Urban Taskforce
AUSTRALIA

Speaking to government

Why businesses lobby government

A submission to the Independent Commission Against Corruption in response to *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW*

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The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with both government and the community.

Executive Summary

This submission has been prepared in response to an invitation by the Independent Commission Against Corruption (ICAC). The ICAC is currently conducting an investigation into lobbying of public officials and public authorities in NSW. This submission has been written with reference to the ICAC paper: *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* ("the issues paper").

Definition issues

There may be public policy arguments to limit the regulation of lobbying. However, the issues paper has excluded a wide range of lobbying for personal advantage from the definition of "lobbyist" before that question is even addressed. This skews much of the subsequent analysis in the issues paper. Nonetheless, we do agree with the issues paper's statement that it is impossible to control all lobbying activity.

The issues paper's discussion of "indirect lobbying" makes some value-laden assumptions. It assumes that someone who is attempting to convince the community of the merits of their case is "exerting pressure" and is attempting to "manipulate public opinion". Frankly, this proposition is an offence to basic democratic principles. Democracy is dependent on those with different opinions airing them publicly so that the voting public may make informed decisions at the ballot box. By characterising one attempt to air an issue publicly as "manipulation" while presumably willing to describe other attempts as "free expression", the issues paper has made a value assumption that some parties have a lessor right to be heard in the public domain than others.

Similarly the description of public advocacy as "exerting pressure" implies that going directly to the community, via the media, with concerns is somehow inappropriate. This is how democracy has worked from day one, and without it, our system of government could not function.

The issues paper draws a distinction between so-called "grassroots lobbying" and "astroturf lobbying". A series of value-laden assumptions have been made in order to create distinctions when none exist. This seems like an attempt to artificially draw a distinction between wholesome lobbying and evil lobbying.

Firstly, "grassroots lobbying" apparently occurs when it is undertaken by "ordinary people". Who are "ordinary people" and who are the (implied) extraordinary people?

We also note the issues paper's suggestion that "a truly 'grassroots' movement should be natural and spontaneous". We find this statement to be bizarre. We frequently come up against not-in-my-backyard (NIMBY) activist campaigns, and campaigns by green groups. We would not deny that these campaigns are grassroots campaign, but nonetheless they are neither spontaneous, nor are they natural.

Role of lobbyists

Lobbyists play a *very* wide role in NSW society. While their expertise may vary, they are present in every aspect of public decision-making. And so they should be. A democratic government cannot function if it does not listen to people, and people (whether they are individuals, non-profit groups or businesses) must be entitled to employ others to talk to government on their behalf.

A proponent is likely to select a person to represent them based on the issues that need to be canvassed. If the issues are legal ones, then a lawyer may be the best representative. If they concern urban design, then an expert in this area may be appropriate. If the issue is unjustifiable bureaucratic resistance, a person who understands these kinds of public sector organisational issues would be needed. If the issues are local political opposition (e.g NIMBYs, local political opponents, etc) then someone who understands the political debate would be appropriate.

On this last point, we would note that a vast number of development proposals are defeated or significantly amended, not because of any intrinsic problems with the idea, but because of the opposition of existing residents who have a philosophical or vested interest in blocking new development. We aren't alone in making this observation. It is a political phenomenon that has been observed all over the Western world.

The reality of government decision-making in the planning system is that legitimate technical issues favouring an approval are often balanced against political issues favouring refusal. Often this is not apparent on the face of a decision, but there are, nonetheless, many clear examples of this on the public record.

The most common reason for hiring lobbyists is the need to secure a human resource to undertake time consuming work. Developers hire lobbyists in the same way they hire architects, town planners, administrative staff, builders and real estate agents. Obviously, if you are going to hire someone to undertake work of liaising with public officials you look for someone who has the qualifications and experience that makes them the best person for the job.

For this reason development proponents must often hire people who have expertise public administration and/or the nature of anti-development political campaigns, in addition to people with expertise in areas such as law, urban design, etc. If the intent of any lobbying regulation is to make people with such skills unemployable in the development industry it will not only be unjust for them, but it will make it harder for developers to anticipate and respond to community objections to development proposals.

Public perceptions

The word "lobbyist" clearly has negative connotations in the public mind. However, the actual work of lobbyists (as defined by the issues paper), that is, communicating with public officials to persuade them of the merits of a case, is well understood by the public to be an essential part of a democratic society.

Whether or not someone is regarded as "lobbying" and a "lobbyist" will often depend on one's perspective as to the merits of their argument. If someone is described as a "social issues campaigner" they are likely to be viewed more favourably by the public than someone who is described as a "lobbyist", yet their work is the same.

If you agree with the lobbying efforts being mounted by a group, you are more likely to describe it as a "grass roots push" or "a campaign". If you oppose the work of the group you are more likely to describe the group or their work as "lobbyists" or "lobbying".

The point is simple. It's not lobbying itself that people object to; it is generally their subjective opinion as to the subject matter that they don't like. Different people will have different perceives as to which subject matter is worthy and which subject matter is not.

