

The Senate

Standing Committee on
Finance and Public Administration

Knock, knock... who's there?

The Lobbying Code of Conduct

September 2008

© Commonwealth of Australia 2008

ISBN 978-0-642-71975-1

Printed by the Senate Printing Unit, Parliament House, Canberra.

Membership of the Committee

Members to 30 June 2008

Senator Helen Polley (Chair)	ALP, TAS
Senator Mitch Fifield (Deputy Chair)	LP, VIC
Senator Carol Brown	ALP, TAS
Senator Jacinta Collins	ALP, VIC
Senator Concetta Fierravanti-Wells	LP, NSW
Senator Claire Moore	ALP, QLD
Senator Andrew Murray	AD, WA
Senator John Watson	LP, TAS

Members from 1 July 2008

Senator Helen Polley (Chair)	ALP, TAS
Senator Mitch Fifield (Deputy Chair)	LP, VIC
Senator Doug Cameron	ALP, NSW
Senator Jacinta Collins	ALP, VIC
Senator Concetta Fierravanti-Wells	LP, NSW
Senator Claire Moore	ALP, QLD
Senator Scott Ryan	LP, VIC

Participating Members

Senators Abetz, Adams, Arbib, Barnett, Bernardi, Birmingham, Bishop, Bilyk, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Coonan, Cormann, Crosin, Eggleston, Ellison, Farrell, Feeny, Fielding, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Hogg, Humphries, Hurley, Hutchins, Johnston, Joyce, Lulam, Lundy, Ian Macdonald, Marshall, Mason, McGauran, McLucas, Milne, Minchin, Nash, O'Brien, Parry, Payne, Ronaldson, Pratt, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Secretariat

Stephen Palethorpe	Committee Secretary
Tim Watling	Principal Research Officer
Michael Masters	Research Officer
Katie Meyers	Executive Assistant
Margaret Cahill	Executive Assistant

Committee address

Finance and Public Administration Committee

SG.60, Parliament House

CANBERRA ACT 2600

Tel: 02 6277 3530 Fax: 02 6277 5809

Email: fpa.sen@aph.gov.au

Internet: www.aph.gov.au/senate_fpa

TABLE OF CONTENTS

Membership of the Committee.....	iii
Abbreviations	vii
Recommendations.....	ix
Chapter 1 - Inquiry into the Lobbying Code of Conduct	1
Background.....	1
Purpose of the Code.....	1
Conduct of the inquiry	2
Acknowledgement	3
Note on references	3
Chapter 2 - Issues.....	5
Widespread support	5
Coverage of lobbyists	6
Procedural fairness	9
Regulatory burdens.....	11
Legal status	12
Coverage of Parliamentarians.....	13
Post-employment prohibitions.....	15
Conclusion	17
Coalition Senators' Minority Report	19
Introduction	19
Arbitrary powers of sanction	19
Selective application.....	21
Use of vague terms	22
Inadequate provisions	23

Post-employment prohibitions.....	24
Confusion over Q&A	25
Wider application to non-executive parliamentarians and staff.....	26
Conclusion	27
Recommendations	27
Appendix 1.....	29
Submissions received	29
Appendix 2.....	31
Additional information received.....	31
Appendix 3.....	33
Public hearings and witnesses	33

Abbreviations

ACCI	Australian Chamber of Commerce and Industry
APS	Australian Public Service
CPSU	Community and Public Sector Union
PIAC	Public Interest Advocacy Centre
PM&C	Department of the Prime Minister and Cabinet
the Code	Lobbying Code of Conduct
the Committee	Senate Finance and Public Administration Committee
USU	United Services Union

Recommendations

Recommendation 1

2.58 That the Senate Standing Committee on Finance and Public Administration conduct an inquiry into the operation of the *Lobbying Code of Conduct* in the second half of 2009.

Chapter 1

Inquiry into the Lobbying Code of Conduct

Background

1.1 A Lobbying Code of Conduct (the Code) was tabled in the Senate on 13 May 2008 by the Cabinet Secretary, Senator the Hon. John Faulkner. The following day, the Senate referred the Code to the Finance and Public Administration Committee (the committee) for inquiry and report by 28 August 2008, with the following Terms of Reference:

...whether the proposed code is adequate to achieve its aims and, in particular, whether:

- (i) a consolidated code applying to members of both Houses of the Parliament and their staff, as well as to ministers and their staff, should be adopted by joint resolution of the two Houses;
- (ii) the code should be confined to organisations representing clients, or should be extended to organisations which lobby on their own behalf; and
- (iii) the proposed exemptions are justified...

