



**STANDING COMMITTEE ON
FINANCE AND PUBLIC
ADMINISTRATION**

Lobbying Code of Conduct

ACCI SUBMISSION

June 2008



LEADING AUSTRALIAN BUSINESS



ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nationwide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.

- Business representation on a range of statutory and business boards, committees and other fora.
- Representing business in national and international fora including the Australian Fair Pay Commission, Australian Industrial Relations Commission, Australian Safety and Compensation Council, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.
- Research and policy development on issues concerning Australian business.
- The publication of leading business surveys and other information products.
- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

A range of publications are available from ACCI, with details of our activities and policies including:

- The *ACCI Policy Review*; a analysis of major policy issues affecting the Australian economy and business.
- Issue papers commenting on business' views of contemporary policy issues.
- *Policies of the Australian Chamber of Commerce and Industry* – the annual bound compendium of ACCI's policy platforms.
- The *Westpac-ACCI Survey of Industrial Trends* - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.

- The *ACCI Survey of Investor Confidence* – which gives an analysis of the direction of investment by business in Australia.
- The *Commonwealth-ACCI Business Expectations Survey* - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.
- The *ACCI Small Business Survey* – which is a survey of small business derived from the *Business Expectations Survey* data.
- Workplace relations reports and discussion papers, including the ACCI *Modern Workplace: Modern Future 2002-2010 Policy Blueprint* and *Functioning Federalism and the Case for a National Workplace Relations System*.
- Occupational health and safety guides and updates, including the *National OHS Strategy* and the *Modern Workplace: Safer Workplace Policy Blueprint*.
- Trade reports and discussion papers including the *Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper*.
- Education and training reports and discussion papers.
- The ACCI *Annual Report* providing a summary of major activities and achievements for the previous year.
- The ACCI *Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014*.
- The ACCI *Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success*.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.



1. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) provided input on the Department of Prime Minister and Cabinet's (DPM&C) exposure draft of the Lobbying Code of Conduct (the Code) before its finalisation and implementation.
2. ACCI welcomes this opportunity to amplify and build on ACCI's prior written submission to the DPM&C, which was limited to a number of discrete issues.
3. ACCI does not specifically wish to address every issue in the Committee's terms of reference (14 May 2008), but rather to limit our response to a number of issues which we wish to draw to your attention as being of particular significance to the operations of Australia's business representative organisations, including ACCI and its members.
4. These issues appear to fall appropriately within the Senate's term of reference (b) (iii) *"whether the proposed code is adequate to achieve its aims and, in particular, whether ... the proposed exemptions are justified"*.

2. ACCI AND MEMBER-BASED EMPLOYER / BUSINESS ORGANISATIONS

ACCI's Legal Structure

5. ACCI is Australia's peak council of business and employer organisations, representing 35 separate member-based organisations including both principal State and Territory Chamber of Commerce, and national and sectoral industry associations.
6. Our structure is in the form of a not-for-profit public corporation and our members (namely, the 35 Chambers and industry organisations) pay a subscription fee for joining ACCI.
7. We are also a peak council of industrial organisations under s.100(11) of the *Workplace Relations Act 1996*, whilst also being formally recognised (along with one of our members) under the *National Workplace Relations Consultative Council Act 2002 (Cth)*.

8. Internationally, ACCI is recognised by the International Labour Organisation (ILO), International Organisation of Employers (IOE) as Australia's most representative body on labour matters, and in respect of which Australia has treaty obligations. Amongst other international affiliations, we also are members of the International Chamber of Commerce (ICC) and administer the Australian secretariat of the ICC.

Our Members

9. Our members' legal structure and purpose may differ from ACCI, with some members being incorporated associations, incorporated entities under the *Corporations Act* and others existing by virtue of Commonwealth and State industrial relations legislation (which grants body corporate status). Moreover, those ACCI member bodies that are registered industrial organisations are generally exempt from income tax as non-profit organisations.¹ However, ACCI does not have direct knowledge as to which of our members may or may not be endorsed as deductible gift recipients (DGR), but would anticipate that no member is a DGR recipient.
10. Our Chambers and industry organisation members provide broad based services to the business community and their corporate / employer members, and also specific services on a fee for service basis (in most cases to members but in some cases to non members as well).

Exemptions

11. One of the services provided by ACCI and our member based Chamber and industry organisations are advocacy and lobbying services. Indeed, these are well established, core activities of Australia's business representatives. They would be regarded as "lobbying activities" as defined in clause 3 of the Code.
12. However, we understood the Government's intention when seeking to establish the Code was for membership based organisations and their peak councils (such as the ACTU, trade unions, ACCI, Chambers and other industry and business organisations) to not be drawn into the regulatory structure of the Code.

