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Lobbying

What is the role of lobbyists, particularly in relation to planning matters such as a land rezoning application? In your view, do lobbyists have a legitimate role to play in planning matters?

The role of lobbyists in planning matters such as land rezoning applications is to advocate on their client's behalf for government decisions to be made in their client's favour. Lobbyists have a legitimate role to play in a modern democracy. As the British Neill Committee on Standards on Public Life recognised:

> [t]he democratic right to make representations to government – to have access to the policy-making process – is fundamental to the proper conduct of public life and the development of sound policy.[1]

Although lobbying is integral to democratic representation, there are concerns regarding the secrecy and unfair influence of professional lobbyists, which may ultimately lead to corrupt conduct by lobbyists and/or officials. As the OECD has observed:

> [l]obbying is often perceived negatively, as giving special advantages to "vocal vested interests" and with negotiations carried on behind closed doors, overriding the "wishes of the whole community" in public decision-making.[2]

The primary risks of lobbying to democracies include secrecy, unfair access and influence and corruption.[3]

There are three main purposes in regulating lobbying. The first is to prevent corrupt behaviour by lobbyists and public officials. The second purpose is a broader notion of political equality in ensuring the fairness of government policy-making and decision-making processes by increasing transparency in the disclosure of lobbying activities. This is aimed at reducing the incidence of secret lobbying by vested interests and reducing the risk of regulatory capture by government. This leads to the third main purpose of improving the quality of government decision-making and policy-making in ensuring that government decisions are made according to merit, rather than skewed towards narrow sectional interests.

What are the key elements of an effective registration system for lobbyists? Are there elements of registration systems in other jurisdictions that you consider work effectively?

Key Elements of an Effective Lobbying Regulatory Scheme

There are several key elements of an effective lobbying regulatory scheme.

Firstly, ***adequate coverage of the lobbyist register***. The lobbyist register should cover both third party and in-house lobbyists, consistent with comparable jurisdictions such as Canada and the United States.

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[1] Committee on Standards in Public Life, *Reinforcing Standards: Sixth Report of the Committee on Standards in Public Life: Review of the First Report of the Committee on Standards in Public Life* (2000) 86.
[2] OECD, *Lobbyists, Governments and Public Trust: Volume 1* (OECD Publishing, 2009) 9.
[3] Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010) ch 9.

Second, ***adequate disclosure of lobbying activity***. To increase transparency, lobbyists should be required to disclose every lobbying contact. There should be an accompanying requirement for Ministers, ministerial advisers and senior public servants to proactively disclose their diaries. Disclosures should be sufficiently detailed, i.e. required to specify the subject matter, and whether it relates to any legislative bills (which should be specified), grants or contracts.

Third, **data should be integrated** from various sources and made publicly available. This data should include:

(i) political donations made by lobbyists
(ii) the register of lobbyists
(iii) ministerial diaries
(iv) where publicly available, details of investigations into misconduct or corruption
(v) list of holders of parliamentary access passes
(vi) gifts given by lobbyists to government officials, and
(vii) details of each lobbying contact (if reform occurred).

Fourth, the ***independence of the regulator*** is essential, and it is best if the scheme is administered by an independent statutory authority, rather than a department within the executive.

Fifth, ***adequate enforcement by regulators*** is a major issue, as there are some rules in certain jurisdictions, e.g. post-separation employment provisions, which are not enforced despite many breaches.

Other Comparator Jurisdictions

Canada and the United States have well-established lobbying laws, which may be models that could be considered for the Australian context.

The coverage of lobbyists on the register of Canada and the United States is broader than Victoria. For instance, the Canadian lobbyists register requires the registration of professional lobbyists or any individual who, in the course of his or her work for a client, communicates with or arranges meetings with a public office holder.[4] This includes third party lobbyists, in-house lobbyists for corporations, and in-house lobbyists for not-for-profit organisations.[5]

The United States covers lobbyists based on financial thresholds. Lobbyists are required to be registered if they are:

- Persons who receive financial or other compensation for lobbying in excess of $2,500 per three month period, make more than one lobbying contact and spends 20% or more of their time over a three month period on lobbying activities on behalf of an employer or individual client. This covers both third party lobbyists and in-house lobbyists.
- An organisation is required to register if it plans to engage in lobbying activities during any three-month period and during that period incurs at least $12,500 in lobbying expenses for organisations that employ in-house lobbyists and $3,000 for lobbying firms.[6]

[4] *Lobbying Act,* RSC 1985 (4th Supp), c 44 ss 5-7.
[5] Ibid ss 5-7.
[6] *Lobbying Disclosure Act of 1995*, 2 USC § 1601-3(10).

