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Government Relations

Friday, 24 May 2019

Chief Commissioner
NSW Independent Commission Against Corruption
GPO Box 500
Sydney NSW 2001

Dear Sir

The Regulation of Lobbying, Access and Influence in NSW

I write on behalf of Barton Deakin Pty Ltd ("Barton Deakin Government Relations" or "Barton Deakin") in response to your discussion paper, *The Regulation of Lobbying, Access and Influence in NSW: A chance to have your say.* The comments below reflect the views of Barton Deakin, informed by decades of government, political and corporate advisory experience across Barton Deakin's team.

I am CEO and National Managing Director of Barton Deakin, and I have over 30 years' experience in many aspects of government relations, ministerial offices at State and Federal level, as the CEO of an industry association and as a registered lobbyist. I explicitly state the places in this submission where I record purely personal views.

About Barton Deakin

Barton Deakin Pty Ltd is a registered third-party lobbying company which in November 2019 will have operated for a decade. Throughout our history we have been active and registered in all Australian jurisdictions (where it is required) and in New Zealand. We are owned by the public company WPPAUNZ, which in turn is majority owned by global communications conglomerate WPP.

Barton Deakin is a "partisan" third-party lobbying firm, that is, we only lobby Liberal National Coalition Governments and Oppositions on behalf of our clients. WPPAUNZ owns another lobbying firm, Hawker Britton, which only lobbies Labor Governments.

General Comments

Before I move to the specific questions raised, I would like to make some general comments. The approach and ethic of Barton Deakin (and Hawker Britton) on these matters is, "governments regulate, we comply". In that spirit, we are pleased to share our views about your discussion paper and its philosophical and practical issues.

The value of lobbyists

Lobbying is part of an effective democracy. Lobbying to influence political and policy outcomes is undertaken by citizens - as well as many other entities, interest groups, community organisations, industries, businesses and others.

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I am pleased that your discussion paper recognises the legitimacy and value of lobbyists and lobbying activity. Australian Governments, collectively, spend tens if not hundreds of billions of dollars purchasing products and services from the private and community sectors. They also make policy, regulatory and funding decisions that impact Australian businesses and the community sector daily. Government needs to understand the impact of their decisions on communities and on sectors of the economy.

Conversely, businesses and community groups need to understand the impact of government proposals and decisions. In my long experience, often government and business find it hard to understand each other. It is uncommon for a Minister to be a subject expert in their portfolio especially in the early period of their Ministry. A good lobbyist will understand both government and business and will perform as a communications conduit that improves the efficiency and effectiveness of the relationship between governments, the business community and community groups.

A live example is the case of the technology sector, and in particular the Australian-based entrepreneurial start-up economy. Over the course of the last Parliament, the Commonwealth Government sought to legislate in two areas that created a negative response in the tech sector. One of those was a security measure for encrypted communications apps (The "AA" Act) and one was on the carriage of violent and offensive materials on social media platforms. The debate around these proposals were characterised, on both sides, by claims of misunderstanding of intent, (by government) and impact (by industry). Government, Opposition and the industry itself publicly stated the need for industry to improve its communications with government to create a better understanding of each other. That goal is being pursued with the direct assistance of in-house government relations executives and third-party lobbyists such as Barton Deakin.

Lobbying to influence a desired outcome occurs not just of Ministers, public servants and advisors. It can be aimed at cross bench MPs, minor parties, political parties, and others that surround them. Lobbying of the all is legitimate but what occurs with the latter is less visible publicly but can still affect public policy outcomes. Whilst we agree it is important to acknowledge that many forms of lobbying occur, it would be impractical nevertheless to require all of these lobbying activities to be detailed publicly.

It is reasonable to note that former political staff, Members of Parliament and public servants do tend to have relationships across the political and government processes. We consider it aids public confidence if there is a greater acknowledgement and visibility when these categories of people engage in lobbying.

This can be achieved by requiring specialist "in-house lobbyists" employed by a business, industry association or charitable/community groups, who are former elected officials or senior public servants and advisors, to be on a secondary register. This could be similar (but broader) to that in Victoria for Government Affairs Directors.

Assumptions in the Paper

I wish now to expand on my theme that lobbyists facilitate efficient and effective communications between governments, the private sector and community sectors.

One of the key weaknesses of the Discussion Paper and its supporting Study is that it presents a one-dimensional, binary image of the work of lobbyists. This is also the key weakness of critics of the

government relations industry. This key weakness is an assumption that all a lobbyist does is lobby a government on behalf of a client for a result.

