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INDEPENDENT COMMISSION
AGAINST CORRUPTION

INVESTIGATION INTO CORRUPTION RISKS INVOLVED IN LOBBYING

ICAC REPORT
NOVEMBER 2010

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In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into the corruption risks involved in the lobbying of public officials and public authorities in New South Wales.

The Commission has made a number of recommendations for a new regulatory scheme designed to address relevant corruption risks and improve transparency and integrity.

Pursuant to section 78(2) of the *Independent Commission Against Corruption Act 1988* the Commission recommends that this report be made public forthwith. This recommendation allows either presiding officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

Yours faithfully

The Hon David Ipp AO QC
Commissioner

Contents

Glossary

Communication

A communication by means of telephone, electronic mail, written words and face-to-face meetings.

Government Representative

A minister, parliamentary secretary, ministerial staff member or a person employed, contracted or engaged in a public sector agency (a division of the government service in section 4A of the *Public Sector Employment and Management Act 2002)*, other than staff employed under section 33 of the *Public Sector Employment and Management Act 2002*.

In-house Lobbyist

Those who as part of their employment with an organisation engage in lobbying on behalf of that organisation.

Lobbying Activity

A communication with a Government Representative in an effort to influence government decision-making. The extended definition proposed by the Commission is at page 49.

Lobbying Entity

A body corporate, unincorporated association, partnership, trust, firm or religious or charitable organisation that engages in a Lobbying Activity on its own behalf.

Lobbyists Register

A two-panel register proposed by the Independent Commission Against Corruption (one for Third Party Lobbyists and one for Lobbying Entities) that requires disclosure of the month and year in which a Third Party Lobbyist or Lobbying Entity engaged in Lobbying Activity, the identity of the government department, agency or ministry lobbied, the name of any Senior Government Representative lobbied, and, in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred and the name of any entity related to the client the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying.

Senior Government Representative

A minister, parliamentary secretary, ministerial staff member or division head referred to in Schedule 1 of the *Public Sector Employment and Management Act 2002*, and members of the senior executive service, as defined in the *Public Sector Employment and Management Act 2002*.

Third Party Lobbyist

A person, body corporate, unincorporated association, partnership, trust or firm who or which is engaged to undertake a Lobbying Activity for a third party client in return for payment or the promise of payment for that lobbying.

Comprehensive definitions of most of these terms are included in Chapter 9 of this report.

Executive summary

This investigation differs from the usual investigation conducted by the Independent Commission Against Corruption ("the Commission") in that it was not concerned with whether any particular individual had engaged in corrupt conduct.

Rather, the investigation examined the corruption risks involved in the lobbying of public authorities and officials. Its aim was to examine whether such relationships may allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct, and to identify whether any laws governing any NSW public authority or public official should be changed. The Commission also examined whether any work methods, practices or procedures of any NSW public authority or public official could allow, encourage or cause the occurrence of corrupt conduct, and, if so, what changes should be made.

The Commission found that lobbying attracts widespread community perceptions of corruption, and involves a number of corruption risks. However, there was much evidence that demonstrated that, in general, professional lobbyists act ethically, and that lobbying, when done well, can enhance rather than detract from good decision-making by public officials.

A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust. Those who lobby may be entitled to private communications with the people that they lobby, but they are not entitled to secret communications. The public is entitled to know that lobbying is occurring, to ascertain who is involved, and, in the absence of any overriding public interest against disclosure, to know what occurred during the Lobbying Activity.

The primary aim of any lobbying regulatory system must be to improve transparency and address other corruption risks in a manner that is practical and not unnecessarily onerous, and one that does not unduly interfere with legitimate access to government decision-makers.

The principal features of a new lobbying regulatory scheme proposed by the Commission are as follows:

- establish a public sector meeting protocol for the conduct of meetings with lobbyists, for the minuting of these meetings and relevant telephone calls, and for the retention of records of Lobbying Activity in accordance with the *State Records Act 1998* (see Recommendations 2 and 3, and Chapter 7)
- amend the *Government Information (Public Access) Act 2009* ("the GIPA Act") to include records of Lobbying Activity in the definition of "open access information", for which there is no overriding public interest against disclosure. Under the GIPA Act, open access information held by an agency must be made publicly available, including on a website maintained by the agency (see Recommendation 4, and Chapter 7)
- expand the class of lobbyists that are to be regulated to include all Third Party Lobbyists and Lobbying Entities (see Chapter 9)
- impose statutory regulation of Third Party Lobbyists and Lobbying Entities, including a mandatory prescribed code of conduct (see Recommendations 1 and 6, and Chapters 6 and 8)
- require Third Party Lobbyists and Lobbying Entities to register before they can lobby a Government Representative, (see Recommendation 7, and Chapter 9)
- establish a two-panel Lobbyists Register – one for Third Party Lobbyists and one for Lobbying Entities – that requires disclosure of the month and year in which they engaged in Lobbying Activity, the identity of the government department, agency or ministry lobbied, the name of any Senior Government Representative lobbied, and, in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred and the name of any entity related to the client

the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying (see Recommendation 7, and Chapter 9)

- enable an interested person to use the information disclosed on the proposed Lobbyists Register, in relation to the date of lobbying and who was lobbied, in order to seek access to further information from the relevant public sector agency through the various mechanisms set out in the GIPA Act (see Chapter 9)
- provide for an independent government entity, such as the NSW Information Commissioner, to maintain and monitor the Lobbyists Register, and have powers to impose sanctions on lobbyists (see Recommendation 8, and Chapter 9)
- impose restrictions on former ministers, parliamentary secretaries, their staff and senior government officers from acting as lobbyists (see Recommendation 10, and Chapter 10)
- ban lobbyist success fees (see Recommendation 11, and Chapter 10).

Local councils are not included in this scheme. Instead, the Commission recommends the development of a standard protocol for the regulation of contact between council staff and applicants for development proposals, and the requirement that those seeking council determinations or decisions make a written declaration of affiliations or business interests with council staff. Lobbying at local council level is examined in Chapter 11.

Recommendations 12 to 16 outline the scheme proposed by the Commission for local councils. The scheme does not apply to state-owned corporations or to non-executive members of the NSW Parliament. The reasons for this are outlined in Chapter 9.

A list of the Commission's 17 recommendations in relation to its proposed lobbying regulatory scheme is available on page 9.

List of recommendations

Recommendation 1

The Commission recommends that the NSW Government enacts legislation to provide for the regulation of lobbyists, including the establishment and management of a new Lobbyists Register.

Recommendation 2

The Commission recommends that the NSW Premier develops a model policy and procedure for adoption by all departments, agencies and ministerial offices concerning the conduct of meetings with lobbyists, the making of records of these meetings, and the making of records of telephone conversations. As a minimum, the procedure should provide for:

a. a Third Party Lobbyist and anyone lobbying on behalf of a Lobbying Entity to make a written request to a Government Representative for any meeting, stating the purpose of the meeting, whose interests are being represented, and whether the lobbyist is registered as a Third Party Lobbyist or engaged by a Lobbying Entity

b. the Government Representative to verify the registered status of the Third Party Lobbyist or Lobbying Entity before permitting any lobbying

c. meetings to be conducted on government premises or clearly set out criteria for conducting meetings elsewhere

d. the minimum number and designation of the Government Representatives who should attend such meetings

e. a written record of the meeting, including the date, duration, venue, names of attendees, subject matter and meeting outcome

f. written records of telephone conversations with a Third Party Lobbyist or a representative of a Lobbying Entity.

Recommendation 3

The Commission recommends that the NSW Premier requires all government agencies and ministerial offices to ensure that they have adequate measures in place to comply with the *State Records Act 1998*.

Recommendation 4

The Commission recommends that the NSW Government amends the definition of "open access information" in the *Government Information (Public Access) Act 2009* to include records of Lobbying Activities for which there is no overriding public interest against disclosure.

Recommendation 5

The Commission recommends that all agencies subject to the operation of the *Government Information (Public Access) Act 2009* proactively release lobbying information for which there is no overriding public interest against disclosure, including by publishing that information on their websites.

Recommendation 6

The Commission recommends that the NSW Government develops a new code of conduct for lobbyists, which sets out mandatory standards of conduct and procedures to be observed when contacting a Government Representative. The code should be based on the current NSW Government Lobbyist Code of Conduct, and include requirements that lobbyists must:

a. inform their clients and employees who engage in lobbying about their obligations under the code of conduct

b. comply with the meeting procedures required by Government Representatives with whom they meet, and not attempt to undermine these or other government procedures or encourage Government Representatives to act in breach of them

c. not place Government Representatives in the position of having a conflict of interest

d. not propose or undertake any action that would constitute an improper influence on a Government Representative, such as offering gifts or benefits.

Recommendation 7

The Commission recommends that the legislation, enacted in accordance with Recommendation 1 of this report, includes a provision that a Government Representative not permit any Lobbying Activity by a Third Party Lobbyist or any person engaged by a Lobbying Entity, unless the Third Party Lobbyist or the Lobbying Entity is registered on the proposed Lobbyists Register.

Recommendation 8

The Commission recommends that all Third Party Lobbyists and Lobbying Entities be required to register before they can lobby any Government Representative. This register would comprise two panels; one for Third Party Lobbyists and one for Lobbying Entities.

Both Third Party Lobbyists and Lobbying Entities would disclose on the register the month and year in which they engaged in a Lobbying Activity, the identity of the government department, agency or ministry lobbied, the name of any Senior Government Representative lobbied, and, in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred, together with the name of any entity related to the client the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying activity.

Recommendation 9

The Commission recommends that an independent government entity maintains and monitors the Lobbyists Register, and that sanctions be imposed on Third Party Lobbyists and Lobbying Entities for failure to comply with registration requirements.

Recommendation 10

The Commission recommends that the new code of conduct for lobbyists contains a clear statement prohibiting a lobbyist or a lobbyist's client from offering, promising or giving any gift or other benefit to a Government Representative, who is being lobbied by the lobbyist, has been lobbied by the lobbyist or is likely to be lobbied by the lobbyist.

Recommendation 11

The Commission recommends that, consistent with restrictions currently contained in the Australian Government Lobbying Code of Conduct, the proposed lobbying regulatory scheme includes provisions that former ministers and parliamentary secretaries shall not, for a period of 18 months after leaving office, engage in any Lobbying Activity relating to any matter that they had official dealings with in their last 18 months in office. The Commission also recommends that former ministerial and parliamentary secretary staff and former Senior Government Representatives shall not, for a period of 12 months after leaving their public sector position, engage in any Lobbying Activity relating to any matter that they had official dealings with in their last 12 months in office.

Recommendation 12

The Commission recommends that the new lobbying regulatory scheme includes a prohibition of the payment to or receipt by lobbyists of any fee contingent on the achievement of a particular outcome or decision arising from a Lobbying Activity.

Recommendation 13

The Commission recommends that the NSW Government amends the *Model Code of Conduct for Local Councils in NSW* or otherwise introduces a protocol for the regulation of contact between council staff and applicants for development proposals (including those acting for

applicants), similar to that established by the NSW Department of Planning but taking into account the circumstances and resources of local government.

Recommendation 14

The Commission recommends that the NSW Government amends procedures for the making of applications to local councils that require council approval, determination or decision to include provision for a declaration by applicants of affiliation with any council officer. In this instance, affiliation means by way of family, close personal friendship, or business interest with the council officer in the previous six months. Applicants should have brought to their attention the existence of criminal sanctions for false declarations, and that the obligation to disclose an affiliation is ongoing until the conclusion of all council determinations, approvals or decisions with regard to the application.

Recommendation 15

The Commission recommends that sanctions should apply to applicants who submit a false declaration.

Recommendation 16

The Commission recommends that all local councils implement procedures that:

a. necessitate an assessment of whether an application, in which a declaration is made that an affiliation exists, requires management

b. require the management of such applications to avoid where possible, or supervise if necessary, the role of the affiliated council officer.

Recommendation 17

The Commission recommends that the NSW Government amends the *Model Code of Conduct for Local Councils in NSW* or otherwise introduces a protocol that council officers engage only with applicants who have submitted a declaration of affiliation.

List of public inquiry witnesses

1. Michael Ahrens, Executive Director, Australian Chapter, Transparency International, and former Senior Partner, Baker & McKenzie
2. The Hon Bruce Baird AM, Chairman, Tourism and Transport Forum, and former NSW and Federal MP and Minister
3. Wayne Burns, Director, Centre for Corporate Public Affairs, and Director, Allen Consulting Group
4. The Hon Fred Chaney AO, former Federal MP and Minister
5. Professor Ken Coghill, Deputy Director of Education, Post Graduate Education, Monash University, and former Victorian MP
6. Dr Betty Con Walker, consultant, lobbyist and author
7. Fiona Davies, Chief Executive Office, Australian Medical Association NSW
8. Robert Donaldson, Assistant General Manager, Shoalhaven City Council
9. Councillor Allan Ezzy APM, Vice President, Local Government Association, and Councillor, Holroyd Council
10. Julian Fitzgerald, author, journalist and former federal public servant
11. Catherine Fitzpatrick, Manager Government Relations and Sustainability, Leighton Holdings
12. Robert Furolo, NSW MP, and Mayor of Canterbury City
13. Aaron Gadiel, Chief Executive Office, Urban Taskforce, and former NSW ministerial Chief of Staff
14. Scott Gartrell, NSW ministerial Chief of Staff
15. Ian Glendinning, Director, Glendinning Minto & Associates
16. Prof Adam Graycar, Professor of Public Policy, Australian National University, and Dean, Australian National Institute of Public Policy
17. Sam Haddad, Director General, NSW Department of Planning
18. Tony Harris, columnist, and former NSW Auditor-General
19. Bruce Hawker, Chairman, Hawker Britton, and former Chief of Staff to former NSW Premier Bob Carr
20. Bruce Hodgkinson SC, Chairman, Cancer Council NSW
21. The Hon Dr John Kaye, NSW MP
22. Mark Lennon, Secretary, Unions NSW
23. Ian Macintosh AM, Pro-Chancellor, Charles Sturt University, former ACT lobbyist, and former Mayor of Bathurst
24. Rachel McCallum, A/Executive Director Legal, NSW Department of Premier and Cabinet
25. Kate McClymont, journalist
26. Tim McKibbin, Chief Executive Officer, Real Estate Institute NSW
27. Steven McMahon, NSW ministerial Chief of Staff (currently serving on Hurstville City Council)
28. Carol Mills, Director General, Communities NSW
29. Alex Mitchell, journalist
30. Deirdre O'Donnell, NSW Information Commissioner

31. Tim O'Halloran, NSW ministerial Chief of Staff

32. Brendan O'Reilly, Director General, NSW Department of Premier and Cabinet

33. Dr Andrew Penman, Chief Executive Officer, Cancer Council NSW

34. David Pigott, Leader, Government and Cross-Sector Partnerships, Mission Australia

35. Ray Plibersek, Internal Ombudsman, Sutherland Shire Council

36. Tony Pooley, Deputy Chief of Staff, NSW Premier Kristina Keneally

37. The Hon Nathan Rees, NSW MP, former NSW Premier

38. John Richardson, Director, Richardson Coutts, and former adviser to various Federal ministers

39. Peter Sekuless, lobbyist and author

40. Dr Richard Sheldrake, Director General, NSW Department of Industry and Investment

41. Peter Shmigel, General Manager, Sustainability and Strategy, Veolia Environmental Services

42. Margaret Simons, journalist, and Convenor of Journalism, Swinburne University

43. Dr David Solomon AM, Queensland Integrity Commissioner

44. Doris Spielthenner, Managing Director, IDU Consultant

45. Dick Warburton, Company Director and Chairman, Chairman Board of Taxation

46. Prof John Warhurst, Emeritus Professor of Political Science, Australian National University

47. Annabelle Warren, National Chairperson, Public Relations Institute of Australia Registered Consultancies Group

48. Graeme Wedderburn, contractor, KPMG, and former Chief of Staff to former NSW Premiers, Bob Carr and Nathan Rees

Chapter 1: The investigation

This chapter sets out some relevant background information on the Commission's investigation and the general principles adopted by the Commission in considering and formulating its recommendations for changes to the regulatory system governing lobbying in NSW.

Why we investigated

There is general agreement that lobbying of government decision-makers has increased in scale, complexity and sophistication in recent years. In 2009, the Organisation for Economic Co-operation and Development (OECD) reported that lobbying is now "a worldwide phenomenon", with globalisation producing similar lobbying techniques in different countries.

Over the past two decades, the volume of public services that are actually delivered (or co-delivered) by the private or non-government organisation (NGO) sector in Australia has expanded considerably. This has created a much larger number of programs, contracts, outsourcing opportunities, grants and so on for which to lobby. At the same time, desirable, developable land has gradually become scarcer in parts of Australia, which has made urban development a more contestable sphere of activity, and, in particular, has clashed with environmental protection interests.

On the one hand, appropriate lobbying can enhance government decision-making by allowing those with an interest in the decision to contribute in a way that can improve the quality of information available to the decision-maker. On the other hand, there are widespread perceptions of corruption and a number of corruption risks associated with lobbying.

Over the years, the Commission has received a substantial volume of complaints about the activities of lobbyists. These allegations are usually asserted but, in the absence of some credible information about an inducement or reward, an undisclosed conflict of interest or inexplicable partiality, they are not easily investigated or substantiated.

That does not mean that these complaints were without foundation. There have also been a significant number of reports in the media over the years that have implied that decisions were made as a result of inappropriate or corrupt lobbying.

A widespread perception of corruption in the government decision-making process has the capacity to adversely affect the proper working of our system of democracy. The people of NSW generally respect and obey the law. This is the foundation for the rule of law that prevails in this state. However, once citizens believe that government is corrupt, that the very people who make the laws are corrupt, and that government decisions are corruptly made or influenced, the belief in the rule of law will diminish, and our way of life will ineradicably alter. This has proven to be the case in other jurisdictions.

The conduct of lobbying involves a number of potential corruption risks. On occasions, these risks have led to improper conduct on the part of lobbyists and those lobbied. Investigations conducted by the Corruption and Crime Commission in Western Australia into the activities of lobbyists Brian Burke (a former WA Premier) and Julian Grill (a former WA Minister) are recent examples where such allegations have been investigated and received wide public exposure.

There have been well publicised instances of corrupt lobbying in the United States and Britain. For example, in March 2010, four members of parliament in Britain, who were former ministers, promised to arrange access to current ministers for a fee. In 2009, also in Britain, the "cash for amendments episode" occurred, in which two peers were suspended from parliament and two more had to apologise for inappropriate lobbying.

In its 2009 report, *Lobbyists, government and public trust*, the OECD noted that:

> Effective standards and procedures that ensure transparency and accountability in decision making are essential to reinforce public trust. There is a growing recognition that regulations, policies and practices which require disclosure of information on key aspects of the communication between public officials and lobbyists have become vital aspects of transparency in 21st century democracies to empower citizens in exercising their right to public scrutiny. Measures promoting a culture of integrity are also an integral part of the "good governance" approach, particularly those that clarify expected standards of conduct in lobbying for both public officials and lobbyists.

The OECD subsequently developed its "10 Principles for Transparency in Lobbying", which includes fair access for all interested parties and an adequate degree of transparency to ensure that these parties can obtain sufficient information about lobbying activities.

Both in NSW and elsewhere, governments have established regulatory regimes intended to address corruption risks and promote effective standards and procedures to ensure greater transparency in the interaction between officials and lobbyists. The Commission determined that it was in the public interest to investigate the current regulatory system in NSW for the purposes of identifying corruption risks that might allow, encourage or cause corrupt conduct or conduct connected with corrupt conduct, and to identify any necessary changes to address these risks and thereby reduce the likelihood of the occurrence of corrupt conduct.

How we conducted the investigation

The Commission commenced the investigation on its own initiative in December 2009. The investigation was carried out primarily by staff of the Commission's Corruption Prevention, Education and Research (CPER) Division. A deliberate decision was taken to avoid the formal exploration of specific allegations of corrupt conduct, and, instead, to focus on identifying any systemic weaknesses that could allow, encourage or cause corrupt conduct and to identify necessary changes to address these weaknesses.

The investigation commenced with a review of relevant literature on lobbying, case studies and regulatory systems. This encompassed Australian and overseas jurisdictions, focusing mainly on OECD nations with mature democracies. Special emphasis was placed on jurisdictions with Westminster systems of government.