The United States and Canada are also broader in terms coverage of government officials, as both legislative and executive branch officials are covered by the lobbying provisions.[7]

The disclosures of lobbying activities are also more extensive in the United States and Canada (compared with Victoria); both require disclosure of each lobbying contact, and additionally the United States requires lobbyists to disclose their expenditure as well. Registered lobbyists are required to file quarterly activity reports with the Clerk of the US House of Representatives and the Secretary of the US Senate.[8] Lobbyists must also file semi-annual reports of campaign contributions to federal candidates and events that honour federal officeholders.[9] The semi-annual report must contain information about the lobbying clients, issues, including bill numbers and executive branch actions, and total income and expenses received from the client.

Canadian lobbyists have an obligation to file a monthly return to the Commissioner of Lobbying, no later than 15 days after the end of every month, setting out the details of the lobbying clients, name of the public office holder, subject matter and date of communication.[10]

In Canada, lobbyists' donations to political parties are capped at $1,000,[11] although there is a loophole within the system that allows lobby groups to provide 'consultancy services' to political parties for free during election times and many lobbyists do so.[12]

These regulatory systems have broader coverage of both lobbyists and government officials. They also involve far more extensive disclosure requirements (including disclosures of each lobbying contact, income and expenditure by lobbyists). Alongside the regulation of political donations by lobbyists (through either caps or disclosures) these models contain measures that could be considered as possible reform options.

In terms of disclosures provided on the lobbyist register, an excellent example can be seen in Scotland, where the lobbying register has a searchable database that includes detailed information about each lobbying contact with government officials, including precisely who they met, the subject

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[7] Covered executive branch official, i.e. the President, the Vice President, any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President, any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order, any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37, United States Code; and any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, United States Code: *Lobbying Disclosure Act of 1995*, 2 USC § 1601-3.
Covered legislative branch official, i.e. a Member of Congress, an elected officer of either House of Congress, any employee of, or any other individual functioning in the capacity of an employee of a Member of Congress, a committee of either House of Congress, the leadership staff of the House of Representatives or the leadership staff of the Senate, a joint committee of Congress, and a working group or caucus organised to provide legislative services or other assistance to Members of Congress; and any other legislative branch employee serving in a position described under section 109(13) *Ethics in Government Act 1978* (5 USC App).
Lobbying Act (Can), section 2.

[8] Ibid § 1601-5.

[9] Office of the Clerk, *Guide to the Lobbying Disclosure Act* (17 June 2014) US House of Representatives <http://lobbyingdisclosure.house.gov/amended_lda_guide.html>.

[10] *Lobbying Act,* RSC 1985 (4th Supp), c 44 ss 5-7.

[11] *Canada Elections Act*, SC 2000, c 9 s 405.

[12] Raj Chari, John Hogan and Gary Murphy, *Regulating Lobbying: a Global Comparison* (Manchester University Press, 2010) 42.

matter discussed, which legislation they are lobbying in relation to, and what they were hoping to achieve with the meeting.[13]

What other controls do you believe would be effective to mitigate the risk of corruption associated with lobbying activities?

To mitigate the risk of corruption associated with lobbying activities, there could be further measures instituted such as:

- Bans on the ability of lobbyists to receive success fees, as fees contingent on success give the lobbyist an incentive to engage in potentially unethical or corrupt behaviour in order to secure their remuneration. These exist in certain Australian jurisdictions, including Victoria.[14]
- Bans on MPs receiving remuneration from any third parties including lobbyists for parliamentary speeches, questions, motions, introduction of a bill, or amendment to a motion or bill, as this enables interest groups to utilise money to monopolise a scarce parliamentary resource; consequently it may lead to a conflict of interest between the MP's personal financial advancement and the public interest.
- Bans on lobbyists giving gifts to government officials, as this is seen to unduly sway public officials to be more receptive to the entreaties of lobbyists.[15]
- Bans on post-separation employment for government officials both in Australia and overseas, where certain government officials, such as Ministers, their advisers, and senior public servants, are prohibited from working for lobbyists in their portfolio area for a certain period.[16] These bans are not well-enforced in Australia.[17]

What recording or disclosure obligations should apply to politicians and government officials who may be lobbied?