1.2 The Code is available from <http://lobbyists.pmc.gov.au/lobbyistsregister/>.

Purpose of the Code

1.3 The preamble to the Code states that it is:

...intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty. Lobbyists and Government representatives are expected to comply with the requirements of the *Lobbying Code of Conduct* in accordance with their spirit, intention and purpose.¹

1.4 The Code establishes a publicly available Register of Lobbyists. The register has operated since 1 July 2008 and as at 4 August 2008, lists the details of 171 lobbyists and their clients.² It provides the following information on the Department of the Prime Minister and Cabinet (PM&C) website:

- business registration details, including trading names, of the lobbyist;

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

2 <http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=whoIsOnRegister> (accessed 4 August 2008).

- the names and positions of persons employed, contracted or otherwise engaged by the lobbyist to carry out the lobbying activities; and
- the names of clients on whose behalf the lobbyist conducts lobbying activities subject to not disclosing certain information under Chapter 6CA of the *Corporations Act 2001*.³

1.5 A significant feature of the Code is that it applies only to 'third party lobbyists'. That is, it applies to lobbyists who lobby one party on behalf of a third. It does not apply to 'in house' lobbyists. Another significant feature is that it applies to government ministers and does not extend to other parliamentarians.

1.6 Although Australia had a lobbyists register in place from 1984 to 1996, it was not a public register, and did not include a code of conduct to regulate lobbying practice. The committee understands that the European Parliament is moving to establish a mandatory public register of lobbyists, as well as a code of conduct, and that Canada and the United States also have registers.⁴

Conduct of the inquiry

1.7 The committee advertised the inquiry nationally in *The Australian* on 21 May, 4 June and 18 June 2008.

1.8 The committee received 13 submissions, which are listed in Appendix 1. Submissions were also posted on the committee's website to facilitate public access. The committee also received several items of additional information, which are listed in Appendix 2, including 25 submissions received by PM&C on the exposure draft of the Code.

1.9 The committee held hearings in Canberra on 16 June and 23 June 2008. A list of the witnesses who appeared at the hearings is in Appendix 3. Copies of the Hansard transcript are available on the committee's internet page at:
www.aph.gov.au/senate/committee/fapa_ctte/lobbying_code/hearings/index.htm.

3 Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, May 2008, p. 3.

4 See for example Senator the Hon. John Faulkner, Cabinet Secretary, *Senate Hansard*, 13 May 2008, p. 1510.

Acknowledgement

1.10 The committee appreciates the time and work of all those who provided written and oral submissions to the inquiry. Their work has assisted the committee considerably in its inquiry.

Note on references

1.11 References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

Chapter 2

Issues

Widespread support

2.1 The committee received evidence from a variety of organisations and individuals that generally welcomed the *Lobbying Code of Conduct* (the Code). The majority of evidence received included comments of support, which viewed the Code as a significant step towards increasing the level of transparency surrounding lobbying activities.¹ Typical of these was the following comment from Mr John O'Callaghan:

...I welcome the Code. It will lead to improved transparency in dealings between lobbyists and the federal government, providing a higher level of confidence about the processes of government, including government policy making.²

2.2 Furthermore, Professor John Warhurst argued that 'lobbyists welcome the recognition and legitimacy that tends to follow such government attention'.³

2.3 The committee notes that increasing the focus on the activities of lobbyists is in the public interest, with many citizens either unaware or sceptical of the complexities involved in the relationship between lobbyists and parliamentary processes. The committee acknowledges and supports the general aim behind the Government's introduction of the Code:

...to promote trust in the integrity of government processes and ensure that contacts between lobbyists and Government representatives are conducted in accordance with public expectations of transparency, integrity and honesty.⁴

2.4 Notwithstanding the broad ranging support for the introduction of the Code, the committee heard evidence on a range of issues including the following items which are discussed below:

- whether the coverage of lobbyists is adequate;
- procedural fairness;
- regulatory burdens;

1 See for example Mr Tim Grau, Managing Director, Springboard Australia, *Submission 1*, p. 1 and Mr Greg Sam, Joint Managing Director, Parker and Partners, *Submission 3*, p. 1.