This led to the release of an issues paper by the Commission in May 2010 on the nature and management of lobbying in NSW, which identified 26 principal issues. Interested parties were invited to make written submissions to the Commission in response to both the issues and the subject in general. Over 60 submissions were received and considered by the Commission.

Parallel to this process, the Commission conducted a large number of voluntary, informal interviews with academics, journalists, individual lobbyists and representatives of lobbying entities, such as peak bodies, corporations and unions. A number of current and former public officials, including former premiers, ministers, members of parliament, chiefs of staff, and departmental heads were also interviewed. The Commission also sought the views of persons from other states, and spoke to Canadian Commissioner of Lobbying Karen E. Shepherd and her deputy and chief counsel about the statutory regulatory system currently operating in Canada.

The Commission obtained further information by serving notices under sections 21 and 22 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"). A section 21 notice requires a public official to

produce a statement of information, and a section 22 notice requires the recipient to produce the documents specified in the notice. Notices were served on:

- chiefs of staff to serving NSW ministers
- a selection of NSW ministers
- heads of state-owned corporations
- a selection of general managers of NSW local councils.

The Commission conducted a public inquiry over 11 days, commencing on Monday, 2 August 2010. The Hon David Ipp AO QC, Commissioner, presided at the inquiry, and Jeremy Gormly SC appeared as Counsel Assisting the Commission. A list of the 48 witnesses who gave evidence is on page 12. All witnesses gave their evidence voluntarily.

The Commission is grateful to those who took the time to make submissions, participate in interviews and give evidence at the public inquiry. The information obtained from these sources in particular has been of considerable value in considering and formulating the Commission's recommendations.

Principles underlying our recommendations

Any regulatory system for lobbying should address the relevant corruption risks. To do so, it must be based on the principles of transparency and accountability. These are the broad principles the Commission applied in reviewing the current lobbying regulatory system in NSW, and in determining what changes to recommend in order to address relevant corruption risks and the community's adverse perceptions of lobbying.

The Commission has at all times been desirous to recommend a scheme that would be practical and simple, and would not impose undue cost or regulatory burdens on the government or the community. In formulating its recommendations, it has balanced these concerns against the demonstrated need for change.

Furthermore, in undertaking the investigation and formulating its recommendations, the Commission has at all times been mindful of the need to avoid interfering unduly with the fundamental rights of citizens of NSW to communicate with their government.

Chapter 2: Corruption – perceptions and risks

The investigation confirmed the existence of community perceptions of corruption in the interaction between lobbyists and those lobbied. There was also evidence from both lobbyists and the lobbied as to the professionalism of the lobbying industry, and the ethical conduct of both lobbyists and the lobbied. The two viewpoints are not inconsistent.

In any endeavour, the activities or perceived activities of a few individuals can affect the reputation of a whole industry, even if the actions of the majority are above reproach. The Commission examined the basis for the dichotomy of views by exploring the adverse perceptions, including the main corruption risks associated with lobbying, and comparing these to what lobbyists told the Commission about how they actually perform their work.

This chapter examines the perceptions of corruption connected with lobbying and the corruption risks that give rise to these perceptions, while Chapter 3 outlines the evidence of how lobbyists go about their work.

Perceptions of corruption

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

One of the submissions that addressed the issue of perception included the following comment (typical of similar comments made in other submissions):

> Public perception of a lobbyist is that private advantage is being promoted at the expense of the public interest.

A number of witnesses at the public inquiry gave evidence of a similar nature. Journalist Alex Mitchell gave the following evidence, which strongly articulated the complaints about lobbying as an activity that adversely impacts on government decision-making:

> *Lobbying has become a blight on public life in NSW. It has a corrosive and corrupting impact on state politics and on local government. It has become a high dollar pathway for powerful, private interest groups to obtain law changes and administrative decisions which are favourable to them and not necessarily in the public interest. It means that high-level decision-making is often skewed in favour of those with the deepest pockets who employ the most artful, persuasive and well-connected lobbyists and it all happens behind closed doors without any real attempt at transparency or accountability.*

The Hon John Kaye MLC told the Commission that there was strong community perception that lobbying can lead to decision-making that is not in the broader public interest. He believed that democracy is adversely affected where decision-making is influenced by one side of an argument and without hearing from others who have an interest in the outcome. Almost all witnesses who gave evidence believed that lobbying was adversely perceived, yet almost all believed the perception was not an accurate reflection of reality.

Annabelle Warren is National Chairperson of the Public Relations Institute of Australia Registered Consultancies Group. She explained that the lack of information about lobbying activity often led to the creation of negative perceptions:

> *I think that the lack of facts often causes people to fill in the blanks. For instance, up until last year there was a lot of [media attention] about government contracting and there was certain speculation that certain firms were getting lots of business and now they have published the data about how much work is going to different firms. And a lot of the sting has gone away because the facts are presented. And I think that the transparency is something that should be there. People should know who is talking to ministers and who they are representing. And I think that transparency is very important.*

Even those engaged in the lobbying industry mostly accepted, both in their submissions and in the evidence provided at the public inquiry, that the general community had significant adverse perceptions of the conduct of lobbying. In a submission provided to the Commission by a lobbyist, lobbying was described as a "somewhat pejorative term". Lobbyists themselves often prefer terms such as "government relations" or "advocacy" to describe the work they do.

Even without evidence of actual corruption, adverse perceptions can have a corrosive effect on public confidence in government. These perceptions, however, do not exist in a vacuum; they are created and reinforced by evidence of actual corruption in lobbying activity both within Australia and beyond. In other cases, evidence has emerged not of actual corrupt behaviour but of conduct that falls short of the standards of probity and ethical conduct expected by the broader community.

As with most activity involving interaction between private and public interests, corruption risks exist in lobbying, and these risks can lead to corruption. The risks also serve as a foundation for adverse community perceptions of lobbying. A regulatory scheme for lobbying, therefore, needs to address the relevant corruption risks.

Corruption risks

A number of corruption risks arise from the way in which lobbying can be conducted, the nature of the lobbying activity, and the background of the person undertaking the lobbying. The main corruption risks identified in the investigation are outlined below.

Lack of transparency

Lobbying is often conducted in private. Whether intentional or not, this can mean that the lobbying activity is effectively secret, since there may be no mechanisms in place for information on the activity to be made available to members of the public. This lack of transparency in the lobbying process fuels adverse perceptions. As expressed in one submission received by the Commission:

> The public perception is limited because lobbying activity occurs in private. The limitations on public accessibility mean that there are fewer educative mechanisms available for public consumption, evaluation and interpretation which in turn creates a limited and thus negative perception of a valuable political activity.

In the Commission's experience, a lack of transparency in any process involving government decision-making can be conducive to corruption. The corruption risk is exacerbated when secrecy of the lobbying activity itself is allied with secrecy surrounding the basis on which a decision has been made. When information on lobbying activity is not available to the public, those engaged in the lobbying activity can make representations that other interested parties are not in a position to address because they are not aware that they are being made. This can lead to false or misleading claims being made by a lobbyist that may adversely affect the exercise of official functions by the public official being lobbied. Private meetings that are kept from public disclosure also give rise to the perception, sometimes backed up by reality, that both parties have something to hide and that decisions are not being made in the public interest.

This is not to suggest that all private meetings are inappropriate. There are good reasons why many meetings should be conducted in private. However, the corruption risk needs to be addressed by ensuring that there is an adequate mechanism in place to document that the meeting took place and document the result of the meeting, and that this information be available to the public. The lack of effective means to access information on lobbying activity involving a public official is a strong corruption risk.

The ways in which this corruption risk should be addressed are considered in Chapters 6, 7 and 9.

Inadequate recordkeeping

If records of communications between lobbyists and public officials are not made or adequately recorded, there may be no way for a third party (not present at the time) to ascertain what was communicated. This means that persons in a public sector agency where a decision is to be made may not be aware of the full details of the lobbying activity. The same applies to persons outside the agency who are attempting to ascertain what lobbying activity occurred.

The making of accurate records is an important accountability mechanism. Accurate recordkeeping makes it less likely for a lobbyist or the lobbied to hide or misrepresent the lobbying activity. An unscrupulous lobbyist is less likely to make inappropriate or improper proposals if they know that an accurate record of the meeting will be made. A public official is less likely to be receptive to such proposals or to directly or indirectly invite such proposals if they know the meeting is being recorded.

The presence of another public official who is responsible for recording the activity taking place can also be an important corruption prevention mechanism. The presence of such a person can act as a restraint on improper conduct and can ensure that an accurate record of the lobbying activity is kept.

The making of accurate records is only one part of good recordkeeping. The other essential part is to ensure the records are properly maintained and are accessible to those who are entitled to see them, including those within the public sector agency that has been the subject of the lobbying activity. Records that cannot be found when needed do not perform an adequate corruption prevention role. Recommendations for addressing this corruption risk are set out in Chapter 7.

Involvement in political fundraising

Corruption risks are heightened when the lobbying of politicians is combined with the lobbyist or the lobbyist's client making donations to the politician or the politician's party or engaging in fundraising for the politician.

Obvious corruption will occur when a decision is made in return for a political donation or when the eventual decision is influenced by such a donation. Corruption will also occur when a politician refuses to see a lobbyist or to make a decision unless a donation is made. Even when there is no intention to act corruptly, the nexus between lobbying and the making of a donation or engaging in fundraising creates perceptions of corruption that are difficult to counter.

John Warhurst is Emeritus Professor of Political Science at the Australian National University, and an acknowledged authority on lobbying. He agreed with the proposition that as a matter of principle lobbyists who advocate for clients should not be involved in making political donations or fundraising. He saw no practical difficulty in separating these activities.

Bruce Hawker, Chairman of Hawker Britton, and former Chief of Staff to former NSW Premier Bob Carr, told the Commission he believed there should be public funding of political campaigns and political donations should be banned. He said:

> *[This] would be a good move which would take a lot of pressure off a lot of people to have to put on dinners and to attend functions which frankly are there just to assist the re-election campaign ... and in my experience have never been done to achieve an outcome on behalf of the person making the donation.*

The issue of political donations in general was recently considered by the Joint Standing Committee on Electoral Matters. The Committee published its report in March 2010, recommending, among other things, caps on donations and increased public funding. If adopted, these recommendations, which are supported by the Commission, will significantly reduce this corruption risk. The NSW Government is currently considering this issue; the Commission, therefore, does not consider it appropriate to make any further statement.

Gifts and benefits

The giving of gifts or provision of other benefits to a public official by a person seeking a favourable decision from the public official poses an obvious corruption risk. Such conduct can involve bribery or an attempt to bribe for which there is sanction under criminal law. In other cases, gifts or benefits may be proffered not for the purpose of influencing any particular decision but rather to develop a relationship, which can be subsequently exploited to the giver's advantage. A recommendation addressing this corruption risk is set out in Chapter 10.

Difficulty of access

During its investigation, the Commission received evidence that the complexity of government and the decision-making process can mean that ordinary citizens have little prospect of navigating the regulatory or bureaucratic maze to be heard. A complex process can defeat attempts by the wider public to be involved in important decision-making.

The corruption risk is that those who are powerful or wealthy enough to understand how government works or to engage the services of someone who can navigate the decision-making maze on their behalf will exploit their position to their advantage and to the detriment of the public interest.

Former public officials acting as lobbyists

Corruption can arise when former public officials, including politicians, political staffers and senior public servants, who have become lobbyists, use relationships they developed when they were public officials to gain an improper advantage. The recently exposed activities of former WA Premier Brian Burke are an example of this type of situation.

A related corruption risk arises when former public officials, who lobby in the public sector area in which they were previously employed, improperly use confidential information to which they had access in their public career for their own benefit or that of their clients.

Many jurisdictions seek to address these corruption risks by restricting post-separation employment for classes of public officials who leave public sector employment. A recommendation addressing these corruption risks is set out in Chapter 10.

Exploitation of privileged access

As a general proposition, lobbyists of all types spoken to by the Commission tended to accept that relationships with public officials matter and are helpful in obtaining access. They stressed, however, that access to a decision-maker

does not guarantee a favourable decision.

The Commission examined claims made by professional lobbyists on their websites. Many boasted about the nature and quality of their connections to, and contacts within, government. Examples of these statements include:

- "widespread, long-term relationships with political decision-makers"
- "our networks and access to key decision-makers in federal, state and local government are superior to any other firm in Australia"
- "their formidable range of contacts extends throughout Australia's governments, at both state and federal levels, party organisations of all political persuasions, peak industry bodies and major corporations"
- "unparalleled networks in government across the country"
- "close connections and friendships on both sides of politics at state and federal levels"
- "our unique relationships and networks across all political parties, with parliamentarians, heads of government agencies and across the wide spectrum of industry"
- "excellent links with both Government and the bureaucracy throughout Australia. The strength of these relationships is built on an atmosphere of trust over many years...".

Having access to decision-makers does not imply that lobbyists are acting improperly or corruptly. Building relationships is part of their day-to-day work. There is, however, a risk that some lobbyists may build up relationships with public officials or exploit existing relationships in order to exert improper influence.

In its early years, the Commission identified privileged access as a potential corruption risk. In its *Report on Investigation into North Coast Land Development* (1990), the Commission stated:

> The problem arises when the lobbyist is someone who claims to have privileged access to decision-makers, or to be able to bring political influence to bear. The use of such privilege or influence is destructive of the principle of equality of opportunity upon which our democratic system is based. The purchase or sale of such privilege or influence falls well within any reasonable concept of bribery or official corruption.

This issue is further considered in Chapter 10.

Payment of success fees

Success fees can be divided into two categories. The first involves a lobbyist who undertakes to engage in lobbying for a client on the basis that they need be paid their normal fee only in the event that their lobbying is successful. This type of arrangement is often referred to as a contingency fee. The submission received from Hawker Britten noted that, "by making a fee, or some portion of it, contingent on a successful outcome, more organisations are able to access the technical and professional assistance Hawker Britten has to offer". The second category involves a client who agrees to pay a lobbyist an additional sum of money on top of the lobbyist's normal fee by way of a bonus, in the event the lobbyist is successful.

The Commission considers both categories pose corruption risks. Robert Donaldson, Assistant General Manager of Shoalhaven City Council, stated:

> *Any incentive-based monetary payment for lobbyists such as success fees has the potential to create a higher corruption risk environment than a fee for service approach...*

This is because success fees change the incentive from simply doing the job to achieving the outcome in order to obtain payment from the client. Some jurisdictions, including Queensland, have addressed this corruption risk by banning success fees. A recommendation addressing this corruption risk is set out in Chapter 10.

Addressing a dilemma

The adverse perception of corruption and the existence of corruption risks create a dilemma. While lobbying has become the subject of suspicion and complaint, sometimes backed up by evidence of corruption, it can also be an important and valuable contribution to decision-making processes.

The Commission gathered considerable evidence from lobbyists, the lobbied and lobbying commentators that demonstrates that lobbying is not only an essential part of the democratic process but that it can positively enhance government decision-making. It does this by ensuring that arguments being put forward are well researched, clearly articulated and address relevant government concerns. Lobbying assists government to consult widely in a timely manner, and better understand the potential implications of its decisions. The actual work undertaken by lobbyists, which is examined in detail in Chapter 3, underlines these advantages.

Many lobbyists and those who are lobbied expressed impatience with, or scepticism of, corruption concerns. As evidence that there is no systemic corruption, they pointed out the manner in which lobbying is conducted,

the professionalism of most lobbyists, and the integrity of those who are lobbied. The Commission accepts these views have some validity; however, while it is the case that no significant or widespread corruption involving lobbying has been recently identified in NSW, it does not follow that public perceptions and corruption risks are without foundation or do not need to be addressed.

Any regulatory system for lobbying needs to address relevant corruption risks and public perceptions while recognising the general value of lobbying of government. This requires a balancing act between creating greater transparency and integrity, and ensuring that any system is not so onerous as to unnecessarily restrict the flow of information and representations to decision-makers.

Chapter 3: Lobbyists and their work

In developing any regulatory regime to govern lobbying, it is necessary to first understand who lobbies, why they lobby, and what lobbyists do. The Commission heard from a range of people and organisations that lobby government in various ways. This chapter describes what the Commission learnt.

Who lobby?

The individuals and groups who lobby government can be categorised as:

- professional or third party lobbyists (those currently required to register in NSW) acting on a commercial basis for clients, who can include listed and unlisted companies, industry associations, and non-government organisations
- government relations staff of corporations and other commercial entities (also known as in-house lobbyists), together with such directors and other staff who lobby
- technical advisers who may lobby as an aspect of their principal work for a client; for example, consultant town planners, architects, engineers, lawyers, accountants, policy researchers and other consultant advisers
- representatives of peak bodies and member associations
- churches, charities and social welfare organisations
- community-based or grassroots groups, and single-issue interest groups
- members of parliament
- local councillors
- head office representatives of political parties
- citizens acting on their own behalf or for relatives, friends or their local communities.

Currently in NSW, only a limited number of professional third party lobbyists are subject to government regulation. The Commission's investigation was primarily concerned with interactions between government decision-makers and those who engage in lobbying as part of their employment, whether as hired lobbyists or employees of organisations.

Professional profiles and qualifications

The skills that were said to be required of those who lobby professionally were in the areas of media communication, stakeholder relations, government relations, and issues and crisis management. In terms of requisite knowledge and experience, the submission made by one lobbyist firm about the necessary attributes was consistent with the evidence given by lobbyists generally:

- a deeply held interest in public policy and Australian government
- experience and skills in public policy formulation and analysis
- quality research skills
- strong written and verbal communication skills
- a highly developed critical sense that can be brought to bear on a public policy issue
- a commitment to ethical standards of behaviour.

The areas of work experience identified as useful to a role as a lobbyist were politics, media, public service, policy development, and industry and financial analysis.

Another valuable attribute identified was direct experience of how government decision-making works. In NSW, nearly half of the 272 registered individual lobbyists have political experience either as former ministerial staff, ministers or members of parliament. Some witnesses told

the Commission that former ministerial staff and senior bureaucrats are more "useful" as lobbyists than former ministers because they have more operational knowledge and perhaps a wider range of contacts over more levels of government activity. Two senior lobbyists said that being of the same political affiliation as the client and/or the government representative being lobbied engenders trust, and can reassure the parties that they understand one another.

Why lobby?

In his book, *A Practical Guide to Lobbying*, Senator Guy Barnett summarised the reasons people lobby:

- to gain benefits or relief
- to gain or retain an economic, environmental or social advantage, especially if such advantage is likely to be denied
- to resolve problems that only government can fix.

People and organisations typically lobby either because they anticipate being disadvantaged by particular government action or inaction or because they seek some positive advantage from government.

The subject matter that forms the basis of lobbying activity can be extremely diverse. At one end of the spectrum are attempts to change broadly based government policy that have the potential to affect the entire population. Dr Andrew Penman, Chief Executive Officer, Cancer Council NSW, told the Commission:

> *Let me give you some examples. We're currently lobbying for the introduction of a regime to license tobacco retailers. We're currently lobbying for changes to the way nutritional information is conveyed on food packaging. We're lobbying for smoke-free outdoor venues, both at state government level. These positions do impact on commercial interests.*

At the other end of the spectrum are decisions about specific matters, such as a government transaction or approval, which may affect only one person.

In between these two extremes are decisions to set or change government policy or legislation that might affect a particular community, a group of individuals or corporate entities more profoundly or directly than others. An example was given by Catherine Fitzpatrick, Manager Government Relations and Sustainability, Leighton Holdings. She referred to work undertaken in relation to the Federal Government's Emissions Trading Scheme proposal that had an impact on a sector of the corporate community. She emphasised that while her employer would have complied with whatever scheme was ultimately introduced, the scheme as originally devised presented compliance difficulties and may not have achieved the result intended by the Government.

The reasons that peak bodies and member associations lobby was succinctly expressed by Julian Fitzgerald in his book, *Lobbying in Australia: You can't expect anything to change if you don't speak up!*, as the need to, "influence government and to protect or enhance their members' interests".

What lobbyists do

Professional lobbyists do more than just lobby. There is no standard set of services offered by all lobbying firms. One prominent firm, Hawker Britton, identified a range of project management and strategic advice services undertaken for clients in areas affected by government decision-making, such as human resource management, investment decisions and crisis or issues management. Others emphasised expertise in particular policy areas, such as finance or information technology, while another pointed to political opinion polling as a niche service.

