

SUBMISSION TO INTEGRITY COMMISSION TASMANIA

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Thank you for the opportunity to contribute to improving the regulation of lobbying in Tasmania.

The current review is heavily focussed on increasing the visibility of lobbying activity to the public. This is admirable. Indeed, the primary purpose of lobbyist registration and codes of conducts elsewhere is for transparency.

But it must be recognised that transparency alone may have limited effects on changing actual lobbying behaviour and activities. If that is the case, it would also have limited effect on changing the political decisions that motivate such lobbying activities.

I have spent years studying the process of political favouritism. I have conducted controlled experiments of favour-trading behaviour, and many empirical analyses of the causes of political favours. Doing so has led me to the conclusion that many of the standard assumptions about how lobbying works are wrong.

To understand what rules are likely to have material effects, a coherent underlying theory about what lobbying is, and why it works, is necessary.

This submission does the following.

1. Provides summary how a more economically consistent theory differs from a popular but naïve thinking on lobbying.
2. Warns of the limits to transparency alone.
3. Shows what sort of procedural changes an economically consistent theory implies are likely to have a large impact.
4. Addresses some of the specific questions about the scope and inclusions of a system of lobbyist registration and disclosure.
5. Notes some potential next steps to reduce political favouritism generally.

TWO UNDERLYING THEORIES

Contrast the two simplified theories about what lobbying is and why it works.

POPULAR THEORY

- Favourable new laws or regulations are *purchased* with political donations, gifts, or by lobbyists who offer indirect incentives to key political actors.
- This happens in a clandestine manner because it is known by all parties to be unethical.
- If the public could see this behaviour it would cease, even if it was strictly legal. The internal moral compass of the players would direct them to behave by the ethical norms of society when under public scrutiny.
- Because these external ethical norms of society are clear to everyone, rules that oblige ethical behaviour can change actual behaviour.
- If donations and lobbying were banned, or made visible to the public, then donations and lobbying would be limited, and decisions influenced by donations would no longer occur.

AN ECONOMICALLY CONSISTENT “GAME OF MATES” THEORY

- New laws or regulations often give economic advantages to some companies and industries, which are a type of gift that comes at no cost to the giver. These are *grey gifts*.
- These grey gifts motivate economic actors to influence the way laws and regulations evolve. Without them, there is no motivation to sway the hand of government at all, as there is no economic payoff.
- Political actors realise that they often cannot help but provide gifts to different parts of the economy when crafting new laws. They therefore rely on social signals and feedback about which way to craft laws that appear to satisfy their constituents (not just voters, but industry representatives etc).
- When they get a lot of good social signals about the laws they are discussing or proposing they are motivated to further pursue them.
- Many of the signals come in the form of stories about why a certain law or rule that provides a grey gift to one sector is also in the interest of society as a whole. These stories reinforce that what is good for those in the social circle of the politician are good for society as a whole (e.g. if we don't give tax breaks to housing developers then no new housing will get built).
- Lobbyists can provide those signals to politicians in a trustworthy way because of their established personal reputations. Clients of lobbyists would otherwise have a hard time accessing the relevant social networks and having their stories taken seriously.
- Likewise, donors are donating to provide credibility to the signals and stories they are telling so that they are taken more seriously. It is a way to *burn money* to show credibility. They are not buying individual decisions.
- Those who already have social connections or reputations do not need to donate or hire lobbyists to get their stories heard and believed.

- Politicians and bureaucrats do not have an internal ethical compass that tells them not to enact favourable laws for those in their social circles (except in secrecy). In fact, the opposite is true.
- Those politicians and bureaucrats will often believe that helping those in their social circles is what is good for society as a whole, as they keep getting signals and feedback telling them this is the right thing to do, and they are armed with compelling stories about why this is so.

The popular theory implies that transparency will solve corruption and that laws requiring ethical behaviour will have some effect because there exists a universally understood benchmark of ethical behaviour that is known by all.