In our experience, NIMBY activists will regard all work by developers to highlight their position as "lobbying", but praise their own efforts to mount "community campaigns" as something that is morally superior.

If you are unable to cogently mount an agreement on the substance of an issue, a time honoured tactic will see you attack the messenger and the process.

Local government

Using the broad definition of lobbying and lobbyists in the issues paper it is inevitable that all local councils are subjected to lobbying on a continuous basis.

However, local councils are not as complex as state government, and it is less likely (in the development industry) for a registered lobbyist to be used to communicate with a local council.

Nonetheless we see no reason why the current *NSW Government Lobbyist Code of Conduct* should not also be extended to local councils (and for that matter, state owned corporations). However, as we will canvass elsewhere in this submission, we do not support a widening of the scope of the Code of Conduct to cover the professions of salaried employees engaged in lobbying activities on behalf of their employer.

Industry sectors

Merely because complaints and concerns in the media are focused in particular industry sectors does not mean that:

- most or more lobbying occurs in these areas; or
- the process of lobbying is substantially different in these areas.

In our submission, the increased rates of complaint reflect areas where the subject matter of the lobbying is more contentious in the community.

We would urge the ICAC to recognise that lobbying in areas where the community is strongly divided (such as urban development, liquor regulation, gaming policy) are inherently likely to generate complaints about process. While not all complaints about process are ill founded, often the real gripe of the complainant is with the substance of the decision, rather than the process by which it was made.

Increased regulation of lobbying will not reduce complaints about process, so long as the community remains divided about the appropriate public policy response to the substantive issues.

Use of information

It is illogical to suggest, as the issues paper does, that a lobbyist who demonstrates the truth of their assertions with high quality factual information about either a project, or what's going on (in say the planning system) presents any form of corruption risk. On the contrary, such a lobbyist would be adhering to a best practice standard, if such a thing exists.

In relation to the Urban Taskforce we are proud of the fact that our work is centred on the principle of collecting and publishing good information. This involves making available detailed submissions and reports that analyse available economic information, social changes and the application of the planning law. In our view, the best kind of lobbying is one that is based on reasoned logic, backed up by strong evidence and factual information.

Political donations

Many critics of the lobbying process seek to draw links between political donations and government decisions.

The NSW government banned political donations from large, professional property developers in December last year.[1] The NSW law applies to state and local council elections and also bans property developers or their "close associates" from paying to attend political fund-raising dinners. Professional

[1] *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW) commenced on 14.12.2009.

property developers respect the law and, as a result, they no longer have any role in financially supporting political parties in NSW.

Proposed reforms

We are concerned some of the proposed reforms might enable a minister to instruct public servants to meet or not meet certain lobbyists or groups on political grounds. For example, a registered lobbyist who is not regarded as a political ally of a minister may find it difficult to secure meetings with a department because of a quiet word the minister has had with their agency head, following the receipt of such a report.

Such a decision would have a chilling effect on the right of any industry organisation or individual lobbyist to say what they think in the public arena.

We do also not support the extension of the *NSW Government Lobbyist Code of Conduct* to currently excluded groups.

Trying to regulate "in-house" lobbyists will be counter-productive. Describing an "in-house" lobbyist by their title (the form) will be pointless and will be easily circumvented. Describing an "in-house" lobbyist by substance, for example, by use of the issues paper definition, will capture a very, very large number of business people in a very, very large number of businesses who all have regular dealings with government. This information would swamp the process. What would be the gain? The fact that companies talk to government has never been an issue and the mere carrying out of meetings does not suggest a risk of corruption itself. The logic of the lobbyist register is to promote transparency, so that it is clear which lobbyists are acting for which parties. That is not an issue when the Managing Director of a company turns up for a meeting with a minister and hands across his or her business card.

It is worth highlighting the threat to free expression if industry groups, such as the Urban Taskforce, were to be subject to a system of government registration and regulation in order to be able to meet with public officials.

Any regime that allows government to initiate deregistration-style proceedings against any industry group would allow the government to threaten to blacken a group's reputation and discourage frank and fearless public criticism of government policy. The risks of abuse would be compounded if the government was able to regulate access to opposition parliamentarians through denial of registration.

We do not object to the continued administration of lobbyist regulation by the Director-General of the Department of Premier and Cabinet, provided there is a right of appeal available to any person adversely affected by a decision of the Director-General to the Administrative Decisions Tribunal.

Lobbyist regulation should not infringe rights to be heard or free speech

The existing principle that ensures lobbying regulation does not derogate from the legal obligation on decision-makers to accord procedural fairness, consult and consider representations, must remain.

Should the ICAC consider extending any form of regulation to industry groups such as ourselves, it is vital that the regulation does not interfere with our right to speak freely and frankly on government policy in the public arena. It is also vital that the public sector is not given legal powers that can be misused to sanction groups that have fallen out of favour with officials because of criticism levelled at the government.