The range of specific lobbying techniques mentioned by various lobbyists who assisted the Commission in its investigation included:

- conducting research on an issue
- ascertaining the government representatives who will make or recommend decisions
- conducting private meetings with government decision-makers, especially ministers, on an ad hoc basis
- attending regular meetings with government, usually in a forum or group setting
- conducting media campaigns, including lobbying the media and releasing research data
- making public submissions to enquiries or in response to government calls
- informing and influencing key members of parliament – backbenchers and opposition.

The evidence obtained from professional lobbyists indicated that the main activities they undertake fall into three main areas: researching the client's issue, providing advice to the client on a course of action, and directing or conducting lobbying of government decision-makers.

All lobbyists identified their first role in lobbying as one of research. Both lobbyists and those lobbied identified the value of the skilled lobbyist, and that what they had above the self-represented was the ability to find out and marshal the facts, figures and policy considerations likely to be of assistance in matching a client's need with government policy imperatives. Research, including the ability to derive a clear understanding of the client's position, was therefore seen as a lobbyist's primary skill.

Providing advice

Whether working for a commercial employer or a non-profit organisation, both third party lobbyists and in-house lobbyists emphasised that advising those they represent is a significant aspect of their work. In the case of a member association, this might include providing advice on how to form a lobby on a specific issue and activate members to represent themselves, preparing a client's executives for meetings with government, and giving general advice about government processes, such as policy cycles, budget cycles and the roles of various government stakeholders.

During its investigation, the Commission heard that some clients, organisations or members may have unrealistic expectations of government. Consequently, advising may include helping to align the client's goals with the practical realities of government that often entail substantial and routine background research and fact finding. The ongoing nature of this role was described by Wayne Burns, Director, Centre for Corporate Public Affairs, and Director, Allen Consulting Group, who told the Commission:

> *The in-house government relations practitioner spends most of her or his time keeping an eye on the overall political environment and the socio-political environment that's affecting the organisation, including the economic environment. That person is almost like an interpreter. Working as a practitioner in a corporation in that role you're the window in and the window out in terms of how public policy is progressing and how it's affecting the organisation.*

Lobbyists often work with clients to package and present the client's case in a manner that is succinct, persuasive and able to be easily digested by government decision-makers. This may involve preparation of written material. It can also involve the lobbyist preparing the client to engage directly with government decision-makers rather than doing so through the lobbyist. On other occasions, the lobbyist may be responsible for implementing the strategy by engaging with the decision-maker.

A strategy for a community interest group might involve grassroots campaigns consisting of petitions and public meetings. Industry or sectoral interests that are commonly represented by peak bodies, member associations and non-profit interest groups may conduct their communication strategies almost entirely in the public arena if it will garner public support for the policy positions that they intend to put to government. Typically, this involves responding to government requests for information either by public announcement, consultation draft of legislation or by selective invitation for comment.

The lobbyist's ability to present difficult or complex issues in a comprehensible way is clearly important and helpful to both the client and the government, as the example given by Ms Fitzpatrick, attests:

> *We generally made appointments with the department first. Our issue related specifically to contract mining, which isn't well understood. So we made a presentation pack and told people how it works and how the legislation might impact on us. And then made suggestions for how we thought the legislation might be changed so that the government could still achieve its intended aim … but it might work a bit more logically as it applied to our business.*

Lobbying government

Lobbyists will lobby those whom they believe are most likely to be able to affect the desired outcome. The Commission heard that many lobbyists go directly to departmental or ministerial staff who may be advising the minister about the issue they want to pursue. An example

of the range of approaches emerged in the evidence of Ms Fitzpatrick:

> *We looked at which people in the department were working on relevant parts of the legislation. We then looked at, as we sort of escalated, which ministers had responsibility and who were their key staff members, which parliamentary committees may be looking at the legislation or issues to do with the legislation, which members of the opposition might be interested and any local MPs that may, where we might work and have some unintended consequences, we wanted them to know what might happen in their electorate, to our business.*

Some public officials expressed a preference for dealing with professional lobbyists because they were well-acquainted with government procedures, could present arguments succinctly, and understood the practical realities of what government could and could not do. Others were less positive, and mentioned that some professional lobbyists used tactics that were heavy-handed or persistent, although they did not consider this conduct to be corrupt. Some claimed lobbyists made claims that were tendentious or exaggerated. Some witnesses expressed the view that while lobbyists might not be harmful, they generally did not contribute much to the decision-making process.

Lobbying is often thought of as simply "door opening" or gaining access to a decision-maker by virtue of a previous or personal association. This view may be exacerbated by the perceived revolving door between professional roles in government and in lobbying government.

Several registered lobbyists indicated that having access or being able to obtain access might be necessary but it is not enough to achieve a successful outcome. A submission by one lobbyist firm asserted that most of its clients, "are capable of 'opening' their own 'doors' in government but retain [the firm] to provide advice on the most efficient way to engage government once inside that door". Peter Shmigel, General Manager, Sustainability and Strategy, Veolia Environmental Services, summed up a view expressed by a number of others, saying that, "the age of the door opener is dead".

Former minsters who spoke to the Commission during its investigation mentioned that many lobbyists add nothing of value to the decision-making of government unless they present a case that is well argued and information that is useful to government. The most common view was that effective lobbyists need both established relationships to facilitate access and a well prepared case to put to government. Tim McKibben, Chief Executive Officer, Real Estate Institute NSW, expressed it this way: "There seems little point in developing a very good message if that message doesn't get through to the decision-maker".

The Commission found no evidence that hiring a paid lobbyist provided any guarantee of success in lobbying government. Most lobbyists spoken to by the Commission indicated that they often fail to bring about their or their client's desired outcome and have a modest success rate. A similar view was expressed by senior bureaucrats. Some lobbyists made the point that their work more often entails securing one or two minor compromises, as opposed to a categorical success. Others told the Commission that they simply do not take on clients with far-fetched expectations.

There was also a view expressed that professional lobbyists with good reputations can prevent clients from engaging in deceptive behaviour or making unrealistic or exaggerated claims. Several established, professional lobbyists expressed the view that any form of dishonest or deceptive lobbying behaviour by themselves or their client would be extremely damaging to the reputation of their business. While such behaviour might assist a particular client, it has the potential to jeopardise the credibility of the entire business and is, therefore, unlikely to occur. As one in-house lobbyist said, "The reality is it's like any other relationship that we have in our business, it's professional, it's conducted with integrity".

The general proposition put by lobbyists, the lobbied and lobbying commentators that lobbying was a normal, healthy and necessary component of democracy was borne out in evidence. The value of the able and experienced lobbyist was to endeavour to match reasonable client needs with government policy and need. The lobbyist may moderate client expectations and persuade government to exercise discretion favourably. When lobbying is done well it can be of value not only to the client but also to government.

The vast majority of complaints about lobbying were not in relation to the existence of lobbying but to some of its techniques, and in particular the fact that lobbying occurs behind closed doors, in a covert non-transparent way.

Chapter 4: Lobbying regulation in other jurisdictions

The perception that the practice of lobbying gives rise to corruption or undue influence and the recognition that corruption risks exist are not unique to NSW. There have been a number of instances of corruption arising from lobbying activity, and a great deal of investigation, discussion and reforms of lobbying practices in other jurisdictions.

There is recognition worldwide that proper care for the political health of the democratic process requires the regulation of aspects of the lobbying process. The principal response in Australia and in other countries has been to impose registration and disclosure requirements on certain classes of lobbyists. This chapter outlines developments in some other jurisdictions (in Australia and beyond), and Chapter 5 examines the current NSW regulatory system as it applies to lobbyists and the lobbied at the state government level.

United States (US)

The system of government in the US tends to encourage greater lobbying activity, particularly of individual members of the US Congress. This has prompted greater regulation of lobbying. There has been federal lobbying legislation in the US since the *Federal Regulation of Lobbying Act* of 1946, which was considered inadequate and replaced by the *Lobbying Disclosure Act* of 1995.

Under the current *Lobbying Disclosure Act*, lobbyists who expect to receive more than a specified amount over a six month period for lobbying or organisations that expect to spend more than a specified amount in a six-month period for lobbying with their own employees must register. Reports must also be filed that list the issues lobbied on, the institutions contacted, and the lobbyists involved. The *Lobbying Disclosure Act* extends to lobbying of Congress, congressional support staff, and policy-making officials of the executive branch, including the president, senior White House staff, cabinet members and their deputies, and independent agency administrators and their assistants.

Since January 2009, the Obama Administration has introduced an array of legislative measures and probity requirements, including a memorandum that government must not consider the view of a registered lobbyist unless it is provided in writing.

There are various regulatory regimes in each state of the US, with Washington State considered the most regulated.

United Kingdom (UK)

The UK previously rejected the regulation of lobbyists, instead relying on a regulatory system focused on the conduct of public officials and self-regulation of lobbyists. There has been significant criticism in the UK on the lack of a statutory register of lobbying activities and interests. Recent developments, including a number of "cash for influence" scandals involving members of parliament and members of the House of Lords, have acted as catalysts for a movement towards the introduction of a lobbyist registration system. Prime Minister David Cameron has agreed to introduce a statutory register, although no timeframe has yet been set for its introduction.

Canada

Canada has experienced a number of notable scandals involving lobbyists, which have given rise to the introduction of statutory registration and disclosure procedures for lobbyists at the national level (also reflected to varying degrees in the legislative regimes of several of Canada's provincial governments).

The *Lobbying Act* of 1995 applies at the federal level. It establishes a Commissioner of Lobbying to oversee the operation of the Act. The Commissioner is required to develop a lobbyists' code of conduct and has powers to conduct investigations and report to parliament.

The Act regulates the conduct of consultant lobbyists and in-house lobbyists. In the case of the former, an individual

who, for payment, undertakes to communicate with a public office holder on behalf of any person in relation to any of the matters specified in the Act, or to arrange a meeting with a public office holder, is required to file a return no later than 10 days after entering into the undertaking. The matters to be disclosed are prescribed and include the subject matter of the communication or proposed meeting. If the individual is a former public office holder, then a description of the office or offices held, and the date on which the individual ceased to last hold that office, must also be disclosed. Likewise, there are also disclosure requirements placed on in-house lobbyists.

The term "public office holder" is broadly defined and includes a member of parliament.

Lobbyists are required to be registered on a register that is public and can be searched online. Lobbyists provide all the required disclosure information via an interactive online system.

The *Lobbying Act* bans success fees and restricts former public office holders, including minsters, members of parliament and senior officials, from lobbying government during a period of five years from the day they ceased to hold public office. The Act also sets out a number of offences for breaches of the Act.

Australia

In 1983, following the Combe–Ivanov affair, Australia introduced a register of lobbyists. Described as a "toothless tiger", it was not accessible to the public, and was abolished in 1996.

In 2008, the Federal Government introduced the Lobbying Code of Conduct and Register of Lobbyists applicable to a limited class of third party lobbyists. In-house lobbyists, employees of peak industry bodies, trade unions, charities, and religious organisations are not required to register, based on the assumption that it is easy for government representatives to determine whose interests these individuals are representing.

The Department of the Prime Minister and Cabinet administers this system. It requires the publication on an online searchable register of the identity of the lobbyist and the client as well as business registration details. The Code applies, inter alia, to interactions with ministers, parliamentary secretaries, their staff, agency heads and persons employed under the *Public Service Act 1999*.

The *Commonwealth of Australia Standards of Ministerial Ethics* (2007) requires ministers to undertake that, for an 18-month period after ceasing to be a minister, they will not lobby, advocate or have business meetings with members of the government. There is a 12-month restriction on ministerial staff, consultants and ministers' electorate officers from acting as third party lobbyists in relation to any matter that they had official dealings with in their last 12 months of employment.

In July 2010, the Special Minister of State announced a review of the Lobbying Code of Conduct and the Register of Lobbyists. A discussion paper was released that raised the issue of a possible industry association, of whether lobbyists should disclose any previous background in government that they might have had, and possible adjustments to post-separation employment restrictions for ministers and parliamentary secretaries. In addition, the discussion paper raised the issue of whether an extension of the code to in-house lobbyists would provide any additional transparency, and whether the ethical standards underpinning the code could be applied more widely to the sector. Harmonisation of the separate lobbying codes among the states and at federal level, and more clearly defined sanctions were also raised.

Queensland

The *Integrity Act 2009* came into force on 1 January 2009, and is administered by the Integrity Commissioner. It applies to a limited class of third party lobbyists who are required to register before they can conduct any lobbying activity with state or local government officials.

Under the *Integrity Act 2009*, lobbying activity is broadly defined as "contact [which includes that done by email, by telephone, in writing and face-to-face meetings] with a government representative in an effort to influence state or local government decision-making". There are a number of exclusions to the definition of lobbying activity, including contact with a parliamentary or local government committee, contact with a parliamentarian or councillor in his or her capacity as a local representative on a constituency matter, and contact in response to a call for submissions. The exclusions are intended to ensure that the regulatory regime does not unduly interfere with democratic rights or impose impractical, unnecessary or onerous requirements.

The register is published on the Integrity Commissioner's website. The Act prescribes basic information that must be contained in the register. The Integrity Commissioner can refuse to register a lobbyist and may cancel a registration. The Act also provides for the Integrity Commissioner to approve a lobbyist code of conduct, after consultation with a parliamentary committee.

The Act bans success fees and places a penalty on lobbyists who receive or agree to receive such fees. Former senior government representatives are prohibited from carrying out a "related lobbying activity" for a third party client within two years of leaving public office employment. A "related lobbying activity" is one relating to the former senior government representative's official dealings as a government representative in the two years before leaving public employment.

Other Australian states

The Commonwealth model has formed the basis of lobbying regulation in Victoria (2008), South Australia (2009) and Tasmania (2009). Queensland initially introduced a similar model in 2009, before the adoption of the *Integrity Act 2009*.

From 2006, Western Australia experienced a series of scandals involving possible misconduct by public officers in connection with their dealings with lobbyists Brian Burke and Julian Grill. The WA scheme, which was introduced in 2007, was deliberately minimalist in its approach, applying only to lobbyists representing third parties, and targeted conduct such as that of Mr Burke and Mr Grill. Western Australia's Contact with Lobbyists Code does not contain post-separation employment restrictions for ministers or public sector executives.

Chapter 5: The current NSW regulatory system

This chapter outlines the present NSW regulatory system as it applies to lobbyists and the lobbied at the state government level. It examines the current NSW Government Lobbyist Code of Conduct ("the Lobbyist Code"), the *Planning NSW Meeting and Telephone Communications – Code of Practice,* relevant memoranda issued by the Premier, and other codes of conduct. Lobbying at the local government level is explored in Chapter 11.

Overview

Under the current regulatory regime, some third party lobbyists must register and accept a code of conduct before lobbying the NSW Government. This means that most lobbying in NSW is unregulated. Unless it involves the NSW Department of Planning, information on the date, venue, subject, and people involved in the lobbying need not be publicly disclosed.

Across government in NSW, there is no consistent approach to minuting meetings or telephone discussions with lobbyists. A failure to take and retain adequate minutes of lobbying conversations contributes to a perception that lobbying is a secret activity. Undisclosed or poorly recorded lobbying meetings held for the purposes of influencing government are an understandable cause of public concern. It would generally be regarded as reasonable grounds for applying regulation. This issue is considered further in Chapter 7.

NSW Government Lobbyist Code of Conduct

The Lobbyist Code was introduced in February 2009 by the then Premier, the Hon Nathan Rees MP. In his evidence to the Commission, Mr Rees explained that the Lobbyist Code was developed in response to adverse public perceptions of the impact of lobbying on government decision-making. He gave the following evidence:

> *The important thing for me to demonstrate to the community of NSW was that we were prepared to make* [lobbying] *more transparent, that this was no longer going to happen in the shadows but there was actually going to be a register, there's going to be a code of conduct and that was the first step along a road to making things much more transparent in order to allay concerns people had.*

Features of the Lobbyist Code

The Lobbyist Code has three main features. First, it relates only to a limited class of third party lobbyists, as defined by the Lobbyist Code, who must register on a public register that sets out prescribed information about the lobbyist and the lobbyist's clients. Secondly, it provides that a government representative shall not have contact with a lobbyist unless the lobbyist is registered on the register. Thirdly, it sets out a set of Principles of Engagement to be observed by lobbyists when dealing with a government representative.

The Lobbyist Code is limited to a class of "third party lobbyists" defined as "a person, body corporate, unincorporated association, partnership or firm whose business includes being contracted or engaged to represent the interests of a third party to a Government Representative". The following entities are excluded from this definition:

- an association or organisation constituted to represent the interests of its members
- a religious or charitable organisation
- an entity or person whose business is a recognised technical or professional occupation, which, as part of the services provided to third parties in the course of that occupation, represents the views of the third party who has engaged it to provide their technical or professional services.

A significant number of those who lobby government are not subject to regulation. The Lobbyist Code does not apply to in-house lobbyists (those who as part of their employment with an organisation engage in lobbying on behalf of that organisation), peak bodies, or third party professionals, such as lawyers or accountants who lobby for their clients.

In contrast, the term "government representative" is widely defined to include most public officials at the state government level, such as ministers, parliamentary secretaries, ministerial staff, and persons employed, contracted or engaged in a public sector agency. The definition does not extend to members of parliament, persons employed by state-owned corporations or to local government.

The Lobbyist Code does not define the term "lobbying", nor is it used in the Lobbyist Code. Rather, it deals with "contact" (broadly defined as telephone, electronic mail and written mail contact, and face-to-face meetings) between a "lobbyist" and a "government representative". When first making contact with a government representative, the lobbyist is required to disclose the fact that they are a registered lobbyist, the name of their client, and the nature of their client's issue.

The Register of Lobbyists is a public document available on the internet and maintained by the Director General of the Department of Premier and Cabinet. The Director General can refuse to accept applications to be placed on the Register of Lobbyists and can remove a lobbyist from it in certain circumstances.

The Lobbyist Code requires the following information to be placed on the Register of Lobbyists:

- the business registration details of the lobbyist, including names of owners, partners or major shareholders, as applicable
- the names and positions of persons employed, contracted or otherwise engaged by the lobbyist to carry out lobbying activities
- the names of third parties for whom the lobbyist is currently retained to provide paid or unpaid services as a lobbyist
- the names of persons for whom the lobbyist has provided paid or unpaid services as a lobbyist during the previous three months.

The principles of engagement for lobbyists are discussed in Chapter 8 in the context of developing a new code of conduct for lobbyists.

Issues not addressed by the Lobbyist Code

Apart from the limited definition of "lobbyist" used in the Lobbyist Code, there are a number of other limitations.

There is no requirement for meetings to be conducted in appropriate venues or for the government representative who is lobbied to make or retain any records of discussions with a lobbyist. The NSW Legislative Council, General Purpose Standing Committee No 4, *Badgerys Creek land dealings and planning decisions,* Report 21, November 2009 recommended:

> That the Premier strengthen the NSW Lobbyist Code of Conduct by establishing protocols to be applied to all meetings between government representatives and registered lobbyists. At a minimum, the meeting protocols should contain guidelines regarding venues, properly recorded minutes and the requirement for the third party presence of at least one government representative (Recommendation 9).

Implementation of this recommendation, coupled with a requirement for retention of meeting minutes, would significantly enhance accountability. A system similar to that recommended by the Committee has been adopted by the NSW Department of Planning, and is discussed below.

There is no mechanism to enable a member of the public or other interested party to identify quickly where lobbying activity is occurring or the general nature of that lobbying activity. Information as to who a lobbyist has contacted, and when, would at least enable an interested party to seek access to further information from the relevant public official or authority.

Currently, the only sanction under the Lobbyist Code for non-compliance by a lobbyist is removal from the Register of Lobbyists. Only the Director General of the Department of Premier and Cabinet has this power. Removal is a powerful sanction as it effectively prevents the lobbyist from lobbying a government representative. However, the powerful nature of the sanction means that it is likely to be employed only in case of serious breaches. A scale of sanctions may be more appropriate to deal with less serious breaches.