¹ Section 50-15 *Income Tax Assessment Act 1997*.

13. We reiterate Senator Faulkner's statement in the Senate on 13 May (at p.3):

"[the Code] 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".

14. We support this intention. The core advocacy and lobbying services of these organisations is well established, for the general benefit of their constituents and is a generic member service which goes to the very *raison d'être* for joining employer associations or trade unions.
15. ACCI's members are well recognised major Australian institutions and appear on the list at the back of this written submission. Each member's purpose and interests are clear, transparent and public.
- a. ACCI members that are registered organisations under various State and federal industrial relations legislation are subject to robust additional regulation.
 - b. ACCI members that are incorporated under State and federal legislation are also subject to regulatory control and oversight.
 - c. In all cases, Ministers and Government representatives can at all times have the satisfaction that they know who they are dealing with and on what basis.
16. We note the DPM&C's website of frequently asked questions (FAQ) on the Code contains the following information²:

3. What is the definition of lobbyist?

A lobbyist is defined in clause 3 of the Code to mean a person, company or organisation who conducts lobbying activities on behalf of a client or whose employees conduct lobbying activities on behalf of a client. These lobbyists are sometimes known as consultant lobbyists, or third party lobbyists.

The Code does not apply to in-house lobbyists, such as government relations staff employed by companies to make representations to government on behalf of the company that employs them, or staff employed in peak industry bodies or trade unions who make representations to government on behalf of their industry or their members. These people are not required to register.

² <http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=faq#8>

17. To this end, it appears that ACCI and its members, may fall under the explicit exemption created in the definition of “lobbyist” (a) or (b). However, it would probably be truer that a majority of members would fall under category (b) “*non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients*”.
18. Whilst we accept that the FAQ provides general advice on the Code, and persons should refer specifically to the Code when considering their status, ACCI considers that the reference to “*peak industry bodies or trade unions*” should be changed to “*industry bodies, chambers of commerce, trade unions, and their peak bodies*” to better reflect the contemporary structure of organisations such as ACCI, (the ACTU trade unions), and employer associations.

Non-Profit Associations / Organisations

19. There maybe some uncertainty as to whether those ACCI member organisations which exist by virtue of being registered under State or federal industrial relations legislation as an industrial organisation are in fact “*non-profit associations or organisations*” for the purposes of the Code³.
20. Generally speaking, industrial relations legislation grants body corporate status and whilst a main objective/purpose is not to be “for profit”, some registered industrial organisations do receive and generate income from various activities etc.
21. However, all registered organisations have extensive reporting obligations and should not be exposed to additional regulation under the Code. The principles behind Code exemption for peak industrial bodies should apply clearly to all industrial bodies.

³ There is some uncertainty as to whether sub-clause (b) is actually two separate exemptions, that being “non-profit associations” and “organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients”, or whether it is both “non profit associations or organisations ...”. The clause may need to be re-drafted in order to provide clarity.

22. Members of the public and Government officials can search federally registered organisations on the Australian Industrial Relations Commission website, and look up each annual return, rules of the organisation etc.⁴ There is comparable regulation at the State level.
23. ACCI believes that it is also important that the Code does not inadvertently alter the status of the exemption in sub-clause (b) by virtue of the fact that some of these organisations have, in recent years, moved to provide a specific lobbying or representative service (as distinct from a general lobbying activity) to a certain company or group of companies which may or may not be a member of the organisation.
24. As this service does not alter the character of the organisation, we would consider that the organisation would (and should) still be exempt under (a) or (b) of the definition of “lobbyist”. However we would recommend (and request) that this be clarified by including an additional point under the ‘for avoidance of doubt’ category (in clause 3, definition of “Lobbyist” after sub-clause (f)) as follows:

“For the avoidance of doubt, this Code does not apply to organisations whose character is that of an organisation listed in sub-clause (b) above even though the organisation may, from time to time, provide a specific lobbying activity for a member or a group of members, or for a prospective member on a fee for service basis or otherwise.”

Employees vs Contractors

25. A lobbyist is defined in clause 3 as: *“... 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, but does not include ... (b) non-profit associations or organisations ...”*(emphasis added)
26. Whilst overwhelmingly employees carry out lobbying activities, ACCI and its members do engage some persons to perform duties on a contract for services basis (independent contractors etc) as opposed to contract of services basis.
27. In some cases, the person performing “lobbying activities” will not be an “employee” in the strict legal sense, and therefore there may be

⁴ <http://www.airc.gov.au/registered/>

some confusion as to whether they would have to register as a lobbyist, whilst their organisation and the organisation's employees would not.