Prohibiting us from exposing poor public policy to the wider community is contrary to the interest of good government. Clearly, some people will dispute our viewpoint, but this is not a reason to deny us from speaking out. Indeed, the wider community is intelligent enough to evaluate our arguments (and those who argue against us) and make their own decisions.

Additionally, any regime that made particular forms of communication (by industry groups or individual businesses) with public officials or the wider community unlawful would, unquestionably, be an erosion of the principles of freedom of speech. We note that the current non-statutory code cannot and does not interfere with freedom of speech because it does make any conduct unlawful, and subordinates itself to the existing law.

Lobbying is an essential mechanism to ensure planning decisions are robust

As long as public opinion or ideology is a guiding factor in setting planning rules and assessing projects against those rules, a high level of subjectivity will inherently exist in the system. This necessarily means the discretionary nature cannot be eliminated. It also means that rules will continue to be fluid because rules set by reference to public opinion or ideology will not stand robust scrutiny in the long run if/when it becomes apparent that they carry high social and economic costs.

"Lobbying" is a process that allows this robust scrutiny to take place and rigid rules to be varied. It is nonetheless an essential part of the process. Rules that prevent or reduce lobbying or limit the discretion of decision-makers to approve development prevents necessary scrutiny being applied to arbitrary or unjustified restrictions and prohibitions.

On the other hand, planning rules that limit the discretion of decision-makers to refuse development, and/or limit the ability of decision-makers to deny development by reference to public opinion, are likely to reduce discretion, reduce the need for lobbying, and therefore reduce perceived corruption risks.

Introduction

The Independent Commission Against Corruption (ICAC) is currently conducting an investigation into lobbying of public officials and public authorities in NSW and the related procedures and regulatory system.

We understand the scope and purpose of this investigation is:

- to consider the relationship between lobbyists and public authorities and public officials for the purpose of examining 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 public authority or public official need to be changed and whether any methods of work, practices or procedures of any public authority or public official could allow, encourage or cause the occurrence of corrupt conduct and if so, what changes should be made.[2]

The ICAC has produced a paper: *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* ("the issues paper") as part of this investigation. The ICAC has sought submissions from the wider community to help inform the investigation.

The Urban Taskforce believes it can assist the ICAC in two ways:

- as a non-profit industry organisation we can advise you on our own approach to public policy advocacy; and
- as a representative of property developers and equity financiers we can speak on behalf of a wide range of businesses that regularly speak to government and utilise a range of consultants and in-house staff to do so.

In both respects our submission:

[2] ICAC, *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* (2010) 6.

- attempts to evaluate the impact of various regulatory options on the commercial activity of businesses in NSW, particularly property developers and equity financers;
- considers the public policy implications of further regulation on communications with government by the private sector.

The issues paper is structured around 26 principal issues. For each principal issue the ICAC has nominated specific "issues for consideration". The structure of this submission is based on the ICAC's issues paper and should be read in conjunction with it.

1. What is lobbying?

1.1 Definition of lobbying

1.1 Does the definition of lobbyist given above adequately cover the type of lobbyist whose conduct or involvement is most likely to affect public perceptions as to transparency, accountability and fairness of decision-making?

The issues paper says that:

> For the purposes of this paper, lobbying is considered as any communication with a public official for the purpose of influencing the making of a decision, including the making or content of policy or legislation, the awarding of a contract, allocation of funding or the making of a planning decision.[3]

There is nothing wrong with this definition. It is in fact, narrower than the dictionary definition of lobby/lobbyist. The Macquarie Dictionary says that "lobby" (relevantly) means:

> a sectional interest, cause, etc. supported by a group of people[4]

In any event, whichever definition is used, it is instantly apparent that a wide range of conduct by both private individuals, businesses, non-profit groups and corporations will fall into the definition of "lobbying".

Perhaps in recognition of this, the paper then narrows the definition of lobbyist:

> For the purpose of this paper, a lobbyist can be considered as someone who engages in lobbying activity in return for payment or as part of his or her employment, whether or not employed primarily in lobbying.[5]

This definition then excludes a wide range of conduct which might be undertaken by individuals without explicit remuneration.

The public policy justification for limiting the definition of "lobbyist" to directly remunerated activity is inconsistent with the broad definition of "lobbying". It overlooks the key fact that people will lobby for their own, the families and their associates' social and economic advancement. The fact that they are not expressly remunerated for this does not change the fact that what they are doing is lobbying.

Consider for example the following two examples.

Example 1: Bill owns a 700 square metre vacant lot. One day he hopes to build himself and his family a home on the property. He becomes aware of a development application to build a four storey apartment building next to his property. He is concerned that the presence of the apartment building will reduce future increases in the value of his property – he has an opinion from a real estate agent who says it might cost him $20,000 over the next three years. Bill approaches the local council and calls

[3] Ibid 9.
[4] University of Sydney, *Macquarie Concise Dictionary* (4th edition) (2006) 703.
[5] ICAC, *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* (2010) 9.

on them to refuse development approval to the apartment development. He cites traffic concerns as the main reason for his objection.