2 Mr John O'Callaghan, *Submission 10*, p. 1.

3 Professor John Warhurst, *Submission 4*, p. 3.

4 Senator the Hon John Faulkner, Special Minister of State and Cabinet Secretary, *Senate Hansard*, 13 May 2008, p. 1511.

- whether the coverage of parliamentarians is adequate; and
- post-employment prohibitions.

Coverage of lobbyists

2.5 The terms of reference required the committee to examine:

...whether the code should be confined to organisations representing clients, or should be extended to organisations which lobby on their own behalf, and the proposed exemptions are justified.⁵

2.6 The definition of 'lobbyist' lies at the heart of the Code, because this determines who will be affected by its application. At present, only third party lobbyists are covered. The definition reads:

...any person, company or organisation who conducts lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client...⁶

2.7 Notably, the definition excludes organisations that engage in lobbying activities on their own behalf rather than for a client. This exclusion covers many types of organisations, such as industry peak bodies and trade unions, which are well known for their engagement in lobbying activities. The express exclusions are:

- charitable, religious and other organisations or funds that are endorsed as deductible gift recipients;
- non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients;
- individuals making representations on behalf of relatives or friends about their personal affairs;
- members of trade delegations visiting Australia;
- persons who are registered under an Australian Government scheme regulating the activities of members of that profession, such as registered tax agents, Customs brokers, company auditors and liquidators, provided that their dealings with Government representatives are part of the normal day to day work of people in that profession; and
- members of professions, such as doctors, lawyers or accountants, and other service providers, who make occasional representations to Government of behalf of others in a way that is incidental to the provision to them of their professional and other services...⁷

5 *Journals of the Senate*, 14 May 2008, p. 389.

6 Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, May 2008, p. 2.

7 Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, May 2008, p. 2.

2.8 At the tabling of the Code, the Cabinet Secretary, Senator the Hon. John Faulkner explained the government's rationale:

It does not apply to government relations staff employed in major companies or peak industry organisations as the very nature of their employment means that it will be clear to ministers and others whose interests they will be representing...[T]he objective of the code is not to make every company whose staff or executives visit a minister sign a register; rather, it is to ensure ministers and other government representatives know whose interests are being represented by lobbyists before them and to enshrine a code of principles and conduct for the professional lobbying industry.⁸

2.9 The committee heard evidence that the definition of 'lobbyist' should be expanded to reflect the diverse nature of organisations that have access and influence in making their views known in political decision making processes.

2.10 For example the committee heard evidence from Mr David Moore, proprietor of The Next Level Consulting Services, who submitted that:

A key issue I have is with the widespread exemptions...that the overwhelming majority of the lobbying effort is actually left untouched...One is the exemption of industry bodies and trade unions, who, I think, exert considerable influence in the polity process of Australia these days, both financially and in terms of their intricate contact with the political process. I am also a bit concerned about the exemption of in-house lobbyists...quite often, we are dealing with the same people...it is not unusual for people to shift between being political staff, being lobbyists, being consultants, being in-house consultants in certain companies, and in and out of the trade union movement, in and out of associations. In effect we are quite often talking about the same class of people.⁹

2.11 Mr Moore summed up his position by stating that 'if we are going to [adopt a] framework, we should actually look to increasing the scope to include in-house lobbyists as well.'¹⁰

2.12 Another example of support for broadening the definition of lobbyist was put forward by Mr Tim Grau, Managing Director, Springboard Australia. Mr Grau raised 'grassroots' campaigning as an area neglected by the current Code, and submitted that:

...the current code that is being implemented would not prevent an organisation, be it a lobbying firm or otherwise...to take the next step, for example the organisation called GetUp which runs a grassroots campaign—

8 Senator the Hon. John Faulkner, Cabinet Secretary, *Senate Hansard*, 13 May 2008, p. 1510.

9 Mr David Moore, Proprietor, The Next Level Consulting Services, *Committee Hansard*, 16 June 2008, p. 3.

10 Mr David Moore, Proprietor, The Next Level Consulting Services, *Committee Hansard*, 16 June 2008, p. 3.

and some would argue that it has been quite successful—would not have to register under the current code. I think that organisations who are clearly involved in a lobbying exercise of some sort, be it grassroots or otherwise, and given the power now of the online lobbying that can be done, should be captured by the code.¹¹