Lobbyist Code in practice

A number of registered lobbyists provided submissions to the Commission or gave evidence. None identified any significant problems with complying with the Lobbyist Code or the disclosure requirements of the Register of Lobbyists. The latter was generally seen to serve a useful purpose.

The Commission also received evidence from Rachel McCallum, A/Executive Director Legal, NSW Department of Premier and Cabinet, who has day-to-day responsibility for the administration of the Register of Lobbyists, and Brendan O'Reilly, Director General, NSW Department of Premier and Cabinet.

At the time of the public inquiry, there were 110 lobbyists in the Register of Lobbyists. Initial registration requires the completion of a form, together with a statutory declaration for each employee undertaking lobbying. The statutory declaration must be to the effect that the lobbyist has not been sentenced to a term of imprisonment of 30 months or more and has not been convicted as an adult, in the last 10 years, of an offence, one element of which involves dishonesty, such as theft and fraud.

The Department then undertakes an assessment as to whether the relevant criteria for registration have been addressed. Ms McCallum estimated that each assessment takes, on average, half an hour. A briefing note is then prepared for the Director General, who is the only person who can approve a registration. Lobbyists are required to notify the Director General of any changes to their disclosure details within 10 days of the change, and to submit quarterly reports confirming their disclosure details are current. New statutory declarations must be submitted every year. The Department's experience is that many lobbyists require assistance in completing the necessary forms, which can involve considerable administrative resources.

Mr O'Reilly estimated that administration of the current system requires the full time work of the equivalent of one-and-a-half departmental officers. Ms McCallum advised that consideration is currently being given to developing a more automated process for registration.

No evidence of any breach of the Lobbyist Code had been received by the Director General at the time of the public inquiry, except for non-compliance with technical requirements with regard to updating details and submitting new statutory declarations. Failure to meet the requisite technical compliance requirements had resulted in some lobbyists being removed from the Register of Lobbyists.

NSW Department of Planning's Code of Practice

The NSW Department of Planning's Meeting and Telephone Communications Code of Practice ("the Code of Practice") came into operation on 1 December 2009. It guides departmental officers in their interactions with registered lobbyists and other persons, such as development proponents, community groups and opponents of any planning or development matter. It is complementary to the NSW Lobbyist Code but provides a more detailed and rigorous regime concerning the conduct of meetings and telephone discussions.

Why a Code of Practice?

Sam Haddad, Director General, NSW Department of Planning, told the Commission that he introduced the Code of Practice to improve transparency, and ensure integrity and probity in the processes and outcomes of the planning system. He gave the following evidence:

> *It is however, in my view, as important if not more important for the planning system to also be seen to perform with a high level of integrity, probity and transparency. Community confidence in the administration of the planning system is highly influenced by perception issues. This is particularly relevant as regards lobbying and lobbyists.*

He regarded the procedures set out in the Code of Practice as "basic protection" for the Department. He said he did not oppose lobbying; indeed, consultation is a specific objective of the *Environmental Planning and Assessment Act 1979*. Rather, he considered that the most helpful lobbying was that done by consultants with expertise to offer the planning process. For this reason, he considered that the politically experienced third party lobbyist offered little to the planning process.

Features of the Code of Practice

Written records of telephone conversations are required to be made and filed in electronic and hard-copy format. Where contact involves a registered lobbyist, a copy of the record must also be sent to the relevant Deputy Director General.

A request for a meeting in relation to specific planning proposals and/or development matters must be made in writing. This is the only obligation placed on the person seeking to lobby the Department. The decision of whether or not to have a meeting must be made at the level of senior planner or above. Where a registered lobbyist is to attend, the decision of whether or not to have a meeting must be made at the level of director or above. Meetings must be conducted on government premises, and be attended by at least two departmental representatives. If the meeting is attended by a registered lobbyist, then at least one of the departmental officers must be a director. A written record of the meeting must be made and signed by the departmental officers present. Agreed outcomes must be noted at the conclusion of the meeting, and signed and certified as accurate. Mr Haddad told the Commission that the minutes are placed on the relevant departmental file.

The Code of Practice provides that all meetings and telephone interactions with a registered lobbyist in relation to any specific planning proposals and/or development matters must be disclosed in an attachment to the relevant reports, which are available online.

Officers attending a meeting with a lobbyist are required to complete an e-learning module to provide them with an understanding of both the Lobbyist Code and the Code of Practice.

Code of Practice in practice

According to Mr Haddad, the Code of Practice is working well. Between 1 December 2009 and July 2010, departmental statistics indicated registered lobbyists had made 62 contacts with the department by way of telephone calls or meetings. Mr Haddad noted that the number of contacts with registered lobbyists had decreased since early 2010. He thought that the Code of Practice may have discouraged some from making unnecessary contact but could not discount the possibility that others might have been discouraged despite having a genuine need to be heard. He also thought that the most likely deterrent was that a record of the discussion could be made public at some point in time.

Mr Haddad also explained that few objections had been received to having the details of a meeting recorded and later publicly disclosed. Those that had been received related to general discussions concerning plans for future projects in the next five or 10 years that an organisation did not want to expose publicly.

Within the NSW Department of Planning, there was some concern, particularly at regional office level, as to the availability of sufficient senior planners and directors to meet the requirements of the Code of Practice. This is an issue Mr Haddad intended to examine.

Mr Haddad told the Commission he intended to initiate a compliance audit of the Code of Practice, which would also assist in identifying if any changes or refinements are required.

The Code of Practice addresses a number of the corruption risks identified in Chapter 2. The Commission believes the Code of Practice is to be commended, and that it serves as a useful guide for the public sector as a whole. Its link to the lobbying regulatory scheme recommended by the Commission is discussed in Chapter 7.

Premier's memoranda

Two recent Premier's memoranda specifically deal with the issue of lobbying: the "Guidelines for Managing Lobbyists and Corruption Allegations made during Lobbying" (M2006–01); and the "Lobbyist Code of Conduct and Register" (M2009–03).

Memorandum M2006–01, which was issued in 2006, applies to all ministers, ministerial staff and public officials who are lobbied with respect to a proposed statutory decision. The guidelines apply when the person who is lobbied is the actual decision-maker as well as in those cases where the person who is lobbied is not the decision-maker and another minister or public official is responsible for making the decision. The guidelines apply to lobbying by any person, including principals seeking or resisting the making of the proposed statutory decision, special interest groups, professional advocates, and members of parliament.

The guidelines also provide that ministers, ministerial staff and public officials should ensure that lobbying in relation to a statutory decision is undertaken in accordance with appropriate practices, and does not undermine the integrity of decision-making processes.

Those being lobbied are reminded that, in some cases, it may be wise to ensure that lobbying does not occur at all while the proposed statutory decision is being made. They are advised to avoid doing or saying anything that could be viewed as granting a lobbyist preferential treatment, and are reminded to ensure that no action is to be taken that involves a breach of a relevant code of conduct.

The memorandum also sets out a protocol to be followed in the event corruption allegations are made during lobbying.

Memorandum M2009-03, which was issued in 2009, notes that codes of conduct applicable to ministers, ministerial staff, and staff working for a parliamentary secretary and the public sector in general have been or should be amended to require compliance with the Lobbyist Code.

The memorandum also provides that government members of parliament must comply with the Lobbyist Code. However, there is doubt as to whether this requirement can validly be made, and, even if valid, the extent to which it can be enforced other than by way of legislation. One of the submissions received by the Commission in response to its issues paper (released in May 2010 on the nature and management of lobbying in NSW) raised doubt as to whether, by applying the doctrine of separation of powers, the Executive Government could seek to regulate how and with whom non-executive members of parliament (backbenchers) communicate when conducting their parliamentary

business. The submission also noted that although the Executive Government could discipline ministers and parliamentary secretaries, who are themselves members of the Executive Government, no such disciplinary power exists in relation to non-executive members of parliament.

Other codes of conduct

The Lobbyist Code provides that a government representative is not to permit lobbying by a lobbyist who is not on the Register of Lobbyists. No other guidelines are set out in the Code concerning the conduct expected of a government representative. However, the conduct of public officials is governed by criminal and civil law. They have a general duty to act in the public interest and are subject to various codes of conduct concerning their behaviour.

Ministerial Code of Conduct

The Code of Conduct for Ministers of the Crown ("the Ministerial Code") is published on the NSW Department of Premier and Cabinet's website. It specifically provides that ministers must comply with the Lobbyist Code. It also generally requires ministers to perform their duties honestly and in the best interests of the people of NSW.

It appears that ministers are, by implication, precluded from engaging in the business of a lobbyist while they are ministers. Clause 2.5 of the Ministerial Code requires ministers to divest themselves of interests that could create the impression of a material conflict with their ministerial responsibilities, and requires them to cease to take an active part in any professional practice or in any business in which they were engaged prior to assuming office.

Clause 7.1 of the Ministerial Code also notes that the full time nature of ministerial office effectively precludes ministers from accepting any form of employment or engagement or otherwise providing services to third parties while in office. While the wording of this clause may be open to interpretation, when read in the context of the Ministerial Code and clause 2.5, it should be read as precluding ministers from accepting or engaging in such employment while in office.

The Ministerial Code does not prevent ministers from setting up as lobbyists once they have resigned from their ministerial position. It does, however, require them to consult with the Parliamentary Ethics Adviser if considering post-separation employment while in office. Former ministers must also consult the Parliamentary Ethics Adviser before accepting employment within the first year of leaving office, if the employment relates to their former portfolio responsibilities. In neither case is the minister or former minister required to act in accordance with the advice of the Parliamentary Ethics Adviser. There is no provision for the advice given to the minister or former minister to be made public.

Code of Conduct for MPs

The Code of Conduct for Members of Parliament ("the Members' Code") applies to all MPs, including ministers. It does not specifically refer to lobbying or how members are to deal with lobbyists. The Members' Code does not prevent MPs from engaging in paid secondary employment, and it appears possible for MPs to act as paid lobbyists, subject to disclosure and some limitations.

Clause 7 of the Members' Code requires disclosure of secondary employment or other engagements when a member participates in debates. The member is specifically exempted from making a disclosure if the member is "simply" voting on a matter. In addition, clause 1 provides that the member, "...must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office". This requirement extends beyond participation in parliamentary debates.

Although a member may engage in secondary employment, there are prohibitions on paid advocacy. The general prohibitions on receiving payment or other benefit in return for promoting or voting on a matter are qualified by the use of the phrase "in the Parliament or its Committees". This suggests that the Members' Code is not intended to prohibit a member from promoting a matter in return for receiving any remuneration, fee, payment, reward or benefit of a private nature, if the promotion takes place outside parliament or its committees.

In the Commission's July 2010 submission to the Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee on the review of the Members' Code, the Commission noted that it:

> ...does not consider that it is appropriate for Members to accept any "remuneration, fee, payment, reward or benefit of a private nature" in return for using their position to advocate the taking of a particular course of action by public officials. There is a strong perception that a Member who is advocating a position in return for reward is primarily motivated by that reward (or the prospect of the reward) rather than the public interest and as such is not using their position "to advance the common good of the people of New South Wales" (as set out in the Preamble to the Code) but rather to advance their own private interest.

However, the Constitution (Disclosure by Members) Regulation 1983 contemplates that MPs may derive income from providing a service arising from or relating to their position as MPs. Clause 7A of the Regulation defines such a service to include:

a. the provision of public policy advice

b. the development of strategies or the provision of advice on the conduct of relations with the Government or Members

c. lobbying the Government or other Members on a matter of concern to the person to whom the service is provided.

The Regulation requires income from any such service to be disclosed.

The Commission has recommended that the Members' Code be amended to extend the prohibition on paid advocacy by MPs to the promotion of matters to public officials outside the parliament or its committees, and that the Regulation be amended to conform to the amended Members' Code.

Other codes of conduct for public officials

The Model Code of Conduct for NSW Public Sector Agencies and the Code of Conduct and Ethics for Public Sector Executives, as well as separate codes of conduct and public agency policy documents, require that public officials and executives comply with the Lobbyist Code.

Chapter 6: Regulating lobbying

The goals of lobbying regulation should be to address the corruption risks by improving transparency and integrity in a manner that is practical and simple, and does not impose unnecessary cost on government or lobbyists or unduly interfere with access to government.

The Commission sees the following elements operating as a single corruption control system: disclosure on a register; recordkeeping by government; adherence to the *Government Information (Public Access) Act 2009* ("the GIPA Act"); adherence to codes of conduct; and prohibitions on certain types of conduct.

Regulation requiring lobbyists to disclose what decision-makers were contacted and when is sufficient for an interested person to seek further information by using the access to information provisions stipulated under the GIPA Act. For this to be effective, records must be created and retained by government. Other corruption risks, such as political fundraising, post-separation employment of public officials, and payment of success fees, must also be addressed.

Better regulation principles

The Better Regulation Office of the NSW Government has established seven principles for regulation of any activity by government, as follows:

- Principle 1: The need for government action should be established.
- Principle 2: The objective of government action should be clear.
- Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options.
- Principle 4: Government action should be effective and proportional.
- Principle 5: Consultation of business and the community should inform regulatory development.
- Principle 6: The simplification, repeal, reform or consolidation of existing regulation should be considered.
- Principle 7: Regulation should be periodically reviewed and, if necessary, reformed to ensure its continued efficiency and effectiveness.

All of these principles have been considered in the formation of the Commission's proposed new lobbying regulatory scheme. Succeeding chapters detail components of the Commission's proposed scheme, including surveys of the arguments that arose in evidence and submissions about specific elements of the proposed scheme.

Proposals for regulating lobbying in NSW

During the course of the investigation, possible systems of regulating lobbying in NSW were raised for comment with witnesses in the 11-day public inquiry. Since the public inquiry, which was held in August 2010, the Commission has developed a broad-based scheme. As far as possible, the scheme takes into account the essence of various cautions, objections and difficulties raised in the submissions and during the public inquiry.

The nine features of the Commission's proposed lobbying regulatory scheme are as follows:

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

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

3. Provision for standards of lobbying conduct is determined in an enforceable code of conduct.
4. Lobbying is not accepted by government representatives until a lobbyist meets the requirements of an online lobbyists register.
5. Lobbyists enter lobbying details online in the month and year that lobbying activity occurred, the name of the senior government representative lobbied, and, in the case of third party lobbyists, the identity of the client for whom the lobbying was done.
6. Restrictions are placed on post-separation employment of former government representatives with regard to lobbying activity.
7. The regulation of political donations is reformed.
8. Limitations are placed on fundraising activity conducted by lobbyists.
9. Contingency and success fees are abolished.

A register is just one part of the scheme. Most of the scheme is aimed at the need for meeting records to be made, kept and made available (just like other government records). Those who lobby may be entitled to private conversations but not to secret conversations. Anyone who lobbies must be prepared to accept that the public is entitled to know that it is occurring, who is doing it, and, with appropriate protections, what occurred during the lobbying activity.

These features of the scheme became apparent during the course of the public inquiry as various ways of addressing relevant corruption risks were raised or considered by witnesses. Some witnesses provided written submissions about specific proposals. Few objected to all of the features of the proposed regulatory scheme. Most accepted that some of the features would work effectively to increase transparency, reduce adverse perception and corruption risks, and not interfere with the proper flow of government business. Some witnesses, and in particular those from the peak body group, had specific objections to the proposed system of regulation. Their objections will be considered in chapters dealing specifically with the relevant aspect of the proposal.

Retention of a register

There was substantial consensus among witnesses at the Commission's inquiry and in written submissions, including feedback from third party lobbyists, that the present register should not be abolished and had some transparency value. In addition, it was accepted as a mechanism by which a lobbying code of conduct could be imposed.

Consideration was also given during the course of the public inquiry to the possibility that the current register might be abolished in favour of requiring government departments and ministers to publish lists of lobbying appointments on their websites. It would be relatively inexpensive to do so, and would avoid the cost of a larger public register and its management. Two principal difficulties arose from such a proposal:

- it would not provide a list of lobbyists, their clients. and the date and place of lobbying activity in a single register available for public inspection
- it would be difficult for the public and the media endeavouring to obtain information about lobbying on a particular proposal to get the information without having to search the websites of every minister and agency that might possibly have touched on the issue in which they are interested.

Objections to lobbying regulation

The Commission's proposal for lobbying regulation in NSW has been designed in a way to address the problems with, and complaints about, lobbying as it operates at present. It was also designed to take into account the various objections, practical warnings and risks of unintended consequence, and to avoid the imposition of unnecessary or onerous requirements.

Evidence in relation to all of these matters came from the submissions, the oral evidence, and the experience of other jurisdictions. The matters raised were helpful in making the Commission's proposal effective without placing unnecessary demand on the government and on lobbyists. Below is a survey of the objections, warnings and risks taken into account in the formation of the Commission's proposal.

A number of specific reasons were offered in written submissions and in oral evidence for not applying any further regulation to lobbying activity; five are examined below.

1. No corruption risk

Many witnesses objected to regulation because they said that lobbying was substantially corruption-free. The arguments that lobbying was not a corruption risk were varied, and included:

- An asserted belief that it is the third party lobbyist who causes the adverse perceptions of lobbying. Unlike peak bodies or charities, for example, third party lobbyists lobby solely for profit. The inference was that this class of lobbyist was responsible for whatever corruption risks there were in lobbying.

- Many representatives of peak body organisations pointed to a higher, more public purpose to their lobbying than that conducted by the private- or profit-driven interest of the clients of third party lobbyists. The difference in motive was claimed as a reason why the regulation of the lobbying of peak body organisations was unnecessary. This argument did not address the problem of undisclosed dealings, and the lack of public access to information and to decision-makers. It also did not address the existence of undisclosed opponents. There is no difference in principle, in method or in its effect between lobbying conducted by third party lobbyists and that conducted by any other entity seeking to persuade government of its view. All seek to use or have an effect on the resources or powers of government, all draw from the same group of methods and tactics to persuade government of the merit of their view, and most seek to make use of a friendly relationship. At present, none is required to make their activity public.
- An argument put forward was that to impose registration on lobbyists and to publish the dates of their activity might impair the relationship needed with government to achieve their aims. While the legitimate role of such a relationship must be acknowledged, the Commission does not accept that regulation of the types proposed would interfere with it. No reasonable argument was offered to support the view that it would.

Objections to a register and to regulation generally as being unnecessary tended to refer to whether lobbying was corrupt rather than whether it was transparent. When the goal of greater transparency was put to objectors, they generally accepted that, if it could be achieved without sacrificing necessary confidentiality and without undue burden, regulation would serve a purpose.

The Commission does not accept the arguments that the regulation of lobbying is unnecessary. The claim that lobbying is generally a "clean" and non-corrupt activity does not address the problem that lobbying at present remains closed and subject to various corruption risks. Information about what happens when lobbying of government changes policy, discretion or legislation needs to be aired publicly, and made available (like most forms of debate) in the public interest. Transparency of lobbying and proper access to information is a worthy and practical goal, and cannot be achieved without some form of regulation.

Despite the argument that lobbying is mostly clean and appropriate, there have been instances of corrupt lobbying. Lobbying at present cannot be seen or tested. It is an example of private influence on government at odds with the principle and prudence of transparency.

2. The frank exchange

Witnesses, including former ministers and premiers, attested to the need for private and frank meetings between government and non-government bodies. Lobbyists and the lobbied asserted that impairment of privacy of a meeting and the frankness that goes with it would reduce the supply of useful information to government and would obstruct the proper flow of government business.

Hypothetical examples were offered of the problems that would be caused if ideas floated in private discussion were immediately scrutinised in public as "policy" or as "intention" when they were little more than discussion. It was said that immediate publication would reduce the quality of the discussion and the expression of ideas.

There was no suggestion that ordinary government minuting of meetings with protection of confidentiality would impair the frankness or open discussion of a lobbying meeting. The concern was that reform might result in a loss of ordinary legal protections. The privacy needed for free exchange of discussion before executive decision-making (it would be less true of lobbying for legislative change), may be justified until an outcome occurs. Those are matters that have already received the attention of parliament in the GIPA Act.

There were other considerations relevant to the question of the frank exchange, including the public need for disclosure of opposing arguments and of the existence of opposing parties. The claim for privacy for the frank exchange also raises the question of a culture of non-disclosure, which results from a non-transparent system of lobbying.

The outcomes sought by one lobbyist may be the subject of other lobbying that opposes those outcomes. In the present, non-transparent system the existence of the other interests (let alone their opposition to the desired outcomes) may be unknown, except to government.