The more accurate theory implies that transparency will do little, as all actors in this *game of mates* believe that they are acting ethically and have good stories to tell about why this is so. Indeed, all their mates are telling the same stories, so how could it not be true?

It also implies that outlawing one type of behaviours that provide feedback and signals to law-makers will simply increase other behaviours that achieve the same outcome. If you ban private meetings with ministers by lobbyists, they will instead buy a seat at a table with the minister at industry breakfasts. It is hard to stop people earning trust and telling stories.

TRANSPARENCY LIMITS

Transparency can be useful, ineffective, or it can even backfire. For example, publishing more information about lobbyists and their meetings with politicians might backfire when lobbyists begin to use this information to demonstrate their political influence to future potential clients.

It seems obvious that publishing ministerial diaries that show dozens of meetings with a certain lobbyist can be used by that lobbyist to advertise their success.

“I can get you what you want from this government. Look, I got twelve meetings with the minister for my other clients!”

While at the same time, the minister can argue that they are doing a great job by meeting with all the important stakeholders and their representatives.

Transparency about disclosing client payments made to lobbyists may show current politicians just how attractive lobbying can be when they retire from politics, providing them more incentive to build social relationships in the industries they regulate which they can capitalise on later.

And overall, the more regulation, registers, and formal acceptance of lobbying there is, the more the practice of lobbying become legitimised, and any ethical concerns that might exist can be more easily overcome.

“Don’t worry, there is nothing dodgy here. This is all standard practice, and I have all the regulatory permits and official requirements to seek favours from my mates in government.”

The expectations of reciprocity by those who have signalled their trust required in some way a transparent environment between the parties. One reason for the popularity of secret ballots as a voting mechanism, either in parliamentary processes or electoral ones, is that in situations where those with decision making power have a personal view that conflicts with those in their trusted social circles, they can vote on with their conscience without justification to those in their network who expect a certain vote. The same might apply to selection panels for public investments. Retaining anonymity of these key decision makers allows them to avoid being lobbied and allows them to make decisions in the public interest without jeopardising other relationships.

Transparency can be a double-edged sword. It can be a step to cleaning up corruption if it helps enforce clear rules to be followed that minimise scope for favouritism, and where deviating from those rules is a corrupt action with significant punishment.

A MORE ECONOMIC APPROACH TO CORRUPTION

It is possible to look at the other end of the corruption/favouritism process by targeting the ability to give grey gifts via political or regulatory decisions in the first place. Are there ways to enforce decision-making methods that eliminate the ability to give economically valuable political or regulatory decisions?

There are essentially two approaches to reducing the valuable decisions that become targets for lobbying.

1. Randomise the decision makers or the decisions
2. Remove the private value of the decisions

RANDOMISATION

Since political favours are a group game, relying on feedback and signals from the trusted social networks of those in power, giving decision-making powers to random individuals (or boards/panels) who are *outsiders* can undermine the effectiveness of lobbying in general.

For example, in criminal courts we use randomly drawn juries to ensure a degree of independence and community expectation is maintained in the criminal justice system. This makes lobbying judges far less effective in jury trials. In international sport, referees are often randomly drawn from a pool that excludes those from the countries participating in the match. Random external audits are used to ensure that auditors are not captured by the groups they work for on a regular basis.

We can enshrine in policies and regulations that certain decisions, perhaps above a value, must be determined by groups of independent field experts, with these experts drawn from an international pool (perhaps as members of the relevant accredited profession). This would apply to tax changes, privatisations, toll road proposals, and so forth. While the process is certainly open to stacking, doing so would require clear breaches of regulations that enable the process, and such actions should be enforceable corrupt conduct.

This requirement would make lobbying by certain businesses or industries less likely to proceed where it conflicts with overall social and economic objectives that independent experts would be keenly aware of.

REDUCE THE PRIVATE VALUE OF DECISIONS

If the *grey gifts* that result from political decisions are of little value, there is little incentive to lobby.

In many of the areas of government where political favouritism is a major concern, such as in planning decisions by state governments and councils, there are simple ways to reduce the private value of those decisions.