Example 2: Jason owns a company, ABC Pty Ltd. There are no other shareholders. Jason draws a salary from the company as its Managing Director. The company owns a 700 square metre vacant lot. Jason's company is holding the property as an investment and intends to sell it one day. Jason also becomes aware of a development application to build a four storey apartment building next to his property. He is also concerned that the presence of the apartment building will reduce future increases in the value of his property – again it might cost his company $20,000. Jason approaches the local council and calls on them to refuse development approval to the apartment development. He also cites traffic concerns as the main reason for his objection.

Under the definition proposed by ICAC, in example 1, Bill is engaged in lobbying, but Bill is not a lobbyist, (as defined by the issues paper) because he is not remunerated directly for his lobbying activity. He intends to secure for himself a financial benefit if he is successful (because he expects an additional $20,000 in property value) but as this is not a "payment" or "remuneration" he falls outside of the issues paper definition of lobbyist.

In example 2 Jason engaged in lobbying and is a lobbyist (as defined by the issues paper) because he draws a salary, and part of his remunerated role, as Managing Director of ABC Pty Ltd, is to make representations to a public official about its decisions.

In both cases the benefit of success is valued at $20,000. In both cases the corruption risk is equivalent. We would submit, in truth, that both examples are instances where lobbying is taking place.

There may be public policy arguments to try and limit the regulation of lobbying to certain kinds of lobbying. However, **the issues paper has excluded a wide range of lobbying for personal advantage from the definition** before that question is even addressed. This skews much of the subsequent analysis in the issues paper.

In any event, we strongly agree with this statement in the issues paper:

> With a broad range of activities classed as lobbying, it is unsurprising that no jurisdiction has attempted to control all such activity. To impose controls such as registration, codes of conduct and disclosure requirements across the board may unduly interfere with open access to government and government agencies.[6]

1.2-1.3 Indirect lobbying

1.2 To what extent does indirect lobbying occur in NSW?

1.3 Are there any recent examples of indirect lobbying in NSW?

The issues paper says that

> lobbying can also be indirect – for example, by *exerting pressure* through the media to broadcast a message and *manipulate* public opinion (emphasis added).[7]

Firstly, this accords with the dictionary definition of lobbying, but does not accord with the definition of lobbying advanced by the issues paper. That is because attempting to convince the wider community of the merit of your argument is not a

> communication with a public official for the purpose of influencing the making of a decision, including the making or content of policy or legislation ...

[6] Ibid 10.
[7] Ibid 9.

A "communication" with a journalist cannot be characterised a communication with a "public official". So, the issues paper is internally inconsistent, because its definition of "indirect lobbying" falls outside of its own definition of "lobbying".

Secondly, no corruption risks arise from persuading the whole community to your viewpoint. That's because any perspective that is reported in the media rarely goes unchallenged. A proponent may make public statements that serve their interests, but those with counter views will have the opportunity to analyse and expose their arguments publicly for inaccuracies or inconsistencies. Importantly, this public debate is very transparent. It takes place in the full glare of the media spotlight. We cannot imagine a scenario where making a case direct to the public, in itself, gives rise to a corruption risk.

Thirdly, in defining "indirect lobbying" the issues paper makes some value-laden assumptions. They assume that someone who is attempting to convince the community of the merits of their case is "exerting pressure" and is attempting to "manipulate public opinion". Frankly, this proposition is an offence to basic democratic principles. Democracy is dependent on those with different opinions airing them publicly so that the voting public may make informed decisions at the ballot box.

By characterising one attempt to air an issue publicly as "manipulation" while presumably willing to describe other attempts as "free expression", the issues paper has made a value assumption that some parties have a lesser right to be heard in the public domain than others.

In any event, the ICAC should not assume that the public are so easily led that they can be 'manipulated'. At the end of the day, the principles of a democratic society hold that the final arbiter of major policy decisions is the community as a whole. Any participant in our society has the right to take their arguments directly to the public and stand or fall on the strength of their case. This is not 'manipulation'; this is democracy in action.

Typically a person who feels that the wider community holds a different view from them on an issue may assert that the wider community has been "manipulated". Nonetheless this is an entirely subjective, value laden view. While it's understandable that those of a minority opinion might attempt to explain away the failure of the majority to agree with them, it does not mean that it is an objective analysis of the situation.

The phrase "exerting pressure" implies that going directly to the community, via the media, with concerns is somehow inappropriate. This is how democracy has worked from day one, and without it, our system of government could not function.

By the way, the letters pages of every newspaper, every day, are full of people making arguments directly to the community to advance their own interests. They include:

- property owners worried about the impact of new development of their property values;
- trade union members worried about the potential loss of some of their legislated industrial rights;
- nurses concerned they might be forced to work harder and longer because (one political party or another) may or may not be planning to cut the size of the health workforce; and
- property developers expressing concern that insufficient urban development is taking place.

None of this conduct should be characterised as "pressuring" or "manipulating".