Only the government representatives being lobbied may know all of the players and their views. While that may have some benefits for a government in negotiation, it provides poor transparency and creates opportunities for corruption.

In the present, non-transparent system of lobbying, where great weight is placed by many lobbyists on having a friendly, frank or working relationship with a minister or department, a lobbied official may feel obliged to maintain confidences, even as to the fact of a meeting, regardless of what is discussed during it. In this way, lobbying can have a covert component in which subtle, complex, all-party non-disclosure or secrecy can result to the detriment of the public interest. The privacy culture currently surrounding lobbying draws both non-government and government officers into a confidentiality of tactics that exceeds the

need for legitimate protection. It contributes to a culture of non-disclosure, even when public disclosure would be harmless.

It seems unlikely that such frank exchange as occurs presently would be damaged by transparency of lobbying, particularly if appropriate protections of the type available under the GIPA Act were to be applied.

3. Self publication as transparent lobbying

Many lobbying entities opposed regulation based on the assertion that their lobbying is transparent and, therefore, unobjectionable because they publish information on their lobbying activity in journals, annual reports and in their own trade publications. They pointed out that they also issue media releases and publish much or most of their lobbying activity in other ways.

This "publication of lobbying" sometimes occurs because the membership of entities such as industry peak bodies expects the peak body to be its voice with government. Publication of this type is not an answer to the need for transparency of lobbying. Many entities may wish to avoid publishing all of their lobbying for legitimate tactical or public relations reasons. Some outcomes of lobbying can also be adverse; all lobbyists made the point that their lobbying frequently fails. Where publication does occur, it may be a correct reporting of the lobbying activity but may only present limited and immediately relevant components of it.

A more comprehensive account of the lobbying activity could be found in a government minute, if one were kept. Transparency of government process is rarely likely to be satisfied by the report of an interested entity.

4. Commercial-in-confidence issues

One objection to regulating for greater transparency in lobbying was that commercial-in-confidence matters (that is, confidential information) had to be protected. There can be no doubt that government inability to maintain the confidentiality of commercial-in-confidence matters of non-government entities would be harmful to government, to its relations with non-government entities and to non-government entities with sensitive commercial information.

These points were frequently made in evidence at the Commission's public inquiry by both government and non-government witnesses. They were often presented as insurmountable obstacles to rendering lobbying a more transparent activity. The GIPA Act is relatively new; unfamiliarity with the protection that it ensures for commercial-in-confidence matters may explain some of this concern.

5. Cost and bureaucracy

Another objection heard by the Commission was that further regulation of lobbying would raise costs and increase bureaucracy without benefit. It was a goal of the Commission from the outset of the inquiry to make recommendations for any regulation of lobbying in the least onerous way and with the least cost.

Many jurisdictions outside NSW have established integrity commissions (although often with multiple functions) or appointed lobbying commissioners who might manage extensive public online registration systems with investigation, prosecution and sanction powers.

It was accepted as a working principle for the purposes of recommending a proposal for NSW that a new and separate commission and a further administrative structure be avoided, if possible.

If the Register of Lobbyists were to be expanded, the evidence suggests that it would no longer be reasonable for officers of the NSW Department of Premier and Cabinet to maintain it. There has been some slight objection to the Department's managing of the register on the grounds that it is insufficiently detached from the government of the day. The Commission does not, at present, share a concern that the current, limited system is compromised by being managed by the NSW Department of Premier and Cabinet.

Nevertheless, a NSW statutory body already exists that could address the demands of lobbying regulation and, particularly, the needs of maintaining a register. The relatively new office of the NSW Information Commissioner, who is the manager of the GIPA Act and whose responsibility involves the disclosure or protection from disclosure of government information, has roles closely aligned with the demands of transparent lobbying. The NSW Information Commissioner is independent and has wide powers.

The likely demands and cost of the lobbying regulatory scheme proposed in this report would be modest. It would involve the set up cost of an online register, the cost of maintenance of the register, and the cost of enforcement by use of sanctions. The jurisdictions with expanded online registers have reported that the set up of their register took time and had initial teething problems but functioned well once participants became aware of how the system operated.

Dr David Solomon AM, Queensland Integrity Commissioner, manages the Queensland Lobbyists online register, including the demands of initial registration. He does so with fewer than three full-time staff. The Canadian national system, which is much larger, more complex and more demanding than the one proposed for NSW, operates

with 28 staff. The experience of both NSW and other jurisdictions is that enforcement and sanctions involve only infrequent action.

To offset the cost of running the register, some consideration could be given to charging a fee for initial registration or an annual fee. Annual fees are charged to other professional groups in the form of a practising certificate in order to meet the cost of regulation of their profession.

Compliance

The Commission's proposal requires that three practical matters be considered:

- Should there be a professional body for lobbyists?
- Is it necessary to establish a legislative structure to achieve a satisfactory lobbying transparency system?
- Should sanctions apply for non-compliance with transparency of lobbying procedures?

1. A professional body for lobbyists

When a professional body for lobbyists emerges, it is likely to need disciplinary powers. Some professional disciplinary sanctions may then be shifted to the professional body. In the meantime, they would have to be imposed by statute.

Many senior third party lobbyists were in favour of the professionalisation of lobbying. They called for qualifications, further education programs, and codes of ethics. Those matters would come with the development of a professional body for lobbyists, the initiation or development of which is outside the scope of this investigation and a matter for lobbyists to take forward.

2. Legislation

The use of legislation is the next practical matter requiring attention. Matters relating to good business procedure, the content of codes of conduct, and administration in general terms have legislative implications, especially with regard to sanctions, but should not themselves be part of a legislative regime. The role of legislation should be kept to a minimum, and only to those matters that require it.

In his submission to the Commission, Dr Solomon noted that, "a regulatory system that relies on a series of Codes of Conduct, protocols, memoranda and directives will inevitably be less effective than a system that is based on and supported by legislation". The Commission endorses this opinion.

There are three areas of lobbyist regulation that require legislative provision: (1) establishment and maintenance of a register, (2) compliance and audit, and (3) sanction.

The first and second relate to the provision of a role and necessary powers for a manager of the online register and its requirements. The manager would need power to establish and manage the register, including (subject to review perhaps by the Administrative Decisions Tribunal) making decisions on any proof of integrity requirement of third party lobbyists.

The view that emerged in the evidence provided to the Commission was that sanctions would be useful and helpful in establishing and enforcing a new system. At least for a period, there would be new demands placed on those who lobby. A manager of the system would initially be dealing with many hundreds of applications for registration, and would be assisted in the role by use of sanctions for non-compliance.

Audits for accuracy of the register could be conducted by way of sample comparisons between the lobbyist meeting entries on departmental, agency and ministerial websites and entries in the lobbyists register. Real assessment of accuracy, however, could be achieved only with statutory power to make demands for information, documents or action. Non-compliance would put at risk trust in government processes, just as the adverse perception of lobbying does now. Non-compliance would also increase corruption risks. Sanctions are likely to be helpful in establishing the new systems.

If the manager of the register is to be the NSW Information Commissioner, the legislation may require additions to the existing GIPA legislation to achieve these ends. There may also need to be consequential amendments to the *Administrative Decisions Tribunal Act 1997*.

3. Sanctions

The establishment of an enforceable regulation system would make lobbying transparent, and the imposition of penalty and disciplinary sanctions would make lobbyists accountable. The penalty and disciplinary sanctions enforced in other jurisdictions, and in particular those of Canada, were examined.

Sanctions cannot be achieved without legislation. Canada has an extensive range of penalties for non-compliance. In *Regulating Lobbying: A Global Comparison*, authors Raj Chari, John Hogan and Gary Murphy consider that, "...the enforcement of the legislation is crucial ... [Any] register should be controlled and monitored by an agency, preferably a completely independent agency".

There are two possible types of sanction. The first might apply only to third party lobbyists. It would involve sanctions similar to those that apply to professional disciplinary proceedings. Those registered as representatives could be struck from the register, and in that way prohibited from lobbying. A related method of

sanction that is used in other disciplinary regimes is the application and publication of reprimand, fine, striking off or other penalty to a registered entity either on the register or another website. Disciplinary sanctions of this type operate for many professions, including legal practitioners.

This first type of sanction (in the nature of disciplinary sanctions) is less suitable for breaches by lobbying organisations that lobby on their own behalf because self representation involves important rights of access to government, which ought not to be stopped even if there are some instances of wrongdoing by individuals. This would include lobbying by corporations, religious bodies, charities and, to some extent, peak bodies. A breach of the law would not generally deprive an entity acting in its own interest of the right to access a minister or senior bureaucrat. Prohibition from lobbying may be available against an employee who lobbies inappropriately in their employer's direct interest. Even that, however, has difficulties in the case of the director of a company that lobbies in its corporate interest; for example, in the case where the corporation is the vehicle for direct ownership, such as in a family company. In such cases, penalty, which is the next form of sanction considered, may be more appropriate.

The second type of sanction refers to a range of penalties, from administrative fines to criminal conviction. Penalty sanctions are likely to be useful across the whole spectrum of lobbyists, while disciplinary sanctions may be an added sanction available against the third party lobbyist (including, in the definition proposed in Chapter 9, a category of third party lobbyist expanded to include other representative professions, such as lawyers and accountants).

The position concerning legislation and sanction in local government lobbying differs, and is considered separately in Chapter 10.

Recommendation 1

The Commission recommends that the NSW Government enacts legislation to provide for the regulation of lobbyists, including the establishment and management of a new Lobbyists Register.

Chapter 7: Recording and accessing lobbying communications

An effective method of addressing some of the adverse perceptions and corruption risks associated with lobbying (identified in Chapter 2) is to establish clear protocols for the conduct of meetings with lobbyists, and to ensure that records of lobbying activity are available to public scrutiny. As Dr Richard Sheldrake, Director General, NSW Department of Industry and Investment, explained:

> *The overriding issue is not … lobbyists being used to bring matters to the notice of ministers or public servants. Rather, it is that the government and the public sector have in place and use processes that ensure whenever representations are being made to government they are done in a way that is open and transparent.*

One way of making records available to public scrutiny would be to require lobbyists to disclose details of their communications with those that they lobby. The Commission rejected this approach for two reasons. First, it would place an unduly onerous burden on lobbyists to create and publish records of their lobbying activity. Secondly, there may be cases where there are legitimate reasons why such details should be kept private. To place the responsibility on lobbyists to determine such matters would place them in an invidious position.

The scheme preferred by the Commission is to require those who are lobbied to create records of the lobbying activity, and for those records to then be accessible to the public through the operation of the GIPA Act. Under this scheme, lobbyists would be required to divulge on the lobbyists register details of senior government representatives that they lobbied and when they lobbied them. This would then enable interested parties to obtain more detailed information of the lobbying activity through the various processes set out in the GIPA Act for accessing records. A significant advantage of this scheme is that the GIPA Act sets out an established regime for public access to information, which can be readily used to access records of lobbying activity without the need to create a new system.

Before considering the operation of the GIPA Act, this chapter examines the need for standard public sector protocols for meetings with lobbyists, and the importance of recordkeeping.

Communication protocols

A practical measure that received strong support from both lobbyists and the lobbied was the establishment by government agencies and ministerial offices of a standard protocol for the conduct of meetings between lobbyists and government representatives (as defined in Chapter 9), and the recording of telephone conversations.

The NSW Department of Planning's Meeting and Telephone Communications Code of Practice (details of which are outlined in Chapter 5) establishes a model procedure for recording meetings and telephone conversations. It requires two or more officers to attend meetings with lobbyists, and specifies the venues at which such meetings are to occur. The evidence provided before the Commission supported the introduction of similar procedures throughout the NSW public sector.

A verbatim record of what occurs at a meeting or during the course of a telephone call is not required. Several witnesses rightly pointed out that such a record would neither be useful nor productive, and was impractical, in any event. It is sufficient for the record to show when, where, by whom, and with whom lobbying occured, what it was about, and the outcome. It was agreed by those witnesses who commented on the matter that a system of this type would be both practical and adequate.

It was suggested that telephone calls might be more difficult to minute. The evidence before the Commission, and experience of government practice and of work practices of the legal profession suggest that minuting lobbying phone calls would not be impractical or unreasonable.

The value to the public of conducting lobbying meetings at business venues where minutes can be kept is obvious. The choice of non-business venues gives rise to perceptions that the lobbying is not based on merit. The NSW Department of Planning's protocol prohibits meetings anywhere other than onsite or in departmental or council offices.

It may not always be possible to restrict meetings with lobbyists to business premises. There was some evidence that ministers, in particular, could be approached at cocktail parties, dinners, public meetings, formal openings and any number of informal occasions. It was claimed that social occasions for politicians invariably involve lobbying that could not be minuted or made the subject of regulation. A distinction between lobbying meetings and social functions was drawn by most witnesses who had experienced both. The consistent evidence before the Commission was that when lobbying occurred socially, and the subject matter of the lobbying was likely to be a matter of interest to a minister, an arrangement would usually be made for a meeting on a later occasion.

In Canada, "social lobbying" is not recorded in its register. Canada's highly regulated system controls all forms of written lobbying and any pre-arranged oral lobbying, whether by telephone or meeting. The rationale behind excluding social lobbying in Canada is consistent with the evidence given to the Commission.

The Commission accepts the difficulties inherent in requiring a written record to be made of lobbying at social events or in attempting to ban such lobbying. Such lobbying is more likely to be informal in nature and unlikely to require deliberation by a minister. However, in cases where the lobbying takes on a more formal nature it would be appropriate for the minister, in accordance with current practice, to request the lobbyist to make an appointment at a later date for a formal meeting, where an appropriate record can be made of what transpires.

A meeting protocol that requires the presence of more than one government representative at the time when lobbying occurs is consistent with traditional government practice, modern business practice, and ordinary prudence.

There was evidence that ministerial staff do not, routinely, apply the same accountability controls as other public officials who have dealings with lobbyists. Ministerial staff are highly exposed to the risks in lobbying and to perceptions of secret dealings. In these circumstances, the Commission considers it appropriate that similar procedures apply to lobbying of ministers and ministerial staff. Activities that come within the definition of lobbying activity (see Chapter 9) should not be treated in a less accountable way just because they take place in a ministerial office.

Procedures should be developed that guide all government representatives in their communications with lobbyists, whether those communications are by telephone, email or occur in face-to-face meetings. The procedures should also set out requirements for the conduct of meetings, including the level at which approval should be given for such meetings. It is desirable that a consistent approach is taken across the public sector. To this end, it would be appropriate for the NSW Premier to develop a model policy and procedure for adoption throughout the public sector.

Recommendation 2

The Commission recommends that the NSW Premier develops a model policy and procedure for adoption by all departments, agencies and ministerial offices concerning the conduct of meetings with lobbyists, the making of records of these meetings, and the making of records of telephone conversations. As a minimum, the procedure should provide for:

a. **a Third Party Lobbyist and anyone lobbying on behalf of a Lobbying Entity to make a written request to a Government Representative for any meeting, stating the purpose of the meeting, whose interests are being represented, and whether the lobbyist is registered as a Third Party Lobbyist or engaged by a Lobbying Entity**

b. **the Government Representative to verify the registered status of the Third Party Lobbyist or Lobbying Entity before permitting any lobbying**

c. **meetings to be conducted on government premises or clearly set out criteria for conducting meetings elsewhere**

d. **the minimum number and designation of the Government Representatives who should attend such meetings**

e. **a written record of the meeting, including the date, duration, venue, names of attendees, subject matter and meeting outcome**

f. **written records of telephone conversations with a Third Party Lobbyist or a representative of a Lobbying Entity.**

Recordkeeping

It is a basic principle of government accountability and a requirement of the *State Records Act 1998* ("the Records Act") for public officials to, "make and keep full and accurate records of their official activities".

The NSW Ombudsman's *Guide to Good Conduct and Administrative Practice* details the benefits of accurate records to agencies and their staff, such as facilitating compliance with legislative and regulatory requirements. The guide also identifies a benefit, mentioned by a number of experienced public officials to the Commission during its investigation, that accurate records act as a protection in the event of a dispute or misunderstanding.

The Commission's proposed lobbying regulatory scheme is dependent on public officials retaining appropriately detailed records of relevant lobbying activity. This includes minutes of meetings, records of telephone conversations, and written and electronic correspondence. The Commission heard evidence of poor practices among some public officials with regard to filing records of lobbying activity. This raised the possibility that there could be difficulty in identifying whether records of lobbying activity exist or in locating such records. The effectiveness of the access requirements of the GIPA Act will be compromised if agencies cannot identify or locate relevant records.

The Records Act makes provision for the creation, management and protection of state records, defined as, "any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office".

This definition is broad enough to cover records of lobbying activity made by a person in a public office or someone who works for a person in a public office, if the lobbying activity relates to the functions of the public office. The term public office includes a government department or agency exercising any function of any branch of the government of the state, a local government council, the cabinet and executive council and the holder of any office under the Crown (the latter would include the Premier and Ministers of the Crown who are appointed to office by the Governor). The term covers those public officials whose contact with lobbyists the Commission considers should be formally recorded, but does not specifically refer to ministerial staff.

There was evidence before the Commission that ministerial staff, and in particular, ministerial chiefs of staff, have contact with lobbyists. Given the nature of their role – close connection with their minister and the potential for their involvement in the decision-making process by way of providing advice – it is essential that their contact with lobbyists is recorded, and that those records are retained and accessible. Given that records of their contact with lobbyists will constitute a record that is made for the purpose of a public office, the Commission considers that records of lobbying activity created by ministerial staff are covered by the Records Act.

The Records Act requires each public office to ensure the safe custody of its state records. Each public office is required to establish and maintain a records management program that conforms with standards and codes of best practice approved by the State Records Authority. Each public office must make arrangements with the State Records Authority for the monitoring by the Authority of the public office's records management program. Furthermore, each public office must report to the State Records Authority, in accordance with arrangements made with the Authority, on the implementation of the public office's records management program.

The State Records Authority has issued a number of General Retention and Disposal Authorities (GDAs) dealing with the retention and disposal of public office records. An example is GDA 13, which relates to records concerning ministerial portfolio responsibilities. It specifies that certain records are required to be retained as state archives. These include records relating to the development, implementation or review of government policy and legislation, records concerning appointments to positions, and correspondence from members of the public and organisations concerning matters relating to the ministerial portfolio responsibilities.

GDA 13 also provides that electronic records relating to ministerial portfolio responsibilities should be captured into official filing systems. Records categorised as state archives cannot be destroyed but must be transferred to the custody of the State Records Authority once they are no longer required by the minister. It is an offence for a person to abandon or dispose of a state record.

The Commission is satisfied that the Records Act, if properly applied by relevant public officials, provides an appropriate scheme for the retention of state records. If the scheme proposed by the Commission for public access to records of lobbying is adopted, it will be necessary for relevant public officials to ensure their record management schemes comply with appropriate standards so that records of lobbying activity are easily identified and accessible.

Recommendation 3

The Commission recommends that the NSW Premier requires all government agencies and ministerial offices to ensure that they have adequate measures in place to comply with the *State Records Act 1998*.

GIPA Act

The purpose of the GIPA Act is to, "maintain and advance a system of accountable and representative democratic Government that is open, accountable, fair and effective".

To achieve this purpose, the GIPA Act:

- encourages the proactive public release of information by government agencies
- gives members of the public an enforceable right to access government information
- provides that there is a presumption in favour of disclosure of information unless there is an overriding public interest against disclosure.

The GIPA Act applies to public sector agencies. The definition of agency is broad, and includes a government department, minister (including a minister's personal staff), public authority, public office and a local government council. Government information is also broadly defined as "information contained in a record held by an agency".

The GIPA Act provides fours ways for government information to be released:

1. It makes it mandatory to release information classed as "open access information", the definition of which does not cover records of lobbying activity. However, provision is made for regulations to the GIPA Act to prescribe additional information to be included in the definition.
2. It authorises agencies to proactively make information publicly available unless there is an overriding public interest against disclosure of the information.
3. It authorises agencies to release information in response to an informal request by the person unless there is an overriding public interest against disclosure of the information.
4. If information is not available through any of the methods outlined above, a formal access application can be made. An application for access can be denied on the basis that there is an overriding public interest against disclosure.