To increase transparency, Ministers, ministerial advisers and senior public servants should be statutorily obliged to proactively disclose their diaries. There should be an accompanying requirement for lobbyists to disclose each contact. Disclosures should be sufficiently detailed, i.e. required to specify the subject matter, and whether it relates to any legislative bills (which should be specified), grants or contracts.

In your 2019 submission to NSW ICAC Operation Eclipse, you referred to higher risk industries including property developers, in the context of lobbying. Can you elaborate on the factors that you consider make property developers higher risk?

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[13] See The Scottish Parliament, *Lobbying Register* <https://www.lobbying.scot/>.

[14] E.g. *Lobbying of Government Officials Act 2011* (NSW) ss 14-6; *Lobbyists Act 2015* (SA), s 14; *Integrity (Lobbyists) Act 2016* (WA), ss 20-2.

[15] Canada, *The Lobbyists' Code of Conduct* (2012), cl 10 <http://www.ocl-cal.gc.ca/eic/site/012.nsf/eng/h_00014.html>.

[16] E.g. the 'cooling off period' at the Commonwealth level is18 months for Ministers taking up lobbying positions in their former portfolio area and 12 months for ministerial advisers and senior public servants. Australian Government, Lobbying Code of Conduct <https://lobbyists.pmc.gov.au/conduct_code.cfm>; Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards* <https://www.pmc.gov.au/resource-centre/government/statement-ministerial-standards>. Canada has a five year post-separation ban for Ministers, MPs, ministerial advisers, and senior public servants from being third party or in-house lobbyists. *Lobbying Act,* RSC1985 (4th Supp), s 10.11.

[17] Yee-Fui Ng and Joo-Cheong Tham, *Enhancing the Democratic Role of Direct Lobbying in NSW: A Discussion Paper for the New South Wales Independent Commission Against Corruption* (2019).

Property developers are a higher risk industry as the commercial interests at stake are directly affected by the exercise of public power, which gives property developers a strong incentive to influence government in their self-interest. As a High Court majority indicated in *McCloy v NSW*, the degree of dependence of property developers on decisions of government about the zoning of land and development approvals distinguishes them from actors in other sectors of the economy.[18]

In addition, the NSW Independent Commission Against Corruption (ICAC) and other bodies have published eight adverse reports between 1990 to 2015 concerning land development applications.[19] As the High Court indicated:

> Given the difficulties associated with uncovering and prosecuting corruption of this kind, the production of eight adverse reports in this time brings to light the reality of the risk of corruption and the loss of public confidence which accompanies the exposure of acts of corruption.[20]

Therefore, the significant commercial incentives for property developers to influence government decisions and the history of corruption relating to that industry provides justification for specifically regulating property developers as a higher risk industry.

Ministerial advisers and undue influence

What mechanisms are currently in place to hold ministerial advisers to account in Victoria? Are these mechanisms adequate?

It is necessary to implement mechanisms to hold ministerial advisers to account. Public servants have complained that ministerial advisers have interfered with bureaucratic advice and decision-making.[21] The actions of ministerial advisers exceeding their boundaries has resulted in a number of scandals and controversies over the years that have been headline news.[22]

Yet there are no evident mechanisms of accountability for ministerial advisers in Victoria. Ministerial advisers are provided with guidance issued by the Victorian Public Sector Commission about their roles,[23] but these do not impose any formal accountability requirements. At the Commonwealth level, there is a publicly available statement of standards for ministerial staff,[24] but no such public code of conduct is available in Victoria. A 2014 Ombudsman's Report referred to a Victorian ministerial staff code of conduct,[25] but it is unclear whether one still exists, or its currency or its content, which shows a lack of transparency.

It is thus impossible to assess the adequacy of the regulation of ministerial advisers in Victoria, without access to information about whether they are subject to a code of conduct and if it exists, without knowing the content of such a code.

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[18] *McCloy v New South Wales* (2015) 257 CLR 178, [49]-[50].
[19] Ibid [51].
[20] Ibid.
[21] Yee-Fui Ng, *The Rise of Political Advisors in the Westminster System* (Routledge, 2018) ch 3.
[22] Ibid ch 4, Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016).
[23] Victorian Public Sector Commission, 'Serving Government: A Guide to the Victorian Public Sector for Ministerial Officers' <https://vpsc.vic.gov.au/wp-content/pdf-download.php?postID=24541>.
[24] Special Minister of State, *Statement of Standards for Ministerial Staff* <https://www.smos.gov.au/statement-standards-ministerial-staff>.
[25] Victorian Ombudsman, *Ombudsman's Recommendations: Third Report on their Implementation* (2014) 9-10 <http://www7.austlii.edu.au/au/other/VicOmbPRp/2014/2.html>.