2.13 In contrast, Community and Public Sector Union (CPSU) National Secretary, Mr Stephen Jones submitted that, while he did not advocate the application of the Code to unions, if it were to apply it would not be overly burdensome.¹²

2.14 Similar sentiments were echoed by the Australian Chamber of Commerce and Industry (ACCI). ACCI representatives explained why they felt that the current Code struck the right balance with the organisations that are excluded from the definition of 'lobbyist'. Mr Daniel Mammone, Senior Advisor, Legal and Industrial told the committee that membership of ACCI:

...is based on articles of association, a company's constitution or a registered organisation's rules. Each member's purpose and interests are clear, transparent and public. In all cases, ministers and government representatives can at all times have the continuous satisfaction that they know who they are dealing with and on what basis.¹³

2.15 Mr Scott Barklamb, ACCI's Director of Workplace Policy elaborated saying that like other 'core industrialised NGOs', such as the Australian Medical Association, the Business Council of Australia and the Australian Conservation Foundation, ACCI has 'a different fundamental purpose and character from a commercial lobbyist...'¹⁴

2.16 The committee also received evidence from CPA Australia who raised concerns about the definition surrounding 'advocacy activities'. CPA Australia stated that it remained unclear whether an organisation such as theirs would apply for registration on the lobbyists register.¹⁵ The Department of the Prime Minister and Cabinet (PM&C) subsequently informed the committee that changes were made to the *Questions and Answers* section on their website to explain that non-profit organisations such as CPA Australia are not required to register. However, were CPA

11 Mr Tim Grau, Managing Director, Springboard Australia, *Committee Hansard*, 16 June 2008, p. 5.

12 Mr Stephen Jones, National Secretary, Community and Public Sector Union, *Committee Hansard*, 16 June 2008, p. 16.

13 Mr Daniel Mammone, Senior Advisor, Legal and Industrial, Australian Chamber of Commerce and Industry, *Committee Hansard*, 16 June 2008, p. 18.

14 Mr Scott Barklamb, Director, Workplace Policy, Australian Chamber of Commerce and Industry, *Committee Hansard*, 16 June 2008, pp 18–19.

15 CPA Australia, *Submission 5*, p. 1.

Australia to lobby on behalf of a client who was a member of its organisation, then registration would be required.¹⁶

2.17 Taking into account the disparate views concerning which types of lobbyists the Code should apply to, the committee refers again to the government's stated aim that it 'is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty.'¹⁷

2.18 The committee is of the view that, despite some doubts that exist among some stakeholders regarding its scope, the Code as it currently stands provides a robust framework to achieve the government's stated objective.

2.19 Whilst the committee acknowledges that the definition of 'lobbyist' as it currently stands, is likely to cover small to medium enterprises more so than large organisations, the committee believes that it is too early to seriously consider an expansion of its scope. At the time of writing, the Code has operated for less than two months, and lists 171 lobbyists.

2.20 In order to ensure that the Code continues to achieve the government's stated objective, later in this report the committee makes a recommendation regarding a re-examination of the Code toward the end of 2009, so as to properly assess its operation in practice.

Procedural fairness

2.21 The committee heard evidence about the level of power vested in the Cabinet Secretary and the Secretary of PM&C, who are authorised to identify potential breaches and remove organisations and individuals from the register of lobbyists.¹⁸ Parker and Partners stated that more information should be provided that explains the process behind the 'reporting and handling of potential breaches'.¹⁹

2.22 PM&C informed the committee of the various 'stages' that would occur once an allegation of a breach of the Code had taken place.²⁰ Officials submitted that in most cases it is expected the Secretary of PM&C would be informed in writing of a

16 Department of the Prime Minister and Cabinet, *Lobbying Register – Questions and Answers*, 23 June 2008, p. 4, www.aph.gov.au/senate/committee/fapa_ctte/lobbying_code/additional_info/PMC_Updated_Lobbyists_Register_Questions_Answers.pdf (accessed 5 August 2008).

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

18 Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, May 2008, pp 5–6. See clauses 9 to 10.5.