The Urban Taskforce is an advocacy organisation on behalf of property developers and equity financiers. Our mission is clear. The Taskforce provides a forum for the views and ideas of our members. It provides a vehicle through which the membership can respond to policy initiatives and debates on issues related to the urban environment.

Part of our role is to explain the viewpoint of the property development industry to the wider community, and yes, we hope to demonstrate that our viewpoint is a sensible one.

What we do is no different from, say, the work of the Nature Conservation Council who enjoy significant government and private funding to place before the community the issues of concern to them. Similarly, we join in debate regularly with the Local Government and Shires Association and individual councils, as well as a wide range of action groups formed by property owners opposed to having more people living and working in their community.

Public advocacy is the lifeblood of modern civil society. People fought revolutions across the Western world for the right to have it. We're surprised that the issues paper should attempt to suggest that there is anything inappropriate about it.

By the way, the Urban Taskforce is very transparent about its public advocacy efforts. Every media release we issue clearly states who we are and who we represent. Our website is full of our media statements and submissions. Many people do dismiss what we say, merely because we represent property developers. Thankfully, others are willing to evaluate what say based on the strength of our arguments and the evidence that we provide.

1.4 Astroturf lobbying

1.4 Is there any evidence of "astroturf lobbying" in NSW?

The issues paper draws a distinction between so-called "grassroots lobbying" and "astroturf lobbying". It says that

> "Grassroots lobbying" occurs when ordinary people mobilise concerning an issue and may take the form of letter-writing campaigns and petitions although media coverage can also play an important role. A truly "grassroots" movement should be natural and spontaneous. ... Astroturf [lobbying] refers to apparently grassroots-based citizen groups or coalitions that are primarily conceived, created and/or funded by corporations, industry trade associations, political interests or public relations firms. [8]

This seems like an attempt to artificially draw a distinction between wholesome lobbying and evil lobbying. It seems like a series of value-laden assumptions have been made in order to create distinctions when none exist.

Firstly, "grassroots lobbying" apparently occurs when it is undertaken by "ordinary people". Who are "ordinary people" and who are the (implied) extraordinary people? We know property developers consider themselves to be "ordinary" and not in any way extraordinary. But somehow, we suspect that whoever drafted the definition of "grassroots" lobbying intended the phrase "ordinary people" to arbitrarily exclude a wide range of people, including property developers.

Let's put property developers aside for a moment and consider other categories of people. Are trade unionists lobbying through petitions, letter writing campaigns, etc "ordinary people"? We would have thought they are, but their inclusion in the definition of "Astrotuf" lobbyists suggests they are not.

Is a group of small businesspeople pushing to block a supermarket, because they are worried their customers will have the choice of cheaper groceries, a campaign by ordinary people? Even though we wouldn't approve of their campaign, we do think that they are "ordinary people".

The ICAC should not attempt to divide the community into "ordinary people" whose lobbying is noble and non-ordinary people whose lobbying is automatically suspect. To do so is to make a value judgment, based on one's own philosophical perspective about good lobbying and bad lobbying. Ordinary people undertake good lobbying. Non-ordinary people undertake bad lobbying. All there is left to do is to decide who is "ordinary".

We also note the issues paper's suggestion that "a truly 'grassroots' movement should be natural and spontaneous". We find this statement to be bizarre. We frequently come up against not-in-my-

[8] Ibid 9.

backyard activist campaigns and campaigns by green groups. We would not deny that these campaigns are grassroots campaign, but nonetheless they are neither spontaneous, nor are they natural.

Typically they arise from the tireless efforts of a large number of full-time employees who are busy preparing petitions, drafting and circulating e-mails urging submissions to be made, and generally organising rallies and events. In the great majority of cases these full-time staff are paid, in some way or another, by tax payers. They may be university academics, staff of members of Parliament, employees in non-profit groups funded by the government, staff of local councils, consultants or contractors to public authorities. Occasionally there are even full-time volunteers prepared to devote a part of the life to something they believe in. Good luck to all of these people. It's a democracy, so they are entitled to do it. But campaigns of this kind are no more "natural" or 'spontaneous" than campaigns run by the Urban Taskforce or the Minerals Council.

2. What is the role of a lobbyist?

2.1 Role of lobbyists in NSW

2.1 What role do lobbyists play in NSW?

The issues paper summarises some commentary which distinguishes between lobbyists and consultants.

If this question about the role of lobbyists is answered with reference to the issues paper's definition of lobbying, it becomes very difficult to draw a clear line between "technical consultants" and "lobbyists".

Under the issues paper's broad definition, any person engaged for the purpose of persuading a public official is a lobbyist, irrespective of their expertise. A lawyer undertaking court work is employed to persuade a public official (i.e. a judge) and therefore is a lobbyist under the issues paper definition. Similarly an architect who has designed a now commercial office tower on behalf of a developer and is being paid to present their work to a local council's design review panel is a lobbyist, under the issues paper.