For example, one way is to require that new planning rights are sold to landowners at market value, rather than being given for free. Just like government property cannot be disposed of without an attempt to fetch a market price, property rights to landowners that are disposed of (privatised) should be priced.

This is why planning and zoning is a primary focus of lobbying activity, but the sale of government property, or disposal of surplus vehicles and equipment, is not.

I have estimated that rezoning decisions nationally give away new development rights worth \$11 billion! No wonder that lobbying and corruption in planning and development is so rife.

RESPONSES TO QUESTIONS ON LOBBYING REGULATION

With the background in mind, there remain specific questions about what direct actions might be done immediately to ensure that lobbying is monitored and does not evolve into bribery or collusion.

It is important to keep in mind at every step the question of the purpose of lobbyist regulation and disclosure. It is also important to keep in mind that whatever system is created, some people will be able to navigate the system better than others. Despite intentions, regulations can become barrier that sustains access by insiders to the disadvantage of newcomers who cannot easily navigate the regulations.

WHO IS INCLUDED IN THE REGULATION?

1. Should all Members of Parliament be included?
2. Should all state servants and bureaucrats be included or only those most senior?

Answers to these questions depends on what the regulation is intended to do. If general visibility of the process of lobbying is sought, then a wider net is going to be better. In general, public servants and bureaucrats have a major influence over the way decisions are presented to MPs. Their inside knowledge of decision-making processes can be very valuable for organisations wishing to lobby, and hence many find post-public service careers in lobbying or government relations. Many states do not include senior bureaucrats from lobbying regulations, such as revolving door cooling-off periods, but probably should.

CONDUCT COVERED

3. What standards of behaviour or conduct should be included in a code of conduct?
4. Should lobbyists be prohibited from giving gifts to people who are lobbied?
5. Should a lobbying code of conduct include standards of conduct for both lobbyists and people who are lobbied?

Gift giving is a key element of signalling trust and should be prohibited, as it is generally in lobbyist regulations in other places.

Other conduct is hard to police and very ambiguous. Meetings are necessary. Sometimes a *four eyes* principle is enacted, requiring that meetings with registered lobbyists be conducted with an external party present. Who that may be is not clear, but the more random and less associated with the meeting parties the better (e.g. not direct staff of the MP in the meeting).

WHAT IS A LOBBYING ACTIVITY?

6. What activities, if any, should be exempt from the definition?
7. Should registerable lobbying activity be triggered by one communication only?
8. What sort of contacts, communications or other actions should be included as lobbying activities?

The unfortunate reality is that lobbying is not a specific activity, but a process of changing the direction of a political decision where influence from any direction might be relied upon.

The items in the list of existing exemptions are clearly all part of lobbying—i.e., they are an effective signal.

It is therefore difficult to draw a boundary. For example, being too broad will capture community groups and not-for-profits who seek to communicate with MPs and bureaucrats who are involved in their industry. This would add a compliance cost to a sector that is very bad at dealing with such costs and constraints.

Generally, the scope of lobbying is defined by who is a lobbyist, which is generally those taking payment from an external party to make representations on their behalf.

WHO IS A LOBBYIST?

9. How should the term 'lobbyist' be defined?
10. Should the regulatory system include only third-party lobbyists or be extended to include in-house (employed within the company doing the lobbying) and other lobbyists?
11. Is receiving payment or setting an expenditure limit an appropriate test for a lobbyist to be included?
12. If in-house lobbyists are to be included, should percentage of time spent lobbying be an appropriate test for inclusion?
13. If in-house lobbyists are to be included, should the number of employees in an entity be used as a qualification test?

14. What information should lobbyists be required to provide when they register?

Again, these questions concern the big picture questions of what lobbying is, why it works, and so forth. For example, industry groups typically state in their foundation documents their role is to lobby in the interests of their members. However, professional membership groups are typically identified as “not lobbyists” in the definitions in other jurisdictions. The same applies to internal government relations staff who deal directly with government agencies and parliamentarians on behalf of their employer.