Based on your knowledge of other jurisdictions, what other controls do you believe would be effective to regulate the interaction between ministerial advisers, departmental staff and lobbyists?

International best practice involves codes of conduct for ministerial staff are that enforced by independent commissioners, such as in Canada.[26]

Australia's federal Statement of Standards for Ministerial Staff is inadequate in this respect, as sanctions under the Standards are handled internally by the core executive through the Prime Minister's Office. This means that any breaches of the Standards by ministerial advisers would be handled behind closed doors, without the scrutiny of Parliament or any external bodies. As mentioned above, it is unclear whether Victoria has a code of conduct for ministerial staff and the content of that code.

In addition, the codes of conduct should be supplemented with training for ministerial advisers that provides them with guidance and advice on how to deal with the public service.

Should the principles of 'responsible government' apply to ministerial advisers? If so why?

Yes, the principles of responsible government should apply to ministerial advisers. This is because ministerial advisers have become an entrenched part of the executive and exercise significant power and influence in modern government that sometimes eclipses that of junior Ministers, MPs and the public service.[27] As significant actors within the executive, they should thus be integrated into the accountability framework of the executive.

Responsible government demands that the executive is responsible to the legislature. However, ministerial advisers have thus far been excluded from the accountability framework of responsible government, as Ministers in the federal and Victorian levels have claimed that there is a constitutional convention that ministerial advisers do not appear before parliamentary committees (eg. as per the 'Children Overboard' and 'Hotel Windsor' incidents). This has led to an accountability deficit in terms of ministerial advisers appearing before parliamentary committees, where neither Ministers nor ministerial advisers appear to provide an explanation, accept a sanction, and provide rectification.

Consequently, the basic tenet of responsible government that seeks to ensure executive accountability is undermined. This is a failure at a systemic level, where Ministers are able to utilise ministerial advisers to avoid their own responsibility to Parliament. My research has sought to disprove the existence of such a convention and argued ministerial advisers should be subject to the principles of responsible government.[28]

Donations

How do you believe political donations can be most effectively regulated?

Any regulation of political donations has to balance two competing interests. First, there is the freedom of individuals and corporations to express their political preferences, including giving

[26] Yee-Fui Ng, *The Rise of Political Advisors in the Westminster System* (Routledge, 2018) ch 5.
[27] Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016).
[28] Ibid; Yee-Fui Ng 'Dispelling Myths about Conventions: Ministerial Advisers and Parliamentary Committees' (2016) 51(3) *Australian Journal of Political Science* 512.

money to political parties they support. This has to be counterbalanced with the pernicious influence of money in politics. The key here is whether large political donations secure greater access to politicians than ordinary people have. Another issue is whether large donations sway politicians to bestow illegitimate favours or adopt policies that directly benefit donors.

According to the democratic principle of political equality, Australians are entitled to equal representation by their elected representatives. We can also expect politicians to be transparent and accountable in exercising their public duties. In particular, politicians should not engage in corrupt behaviour, such as bartering with a wealthy donor to make decisions in their favour in exchange for a large sum of money.

As such, increasing the equity and transparency of political donations through legal regulation is beneficial for democracy. I believe that there are several components of an effective regulatory system:

- introduce caps on donations by individuals, unions and corporations of $1,000 a year;
- public disclosure of donations above $1,000;
- introduce real time disclosures of political donations; and
- ensure that the regulatory body enforces the rules and prosecutes any breaches.

a. Should donations be capped?

Yes, to entrench equity, a yearly cap on donations from each individual and corporation is crucial.

NSW has a yearly cap of $5,800 per party and $2,500 for candidates,[29] which the High Court has ruled as constitutionally valid,[30] and Victoria is has introduced a cap on donations by individuals, unions and corporations of $4,080 over a four-year parliamentary term.[31] In Victoria, the caps should be extended to the local government level as well.

With caps on donations, we can ensure people do not have a larger voice just because they have a larger wallet. In addition, caps that equally target individuals and corporations mean that money cannot be channelled through shady corporate structures or 'associated entities' to evade the rules.

b. Is there value in anonymising donations?

