HRLegal

32 Garden Street South Yarra VIC 3141
+61 3 9948 2450
ABN 67 790 933 018
www.hrlegal.com.au

17 July 2023 Our Ref: 230001:DF:RA

Attention: Greg Melick, AO SC, Chief Commissioner
Integrity Commission (Tasmania)
Surrey House, Level 2
199 Macquarie Street
Hobart TAS 7000

By email: lobbying@integrity.tas.gov.au

Dear Mr Melick,

RE: Proposed Model for Public Consultation - Lobbying Code of Conduct of Tasmania

We act for Font Public Relations Pty Ltd (**Font PR**).

Our client is in the business of providing public relations, strategy and campaigning advice, including providing services to the Liberal Party of Australia (**the Party**) with respect to state and federal election campaigns.

In particular, we note that Font PR is a registered lobbyist on the Commission's *Lobbyists Register*. As a lobbyist on behalf of the Party, it is therefore subject to the *Tasmanian Government Lobbying Code of Conduct* (**Lobbying Code**).

Upon review of the proposed amendments to the Lobbying Code (**Proposed Model**), our clients are concerned that some of the recommended changes are unnecessarily restrictive, unclear, or otherwise appear to be unduly targeted, and should therefore be reconsidered. We set out each of these concerns below.

Dual-Hatting

Section 4.5 of the Proposed Model provides that the Lobbying Code be updated such that public officials (particularly elected representatives) are restricted from being party to lobbying activities by lobbyists who previously advised them on electoral campaigns for a period of 12 months after being elected.

Our clients have a number of deep concerns about this proposal:

Restraint of trade

It appears that, in effect, the dual-hatting changes under the Proposed Model would restrain the work of a lobbying entity (such as our client) with respect to politicians with whom they would otherwise regularly engage.

This means that electoral advice (given for a relatively brief period in the lead up to a State election) would effectively bar those same advisors from conducting lobbying work for a significantly longer period of time. This effect would be both disproportionate and hinder the ability of those entities to conduct their primary lobbying work for a significant percentage of each election cycle.

As you would be aware, it is a longstanding principle that interference with an individual's liberty to ply their trade, and all restraints of trade themselves (if there is nothing more), are contrary to public policy and therefore void (pursuant to the longstanding precedent arising from *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co [1894] AC 535*, which addressed the principle in the context of contracts).

Undue targeting

Further, we are instructed that it appears that – within Tasmania – this proposed restriction on dual-hatting is likely to apply only to our client (as other lobbying entities do not habitually engage in the provision of advice for political campaigns). In light of those instructions, it could reasonably be concluded that the prohibition was in some way targeted towards Font PR and its business activities, without sufficient evidence that there have been any meaningful issues that are required to be addressed by the proposal (beyond the general assertions of the Proposed Model).

Proposal too broad

Notwithstanding that our client believes that the proposed change is a restraint of trade and should not be applied at all; our client is concerned that the proposed restriction is too broad.

Relevantly, the Proposed Model does not distinguish between advice that is a product of a political advisor being engaged by the public official in an official capacity, advice given informally, or advice given through an intermediary. Nor does it provide for a minimum threshold of advice that would engage the restriction set out in the Proposed Model.

By way of example, it is possible for a professional political advisor to give a candidate informal advice (for example during a campaign event) during an election period (with the intention of assisting to get them elected) without having been engaged officially, and seemingly without falling into the exemption around 'volunteering on an election campaign'. In such a scenario, it is not immediately obvious whether a brief conversation would mean that the public official has been 'advised' for the purposed of the future lobbying restrictions once they have been successful in the forthcoming election.

Alternatively, the same scenario may arise in which a third party communicates with both the public official and the political advisor, where the third party effectively passes on the same advice as an intermediary, whether that was intended by the political advisor or not. In such a case, it is unclear whether the Proposed Model would restrict the public official from lobbying activities with the political advisor, the third party, or both.

Lack of clarity - advice provided to political parties

The Proposed Model contains commentary to the effect that the dual-hatting restrictions would only apply to individual public officials, and therefore not to lobbyists advising political parties in general.

However, it is unclear how this exception applies in practice and appears to show a lack of understanding about how election campaigns operate in practice. For example, a political strategist that advises a political party on a campaign generally is likely to be in direct contact with individual candidates (and future public officials) to discuss discrete elements of their campaign without being directly engaged by those candidates.