The GIPA Act provides that an overriding public interest against disclosure will exist only if, on balance, the public interest grounds against disclosure outweigh the public interest grounds in favour of disclosure. The public interest grounds against disclosure are limited to certain types of information described in Schedule 1 of the GIPA Act, and the public interest considerations listed in section 14 of the GIPA Act.

Schedule 1 lists categories of information for which there is a conclusive presumption against disclosure. These categories include information subject to statutory secrecy laws, cabinet information, executive council information, and documents affecting law enforcement and public safety.

Section 14 of the GIPA Act provides that there is a public interest consideration against disclosure, if disclosure could reasonably be expected to have one or more effects specified. These specified effects include:

- prejudice to the supply of information to an agency of confidential information that facilitates the effective exercise of the agency's functions
- reveal a deliberation or consultation conducted in such a way as to prejudice a deliberative process of government or an agency
- found an action against an agency for breach of confidence
- prejudice any person's legitimate business, commercial, professional or financial interests.

For the majority of lobbying activity, there is unlikely to be any GIPA Act public interest considerations against disclosure of agency records. There may be some cases, particularly those involving legitimate commercial-in-confidence issues, which may require non-disclosure or

disclosure of edited records. The GIPA Act adequately addresses this consideration.

The GIPA Act also sets out mechanisms for review of agency decisions to not grant access to information. This means that independent and objective scrutiny can be given to applications for access, and reduces the likelihood that information will be withheld on spurious grounds. Provision is made for an agency to internally review a refusal to grant access. There is also a right to have a decision reviewed by the NSW Information Commissioner and the Administrative Decisions Tribunal.

It is an offence under the GIPA Act for any person to destroy, conceal or alter any record of government information for the purpose of preventing the disclosure of information authorised or required by the GIPA Act.

A person may complain to the NSW Information Commissioner about an agency's exercise of (or failure to exercise) its functions under the GIPA Act. The NSW Information Commissioner may investigate a complaint, and investigate and report on the exercise of an agency's GIPA Act functions. The NSW Information Commissioner has broad powers, including powers to obtain information and documents from an agency, power to enter agency premises and inspect documents, and power to conduct a formal inquiry with the powers conferred on a commissioner under the *Royal Commissions Act 1923*. The NSW Information Commissioner may also make special reports to parliament, which can be made public.

The GIPA Act provides an appropriate and robust mechanism for accessing agency information about lobbying, while at the same time providing adequate safeguards against release of information where there is a legitimate overriding public interest against disclosure.

Recommendation 4

The Commission recommends that the NSW Government amends the definition of "open access information" in the *Government Information (Public Access) Act 2009* to include records of Lobbying Activities, for which there is no overriding public interest against disclosure.

Recommendation 5

The Commission recommends that all agencies subject to the operation of the *Government Information (Public Access) Act 2009* proactively release lobbying information, for which there is no overriding public interest against disclosure, including by publishing that information on their websites.

Chapter 8: Codes of conduct

Codes of conduct set out standards of expected behaviour. They are one of the tools generally employed to prevent corruption.

Most witnesses, regardless of interest or background, considered that codes of conduct are useful in providing a clear set of rules about what constitutes appropriate conduct, and in facilitating sanctions in the event of breach of those rules.

Code of conduct for lobbyists

The current NSW Government Lobbyist Code of Conduct ("the Lobbyist Code") establishes a set of professional ethics for lobbyists, and sets out procedures to be followed when contacting a government representative. Information on the Lobbyist Code is also provided in Chapter 5.

The Lobbyist Code sets out four "Principles of Engagement", which lobbyists are required to observe when engaging with government representatives:

1. Lobbyists shall not engage in any conduct that is corrupt, dishonest or illegal or cause or threaten any detriment.
2. Lobbyists shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided to parties whom they represent, the wider public, governments and agencies.
3. Lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to institutions of government or to political parties or to persons in those institutions.
4. Lobbyists shall keep strictly separate from their duties and activities as lobbyists any personal activity or involvement on behalf of a political party.

The Commission considers these are appropriate principles that should be included in any lobbyist code of conduct. They are not, however, exhaustive standards, and there are other standards that the Commission believes should also be included.

The Lobbyist Code also imposes a procedure that lobbyists must follow in contacting a Government Representative. It provides that:

> When making an initial contact with a Government Representative about a particular issue on behalf of a third party for whom the Lobbyist has provided paid or unpaid services, the Lobbyist must inform the Government Representative:
>
> a. that they are a Lobbyist or employee, contractor or person otherwise engaged by the Lobbyist who is currently listed on the Register of Lobbyists;
> b. that they are making the contact on behalf of a third party;
> c. the name of the third party; and
> d. the nature of that third party's issue.

This is an appropriate procedure under the current system. It will need to be adapted to the new lobbying regulatory scheme proposed by the Commission in order to take into account contact that is made by employees and others acting on behalf of a lobbying entity.

Recommendation 6

The Commission recommends that the NSW Government develops a new code of conduct for lobbyists, which sets out mandatory standards of conduct and procedures to be observed when contacting a Government Representative. The code should be based on the current NSW Government Lobbyist Code of Conduct, and include requirements that lobbyists must:

a. inform their clients and employees who engage in lobbying about their obligations under the code of conduct

b. comply with the meeting procedures required by Government Representatives with whom they meet, and not attempt to undermine these or other government procedures or encourage Government Representatives to act in breach of them

c. not place Government Representatives in the position of having a conflict of interest

d. not propose or undertake any action that would constitute an improper influence on a Government Representative, such as offering gifts or benefits.

Under the Commission's proposed scheme, a lobbying entity would be required to register before its staff could engage in lobbying activity. Its lobbying staff would not be required to register individually. While a self-employed third party lobbyist would be required to register, individuals who are employed by a third party lobbyist organisation would not be required to register individually. This raises the question as to how individuals who lobby for a lobbying entity or third party lobbyist organisation are to be required to comply with any code of conduct.

Under the Commission's scheme, a "responsible person" must be nominated on the register. In agreeing to be nominated, the responsible person will also undertake to ensure that those in his or her organisation who engage in a lobbying activity will be made aware of their obligations under the code of conduct. Both the organisation and the offending individual will be subject to sanction for the individual's breach of the code of conduct.

Code of conduct for government representatives

The conduct of public officials is regulated by numerous codes of conduct. These set out standards of conduct expected of public officials, and typically require them to act honestly, with integrity, and in the public interest. These general standards apply to all interactions between public officials and others, and are equally applicable to interactions with lobbyists.

There is only one requirement for effective operation of the Lobbyist Code that applies to government representatives; the requirement that a government representative not permit lobbying by an unregistered lobbyist or a lobbyist who is not complying with the Lobbyist Code.

This is an appropriate provision but its inclusion in the Lobbyist Code means that not all government representatives who deal with lobbyists may necessarily be aware of this obligation. The Commission does not consider it necessary to include this provision in the various public sector codes of conduct. Under the Commission's proposed scheme, this requirement would be included in the relevant legislation. A breach by a government representative would normally give rise to the taking of disciplinary action.

Recommendation 7

The Commission recommends that the legislation, enacted in accordance with Recommendation 1 of this report, includes a provision that a Government Representative not permit any Lobbying Activity by a Third Party Lobbyist or any person engaged by a Lobbying Entity, unless the Third Party Lobbyist or the Lobbying Entity is registered on the proposed Lobbyists Register.

Chapter 9: Formulating a register

The purpose of a register

Current lobbying regulation in NSW and in other jurisdictions usually calls for extensive disclosure about lobbyists rather than about the lobbying activity in which lobbyists may be involved.

The new lobbyists register proposed by the Commission would publish the amount of information necessary to:

- expose the existence of lobbying activity to public view
- provide sufficient information about specific lobbying activity to enable an interested person to obtain further information using processes under the GIPA Act.

The register could be managed simply and with a modest structure. The disclosure demands on lobbyists would be modest and, together with other requirements imposed on public agencies (such as the lobbying communication and recording protocols discussed in Chapter 7), would expose lobbying to public view, thereby addressing the adverse perception of lobbying and relevant corruption risks.

Definitions for a register

The government has extensive contact with the non-government sector, including contact with lobbyists that may not constitute lobbying. The term "lobbying activity" needs a succinct definition to enable a register to function effectively. Furthermore, there is a substantial amount of lobbying of minor matters that should be managed and recorded in a regular way, but that need not clutter a public register with such an excess of information that transparency is lost. For this reason, a distinction is drawn between lobbying of "government representatives" and "senior government representatives".

A system of registration must also define the communication that might constitute lobbying activity; for example, does the communication relate only to meetings or does it extend to telephone calls and documents intended to influence or persuade government? There would also need to be some level of government officer below which contact is either not regarded as lobbying or does not require regulation. For example, a normal application for the exercise of discretion to grant a form of licence to a disabled person might lead to lobbying but need not be included in a lobbying registration system.

Attention has been given to a group of six definitions (set out below) necessary to allow a lobbying regulatory system and a lobbyists register to work. The definitions set out below have been formulated by the Commission but have been developed from, and in some ways are consistent with, definitions used in various jurisdictions in Australia, Canada, and elsewhere.

1. Third Party Lobbyist

> **A person, body corporate, unincorporated association, partnership, trust or firm who or which is engaged to undertake a Lobbying Activity for a third party client in return for payment or the promise of payment for that lobbying.**

This has been derived from the definition of "lobbyist" in the NSW Government Lobbyist Code of Conduct but does not adopt the exemptions currently in place for professionals, such as lawyers and accountants.

2. Lobbying Entity

> **A body corporate, unincorporated association, partnership, trust, firm or religious or charitable organisation that engages in a Lobbying Activity on its own behalf.**

In general terms, this definition would require all industry peak bodies, trade unions, employer bodies and most

religious and charitable bodies to register. In addition, all corporations that lobby by use of their own in-house staff, including board members, would be required to register.

Many of these entities objected to being regulated, required to register or required to submit their activities to public view. The approach adopted here involves the largest change to the current system. It expands the class of regulated lobbyist from one part of the group of third party lobbyist to all who seek to influence government action, with identifiable exceptions (such as those listed in the definition of lobbying activity).

Most of the broad objections to regulation were discussed in Chapter 6. Objections to aspects of a register are discussed at the end of this chapter.

3. Lobbying Activity

A communication with a Government Representative in an effort to influence government decision-making, including as to the:

- making or amendment of legislation
- development or amendment of a government policy or program
- awarding of a government contract or grant
- allocation of funding
- making of a decision about planning or giving a development approval under the *Environmental Planning and Assessment Act 1979*.

This definition does not include:

a. communication with a committee of the Legislative Council or Legislative Assembly

b. communication with a member of parliament in their capacity as a local representative on a constituency matter

c. communication with a Government Representative in response to a call for submissions or information

d. petitions or contacts of a grassroots campaign in an attempt to influence a government policy or decision (unless the lobbying activity is undertaken by a Third Party Lobbyist for reward)

e. communication with a Government Representative in response to a request for tender or request for quotes

f. statements made in a public forum

g. submission of a written application to a Government Representative in a form required by the public sector agency to whom the application is made

h. representations made on behalf of relatives or friends concerning their personal affairs

i. communication with a Government Representative on behalf of a trade delegation visiting NSW

j. communication with a Government Representative as part of the normal day-to-day work of persons registered under an Australian Government scheme or a NSW Government scheme, regulating the activities of members covered by that scheme

k. communication with a Government Representative limited to ascertaining the progress of a matter or an enquiry as to the application or interpretation of any law, policy, practice or procedure.

The definition is derived from the Queensland *Integrity Act 2009*. It captures the interface between government and non-government, the non-disclosure of which is currently a principal cause of the adverse perception of lobbying.

There were two possible approaches to this definition. The first was to limit the definition of lobbying to commercial activity so that there are no exceptions. While this appears a clean and simple course, it allows a great deal of lobbying about which there may be community dissension to go undisclosed. Formulation of an effective definition of "commercial lobbying" would be difficult.

The second, and better path, and that which has been adopted in most other jurisdictions, is to regulate all lobbying activity except that which obviously does not require inclusion. This is the approach used in the Queensland system, and was endorsed by Dr David Solomon, Queensland Integrity Commissioner.

The Queensland regulation system applies only to a limited class of third party lobbyists. The scheme proposed by the Commission extends to other lobbyists. This extension impacts on the conduct that should be excluded from the definition. The exclusions in the Commission's definition were chosen as being the most appropriate in ensuring that regulation does not unnecessarily interfere with democratic processes, and is not unduly onerous. There may be other exclusions that are also appropriate.

4. Communication

A communication by means of telephone, electronic mail, written words and face-to-face meetings.

This is based on the definition of "contact" in the NSW Government Lobbyists Code of Conduct.

The extent of lobbying that could be captured in this definition generated much debate, since it was potentially onerous to report each incident of lobbying communication on a register. The Commission endeavoured to avoid a burden of that type. By adopting the policy that the register should include only that information required to enable an interested person to seek additional information from government using the GIPA Act processes, a lobbyist need register only the month and year in which any lobbying communication occurred, and the name of the senior government representative who was lobbied. That will be sufficient information in the event it is necessary to make a formal access to information application under the GIPA Act to the relevant government agency on the matter of interest to the agency.

5. Government Representative

A minister, parliamentary secretary, ministerial staff member or person employed, contracted or engaged in a public sector agency (a division of the government service as defined in section 4A of the *Public Sector Employment and Management Act 2002*), other than staff employed under section 33 of the *Public Sector Employment and Management Act 2002*.

This is the same definition used in the current NSW Government Lobbyists Code of Conduct. It does not include local government officers or councillors. The issues in relation to local government differ, and are dealt with in Chapter 11.

The definition does not include a non-executive member of parliament (MP). There are constitutional reasons for not attempting to regulate the circumstances of their contact with the community. More importantly, while MPs may lobby actively, they do not have executive power with which to make decisions.

The definition does not include employees of state-owned corporations (SOCs). There are 18 SOCs in NSW. The Commission sought information from each SOC as to the degree it was lobbied, and the issues on which lobbying occurred. Responses indicated that most were not lobbied. Those that had been lobbied had only been lobbied on few occasions.

The Commission notes that in Queensland, the *Integrity Act 2009* includes employees of government-owned corporations in the definition of government representative. Given the relatively low level of lobbying involving SOCs in NSW, the Commission does not consider it necessary, at this stage, to include them within its proposed lobbying regulatory scheme.

6. Senior Government Representative

A minister, parliamentary secretary, ministerial staff member or division head referred to in Schedule 1 of the *Public Sector Employment and Management Act 2002*, and members of the senior executive service, as defined in the *Public Sector Employment and Management Act 2002*.

The purpose of this definition is to identify those public officials who are most likely to be either the decision-makers or, in the case of ministerial staff and members of the senior executive service, primarily involved in advising the principal decision-makers. These are the persons most likely to be lobbied; consequently it is lobbying of them that requires greater transparency.

Under the proposed scheme, lobbying activity with any government representative or senior government representative will be subject to the meeting and record protocols discussed in Chapter 7. Lobbying activity with a senior government representative will also require notification on the register.

Which lobbyists would have to register?

Third party lobbyists

It was pointed out many times in evidence heard by the Commission during its inquiry and in submissions received that the professions of lawyer, accountant, and planner, and other third party professions frequently provide lobbying services. Many of the larger firms have specialist government relations departments, a function of which is to provide lobbying services. The services they provide are identical to, and compete with, those provided by the third party lobbyists. Currently, these professionals are exempted from registration, while other third party lobbyists are not.

There was some evidence heard by the Commission that some clients elected to have lobbying done by lawyers or accountants because their name and the name of their lobbyist would not be made public on a register. One firm of lawyers that did register, though it was not required to do so, was said to have lost some of its lobbying clients – it was said they did not want the name of their business on the lobbyists register.

Requiring third party lobbyists of all types to register, including the professionals who lobby, has an added benefit. It avoids the potential problem of lawyers, accountants or other representative professionals becoming the publicly declared clients of a third party lobbyist, when that lobbyist might actually be asked to lobby for the undisclosed client of the representative professional. The person lobbied is likely to become aware of the true interest for which the lobbying is occurring; however, the public and media are unlikely to become aware of this interest.

Some of the professions objected to being included in the category of third party lobbyist, and to being required to register or submit to a lobbyist code of conduct. They argued that they were a low corruption risk, subject to existing disciplinary regimes (so that submission to a lobbying code of conduct was an unnecessary duplication), and, finally, that their actions were part of ordinary professional practice.

These arguments focused on a claimed lack of actual corruption and on probity issues. They did not address the transparency problem or the perception issues. Whether or not lobbying work is part of ordinary professional work, it is still lobbying and it is carried out behind closed doors. It involves lobbying in the full sense of the definition, and it needs to be exposed to the operation of the GIPA Act, like any other lobbying activity, in order to allow access to information and to reduce public suspicion about lobbying.

Other lobbyists who must register

The proposed register would expand from a list of the third party lobbyists to include all entities that fit the definition of lobbying entity, and who or which engage in lobbying activity.

Objections and difficulties raised on the issue of registration (outlined in Chapter 6) were taken into account by limiting the demands made on a lobbyist during registration and on the proposed register. Many in these categories and, in particular, representative of charities had no objection to being on a lobbyist register, as long as it did not impose undue administrative burden or cost and as long as their obligations were clear.

Political party office as lobbyist

The Commission carefully considered whether political parties might be lobbying entities liable to register under the proposed lobbying regulatory scheme. Political party members might often be involved in the formation of policy, either as individuals or through the party office. The policy formation process between party office and a government of the day is not amenable to division but, in any event, does not fall into the definition of lobbying activity. It is not lobbying in any particular interest. However, when a party office of a government in power does engage in lobbying activity in an interest, other considerations may arise.

Lobbying by an opposition or a minority party not sharing in government, lobbying by their MPs, members of non-government parties, and non-government party machines may be routine and difficult to distinguish from one another. It highlights the reasons that registration of a political party of the government in power or indeed any political party as a lobbyist seems anomalous.

Questions were also raised in relation to donations and fundraising. One view is that there is a basic problem if ministers or other government representatives are made the subject of lobbying activity by party officials at a time when that party is a party of government, and the lobbying activity is for a private interest. The issue is at its most simple if lobbying is done by a party official in the interest

of a donor to the party or for someone to whom a favour might be done. In either case, the party official could become the rough equivalent of a representational lobbyist, but where the lobbying "fee" risks being presumed to be something other than a fee for service.

The risk of preference or its perception, and the risk to an MP that is dependent on the party for pre-selection or ministerial position, suggest that party officials should never be involved in lobbying members of their own government in an interest. In this regard, any lobbying done by a party office in an interest, other than an interest of the party machine itself, would and does, raise suspicion.

There is nothing essentially wrong with a political party lobbying the representative of a government of its persuasion. It is rather that the need to do so would require the political party to register. If political parties, whether of the government's persuasion or not, do lobby for an interest it is probably a matter for which full transparency would be needed.

Some of the problems about lobbying by political parties would be relieved, though not eliminated, by changes to the political donations system. Changes to the political donations regulatory system are currently under consideration by the NSW Government. With all these considerations in mind, the Commission is of the opinion that when a political party office lobbies, it should be liable to register like any other entity, but such occasions would presumably be unusual and temporary.

Which lobbyists would not have to register?

Those who lobby but would not need to register may be identified in the group of exclusions from the definition of lobbying activity set out above. In general terms, individuals who lobby in their own right or for family or friends, local and grassroots lobbyists, and those who participate in public debate and petitions or lobby their own MP do not have to register. Those who make enquiries of government officers, speak to parliamentary committees, give quotes, submit tenders or contract with government are not engaged in lobbying activity, and do not have to register. The government might also consider it appropriate to exclude other categories; for example, those who address issues of clemency, incarceration, other justice issues or mental health detention.

Operation and contents of a register

There are some components of the present Register of Lobbyists maintained by the NSW Department of Premier and Cabinet that should be retained, some which should be expanded and others that need not be retained.

Each of the components retained, expanded or not retained by the Commission has been judged against the purposes of the proposed register, including with a view to limiting the registration burden and cost necessary to achieve those purposes.