While this is certainly an element of our work, it is only one part. A good lobbyist will understand a government's policies and assist by filling knowledge gaps on either side and ensuring each side can communicate clearly about its perspectives and decisions in relation to an issue at hand. When a client approaches a lobbyist with an issue, that lobbyist should have the confidence to tell them "no" or "it won't work" or "you'll have to wait".

Lobbyists are risk managers for clients, helping to clear consultative processes being clogged with "ideas that won't fly" or proposals with mistaken or false assumptions. Governments and organisations as a result can devote more of their limited resources to other uses.

Good government relations companies perform a range of services beyond government-facing lobbying, much of those services relating to strategic advice including risk management. We advise clients on their strategic plans, we provide opinions on election outcomes, we keep them up to date on government policies and related threats and opportunities. We also assist and educate, explaining to clients how and why governments do things.

Principles

The Discussion Paper sets out four key principles, which I will address in response to the questions below. However, to those four and I would add a further principle, the principle of ***Practicality***. Many of the proposals in the Discussion Paper may appear valid in theory, however there are a number of issues that would render them impractical.

The paper identifies the risk of over-regulation "driving lobbying underground". While this may be a valid risk, I submit that there are also potential risks that over-regulation could impair useful communications that benefit the policy makers, denying themselves useful policy feedback from the private sector. Indeed, the paper makes another false assumption that the communications are all one way – from lobbyists to government. This is incorrect. Government representatives need the opportunity to seek informal feedback to policy ideas.

A case in point is the technology sector example above. There is massive disruption and innovation across all sectors of the economy thanks to technology. Governments, with the best will in the world, struggle to keep up with regulatory responses. There is a place for the formal consultative process in establishing broader policy process, but to keep up with advances in technology and the consequences of regulatory decisions they need to be in constant contact with the sector and their representatives.

The other principle I would add is ***Proportionality***. In my experience governments, in responding to political issues, often impose greater regulation on *already* regulated sectors, while bad actors operating outside of the regulatory environment escape detection, regulation or sanction.

Self-Governance

The paper makes passing reference to self-governance in the context of compliance with lobbyist regulations. I think it is important for the Commission to understand the level of self-governance of a large lobbying firm such as Barton Deakin.

Firstly, Barton Deakin is a national company. We therefore comply with each jurisdiction's regulations and laws, including regarding lobbying, donations and, more recently, the Federal

Government's Foreign Influence Transparency Scheme. In addition, we require and abide by our own terms and conditions including ethical work practices.

Secondly, Barton Deakin is majority owned by a public company, WPPAUNZ. This obligates us to respond to reporting and internal auditing requirements from our owners, who themselves are obligated to comply with Corporations Laws as a listed company.

Thirdly, WPPAUNZ's majority owner, WPP, fully complies with global best practice in corporate governance as enforced by the Sarbanes Oxley (SOX) Act, including through regular audits of subsidiaries including Barton Deakin.

Finally, many of our clients, in particular multinational clients, are also SOX compliant, and therefore require very detailed obligations of us. A recent example was the 18 months taken to be engaged by a client, from the moment of the first inquiry to the signing of the contract.

I hope this gives the Commission an insight into the web of codes, laws, practices and contracts that ensure the highest levels of proper governance of a third-party lobbying company like Barton Deakin, as well as the reputational and commercial risk and damage done to companies which transgress the regulatory environment.

Measures to Improve Transparency

Questions 1 - 10

Barton Deakin believes that the current disclosure regime involving the Lobbyist Register, the Code of Conduct and the declaration of Minister's diaries serves the community well. We would not be opposed to the diary disclosure rules being extended to all MPs, nor for formal meetings with senior public servants.

The formal recording and disclosure of all contacts between government officials and lobbyists would present problems of impracticality. The sheer volume of contacts between lobbyists, industry associations, community groups etc. and government officials, especially during a parliamentary sitting period or at time of crisis (such as natural disasters) would overwhelm government officials and those undertaking lobbying activities. It would immerse them in red tape.

Most contacts are mundane – checking meeting times and attendees, checking facts around policies, checking that that interpretation of a policy is correct. This sheer volume means it would be highly likely that mistakes of omission would be made. This leads to several issues. Firstly, the "civil society" organisations (which are undefined by the Commission) may make mistaken or deliberately vexatious interpretations of disclosed contacts, particularly where they are motivated by political opposition to the incumbent government.