19 Parker and Partners, *Submission 6*, p. 2.

20 Ms Barbara Belcher, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, pp 2–4.

possible breach and that follow-up action would entail the lobbyist having an opportunity to comment on accusations made against them, also in writing. The committee was told that the Cabinet Secretary will be advised of any allegation of a breach.²¹

2.23 PM&C officials informed the committee about what burden of proof will be required by the Cabinet Secretary when passing judgement on allegations of impropriety against persons or organisations placed on the register of lobbyists:

...it would be reasonable to assume that the more damaging the penalty...the higher the standard of proof should be on the minister before making a decision to remove someone from the register. If we are talking about counselling a lobbyist because they may have made a claim that was a bit exaggerated I do not think that the standard of proof for such a finding would be as high as that required for a finding that would lead to the removal from the register.²²

2.24 The committee heard evidence that relatively few avenues exist for appeal where a decision made by the Cabinet Secretary is disputed. In limited cases an appeal against a decision made by the Cabinet Secretary could be taken up with the Commonwealth Ombudsman, but only in regard to administrative decisions leading up to the Cabinet Secretary's decision and not a final decision to strike someone off the register.²³ The only other course of action involves application to the Federal Court or to the High Court.²⁴

2.25 The committee notes that cost implications would make these options inaccessible for most people. Mr John O'Callaghan suggested that the Commonwealth Ombudsman be given broader powers of oversight to review decisions of the Cabinet Secretary in relation to the Code.²⁵

2.26 The United Services Union (USU) contended that an avenue for appeal for employees was also needed:

...If there was to be an application of these sorts of mechanisms to employees, there needs to be transparency as to what mechanisms they

21 Ms Barbara Belcher, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, pp 2–3.

22 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.

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

24 Ms Barbara Belcher, First Assistant Secretary, Government Division, and Mr David Macgill, Assistant Secretary, Parliamentary and Government Branch, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, pp 3–4.

25 Mr John O'Callaghan, Director, John O'Callaghan and Associates, *Committee Hansard*, 16 June 2008, p. 2.

might have accountable to proceed if they need to challenge any of the applications to the punitive nature of what the code is intending...²⁶

2.27 Nonetheless, the committee is reassured by the evidence given by PM&C that decisions on dismissal from the register would not be taken summarily, and that lobbyists would be given the opportunity to respond to allegations. The committee notes its recommendation that the operation of the Code be reviewed toward the end of 2009, and notes that this aspect of the Code would be subject to that review. This, taken together with the anticipated small number of offenders against the Code, lead to committee to make no recommendation for change to its terms at this stage.

Regulatory burdens

2.28 A significant issue raised with the committee was the perceived increase in the regulatory burden faced by lobbyists required to provide information to PM&C.

2.29 John O'Callaghan & Associates raised concerns particularly in relation to clause 5.5 of the Code, which stipulates three dates per annum by which lobbyists must confirm that their details are current:

One of the hallmarks of the Rudd Government's election manifesto was to reduce the regulatory burden on small business, including promising changes to the BAS reporting impost....It seems odd, therefore, that a small lobbying operation like mine will have to report so frequently when I have such a small, but stable client list. It would be better if small businesses were required to report once per year on their lobbying details or on those occasions when their client list changes.²⁷

2.30 The committee took evidence from PM&C officials concerning the steps taken to improve the regulatory burden of the clause. Officials submitted that regular reporting was deemed useful as a means to remind lobbyists of the need to keep their details up to date. Officials also informed the committee that a reminder email will be sent from PM&C to all registered lobbyists before each reporting deadline.²⁸

2.31 The committee also heard that one way to improve the level of information publicly available on the register of lobbyists would be for lobbyists to disclose:

...a list of specific issues upon which they undertook lobbying activities for each client or entity. This should include to the maximum extent practical, a

26 Mr Craig Shannon, Secretary, ACT Clerical and Administrative Employees Branch, United Services Union, *Committee Hansard*, 16 June 2008, p. 25.

27 Mr John O'Callaghan, Director, John O'Callaghan & Associates, *Submission 10*, p. 1.

28 Ms Barbara Belcher, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 23 June 2008, pp 6–7.

list of Bills, Acts, policies, programs, contracts, grants, regulations or appointments about which lobbying occurred.²⁹

Legal status

2.32 An alternative mechanism to implementing a lobbying code of conduct, which was raised by several submitters, would be the application of a code by statute. For example an Act of Parliament could allow for enforcement of the principle behind the Code through the courts, civil actions and criminal prosecution.