The exclusion of these roles obviously creates incentives for more lobbying to be conducted via these *not-defined-as-lobbying* channels.

If the definition of lobbyist included all these entities, there would be questions asked about the role of the regulation.

What exactly is being achieved by having such a broad range of people identified as lobbyists, and why stop there?

As a practical matter, definitions in use elsewhere are probably the best available for the narrow purpose of a lobbyist register and code of conduct.

WHAT NEEDS TO BE DISCLOSED?

15. What information should be disclosed on an online register?
16. Should public officers disclose diaries or other information disclosing communications with lobbyists?
17. If lobbyists and people who are lobbied are to make disclosures, how frequently should this happen?
18. Would disclosures be more likely or reliable if they were made by government representatives rather than lobbyists?

Typically, disclosure of clients, and sometimes of meetings held, are required on the part of lobbyists who fall within the definition.

What is usually not required for disclosure are the fees paid by clients to lobbyists. Why not? What makes transparency useful is the public attention it brings to specific political decisions or actions of lobbyists. A register where the amounts of high value lobbying contracts are available will attract far more public interest than one that is a list of company names.

Indeed, this brings further questions about transparency and disclosure in the corporate system in general. Why aren't directors and shareholders of all companies available for free from the ASIC database? Initiatives like [Open Ownership](#) see such information being of public importance, and yet these are not the focus of transparency efforts.

Also, why aren't all government contracts publicly available? The documents, conditions, prices, can reveal a lot of information about which groups are successful lobbyists regardless of how the lobby. Is it not also important to know if the clients

of lobbyists ended up with lucrative deals with the public sector and the value of those deals?

Perhaps transparency around payments and contracts by the public sectors is more important than transparency around the identities of a narrow type of lobbyist in terms of generating changes to actual decisions.

My view is that these are the bigger questions that can be considered during a review of lobbyist registration and conduct.

COMPLIANCE

19. Does Tasmania need specific legislation to empower the Integrity Commission to provide compliance measures?
20. What, if any, sanctions should be included as part of a lobbying regulatory system?

In terms of uncovering influence and wrongdoing, rather than registering lobbyists, I think that significant cash bounties for whistle-blowers who help uncover wrongdoing will go some way to reversing the prevailing incentive for them to keep quiet to avoid retaliation. This can apply to failures to disclose lobbying, but also other conflicts observed across the public service.

Proportionate fines and penalties should apply.

REVOLVING DOORS

21. Are bans on public officers moving into lobbying roles appropriate?
22. How long should the 'cooling off' period be before public officers can become lobbyists?
23. Which public officers should be subject to cooling off periods?

Limits on public officers taking up lobbyist roles, broadly defined, is one way to reduce the ability to use lobbying to affect decisions.

Since lobbying is about signalling, reputations of lobbyists are important. They vouch for their clients.

The longer that a former public officer must wait before undertaking this role, the less trust they will have with the personnel they seek to influence. As time goes by, people in positions of power do change, and former relationships become less valuable.

Some states have two-year cooling off periods. But the longer the better. Four to five years is probably reasonable.

The scope of inclusion is also tricky. Industry groups and internal lobbying are both effectively similar way to use the trust of a former public officer to help coordinate and signal to current decision makers. A broad definition would be useful, but perhaps impractical, depending on the definition of lobbyist applied to these regulations.

Enforcement could occur simply by requiring a statutory declaration to be made each year about the sources of income and any formal or informal meetings with

the industry bodies or businesses. Random checks can be made and cash bounties offered to anyone who can provide evidence of false statements or failure to comply.

SUCCESS FEES

24. Should receiving or paying success fees be prohibited?

Again, the question of the underlying purpose of the regulations arises. The payment structure of professional lobbying seems to be relatively tangential to bigger underlying process. Would transparency of all fees paid to lobbyists solve the problems? Would transparency of all government contracts show when lobbyists were successful?

It seems easy to skirt such a rule by making payments to lobbyists after success, but in other indirect ways.