It is not clear whether the Proposed Model intends for this situation to give rise to a restriction, or whether (again) there is any minimum threshold of advice below which the restriction would not apply.

This lack of clarity is critical, as it is material to the level of harm that the proposed "dual hatting" ban would potentially have on our client.

Restriction on lobbying activities

The Proposed Model is also unclear on the restrictions on lobbying to apply in the instance of "dual hatting".

While the draft Code states that *"public officials are restricted from being party to lobbying activities by lobbyists who previously advised them on electoral campaigns"* it is unclear exactly how this would work in practice.

For example, does it apply only to an individual who had been involved in an election campaign? Or would the ban apply to an entire lobbying firm, if that firm had been the entity engaged for the election campaign – even if no other individuals at the firm had been involved on the election campaign? Would it be material to the application of the ban if the individual involved on the campaign was an owner, shareholder, director or similar?

Timing

The strict wording of the Proposed Model raises a concern about the timing of lobbying restrictions. That is, an elected official is restricted from being party to lobbying activities by a lobbyist who has previously advised them on electoral campaigns for a period of 12 months after a campaign.

Our client is concerned that if they were , for example, engaged by the Tasmanian Liberal Party for their next election campaign, they would be prohibited from dealing with any member of the Government (should it be re-elected) or Opposition in the event of a defeat for a 12 month period.

The Commission has stated that (not withstanding further consultation), it intends the changes to commence in "late 2024".

As you would be aware, Tasmania does not have fixed election terms, and a state election could be held prior to that date.

Our client therefore seeks clarification about whether any restrictions under the "dual hatting" provisions would be retrospective, and if so, on what basis.

This is a crucial matter for our client's consideration in light of a potential state election in Tasmania within the next 12 months.

Additionally, the proposed changes appear to mean, on a technical reading, that electoral advice given in a *previous* election campaigns would engage the 12 months restriction following any future election (whether the lobbyist provided advice during that campaign or not). It does not appear that this is an intended effect of the proposed change, and it is likely that further clarification would be required to apply the restriction equitably (if such a restriction is to be applied at all).

Lack of consultation

Finally, our client has concerns that the prohibition against 'dual-hatting' was not present in the original discussion paper concerning reforms to the Lobbying Code, and that recommendation was only raised after the initial consultation period (in which our client made its submission to the Commission).

On this basis, the proposal has had significantly less time for public discussion than the other proposed reforms.

Disclosure Reform

Section 4.3 of the Proposed Model provides that the Lobbying Code may be updated such that public officials would be required to disclose any contact that meets the definition of 'lobbying activities' within 5 days of this occurring.

Relevantly, the definition of 'lobbying activities' is naturally subjective, being defined as follows:

> *Communications with 'public officials', in which a person or entity seeks to advocate for or represent an interest, prior to a decision regarding:*
>
> - *making or amendment of legislation*
> - *development or amendment of a government or non-government policy or program*
> - *awarding of a government contract or grant, and*
> - *allocation of funding.*

It would be a significant burden on any public official to establish whether they had just been subject to 'lobbying activities' the moment that they are part of a discussion about a future legislative decision or funding matter. Specifically, they would be required after any such interaction to perform retrospective assessment of whether the person had been 'advocating' for an interest, and would be required to apply the 8 potential categories of exemptions in order to assess whether disclosure is required.

A natural effect of this reform may be a significant chilling effect on the categories of people with whom public officials are likely to speak (whether they are elected officials, or simply advisors), in light of the risk of inadvertently breaching the Code.

This could reasonably result in a drastic narrowing of the breadth of information available to the Government, likely including a significant amount of discussion that would have been permissible within the Proposed Model but for the risk of ambiguity.

Next steps

Our client has sought repeatedly to be kept promptly informed about updates in this matter, particularly where documents have been circulated by the Commission to certain classes of affected individuals.

Accordingly, we respectfully seek that our client be kept up to date with any further developments following this consultation period.

Our client requests that information and questions provided in this submission be treated as a formal submission pursuant to the "final round" consultation closing 28 July 2023.

Further, prior to finalisation of the new version of the Lobbying Code, our client respectfully requests:

- That they be provided with clarification about the way that the proposed restrictions around "dual-hatting" would work in practice, as outlined in their concerns above;
- A response from the Commission to their concerns about restraint of trade, and undue targeting; and
- A response to their question about any retrospective application of the proposed restrictions around "dual-hatting".

Yours faithfully,

Dan Feldman
Managing Partner