2.33 The obvious difficulty with this idea is that it would be seen as an encroachment on the separation of powers between the judiciary and the Parliament. A statute would also have to survive a possible constitutional challenge based on the implied freedom of political communication.³⁰

2.34 Notwithstanding these difficulties, this course attracted some support. Mr Tim Grau, Managing Director of Springboard Australia argued that a statutory code was his preferred method. Mr Grau took the view that a non-statutory code would be insufficiently rigorous and enforceable. Mr Grau stated:

...codes of conduct are just that, they are codes, and they are a guideline for behaviour. We have seen a number of examples where those codes are not [adequately enforced] or the interpretation of what the code is or means can change over time and therefore render them virtually ineffective.³¹

2.35 The committee also received evidence from the Public Interest Advocacy Centre (PIAC) which recommended that the current sanctions in the Code be strengthened. Interestingly PIAC compared the discrepancy between the *Standards of Ministerial Ethics* in which the Prime Minister may refer a breach to an appropriate independent authority, and the Code where there is little guidance to similar avenues when dealing with breaches by Ministers.³²

2.36 However the committee notes that clause 2.1 of the Code states that it applies in conjunction with the Australian Government *Standards of Ministerial Ethics*.³³

Alternative frameworks

2.37 In addition to the option of a statutory code of conduct, other alternatives were put forward. These included the establishment of a Parliamentary Standards Officer or

29 Springboard Australia, *Submission 1*, p. 6. See also the views of the Public Interest Advocacy Centre, *Submission 6*, p. 3.

30 Mr Harry Evans, Clerk of the Senate, *Submission 2*, pp 2–3.

31 Mr Tim Grau, Managing Director, Springboard Australia, *Committee Hansard*, 16 June 2008, p. 7.

32 Public Interest Advocacy Centre, *Submission 6*, p. 9.

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

Commissioner,³⁴ a corruption watchdog³⁵ and an Ethical Advocacy Association of Australia with voluntary membership.³⁶

2.38 The committee notes these suggestions and believes they could warrant further examination if a lobbying code of conduct was intended to apply to all Members of Parliament. Because of the narrower scope of the Code as it stands, it is difficult to justify the establishment of bodies with powers of oversight beyond Parliamentary, Judicial and Independent Statutory Authorities (such as the Commonwealth Ombudsman and the Auditor-General).

Coverage of Parliamentarians

2.39 The terms of reference for the committee's inquiry required an examination of:

[W]hether a consolidated code applying to members of both Houses of the Parliament and their staff, as well as to ministers and their staff, should be adopted by joint resolution of the two Houses.³⁷

2.40 While the Code covers ministers and parliamentary secretaries, several witnesses supported the view that the Code should be expanded to cover all Members and Senators. Witnesses considered that this could be achieved in one of two ways: through a joint resolution of the Senate and the House of Representatives; or through the implementation of an Act of Parliament.

2.41 Springboard Australia argued that the expansion of the Code to all Parliamentarians would enhance the level of transparency of lobbying activities and the public's understanding of how policy positions are determined:

We believe lobbying of the Opposition [should] be subject to similar disclosure as lobbying of the Government. The public equally has a right to know by whom, and how, the alternative Government of Australia is being lobbied and potentially influenced as it forms policy positions. This is particularly important in the lead-up to elections, conscience votes and when the Opposition may be able to influence the passage of legislation through the Senate.³⁸

2.42 Whilst noting that he never experienced any corruption or misconduct from lobbyists, Senator Murray emphasised why, in his view, the Code should also be extended to the Senate cross benches given the important role they play in the Senate:

34 Public Interest Advocacy Centre, *Submission 6*, pp 6–7.

35 Mr David More, Proprietor, The Next Level Consulting Services, *Committee Hansard*, 16 June 2008, p. 3.

36 The Next Level Consulting Services, *Submission 11*, pp 5–6.

37 *Journals of the Senate*, 14 May 2008, p. 389.