The Commission fears the risk of lobbying "being driven underground'. I believe that the real risk is that government officials cease communicating with stakeholders, outside of formal government processes, because of the "risk" of a vexatious claim by other parties. I will return to this below, in supporting another suggestion made by the Commission.

Barton Deakin does not agree with the inclusion of other lobbying entities on the Register of Third-Party Lobbyists. This Register should effectively be a listing of permitted entities with which the private and community sectors can engage with confidence that those entities have met their regulatory obligations and are under continuous scrutiny against those obligations.

We do feel there is a benefit from a secondary list or register for former officials, political staff or MPs who are employed or engaged to lobby by a business, industry association or other charitable or interest group – even if unpaid. This can be similar to the Victorian model and disclose the time of separation from government employment. This secondary register would acknowledge the reality that lobbying by many entities does occur but recognise that the style and purpose may be different.

We would be strongly opposed to public disclosure of our fees and expenditures. This runs counter to deep principles of commercial confidentiality and competition policy. Also, it again exposes a misleadingly simplistic labelling of our work. Direct lobbying is only a part of what we do. Other services include strategic advice, risk management and audits, coaching, education and training, submission writing, business to business services and much more.

One aspect of the NSW Register requiring urgent amendment is the longevity of information contained therein. At present, once a client is on the register, they are listed there permanently, notwithstanding a distinction between "active" and "inactive" clients. This is unfair, as over time ownership of a company may change. It also leads to inaccuracies. For example, during the Electoral Commission's own audit of Ministerial diaries, Barton Deakin was asked if they had been involved in arranging meetings for companies that had not been clients for many years.

The same applies for ownership details. The current Barton Deakin register contains details of two parties that are no longer owners. This is unfair as, at a later date, individuals may need to make disclosures of interest that do not accord with information applied on the Register.

Barton Deakin understands that the principle of transparency requires former clients to remain listed for a statutory period– the national standard being 3 months. Barton Deakin supports the Western Australian system, whereby the registered officer is prompted by a quarterly email to amend the register on a self-service basis.

Questions 11 - 13

Barton Deakin does not oppose any of these proposals. It should be relatively simple for a technology engineer to design a system to link these pieces of information.

<u>Measures to Improve Integrity</u>

Questions 14 - 16

Barton Deakin supports the requirements of lobbyists described in this section. Our statement of ethics available on our website reflects many of these points.

We feel it is incongruous that MPs who are paid by the public to represent the public interest are able to accept payments for lobbying activities. This clashes with the principles in the Commission's paper.

Questions 17 -20

We are not, in principle, opposed to any of the proposals in this section. Indeed, we believe the proposals for meeting procedures in the study are sound and should protect the integrity of both the lobbied and the lobbyist. While we accept the need for meeting records in clause (e), for reasons described above on the principle of practicality, we do not support the proposal in clause (f).

Having said that, and while we have opposed the public disclosure of *all* contacts between government officials and lobbyists, we strongly endorse the proposal to provide a dedicated internal resource for government officials to raise concerns about contacts with *anyone*.

This position is based on my experience as a Chief of Staff. I would have very much welcomed the ability to discuss these matters with a dedicated officer in the public service. Dissatisfied with the support available years ago when I was a Chief of Staff, I simply took contemporaneous notes and filed them. A dedicated, empathetic resource that would allow staffers to a) talk their issues over and/or b) file a formal incident report would be both a great comfort and support to staff. The public knowledge that this resource exists, that MPs and staffers have an "integrity back stop" should provide those contemplating doing the wrong thing a strong deterrent.

Questions 21 - 24

In general, we support the notion of a cooling off period for senior former government officials. Indeed, Barton Deakin insists with new appointments that our consultants do not have contact with the ministerial office they have served for 12 months.

Transparency however can be improved by replicating the Federal approach of requiring disclosure of when separation occurred for former Ministers, ministerial advisors, and public servants.

One issue the Commission may wish to consider is an obligation for MPs or Ministerial staff, on deciding to accept employment with a registered lobbyist or other private entity, to make a declaration to their Minister and Departmental Secretary that would exclude them from accessing cabinet documents and attending sensitive meetings in the period prior to their departure.

We are not opposed to adding our biographies to the register – indeed we would welcome it. Most good lobbyists would have a publicly available website with biographical detail of its staff, as do we.