The proposed features of the register are relatively simple:

a. A managed, online, self-entry, public register of lobbyists.

b. The register would consist of two panels; one where a third party lobbyist must register and identify the clients they represent; and one where each lobbying entity must register, declaring its name but not identifying individual officers, lobbyists or owners.

c. Government representatives must not deal with third party lobbyists who are not registered or with persons employed or engaged by an unregistered lobbying entity. This prohibition is a key component of the operation of the register, and is best dealt with in legislation establishing the operation and management of the register.

d. Maintenance and enforcement of the register would be carried out by an independent government entity.

e. Initial registration by both a third party lobbyist and a lobbying entity would be online but would require:

   i. a nomination by the registrant third party lobbyist or registrant lobbying entity of one of its officers as a responsible person

   ii. an acceptance of the nomination of the responsible person and an undertaking by that person to ensure that all individuals lobbying for or on behalf of the registrant are aware of and accept the NSW Government Lobbyists Code of Conduct

   iii. undertakings by the responsible person to maintain registration details in accurate form, notifying the manager within 30 days of any change

iv. undertakings by the responsible person to notify the manager of:

- any change in the nomination of the responsible person
- any matter likely to affect the obligation to register
- information required by the manager relating to the lobbying activity or the registration of the lobbying entity
- any non-compliance in their registration requirements.

f. Successful registration would result in a system by which the registrant would be allocated a PIN or password that would allow access to their part of the register. This type of entry would allow the registrant sole access (apart from the manager) to update any required details.

g. Posting on the public register by the lobbying entity of the particulars required for public exposure (as outlined below).

h. Sanctions in place against the registrant and the responsible person for non-compliance.

Particulars to be posted

The responsible person would ensure that the following information is posted on the register within 30 days of any change in register details or of any registrable lobbying activity:

a. (the month and year in which lobbying activity occurred with a senior government representative (e.g. "June 2010")

b. the identity of the government agency, department or ministry lobbied

c. the name of the senior government representative lobbied

d. in the case of the third party lobbyist, the name of the client or clients for whom the lobbying occurred, together with the name of any entity related to the client the interests of which did or would have derived a benefit from a successful outcome of that lobbying.

Upon application to the independent manager of the register, and as determined by this person, details of lobbying may be exempted from posting on the register if there is an overriding public interest against disclosure at that time and for such time as the manager may determine.

Information not sought from registrants

There are five categories of information found on other lobbying registers that the Commission believes need not be included in the proposed register:

1. income and expenses information about lobbyists
2. subject matter of lobbying
3. precise dates of lobbying activity
4. personal interest that a decision-maker might have in the subject of the lobbying activity
5. political donations information.

The reasons for not requiring information about these matters in the proposed register are considered below.

Non-declaration of lobbying income or expense

Other jurisdictions, and in particular those of the United States (US), frequently require extensive information to be publicly disclosed by lobbyists about their income and expenditure. The purpose of seeking that information appears to be twofold:

- It might contribute to a check on the amount of money spent and the amount of resources used to achieve a particular lobbying end. This is a substantial issue in the US; it is a lesser issue in Australia because the disparity of resources between competing lobbying interests is, by reason of the smaller market and the smaller community, more obvious and publicly observable.
- The provision of financial information by lobbyists could have an anti-corruption function in that it might be used as an accounting tool to determine whether corrupt payments have been made.

Julian Fitzgerald, a former federal public servant, and prominent author and commentator on lobbying in Australia, made a strong plea to the Commission for recommendations that would require declarations of money spent and income earned by lobbyists. He asserted that to require financial information would facilitate useful research information for academic purposes and would act as a monitoring device on lobbying activity.

The Commission accepts that there would be value for researchers in having income and expenditure information but any purpose in requiring that information would have to comply with the first three Better Regulation Principles of the NSW Government. The Commission has formed the view that, however useful in other ways, to require that information would not be consistent with the goal of rendering the content of lobbying activity transparent by regulation. The public declaration of monies spent would not (in the Australian context) hamper corrupt payments, if there is intent to make them. Such corrupt conduct must be detected in other ways.

Non-declaration of subject matter

The register would undoubtedly be an easier transparency tool if the subject matter of the lobbying appeared in it. Nevertheless, the Commission's proposal is that the subject matter of lobbying not be included on the public register. There are two arguments for adopting this approach, as follows.

The first argument results from a number of warnings from witnesses to the Commission that to require a declaration of the subject matter has the unfair effect of giving commercial opponents premature notice of a proposed project being put to government by a private entity. Disclosure of that subject might compromise the prospects of the project or might cause public speculation that would be damaging to the development of the project idea.

The second argument is that registers of other jurisdictions that require the subject of registrable lobbying to be made public often cast the subject in such general terms that no real information is provided. In Canada, for example, an arms manufacturer lobbying the department of defence might describe the subject of a lobbying event as "defence" rather than the precise topic that might attract public interest. In other cases, a developer might refer to "development" rather than the specific proposal discussed.

Similar experiences to Canada were reported in the 2009 report, *Lobbyists, government and public trust*, of the Organisation for Economic Co-operation and Development (OECD). One university provided such wide detail of the subject of its lobbying that it was no more informative than another university that provided a much shorter but equally vague description. A rule in either a statute or a code of conduct requiring a precise description may overcome aspects of that problem but declaration of subject is not necessary for the operation of the register. It is the enquirer who defines the subject by searching the name of a player in a project of their interest. If the name appears with a date of lobbying and with the agency lobbied, access to further information can be sought through the GIPA Act.

The Commission has concluded that, subject to review of the system after a testing period, the subject matter of the application should not be declared.

Non-declaration of precise dates of lobbying activity

The proposed register would successfully operate with disclosure of the month and year in which any lobbying communication occurred rather than a precise date for each act of lobbying. Many witnesses pointed out that lobbying usually occurs in clusters of activity over a period, consisting of meetings, phone calls, emails and documents. There is little utility and much trouble and cost in specifying each individual event on a register if they could be accessed via application under the GIPA Act.

Non-declaration of interest of decision-maker

Some systems, such as the Canadian Registry of Lobbyists, require disclosure on the register of any interest that a government representative, as decision-maker, might have in the material upon which he or she is being lobbied. It is a means of declaring a conflict of interest. A declaration of that type is a necessary probity measure but it is already covered in NSW by other clear obligations imposed on government representatives. Such a conflict of interest would normally cause a disqualification of the government representative from deciding an affected issue. Disclosure of conflict of interest information does not relate to the purposes of the proposed register, and should not be required on the register.

Non-declaration of donations information

If the current political donations system is altered by reforms of the type proposed by the Joint Standing Committee on Electoral Matters, then a question of donations disclosure on a lobbying register does not arise. If reforms do not take place, the information would be available in any event from the Election Funding Authority of NSW. The impact of donations on the present lobbying system has produced suspicion and scepticism about lobbying; both good reasons for its disclosure. However, while donations information would affect an assessment of particular lobbying, it is not information that is necessary to facilitate access to information under the GIPA Act, and is available elsewhere.

Proof of integrity

The final, practical matter to be considered is whether there should be proof of integrity (a current requirement of the Register of Lobbyists) as a pre-requisite for registration on the Commission's proposed lobbyists register.

For the disciplinary regimes of occupations in which a degree of public trust must be reposed, proof of integrity is a usual component. Loss of integrity or loss of good fame and character can involve loss of the right to work in that occupation. The current NSW Government Lobbyist Code of Conduct calls for some proof of integrity, and requires disclosure of events that would go to questions of integrity. The question is whether that requirement should continue and, if so, whether for all categories.

The same considerations arise with proof of integrity as with a striking from the lobbyists register as a sanction. If striking off applied only to third party lobbyists who lobby occupationally and for a fee, it would be a reasonable disciplinary sanction, just as it is for medical, legal and other practitioners. It might apply for membership of any professional body for lobbyists that may emerge.

The proposed register, however, extends well beyond the third party lobbyist to those who lobby for constituent members, and those who lobby in the interest of their company, church, charity or other entity. Each would be thought to have a right, and at times even a duty, to lobby whatever their repute or personal history. An example would be a prisoner action group, some of whose members may have served terms of imprisonment. That should not prevent access to government to lobby in those interests. The issue is not one of fairness, so much as ordinary political right. To require integrity testing for those who lobby, other than as third party lobbyists, is to engage in a form of disenfranchisement.

The Commission has carefully considered the competing arguments for proof of integrity. Ultimately, the purpose of the whole range of proposals for lobbying is to render it transparent. Nothing in the Commission's proposal should obstruct access to government by any citizen or interest. Proof of integrity has its place among professional third party lobbyists but not otherwise.

Proof of integrity cannot usefully be imposed on others who register. A different sanction would be required. The question of sanction was considered in Chapter 6.

Statutory manager for register

The register would require a manager who is independent of ordinary government function, and able to investigate and initiate the application of sanctions or penalty for breaches of the proposed lobbying regulatory scheme in NSW. The manager should be vested with appropriate statutory powers to investigate and initiate such sanctions as are necessary to ensure the integrity of the system.

The selection of a manager is, of course, a matter for government, but the Commission points out that the Office of the NSW Information Commissioner, with appropriate additions and adjustments, is well placed to meet the additional demands of managing and auditing the system. The position is already invested with independence by statute, and with necessary powers for its role under the GIPA Act. The role has also just undergone a merger with Privacy NSW. The addition of the third role of manager of the lobbyists register, with its emphasis on the management of information about government, is conceptually consistent.

Reactions to an expanded online register

The expansion of an online public register provoked more response than any other part of the proposals for regulating lobbying. Extensive debate occurred during evidence heard by the Commission and in written submissions about the content, extent, utility and practicality of an online public register of lobbyists. It is fair to say that, with the exception of the third party lobbyist and the charities, most lobbying entities had a preference for not being required to publicly disclose their lobbying activity.

Third party lobbyists favoured a level playing field, involving the same levels of disclosure for all regulated lobbyists. Almost all groups agreed with the general approach that lobbying should be transparent, subject to appropriate confidentiality protections.

Many lobbying entities objected to being on the same register as those who lobbied for a fee. As it happens, and for practical reasons, there is a basis for separate panels of registration for third party and non-third party lobbyists on the same register. The former must always disclose the client interest for which lobbying activity occurs.

It was also generally accepted by witnesses that publication of the names of third party lobbyists and their clients, while identifying nothing of their lobbying activity (as occurs in NSW at present), was at least some provision of information about lobbyists to the public.

Below is a survey of the arguments for and against an expanded register.

Expansion of the register

The real division of views about a register was not in relation to its abolition but about the extent of expansion.

The theory behind the proposal for an expanded register is access to information about the lobbying activity itself. Any person with an interest in a particular public issue or decision, could see from the register whether a party to the issue in which they were interested had lobbied government and when this activity occurred. This would

enable the person to seek access to additional information under the GIPA Act.

Some objections were raised to aspects of the Commission's proposal. There were objections of practicality and other objections of a more fundamental nature.

1. Practicalities

Many of the objections related to whether the demands of such a register would be onerous, time consuming or expensive for lobbyists. It was generally accepted that an online, self-maintained register was preferable to the present time-consuming, paper-based system. However, many pointed to the transnational structure of lobbying entities, including representational, corporate and peak bodies. They noted the administrative burden caused a lack of harmony between systems among states and at the federal level. Many witnesses pleaded for a harmonised national system of lobby registration. While this is a matter that could be achieved only by agreement, the Commission has attempted as far as possible to keep the design of its proposed register in line with as many aspects of other Australian lobbying regulatory systems as possible.

As to minimising the burden imposed on registrants, the principal issues raised were:

- listing individuals on the register
- requiring unnecessary information to be entered
- requiring too many entities to register.

2. Listing individuals on the register

The most objections of a practical nature to an expanded register related to a component of the present register. It requires not only the name of the third party professional lobbying entity but also the identity of each of its lobbying staff. If there are staff changes, there must be a paper-based approval of each change, followed by alteration on the online register. It was said that there were too many individual people involved to register names, and that there was no utility in doing so. There is merit in this complaint.

The problem with identifying individual persons on a register was most obvious with corporations, trade unions and peak bodies. Corporations with in-house lobbyists pointed out that the in-house lobbyists were not the only persons who lobbied for the corporation. In a large corporation, there may be dozens or more persons engaged in lobbying activity throughout a given year. Peak bodies and, in particular, trade unions pointed out that lobbying was normal, and might involve such frequent activity in the nature of lobbying that it would be difficult to maintain an accurate list of all persons involved on a register.

Even charities that may lobby in an active way on matters related to money and policy, can have large numbers of staff engaged in lobbying activity. For example, Bruce Hodgkinson SC, Chairman, Cancer Council NSW, and Dr Andrew Penman, CEO, Cancer Council NSW, explained that volunteers were both encouraged and taught to lobby government on issues such as smoking and sun exposure; Cancer Council NSW might not even be aware of the lobbying activities of the volunteers. Both said that lobbying, among authorised paid staff of the Council, would be an approved activity organised, sanctioned and under the discipline of its board. They accepted that staff could be trained on induction in the operation of the code and its requirements but considered that naming every staff member who lobbied on the register would be onerous. David Piggott, Leader, Government and Cross-Sector Partnerships, Mission Australia, and a former political adviser, also considered that compliance was possible if limited to reasonable demands.

In Canada, the US, NSW, Queensland, and other jurisdictions, the identification of staff members is a common requirement of lobbying registers. The objections to the identification of staff members have some substance. The requirement, generally speaking, has been born of a desire to expose lobbyists rather than to render lobbying activity transparent.

The Commission gave careful consideration to the need for identifying individual staff members employed by a lobbying entity. If one nominated person served as a "responsible person" for the purposes of registration, then a combination of modern corporate identity, corporate legal responsibility and the minutes of lobbying meetings was likely to provide sufficient identification of any offending lobbyist.

There is sufficient protection in the publication of the entity name, provided individuals lobbying in its name are bound to the applicable code of conduct. This is an adequate enough measure to achieve public transparency of the lobbying activity. If it is achieved, then the names of the lobbying individuals would be exposed in a lobbying record. In this respect, the proposed lobbyists register could be less demanding for registrants than it currently is under the NSW Department of Premier and Cabinet's Register of Lobbyists.

3. Excessive information

The Commission was alive to the valid objection that provision of excessive information or "dumping" was not a transparency act, and could have the opposite effect.

Those who might be registered under a broader registration system but who are not presently registered consistently made the point that any register should be simple, and contain a minimum of information necessary for the function served.

However, it was argued that to expand the range of registrants to include lobbying by corporations, peak bodies, churches and charities would excessively expand the size of the register. It was suggested that the result would be an unmanageable list rather than a disclosure of lobbyists.

At present, there are about 110 registrants on the NSW Department of Premier and Cabinet's Register of Lobbyists. In comparison, there are about 3,500 registrants on the Canadian register, and 3,500 registrants on the voluntary EU register (a third of potential registrants if all registered), and 104 registrants on the Queensland register. It is difficult to know in advance how many registrants would appear on an expanded NSW register but the numbers above provide a general indication.

Some figures available to the Commission suggest that the ranks of third party lobbyists would be expanded by the small number of accountants, lawyers and other professionals who do un-exempted lobbying work on behalf of clients. It seems unlikely that the ranks of third party lobbyists in NSW would expand beyond a further 20 or 40 registrations. Of the peak bodies, however, there would be several hundred. Of the charities that lobby the NSW Government, the number might be between 50 and 100. Some churches (including diocesan groupings) lobby actively and regularly at NSW Government level, but the number that do so is likely to be less than 50. Corporations that actively lobby the NSW Government with their own staff and directors are probably more modest in number than might be expected; in the range of several hundred. Lobbying would not include tendering, which is subject to a separate set of rules. The total may be between 800 and 1,000 entities or less than a third of that managed by the Office of the Commissioner of Lobbying of Canada.

The Canadian systems and the various systems in the US (all of which are more demanding and more onerous than the one proposed by the Commission) appear to be operating relatively smoothly, and without complaint. Modern online systems easily cope with registers of several thousand entries.

The purpose of an expanded register would not be just to publicly identify lobbyists but to lay a trail of access through the GIPA Act to records of the lobbying activity. There does not seem to be substance to the suggestion that the register would be an unmanageable list of lobbyists without utility. By searching the name of a player in a public issue, access would be made available to relevant records of lobbying of government previously not known to exist.

Recommendation 8

The Commission recommends that all Third Party Lobbyists and Lobbying Entities be required to register before they can lobby any Government Representative. This register would comprise two panels; one for Third Party Lobbyists and one for Lobbying Entities.

Both Third Party Lobbyists and Lobbying Entities would disclose on the register the month and year in which they engaged in a Lobbying Activity, the identity of the government department, agency or ministry lobbied, the name of any Senior Government Representative lobbied, and, in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred, together with the name of any entity related to the client the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying activity.

Recommendation 9

The Commission recommends that an independent government entity maintains and monitors the Lobbyists Register, and that sanctions be imposed on Third Party Lobbyists and Lobbying Entities for failure to comply with registration requirements.

Chapter 10: Addressing related corruption risks

A number of corruption risks associated with lobbying were identified in Chapter 2. Two of these – lack of transparency and inadequate recordkeeping – have been dealt with in other chapters. In its March 2010 report, the Joint Standing Committee on Electoral Matters recommended specific donation caps. The Commission supports this recommendation, which would significantly address the corruption risk inherent in the involvement of lobbyists in political fundraising and donations. The issue of political donations is now under consideration by the State Government. This chapter considers the remaining corruption risks identified in Chapter 2 and, where appropriate, makes recommendations to address them.

Gifts and benefits

Controls on public officials accepting gifts and benefits are commonplace in the NSW public sector. Generally, there is a prohibition on public officials seeking or accepting gifts or other benefits. The reasons for the prohibition are obvious and do not need to be re-stated.

There is no corresponding prohibition outlined in the current NSW Government Lobbyist Code of Conduct on lobbyists offering gifts or benefits to those they lobby. There is no reason why lobbyists or their clients should offer gifts or other benefits to those they lobby, and no circumstances in which such conduct should be considered appropriate. Such conduct should be clearly prohibited.

Recommendation 10

The Commission recommends that the new code of conduct for lobbyists contains a clear statement prohibiting a lobbyist or a lobbyist's client from offering, promising or giving any gift or other benefit to a Government Representative, who is being lobbied by the lobbyist, has been lobbied by the lobbyist or is likely to be lobbied by the lobbyist.

Post-separation employment

Two corruption risks arise from former public officials becoming lobbyists: relationships they developed with other public officials may be used to gain an improper or corrupt advantage; and confidential information, to which they had access while public officials, may also be used to gain such an advantage.

There was evidence heard by the Commission that, at least at the political level, former relationships were unlikely to have any bearing on decision-making processes. Most recognised that knowledge of confidential information could pose a risk but asserted that the relevance of such information loses currency as time goes by.

Restrictive trade covenants are common in private sector employment contracts but must be reasonable to be enforced. The Commission heard views that any restriction on career choices for former ministers, parliamentarians or their staff would be unreasonable. Some witnesses mentioned that such people can find it difficult to find appropriate employment after their time in the public sector. Others noted that there are legitimate reasons why these individuals become lobbyists, and their knowledge of government processes can be valuable to the private sector, non-government organisations and to government.

The Commission has previously recommended the introduction of rules to restrict the range of employment that ministers can take up immediately after leaving office. The NSW Ministerial Code of Conduct now requires ministers to seek the advice of the NSW Parliamentary Ethics Adviser during the first 12 months of leaving office, before accepting any employment or engagement or providing services to third parties that relate to portfolio responsibilities held during the last two years of ministerial office. There is a similar obligation on serving ministers to seek advice from the NSW Parliamentary Ethics Adviser if they are planning post-separation employment. There are, however, no mandatory or enforceable restrictions on

members of parliament, ministers or ministers' staff from working as lobbyists immediately after leaving office.

The NSW Ministerial Code of Conduct and the Model Code for Conduct for NSW Public Agencies contain exhortative provisions in relation to avoiding conflicts of interest and the appearance of improper influence or misuse of confidential information after leaving office. The *NSW Code of Conduct and Ethics for Senior Executives*, noting that the provision is unenforceable, requests executives to "abstain from working on or contributing to a matter that they had previously been responsible for or involved in".

Acknowledging that the work of some public officials is more exposed to attempts to exert improper influence, there is legislation to restrict the post-separation employment of certain NSW public officials. Section 354 of the *Local Government Act 1993* restricts a former mayor or councillor from taking a position as a paid employee in the same council during the six months immediately after leaving office.