28. An amendment could be made to clarify the above in the following manner:

“... employees and persons retained to perform services for a company or organisation”.

[Inserted into clause 3, p.3]

“Lobbyist” means 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, but does not include

... [after (f)]

For the avoidance of doubt, this Code does not apply to any person, company or organisation, or the employees of such company or organisation, engaging in lobbying activities on their own behalf rather than for a client, and does not require any such person, company or organisation to be recorded in the Register of Lobbyists unless that person, company or organisation or its employees also engage in lobbying activities on behalf of a client or clients.

Third Party Clients / Own Behalf

29. It is also potentially unclear whether:
- a. ACCI's members (or their members, in turn) are a third party “client” (as defined in clause 3);
 - b. ACCI or its members engage on its “own behalf rather than for a client” (under “Lobbyist”, sub-clause (f) in clause 3) whilst engaging in lobbying activities.
30. ACCI believes that this could be clarified by including an additional sentence after clause 3 definition of “Lobbyist”, sub-clause (f) and the paragraph starting with “For the avoidance of doubt ...”:

“An association or organisation within the meaning of paragraph (b) is taken to be acting ‘on their own behalf rather than for a client’ if they are acting in the interests of or on behalf of their members.”

General Exemption for Employer/Industry Bodies

31. Another way to address the above issues could be to create an additional category of exemption that explicitly exempts from the Code long standing bona fide (registered and unregistered) industry and employer organisations such as ACCI and its members, particularly if it is the intention that the Code not apply to ACCI or its members (industrial and other business organisations). ACCI would, of course support this also extending to trade unions and their peak council, and other membership based employer or business organisations.
32. This would then make the operation of the Code absolutely clear for those bona fide bodies and would reduce the need to seek independent legal advice on whether they are exempt or not from the Code generally, or in specific circumstances. Potential confusion would be avoided.

3. EMPLOYMENT OR ENGAGEMENT OF PERSONS BY EXEMPT ORGANISATIONS

33. From time to time membership based employer and business organisations engage, either as employees or as consultants, former Ministers, ministerial staff or senior employees of the Commonwealth. This is equally true of trade unions and community organisations, NGO's etc.
34. ACCI has identified a concern with the construction of clause 7 of the Code. Whilst ACCI understands that an association or organisation may be exempt from the Code generally, the current drafting of clause 7.1 and 7.2 of the Code restrains such senior public servants, staff and former Ministers for a period of 12 to 18 months after they cease their employment, from engaging in "*lobbying activities*" regardless of the exempt (or otherwise) status of their employer or potential employer.
35. This would even restrain for a considerable period such persons from being engaged by otherwise Code exempt associations or organisations (as an employee or on a contract basis).

36. ACCI understands that the Code now applies to the Australian Public Service (APS) generally, with the post-separation prohibition applying to staff at SES level (and its equivalent)⁵.
37. 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. Such persons include former APS employees (and at all levels), and former Ministers and their advisors.
38. 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.⁶
39. ACCI questions whether it is necessary to impose, for example, a blanket 12 month post employment restraint on SES equivalent APS employees, which does not factor in their level of involvement in the “*matter that they had official dealings with in the last 12 months of employment*”. It does not distinguish the level of involvement in a particular area, or whether they may have been recently appointed to SES level and for the most part, were involved in other matters.
40. ACCI also notes that there are already significant obligations imposed on APS employees via the APS Code of Conduct, *Public Service Act 1999*, the *Crimes Act 1914* and *Criminal Code 1995*.
41. Again, 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.

Proposed Amendments

42. This issue needs clarification. ACCI would welcome amendments to the Code to allow persons to be employed (or engaged on a contract basis) on a bona fide purpose by exempt organisations (as outlined in this submission) and not having to be recorded on the register of lobbyists in respect of that work.

⁵ Australian Public Service Commission, Circulars No 2008/4; No 2007/3.

<http://www.apsc.gov.au/circulars/circular084.htm>

⁶ *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Limited* [1894] AC 535, 565.

43. We would suggest that clause 7.1 and 7.2 be amended to include after the phrase “... *lobbying activities*” the words “*and who is a lobbyist*”.

Register of Lobbyists

44. A similar amendment could be made to sub-clause 5.1(a) of the Code, to clarify that the registration requirements only apply to “lobbyists” (as defined).

ACCI MEMBERS

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