38 Springboard Australia, *Submission 1*, p. 3.

...I have had carriage over the last 12 years of decisions which have affected tens of billions of dollars, holding a balance of power position. For someone like me not to be subject to a lobbyist code is just ridiculous. The point...that it should apply to all members and senators, not just government ones, I think is well made and I want to reinforce that point by putting my own position on the record.³⁹

2.43 The Clerk of the Senate, Mr Harry Evans, outlined a number of issues he thought should be considered were the Code to be applied to both Members of the Houses. The Clerk submitted that, while a joint resolution of the House of Representatives and the Senate could be implemented, it may give rise to an argument that the Houses of Parliament should not seek to regulate the internal processes of an executive government.⁴⁰

2.44 In order to overcome this hurdle the Clerk argued that an alternative scheme could be developed whereby three separate but similar regimes would be introduced – one regime for each house, to regulate the conduct of Members and Senators, and one to regulate the conduct of ministers. This approach would also overcome the restriction contained in section 50 of the Constitution which mandates the independence of each House.⁴¹

2.45 The Clerk also stated that the three elements (both Houses and the Executive) could develop a joint registration process for lobbyists to reduce any administrative burdens. It would be necessary to establish a joint office with representatives from the Houses and Executive to administer the register and the registration process.⁴²

2.46 The committee heard that the implementation of a joint scheme would face the serious criticism that it is not acceptable to regulate how, and with whom, private members of Parliament communicate when conducting their business. The Clerk stated that:

The Houses have not previously sought to regulate such communications, and an argument would no doubt be raised that it is not proper for them to do so: surely, it could be argued, private members of the Parliament have a right to communicate with whomever they choose, just as they have the right to determine the sources of their information and the matters they will raise in the parliamentary forum. The registration and declaration of interests requires only disclosure; a lobbying code would involve prohibiting members from dealing with certain persons (unregistered lobbyists).⁴³

39 Senator Andrew Murray, *Committee Hansard*, 16 June 2008, p. 7.

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

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

42 Mr Harry Evans, Clerk of the Senate, *Submission 2*, pp 1–2.

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

2.47 The committee is of the view that these concerns are significant. It would be troubled by any regulation that unwittingly limits honest forms of communication by members of Parliament during their day-to-day activities. The committee is not persuaded that the benefits of extending the Code to all parliamentarians would outweigh the disadvantages.

Post-employment prohibitions

2.48 A significant element of the Code is the introduction of post-employment prohibitions on government and various public sector staff engaging in lobbying activities.

2.49 Clause 7 states that Ministers and Parliamentary Secretaries, once they have ceased to hold office, will not be allowed to engage in lobbying activities that are related to any matter they had dealt with during the last 18 months of their employment, for a subsequent period of 18 months. This obligation is raised from 6 December 2007 onward.⁴⁴

2.50 Clause 7 imposes similar restrictions on the following groups, not be allowed to engage in lobbying activities that are related to any matter they had dealt with during the last 12 months of their employment, for a period of 12 months:

- staff employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act), at Advisor level or above (from 1 July 2008);
- members of the Australian Defence Force at Colonel level or above or equivalent (from 1 July 2008); and
- Agency heads or persons employed under the *Public Service Act 1999* in the Senior Executive Service or equivalent (from 1 July 2008).⁴⁵

2.51 The committee received a range of evidence surrounding this matter, particularly relating to post-employment restrictions on ministerial staff. Several organisations raised concerns about the retrospective nature of the restrictions and the negative effects of reducing the pool of experienced employees available to firms.

2.52 Both the United Services Union (USU) and the CPSU expressed concern about the application of clause 7. The USU stated that it was unacceptable for the clause to be applied retrospectively.⁴⁶

2.53 The CPSU presented the committee with several reasons why it believes that a separate code of conduct should be developed and tailored to meet the specific needs

44 The *Standards of Ministerial Ethics*, which apply concurrently with the Code, prohibit, for a period of 18 months, former ministers and Parliamentary Secretaries having business dealings with government representatives on matters with which they had official dealings as minister.

45 Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, May 2008, p. 4.

46 United Services Union, *Submission 7*, p. 1.

of ministerial staff.⁴⁷ The CPSU noted the existing regulatory mechanisms, such as the MOPS Act, the *Australian Public Service Act 1999*, the *Australian Public Service Code of Conduct*, the *Australian Public Service Values* and the *Crimes Act 1914* all deal with various aspects of conduct by ministerial, Australian Public Service (APS) and Defence Force employees.