A straightforward answer, then, to your question would be that lobbyists play a *very* wide role in NSW society. While their expertise may vary, they are present in every aspect of political, bureaucratic and judicial decision-making. And so they should be. A democratic government cannot function if it does not listen to people, and people (whether they are individuals, non-profit groups or businesses) must be entitled to employ people to talk to government on their behalf.

2.2 Different roles

2.2 Does this role differ depending on the nature of the issue that is the subject of the lobbying activity?

The role of a lobbyist does differ depending on the nature of the issue.

In a development context, there are many reasons why a development application or a request for a rezoning may be held up. It may relate to concerns about architectural design, urban design, legal issues, ingrained and unjustifiable resistance from some public servants or noisy objections from not-in-my-backyard activists.

A proponent is likely to select a person to represent them based on the issues that need to be canvassed. If the issues are legal ones, than a lawyer may be the best representative. If they concern urban design, then an expert in this area may be appropriate. If the issue is unjustifiable bureaucratic resistance, a person who understands these kinds of public sector organisational issues would be

needed. If the issues are local political opposition (e.g. NIMBYs, local political opponents, etc) then someone who understands the political debate would be appropriate.

On this last point, we would note that **a vast number of development proposals are defeated, not because of any intrinsic problems with the idea, but because of the opposition of existing residents who have a philosophical or vested interest in blocking new development.** We aren't alone in making this observation. It is a political phenomenon that has been observed all over the world and is well documented in academic literature.

Development approval can be described as a "closed system" decision-making process.[9] Such a system is characterised by a defined set of stakeholders that can directly influence the outcome of a decision.[10] Development systems become closed primarily through two factors – the basic preferences of local voting population, who tend to be averse to change, and the planning laws, which tend to magnify the preference of those resident voters.[11] Incumbent business operators, who play an important role for local government at election time, have strong vested interest in mobilising campaigns against new developments that may place them under competitive pressure.[12]

This closed system approach tends to exclude consideration of the interests of future residents, neighbouring local government areas and non-resident third parties.[13] This approach becomes particularly problematic when communities are faced with accommodating innovative development proposals.[14]

By their nature, innovative proposals break from traditional existing patterns of development.[15] Yet, planning procedures give the most weight to participants with an inherent interest in preserving existing development patterns, and the least to the future residents or the beneficiaries of community changes.[16] Growth management and consistency requirements create a presumption against change.[17]

Research has established that implementation of regional land use policies, such as increasing land use mix and residential density along a transport corridor is near impossible unless there is a significant shift in land use planning authority from local government to a higher level organisation.[18] This takes place, in part, to overcome the not-in-my-backyard view that inevitably emerges at a local level. Nonetheless, in democracy, even a regional, state or national government cannot ignore the vocal objections of activists in local communities.

Leslie A Stein, a barrister and former Chairman of the Western Australian Town Planning and Appeal Tribunal and former Chief Counsel to the Sydney Metropolitan Strategy, commented on the subject of 'standards' in his work: *Principles of Planning Law*, published by Oxford University Press.[19] Stein observed that

> In the 'development control process', when an application is made for the commencement of a use and the physical development of land, the goals and assumptions that were integral to the initial [strategic] planning process and that are expressed in the policies are not usually reviewed at this time. This is because the emphasis in development control shifts, to a significant extent, from pure planning considerations to what is politically acceptable, and often an overwhelming criterion for that acceptability is whether what is proposed

[9] S Staley, "Markets, smart growth and the limits to policy", *Smarter Growth* (2001) 201-217.
[10] Ibid.
[11] S Staley and EW Claeys, "Is the future of development regulation based in the past? Toward a market-oriented, innovation friendly framework", *Journal of Urban Planning and Development* (December 2005), 202-213, 203.
[12] A Fels, S Beare and S Szakiel, *Choice Free Zone* (2008) 38.
[13] S Staley and EW Claeys, "Is the future of development regulation based in the past? Toward a market-oriented, innovation friendly framework", *Journal of Urban Planning and Development* (December 2005), 202-213, 203.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid,
[18] Downs, A. 2005, Smart Growth: Why we discuss it more than we do it. *Journal of the American Planning Association. Vol. 71, No. 4, pp. 367-378.*
[19] L Stein, *Principles of Planning Law* (2008).

> is congruent with existing development in that locality; the 'community interest' always appears to be served when the new development fits into the locality. [20]

The reality of government decision-making is that legitimate technical issues favouring an approval are often balanced against political issues favouring refusal. Often this is not apparent on the face of a decision, but there are, nonetheless, many clear examples of this on the public record.

Example 1: Sand quarry at Somersby

For example, in August 2009 the NSW government refused approval to a sand quarry at Somersby involving the extraction, processing and transportation by road of up to 450,000 tonnes of sand a year for a period of 15 years and progressive rehabilitation of the site. The quarry would have supplied construction sand for the Central Coast and the broader Sydney region.