Question 25

While we understand the theoretical approach behind this proposal, on balance we do not support it on the principle of practicality. It runs the risk of significantly slowing down the policy-making process. Ultimately, the government of the day will have to publicly account for these decisions and be judged by voters at the ballot-box.

<u>Measures to improve fairness</u>

Questions 26 - 28

"Fairness" is a very subjective thing, and difficult to codify. Ultimately it is in governments' political interests to provide as broad and comprehensive consultation process as possible.

At the same time, a "code of best consultative practice" may be useful for government in the following context. Often when lobbying government, the resulting answer to the party doing the lobbying will be unsatisfactory to them. It is very easy for third parties to claim the outcome as "unfair", when their proposal is simply rejected because it "does not measure up" or runs counter to the government's priorities. If the government can show that they have conformed with a code, it could provide a defence against "unfairness".

Barton Deakin is a strong supporter of the Institute of Public Administration Australia (IPAA) and many of our consultants, including the author, are members. IPAA conducts a range of education seminars on best practices in government administration and we would be surprised if they have not covered this matter.

As noted above, we do not agree with the "statement of reasons" proposal.

Question 29

This is an intriguing question and we understand and support the motivation behind it. Barton Deakin serves a range of pro-bono or "low-bono" clients, including in charity, medical research, social services, the arts or other non-government organisations. We would welcome a debate about the merits and challenges posed by a publicly funded advocate that can replicate some of the functions of a registered lobbyist.

Measures to improve freedom

Measures to improve compliance and enforcement

I have chosen to discuss Questions 30-37 together, as I believe they are closely related. The views I express below are my personal views.

Firstly, I would like to address the regulatory counterparty to lobbying activity. My view is that Government can improve its regulatory architecture to supervise legitimate lobbying. Some argue that barriers to entry in the lobbying industry are too low, and that "anyone can sign a few forms and hang out a shingle". While I am not sure I agree with this view, the Government could improve the way that it approaches the regulation of lobbying.

As noted above, I and we strongly support the proposal for an independent officer ("Commissioner for Lobbying") that can provide advice to parliamentary staff and departmental officers who wish to discuss specific lobbying activity and, if they feel the need, formally register an issue for investigation.

I would also support an advisory panel to inform the Commissioner. This may consist of former parliamentarians, former bureaucrats, former lobbyists, former journalists, academics and representatives from "civil society". The panel may have the formal or informal responsibility to consult with stakeholders on developments in lobbying. The Commissioner could have the responsibility to produce the annual report mooted in the discussion paper.

Such a panel would be congruous with advisory committees that support governments with policy and program development, including procurement practices.

One important necessity - and the panel could address this - is to reduce the potential for misunderstanding between the bureaucracy, parliamentary staff and lobbyists.

I therefore support the idea of education campaigns for staff and bureaucrats mooted in the discussion paper, and I believe the IPAA is the best vehicle to deliver them. The IPAA, however, may need strong encouragement and, potentially, resources to do so. In the past, I have offered, unsuccessfully, to provide lectures on parliamentary staffing or lobbying. I have delivered many such lectures to the private sector and to individual government departments.

With respect to lobbying companies themselves, in my MBA thesis I posed myself the question "can lobbying develop into a profession alongside lawyers and accountants?". On balance my answer was "no", however I found that there is scope for ongoing education and formal professional development of lobbyists, following the IPAA model for the bureaucracy.

As an aside, in the course of my research for my thesis, I found a striking paucity in academic study of the lobbying industry and in particular in the Australian context. This was relative to the substantial range of research in other business disciplines such as marketing, finance, governance, operations, etc. I find this gap in peer-reviewed research curious, given the critical and dynamic importance of the relationship between industry and government, for both parties. To that end, while I do not agree with all of the findings and discussions in the study informing the discussion paper, I applaud the author's endeavour and we encourage a greater development of this field of research.

In conclusion

Barton Deakin is very pleased to provide our input into this Inquiry, and we would be pleased to assist further. We appreciate the Commission's recognition of lobbying as a legitimate economic activity. We recognise that all parties have an obligation to operate at the highest standards, including through continuous improvement in regulatory structures around lobbying. At the same time, commercial confidentiality between lobbyists and their clients should be protected rather than weaken competition between firms.

Yours sincerely,

Matthew Hingerty
CEO and Managing Director.