2.54 The CPSU also argued that, because there is a fundamental difference in the employment conditions of ministers compared with those employed under the MOPS Act, such as the possibility for the termination of MOPS staff at any time, that clause 7.2 is not equitable:

...if a Minister is demoted his or her employment continues, the DLO [Departmental Liaison Officer] 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.⁴⁸

2.55 The CPSU also directed the committee to the fact that neither the MOPS Act nor the MOPS Collective Agreement 2006–09 contain any reference to the post-employment prohibition conditions set out in the Code. The CPSU contended that, if the Government wishes to depart from the current terms and conditions set out in these legally binding documents, then a separate code of conduct should be introduced that sets 'appropriate workplace guidelines and a comprehensive training program.'⁴⁹

2.56 ACCI informed the committee that it was concerned with post-employment prohibitions for similar reasons, particularly having regard to the possibility that organisations outside the scope of the Code could be inadvertently affected in their recruitment choices.⁵⁰ ACCI stated:

A legitimate and bona fide part of recruiting talented individuals to work (either as an employee or contractor) for ACCI or its members is to consider all persons with the highest aptitude, skill and knowledge...The common law principles on restraint of trade state that, prima facie, unless it can be shown that the restraint of trade is reasonable, it will be held to be contrary to public policy and unenforceable...ACCI is concerned that the not for profit sector may be denied expertise of vital individuals, best placed to make a contribution to national policy debate.⁵¹

47 Community and Public Sector Union, *Submission 9*, pp 3–4.

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

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

50 Australian Chamber of Commerce and Industry, *Submission 8*, p. 11.

51 Australian Chamber of Commerce and Industry, *Submission 8*, p. 12.

Conclusion

2.57 The committee acknowledges that some aspects of the Code are not wholly supported by some stakeholders. However, the committee notes the widespread underlying support expressed for a code of conduct, that implementation of the Code is in a relatively early stage, and that it may be some time before it becomes clear if its objectives are realised. This being the case, the committee proposes to review the operation of the Code toward the end of 2009, having specific regard to all matters considered in this report and any others that arise in the interim period.

Recommendation 1

2.58 That the Senate Standing Committee on Finance and Public Administration conduct an inquiry into the operation of the *Lobbying Code of Conduct* in the second half of 2009.

Senator Polley

Chair

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:

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 quasiguide.

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.

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.

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

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

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

Appendix 1

Submissions received

Submission Number

Submitter

1. Springboard Australia
2. Mr Harry Evans, Clerk of the Senate
3. Parker and Partners Public Affairs
4. Professor John Warhurst
5. CPA Australia
6. Public Interest Advocacy Centre Ltd
7. United Services Union
8. Australian Chamber of Commerce and Industry
9. Community and Public Sector Union
10. John O'Callaghan & Associates Pty Ltd
11. The Next Level Consulting Services
12. Investment & Financial Services Association Ltd
13. The Hon Dr Bob Such MP, Member for Fisher, South Australia

Appendix 2

Additional information received

1. Community and Public Sector Union: additional information received following Canberra, 16 June 2008 public hearing: NSW Parliamentary Staff Code of Conduct
2. Department of the Prime Minister and Cabinet: Correspondence received on 16 June 2008 from Department of the Prime Minister and Cabinet to CPA Australia
3. Department of the Prime Minister and Cabinet: tabled document during Canberra, 23 June 2008 public hearing: Updated Lobbyist Register Questions & Answers
4. Department of the Prime Minister and Cabinet: additional information received following Canberra, 23 June 2008 public hearing: Submissions made to the department

Appendix 3

Public hearings and witnesses

Monday, 16 June 2008 – Canberra

BARKLAMB, Mr Scott, Director, Workplace Policy
Australian Chamber of Commerce and Industry

EVANS, Mr Harry, Clerk of the Senate

GRAU, Mr Timothy Francis, Managing Director, Springboard Australia Pty Ltd

JONES, Mr Stephen, National Secretary, Community and Public Sector Union

MAMMONE, Mr Daniel, Senior Adviser, Legal and Industrial Affairs
Australian Chamber of Commerce and Industry

MOORE, Mr David John, Proprietor, The Next Level Consulting Services

O'CALLAGHAN, Mr John Jerome, Director, John O'Callaghan and Associates

RAHILL, Ms Alison, Parliamentary Liaison Officer
Community and Public Sector Union

SHANNON, Mr Craig Anthony John, Secretary, United Services Union
Australian Capital Territory

Monday, 23 June 2008 – Canberra

BELCHER, Ms Barbara, First Assistant Secretary, Government Division
Department of the Prime Minister and Cabinet

MACGILL, Mr David, Assistant Secretary
Parliamentary and Government Branch, Government Division
Department of the Prime Minister and Cabinet