The state government had convened an independent hearing and assessment panel which found that the project could proceed, subject to conditions. However the project was opposed by local MPs, and the Director-General recommended refusal based on "public concern" and "anxiety".[21]

Example 2: Melbourne's Windsor Hotel

In February this year the office of the Victorian Minister of Planning accidently leaked a communications strategy prepared by a ministerial media advisor to a journalist.[22] The document discussed stopping the redevelopment of Melbourne's Windsor Hotel, even though it was expected to receive a favourable report from an independent expert panel commission by the government. The basis for the planned blocking of the development would have been community's views.

Example 3: Sydney City Council

For every two residents of the City of Sydney, five people work in the City. That's 429,000 workers compared to 166,000 residents. On top of this many thousands more visit the City every day and feel a deep and passionate commitment to it. In short, more than any other local government area, the public realm of the City of Sydney belongs to many more people than just its existing residents. Yet the Lord Mayor, Ms Clover Moore, has made her priorities as chair of the Central Sydney Planning Committee clear:

> I speak up for residents. I prepare submissions and advocate for residents affected by developments and construction. My Independent Team of Councillors at the City determines development and shares my commitment.[23]

The chairperson of a committee (charged with deciding development applications of $50 million or more) sees her role as being about the interest of existing residents. The chairperson defines that role in terms of the impact of developments and construction; rather than, say, affordable rents, housing choice, effective utilisation of the state's sunk investment in public transport, reducing congestion across the Sydney metropolitan area, etc.

Example 4: The views of residents are embedded in the planning system

The Land and Environment Court, in *New Century Developments Pty Ltd v Baulkham Hills Shire Council*[24] made the following relevant comments on assessing the impact of development:

> Indeed... it is not difficult to envisage a development which causes such great offence to a large portion of the community that for that reason it ought not to be permitted on town planning grounds ... Such

[20] Ibid 11.
[21] < http://majorprojects.planning.nsw.gov.au/files/38831/Assessment%20Report.pdf> at 16 July 2010.
[22] < http://www.abc.net.au/news/stories/2010/02/26/2830806.htm?site=melbourne&section=news> at 16 July 2010.
[23] <http://www.clovermoore.com/main/?id=9> at 7 July 2010.
[24] [2003] NSWLEC 154 (Lloyd J).

> antagonism would amount to a detrimental social impact ... . [T]here is room for opinions to differ in weighing the same objective criteria. [25]
>
> [A] court would prefer views from residents which are based upon specific, concrete, likely effects of the proposed development. [26]

This decision has been cited and applied many times since by decision-makers in the planning system, including subsequent decisions in the Land and Environment Court. Public opinion is accepted by the planning system as a legitimate input in the planning process, and therefore, business participating in the planning process must be both cognisant public and have staff and/or consultants available skilled at anticipating to, interpreting and responding to public opinion.

Clearly, **the above examples illustrate the need for development proponents to hire people who have expertise public administration and/or the nature of anti-development political campaigns**, in addition to people with expertise in areas such as law, urban design, etc.

2.3 Different roles

2.3 *Are lobbyists needed to provide information to their clients on how to put their case to government or are other sources of information available to clients to enable them to ascertain how to do so?*

This question is curious, because it implicitly assumes that "clients" have the resources to speak to government but only use lobbyists as "sources of information".

The assumption must be challenged. The owner of most businesses cannot do everything themselves. That's why they hire staff and engage contractors. In our industry, individual property developers may have skills in architecture, but that doesn't stop them from hiring an architect to design their building. They're too busy running a business to attend to every facet of every project. If an important part of a business is talking to government, then the chief executive officer or owner cannot do it all him or herself. He or she will hire either an employee or a contractor to do some or all of that talking on their account.

It would be rare that a person is hired as a lobbyist solely for the purpose of providing information. **The most common reason for hiring lobbyists is the need to secure a human resource to undertake time consuming work**. Developers hire lobbyists in the same way they hire architects, town planners, administrative staff, builders and real estate agents. Obviously, if you are going to hire someone to undertake work of liaising with public officials you look for someone who has the qualifications and experience that makes them the best person for the job.

Nonetheless, lobbyists can play an important role in advising their employer/client. For example, a developer from interstate looking to build something in the City of Sydney might have been unaware that the Lord Mayor characterises her role as the Chair of the Central Sydney Planning Committee as primarily being about the concerns of residents. A lobbyist can inform their client of this fact. This will assist the client in understanding the perspective of local decision-makers.

Such information would be available elsewhere. For example, if the interstate developer had the time and the skills to undertake a detailed trawl of the internet using Google he or she may have established that fact themselves. Of course they have a business to run and their time is valuable. They would probably find it much simpler and more cost effective to hire someone who already knew these matters and simply ask them.

[25] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]
[26] Ibid [63]

2.4-2.5 Difference between a consultant and/or a lobbyist

2.4 Is there a difference between representations made by a lobbyist and those made by a consultant or other similar entity?

2.5 Is it possible to distinguish between the role of a lobbyist and a consultant when it comes to representing a client's interests to public officials?