No, donations should not be anonymised. As discussed above, a main purpose of regulating political donations is to increase transparency, which means that donations should not be anonymised as this would hinder public scrutiny of who is seeking to influence government. Disclosure of the identity of donors adds to transparency. They allow us to follow the money and scrutinise who has made large donations.

c. Should there be any differences in the regulation of donations in state government compared to local government or Commonwealth government?

Donation rules should apply equally to the Commonwealth, state and local governments. There is no principled reason why these should differ, as there are risks of corruption and undue influence at the Commonwealth, state and local government levels.

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[29] See NSW Electoral Commission: <https://www.elections.nsw.gov.au/funding-and-disclosure/political-donations>.
[30] *McCloy v New South Wales* (2015) 257 CLR 178.
[31] See Victorian Electoral Commission: <https://www.vec.vic.gov.au/candidates-and-parties/funding>.

At present the Commonwealth has comparatively more lax donation rules than Victoria, which means that donations could be funnelled through the federal branch of political parties, where there are no donation caps. This suggests that there is a need for harmonisation of political finance laws across with federation, with the same donation and expenditure caps that apply to all jurisdictions.

d. Should donations from property developers be banned? Why/why not?

Yes, donations from property developers should be banned. As discussed above, this is because the commercial interests of property developers are directly affected by the exercise of public power, which gives property developers a strong incentive to influence government in their self-interest. The consequent risk of corruption justifies stronger regulation.

e. Should donations from companies or trusts be banned?

This may not be constitutionally permissible. In *Unions NSW v New South Wales*, the High Court struck down a scheme that only allowed donations from individuals on the electoral roll, thus banning donations from corporations, unions and non-citizens.[32] The Court found that there was no evidence that donations by non-voters had a greater corrupting influence than other donations.

f. What are your views on disclosing donations in real time?

Disclosures should be published in real time to avoid a large time lag between donations and disclosures. Queensland has implemented real-time disclosures of political donations through an electronic disclosure system.[33] In Victoria, disclosures above $1,020 must be made on the Victorian Electoral Commission website within 7 days.[34]

Real-time disclosures will increase the transparency of the system.

Drawing on your knowledge of how other jurisdictions manage donations, is there a model for regulation this area that you think could work well in Victoria?

The Victorian model, which was revamped in 2018 is now one of the strongest regimes in Australia, with caps on political donations of $4,080 over a four-year parliamentary term, disclosure of donations above $1,020 within 7 days, and a ban on foreign donations.

Areas of improvement could be to extend the regulation of donations to the local government level, as well as bans on donations from high-risk industries such as property developers and the gambling industry.

In your view, what are the key mechanisms that could be put in place to prevent parties from disguising donations from particular interest groups?

There should be rules about aggregating donations, the use of cash donations, and the use of associated entities to avoid loopholes where donations can be disguised or channelled through entities.

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[32] *Unions NSW v New South Wales* (2013) 252 CLR 530.
[33] See Qld Electoral Commission: <https://disclosures.ecq.qld.gov.au/>.
[34] *Electoral Act 2002* (Vic), s 217.

What entity do you consider should be responsible for overseeing (ie monitoring and taking enforcement action in relation to) the donation regime at both the state and local levels of government?

An independent statutory authority should be responsible for monitoring donations at the state and local government level, such as the Victorian Electoral Commission. The key to the effectiveness of the donations system is strong enforcement by independent bodies. For example, the New South Wales Electoral Commission penalised the state Liberal Party for breaching electoral rules. The party used the Free Enterprise Foundation to disguise donations from donors banned in the state, such as property developers.[35] Thus, the commission withheld $4.4 million in public funding from the party.[36]

Thus, it is incumbent on the Victorian Electoral Commission to vigilantly monitor compliance with the rules and prosecute any breaches.

[35] Sarah Gerathy, 'Liberal Party used "Charitable" Free Enterprise Foundation to Disguise Donations: NSW Electoral Commission', *ABC News* (online, 24 March 2016) <https://www.abc.net.au/news/2016-03-24/nsw-liberal-party-disguised-political-donations-free-enterprise/7272446>.

[36] Quentin McDermott et al, 'NSW Electoral Commission Defends Decision to Withhold Millions of Dollars from Liberal Party', *ABC News* (online, 23 May 2016) <https://www.abc.net.au/news/2016-05-23/electoral-comm-defends-decision-to-withdraw-funding-from-libs/7435900>.