Section 16(1) of the *Casino, Liquor and Gaming Control Authority Act 2007* restricts "former key officials" from holding a gaming or liquor licence or from holding office as a member of the governing body of a registered club without the approval of the appropriate authority. They are also restricted from seeking employment in the casino, liquor and gaming industries for a period of four years after leaving office.

The evidence heard by the Commission generally supported the introduction of employment restrictions or cooling-off periods for ministers and parliamentary secretaries, members of parliament, ministerial staff, senior public servants, and local government councillors and staff. The real issue was not so much whether such restrictions should apply but rather the period for which they should apply. Most witnesses agreed that the length of the restriction should be calibrated according to the breadth of knowledge and contacts that an affected individual might be likely to possess. Specific periods of time mentioned ranged between 12 months and two years, depending on seniority. A few witnesses mentioned that the length of the electoral cycle might be a relevant timeframe.

In Queensland, the *Integrity Act 2009* imposes a two-year restriction on former senior government representatives, including ministers, parliamentary secretaries, their staff and senior public servants, on lobbying relating to the former official's dealings as a public official in the two years preceding the official ceasing to be an official. In Canada, there is a five-year ban under the *Lobbying Act* of 1985.

The Australian Government Lobbying Code of Conduct provides that former ministers and parliamentary secretaries shall not, for a period of 18 months after leaving office, engage in lobbying activity relating to any matter that they had official dealings with in their last 18 months in office. A 12-month restriction is placed on persons at adviser level and above, employed in ministerial or parliamentary secretaries' offices, and senior government officials from engaging in lobbying activities relating to any matter that they had official dealings with in their last 12 months of employment.

Given that the relevance of confidential information acquired during the course of official employment is likely to decline, these restrictions address that aspect of the corruption risk. They go some way to addressing the relationship aspect of the risk. This aspect of the risk is only partially addressed. Such relationships can endure well beyond 12 or 18 months. However, short of prohibiting any form of post-separation employment as a lobbyist, cooling-off periods will not cover such situations. These situations are, in any case, likely to be limited. In most cases, it will be sufficient for there to be a break in the interaction between a former public official and their former colleagues.

The Commission considers there is merit in applying standard post-separation restrictions across the various Australian jurisdictions. It therefore recommends that NSW adopts the restrictions currently contained in the Australian Government Lobbying Code of Conduct.

Recommendation 11

The Commission recommends that, consistent with restrictions currently contained in the Australian Government Lobbying Code of Conduct, the proposed lobbying regulatory scheme includes provisions that former ministers and parliamentary secretaries shall not, for a period of 18 months after leaving office, engage in any Lobbying Activity relating to any matter that they had official dealings with in their last 18 months in office. The Commission also recommends that former ministerial and parliamentary secretary staff and former Senior Government Representatives shall not, for a period of 12 months after leaving their public sector position, engage in any Lobbying Activity relating to any matter that they had official dealings with in their last 12 months in office.

Exploitation of privileged access

The perception that lobbyists achieve favoured access was the subject of vague assertions and firm denials. Most ministers and former ministers asserted that they had an open door policy. Their staff tended to say that time management led to selection of appointments based on significance. Access to government representatives generally appeared, from the evidence heard by the Commission, to be surprisingly unrestricted.

Government processes need to be such that they are accessible to ordinary members of the public, who can thereby participate in those processes. Put simply, government needs to aim for a level playing field so that those without money, connections or special influence are also able to be heard effectively.

The evidence before the Commission was that government is generally aware of this risk, and takes steps to address it. The Commission heard that Communities NSW, for example, in its multiple roles as a regulator, a funding authority and a service provider, interacts with a great variety of organisations, individuals, industries and industry representatives on a regular basis, "who all have a view of the ways in which our resources might be best applied". This kind of interaction is part of sound policy development, just as the engagement of interested parties by a government agency is regarded as good public management.

Government often consults widely and engages with interested parties using forums such as focus groups, advisory committees, interest group meetings, expert policy committees and panels, and even regular private meetings.

The Commission is satisfied this risk is understood by government and that mechanisms are in place to address it. The Commission does not consider it necessary to make any recommendation on this issue.

Payment of success fees

As stated in Chapter 2, the Commission regards success fees as a corruption risk, irrespective of whether they are in the nature of a contingency fee or a bonus. This is because both are dependent on the lobbyist achieving a successful outcome. The risk exists because an unscrupulous lobbyist may be encouraged to use corrupt means to gain a favourable lobbying outcome in order to obtain payment.

Only a small number of the submissions received in response to the Commission's issues paper mentioned success fees but they represented diverse and strongly-held views, indicating the controversial nature of the issue.

Similarly, in interviews conducted by the Commission, more than half the responses to questions about prohibiting success fees either did not support a ban or noted ways in which a ban would be circumvented. Several lobbyists maintained that success fees enabled them to undertake work for clients who would not otherwise be able to afford representation.

Others compared success fees to performance bonuses in many occupations, and contingency fees in the legal profession. There is, however, a difference between payment of contingency fees for lobbyists and payment of such fees in the legal profession. In the latter case, payment of the fee is usually contingent on the successful outcome of litigation. In litigation, the arguments of the parties are made before a court and in one another's presence. Each party is fully aware of the other's arguments, and has an opportunity to address them. Lobbying, on the other hand, usually takes place behind closed doors, and other interested parties may not know that the lobbying is occurring or have an opportunity to address the case being put forward by the lobbyist.

Journalist Kate McClymont asserted that, "a success fee indicated payment on the outcome of a lobbyist's actions rather than the legitimate task of getting government to consider their clients' argument". Others in favour of a ban were emphatic in describing the practice as "dangerous", likely to "cause corruption", and capable of creating perceptions that would tarnish the institution of government.

Success fees are prohibited under Queensland's *Integrity Act 2009*.

The Commission takes the view that the relative disadvantage of the prohibition, as identified by some witnesses, is outweighed by the public interest in effectively addressing this corruption risk.

Recommendation 12

The Commission recommends that the new lobbying regulatory scheme includes a prohibition of the payment to or receipt by lobbyists of any fee contingent on the achievement of a particular outcome or decision arising from a Lobbying Activity.

Chapter 11: Local government and lobbying

The Commission does not consider that lobbying at local government level should be subject to the same regulatory regime as lobbying at NSW State Government level. Instead, recommendations have been made by the Commission that aim to address the particular corruption risks encountered at local government level.

A lobbying problem exists at the local government level but differs from the problem at state level. At state level, these problems are about the perceptions and corruption risks arising from closed door lobbying, and from the lack of availability of information about lobbying. The local government lobbying problem is about contact between an applicant and a council officer, which can lead to corruption or the perception of corruption. The process of controlling that contact is already quite advanced in the field of planning, and to a large extent, in local government. The only "secret" parts of the contact now available are the covert grooming towards dishonest conduct. The unanimity of view on the source of local government corrupt lobbying was notable.

There was a widespread view from witnesses, including experienced local government witnesses, experienced administrators and the ranks of developers that pointed directly at the small to medium developer as the source most likely to engage in lobbying that led to overtly corrupt conduct with council officers. That is largely consistent with the experience of the Commission. The conduct in question was seen to be a species of lobbying or as something that commenced with it.

Many mistakenly thought this problem to be one of transparency, which, in turn, led them to believe that a lobbyists register would assist. In fact, transparency of ordinary process, which does serve as a corruption prevention technique, is higher in local government than in most areas of public administration. There was no complaint in evidence received by the Commission about a lack of information in ordinary local government process. Local government files are available under the GIPA Act, and, in any event, are searchable in a wide array of circumstances. Proposals are also advertised, and decisions are frequently made in public. Where they are not, the results of the decision are usually visible to the local community. Access to a decision-maker or to information is not the problem.

Rules relating to access to councillors are difficult to regulate. Councillors remain largely part-time, unpaid representatives, much of whose work must be done out of hours. Restraints on contact would be applied only with caution but the Commission has issued guidelines on lobbying local government councillors (August 2006), which, if adhered to, resolve substantial corruption risks. Councillors do display their decision-making in public meetings of the council.

This chapter considers the risks that arise from the contact between employed council officers and lobbyists, such as:

- why lobbying is different at local government level from that of the NSW Department of Planning and from that of other areas of state government
- the form lobbying takes at local government level
- what action could be taken to avoid the risks of inappropriate lobbying of local government.

Why lobbying local government is different

There are three discernable factors in the difference between lobbying at state level and local government level. They are:

- the different nature of lobbyists in local government
- local government is primarily lobbied on matters affecting land value
- the problem of covert relationships.

Local government lobbyists

The small to medium developer does not use professional registered third party lobbyists in local government. Indeed, it is a feature of lobbying in local government that third party lobbyists currently registered on the NSW Department of Premier and Cabinet's Register of Lobbyists are only rarely seen, and have not made inroads into local government nor have they sought to do so.

Local government is rarely lobbied by the array of peak bodies, charities or religious groups that the state government is lobbied by, unless it relates to uses of their own land. Lobbying of local government is usually confined to development issues and the services provided by local government.

Sam Haddad, Director General, NSW Department of Planning, gave evidence to the effect that it was relatively unusual to be lobbied by a third party lobbyist in planning, in part because they had no technical insight to offer of the type a planner, architect or lawyer might have.

There are some local government bodies, including those of North Sydney and Sutherland Shire, which have registers that require third party registered lobbyists to separately register on a council register before lobbying that council. Since the inception of the lobbyist register at North Sydney Council in September 2009, no third party lobbyist has registered. At Sutherland Shire Council, only one third party lobbyist had registered since the register was established in March 2009.

That is consistent with evidence heard from experienced local government councillors. Ian Macintosh AM, former Mayor of Bathurst, who, prior to that role, was a senior long term lobbyist in Canberra familiar with the role of third party lobbyists, gave evidence that he had not experienced professional lobbying in his time as an elected local government representative, even during periods of major infrastructure development.

Councillor Steven McMahon is currently serving on Hurstville City Council in the Sydney metropolitan area. His usual occupation is Chief of Staff to a NSW Minister. He is aware of the work of registered lobbyists. He gave evidence to the Commission that he had rarely experienced the involvement of professional lobbyists in local government. He said that it was, "very rare that a professional lobbyist had approached me or council to lobby unless it has involved a significant development".

The Division of Local Government within the NSW Department of Premier and Cabinet (formerly the Department of Local Government) made a submission to the Commission, stating that professional lobbyists are less likely to lobby council officers, and that councils are more likely to be lobbied by individual applicants and professional bodies.

As part of its investigation, the Commission served notices on a number of councils in order to identify the extent to which local government is subject to lobbying by the class of third party lobbyists currently regulated under the NSW Government Lobbyist Code of Conduct. The response indicated minimal interaction with such lobbyists.

It is reasonable to conclude that whatever growth professional lobbying may have undergone in NSW, it has not extended to local government, and it seems unlikely that it will do so in the immediate future.

Those who do lobby at local government level are individual property owners, the self-employed developer, small corporations, large corporations with development or property interests in the relevant local government area, and professional technical experts such as planners, lawyers, architects and related experts.

Technical experts in local government carry out their work by advising clients, formulating plans that might meet planning requirements, and then entering into a lobbying or negotiating process designed to match client desire with council discretion. In this way, their work does not differ in principle from the work of the third party lobbyist at state and federal government level. The third party lobbyist has an area of expertise and understanding of the policies and processes of state or other federal governments. The technical expert lobbyist at local government level has expertise in planning, planning law, building, design, land economics or other land development fields.

Changing the value of land

A feature that the NSW Department of Planning has in common with local government and which has an impact on lobbying, is the capacity of each to make decisions that, without other than application costs and without capital involvement, can alter the value of land. A rezoning for planning purposes or consent to develop land may cause the value of land to fall or more likely rise. The interest of landowners or developers in achieving rezoning or approval of a particular land use may be of a high order.

The critical planning power of NSW Department of Planning officers and of local government bodies to affect how and when land can be used causes them to be subjected to intensive lobbying by land owners. The result has been the need to erect extensive probity procedures to separate departmental and council staff from inappropriate advances from interested parties.

At local government level, there has unquestionably been a response to the exposure of the series of corruption investigations conducted by the Commission and its subsequent findings. Many councils have introduced procedures similar to those of the NSW Department of

Planning, the effect of which is intended to control contact between council officers and applicants.

All councils are obliged to comply with a minimum standard in the Model *Code of Conduct for Local Councils in NSW* (the Model Code of Conduct), which has been adopted pursuant to section 440 of the *Local Government Act 1993*. Individual councils may consider supplementing their codes with additional topics that reflect the specific needs of council, as long as they are consistent. The practical effect of the Model Code of Conduct is not only to set standards of conduct but to prescribe work methods in local government that constrict the opportunity for covert contact, the formation of corrupt relationships, and the passage of corrupt decisions.

Covert relationships

The development of covert relationships is a pathway to self-interested interference with the processes of local government that can alter the value of land. Covert relationships between applicants and council officers can be developed and used to deliver outcomes favourable to the applicant.

What form does lobbying take at local government level?

Lobbying at local government level has two principal sources: technical professionals, including planners, architects, builders or lawyers; and direct lobbying by individual landowners and the applicant developer.

It was generally thought in evidence heard by the Commission that whatever planning risks technical experts might present given available discretions, the technical lobbyist did not represent a corruption risk to local government. The Commission certainly has experienced examples to the contrary, but the wider view appears to be that technical specialists who lobby for clients at local government level, generally act as a protection against corrupt conduct. When used, they can act as a probity barrier between the applicant and council officers. It was not thought reasonable by any witness, nor is it thought reasonable by the Commission, to require the use of technical lobbyists by all applicants. The increase in cost to local government users would not be justified, and use of a technical expert would not in any event guarantee the exclusion of the corrupt applicant from the process.

That leaves the direct interest of individuals, and in particular of the small to medium developer or business entity (the group widely identified as the principal corruption risk) as the principal lobbying risk as well.

The contact between the direct applicant and council staff can be one of intense lobbying for the interest they pursue. Corruption risks lie in the need to control inappropriate offers and grooming opportunities, in attempts to form inappropriate relationships and in the making of false statements by those seeking approvals and exercises of discretion from a council.

A control on that contact between development interest and council officer is what addresses the risks. It need not address either access to decision-makers or access to information. Rather, it must address the mechanics of contact, so as to inhibit the opportunities for corrupt lobbying and make breaches of contact rules amenable to penalty. This must apply not only to the council officer "controllable" by reason of their employment but to the "uncontrolled" applicant who attempts to breach contact rules.

Regulation of lobbying of local government

Goals of lobbying regulation

The goals of lobbying regulation at local government should be to control contact between the council officer and the applicant. Any system of regulation should render contact by those who lobby council officers:

- visible
- witnessed, where a second person is available
- noted and recorded on a council file
- restricted to business hours and, as far as possible, business venues
- prohibited to social contact, at least while an application is being considered
- the subject of prior declarations of affiliation between council officer and applicant
- prohibited by applicants with council officers out of hours and discussing current applications
- capable of criminal sanction against the initiator of contact and disciplinary sanction against a council officer who responds in breach of contact rules.

The controls numbered 1 to 5 above are in the nature of ordinary good practice. They would not amount to an imposition on lobbyists or local government systems or officers. That is not to say that there will not continue to be attempts at corrupt conduct. Good business practices of the type set out above and in the NSW Department of Planning protocol should, however, result in the risks of corrupt lobbying being inhibited and reduced. An experienced planner and public administrator, who

has headed both state government departments and local government administrations, expressed the view in interview that good business practice was the best protection against local government corruption. That view was heard many times in evidence given to the Commission during its public inquiry.

The controls numbered 6 to 8 above involve extending regulation beyond internal procedures, and imposing obligations on and prohibiting certain conduct by applicants. A declaration of affiliation by applicants of any family connection, friendship or business interest with a council officer, together with sanctions for false declaration, would be part of a system of contact rules that would inhibit corrupt contact, and make breaches more capable of proof than overtly corrupt conduct. In this way, inappropriate contact would not only be discouraged but more detectable. Procedures of this type already operate in some councils but without sanction. The number of positive declarations of an affiliation received by Sutherland Shire Council suggests that the declarations serve a valuable purpose. In 2009, almost 7% of applications involved a positive declaration of a relationship with a council officer.

A declaration of affiliation would be part of an initial application to council but would be an ongoing obligation until the conclusion of council decisions on the application, to cover any change of circumstance. This procedure is simple, cheap and covers the basic requirements of transparency and conflict. It also allows applications that are the subject of a positive declaration of affiliation to be managed. A sanction for a false declaration seems already to be covered by section 665 (false or misleading information) of the *Local Government Act 1993*, which provides:

> (1) A person who, in or in connection with an application under this Act, makes any statement that the person knows to be false or misleading in a material particular is guilty of an offence.
>
> Maximum penalty: 20 penalty units.

Sanctions for easily detectable breaches of contact rules between a council officer and an applicant discourage grooming and non-business contact, and become primary inhibitors of corruption that are useful when corruption itself might not be established. Prohibited behaviours, which are formulated, advertised and implemented, would quickly become barriers known to those inclined to corruption. Two examples of conduct usefully prohibited with penalty are:

1. Failure by an applicant for a local government decision to truthfully include a written declaration of affiliation between the applicant and a specified council officer.
2. Taking action to contact a council officer outside business hours to discuss a current application.

Recommendation 13

The Commission recommends that the NSW Government amends the *Model Code of Conduct for Local Councils in NSW* or otherwise introduces a protocol for the regulation of contact between council staff and applicants for development proposals (including those acting for applicants), similar to that established by the NSW Department of Planning but taking into account the circumstances and resources of local government.

Recommendation 14

The Commission recommends that the NSW Government amends procedures for the making of applications to local councils that require council approval, determination or decision to include provision for a declaration by applicants of affiliation with any council officers. In this instance, affiliation means by way of family, close personal friendship, or business interest with the council officer in the previous six months. Applicants should have brought to their attention the existence of criminal sanctions for false declarations, and that the obligation to disclose an affiliation is ongoing until the conclusion of all council determinations, approvals or decisions with regard to the application.

Recommendation 15

The Commission recommends that sanctions should apply to applicants who submit a false declaration.

Recommendation 16

The Commission recommends that all local councils implement procedures that:

a. **necessitate an assessment of whether an application, in which a declaration is made that an affiliation exists, requires management**
b. **require the management of such applications to avoid where possible, or supervise if necessary, the role of the affiliated council officer.**

Recommendation 17

The Commission recommends that the NSW Government amends the *Model Code of Conduct for Local Councils in NSW* or otherwise introduces a protocol that council officers engage only with applicants who have submitted a declaration of affiliation.

The local government lobbyists register issue

numerous witnesses expressed the view in evidence to the Commission that local government should make use of lobbying registers. Some would have had that register limited to the third party political lobbyist, while others were of the view that lobbying regulatory systems at local government should be no different from state government level, and should, therefore, include all parties likely to lobby. Some thought it should be the same register, while yet others thought there should be a separate local government register. Opinions differed as to whether each council should have its own register or whether there should be a single, online state register. All were responding to the widely held view that control of the conduct of potentially corrupt applicants was a control over a form of lobbying.

After close scrutiny, and taking into account its own experience with local government corruption, the Commission has come to the view that a register of third party lobbyists in local government serves no useful purpose and does not address the risk of corrupt lobbying. If North Sydney Council has not been lobbied by a single third party lobbyist, and Sutherland Shire Council has been lobbied only by one since the inception of each respective council's register, the imposition of registers in all councils to require registration of third party lobbyists is not justified.

Different questions arise as to whether a register should be kept by local government bodies on which all persons lobbying local government should be registered. This would require that all planners, architects, builders, developers, lawyers and anyone else (perhaps other than the personal householder) be included on a local government lobbyists register. Apart from the enormous task of policing the registration of those who lobby the 152 councils in NSW, the utility of a register of that type is doubtful.

A requirement that applicants register their lobbying would serve no role in excluding the principal lobbying risk; namely, lobbying contact that leads to the formation of corrupt relationships with council officers. Such a register at state level serves a different function.

In any event, there is no definable risk met by a register or from the numerous classes of registrant that might be required to register that would match the cost and inconvenience to local government of such a large register.

For these reasons, the Commission recommends against the use of lobbyists' registers at local government level.

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