the regulation of members.'[16]

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12 Mr Harry Evans, Clerk of the Senate, *Submission 2*, p. 1.

13 Mr Harry Evans, Clerk of the Senate, *Submission 2*, p. 2.

14 Mr Harry Evans, Clerk of the Senate, *Submission 2*, p. 3.

15 Mr Harry Evans, Clerk of the Senate, *Submission 2*, p. 3.

16 Mr Harry Evans, Clerk of the Senate, *Submission 2*, p. 3.

Conclusion

1.39 There is no widespread crisis of public confidence in the probity of Commonwealth governance or institutions. The proposed Code should be viewed in this context.

1.40 But if the aim of the Code is to stop the occurrence in the Federal jurisdiction of the episodes witnessed with the likes of disgraced former Western Australian premier Brian Burke and the Wollongong development scandal in New South Wales, then this Code fails that test.

1.41 The Code is marred by vague wording and many inadequately considered provisions. The Government's Lobbying Code of Conduct, in unamended form, will fail to achieve its stated purpose and could create a cure worse than the mild imperfections that might occasionally afflict the realm of political lobbying at Commonwealth level. Opposition Senators therefore propose the following amendments to the code.

Recommendations

Recommendation 1

1.42 That the Cabinet Secretary's powers to exclude a lobbyist from the register be devolved to the Secretary of the Department of the Prime Minister and Cabinet.

Recommendation 2

1.43 That a decision to exclude an individual or entity from the register be subject to appeal to the Administrative Appeals Tribunal, to ensure that legal recourse is not cost prohibitive.

Recommendation 3

1.44 That coverage of the Code be expanded to embrace unions, industry associations and other businesses conducting their own lobbying activities.

Recommendation 4

1.45 That post-employment restrictions on MOPS staff be removed from the Code

Recommendation 5

1.46 That the status of the Code Q&A section on the PM&C website be clarified to establish whether it forms part of the Code itself.

Recommendation 6

1.47 That the Code should not be expanded to apply to non-executive members of either House of Parliament nor to non-ministerial MOPS staff.

Senator Mitch Fifield
Deputy Chair

Senator Concetta Fierravanti-Wells

Senator Scott Ryan