This question is odd, because it seems to overlook the definition the issues paper itself has adopted. Under that definition of "lobbyist", a lobbyist is either a consultant/contractor or an employee who makes representations. The question seems to assume that the world can be divided into lobbyists and consultants. Last time we looked the largest single registered lobbyist was Hawker Britton, who is available for hire as a consultant.

Even if we assume this question is simply talking about "technical" consultants, we don't understand why any such "technical" consultant (if they are making representations to government) would not be a lobbyist under the issues paper definition.

If we're looking to divide the world up into different categories of people who may hired to talk to government, we could distinguish between those who are practicing as members of a recognised profession, versus others. The former would clearly include architects, lawyers, consultant town planners, environmental scientists and the latter might include some former public servants, some former politicians and some public relations practitioners who are not practicing as members of a recognised profession.

If you then wanted to characterise the work of the two different groups you could do so, by reference to the fact that (say) an architect would normally be making representations about the work of his or her own firm. However, a consultant town planner, lawyer and/or expert in public policy would each be making representations to government following an analysis and advice they gave the employer/client. All would, to some extent, be engaged in advocacy.

3. What is the public perception of the role of lobbyists?

3.1-3.3 Public perception

3.1 What is the public perception of the role of lobbyists in NSW?

3.2 What factors have contributed to this perception?

3.3 Do public perceptions differ depending on the background of the lobbyist (i.e. if the lobbyist is a former minister, MP, political staffer or senior public official)?

The word "lobbyist" clearly has negative association in the public mind. However, **the actual work of lobbyists** (as defined by the issues paper), **that is, communicating with public officials to persuade them of the merits of a case, is well understood by the public to be an essential part of a democratic society.**

If someone is described as a "social issues campaigner" they are likely to be viewed more favourably by the public than someone who is described as a "lobbyist", yet their work is the same.

3.4-3.7 Relationship between the perception and subject of the lobbying

3.4 Does the public perception of lobbying differ depending on the subject of the lobbying?

3.5 Do public perceptions differ depending on whether the person being lobbied is a politician or a public sector employee?

3.6 What is the public perception of the way in which lobbyists gain access to public sector decision-makers?

3.7 What factors have contributed to this perception?

Whether or not someone is regarded as "lobbying" and a "lobbyist" will often depend on one's perspective as to the merits of their argument.

If you agree with the lobbying efforts being mounted by a group, you are more likely to describe it as a "grass roots push" or "a campaign". If you oppose the work of the group you are more likely to describe the group or their work as "lobbyists" or "lobbying".

The point is simple. It's not lobbying itself that people object to; it is generally their subjective opinion as to the subject matter that they don't like. Different people will have different perceives as to which subject matter is worthy and which subject matter is not.

In our experience, NIMBY activists will regard all work by developers to highlight their position as "lobbying", but praise their own efforts to mount "community campaigns" as something that is morally superior.

For example, on 12 September 2009, *the Sydney Morning Herald* published two letters to the editor on the Urban Taskforce's lobbying activity:

> **Argument is not with lobbying, but with privileged treatment**
>
> Aaron Gadiel (Letters, September 11) disingenuously misses the point of Elizabeth Farrelly's article ("Clean up this mess: put planning on a pedestal", September 10).
>
> She does not say it is wrong for developers to have a lobby group, but that the closeness and ease of contact - "the seamless connect" - between developers and government shakes public confidence in planning.
>
> Like Gadiel's developer group, our local resident group has democratically convened in order to meet politicians. The difference is that our state representative, Kristina Keneally, refuses to meet us, despite a number of requests and a petition signed by hundreds of her constituents.
>
> Unlike the Urban Taskforce, we cannot offer our members "regular meetings" with state and federal ministers and senior officials. There is no seamless connect between constituents and their elected government.
>
> Graeme Grace Rosebery Residents Action Group, Rosebery

This first letter is actually from a lobby group itself ("Rosebery Residents Action Group"), although we doubt they would describe themselves in that way. Their criticism seems to be that they can't get a meeting with their local MP, and therefore that means there is something wrong with us, a national organisation, meeting federal, state and local public servants and parliamentarians. One proposition does not follow from the other. If they are unhappy with their local MP then they are free to publicly criticise her (as they have done so).

The fact that one local group is unable to meet with their local MP should not, in the assessment of any reasonable person, have any bearing on the appropriateness of the Urban Taskforce meeting officials. In any event, I think they would find that state groups, such as the Local Government and Shires Association and the Total Environment Centre, do have equivalent (or greater) access to officials that we do.

A second letter says:

> Yes, Aaron Gadiel, Elizabeth Farrelly is suggesting it is wrong for property developers to have an industry group, if that group gets privileged treatment from politicians and bureaucrats.
>
> Farrelly is not denouncing meeting politicians. What she is pointing out, as did Justice David Lloyd in his Catherine Hill Bay ruling, is that it is wrong for developers to get preferential decisions before due process on a development has even started.
>
> Elisabeth Goodsall Wahroonga

This letter asserts that our lobbying efforts involve securing "preferential decisions before due process on a development has even started". This is a statement without evidence or support, made only because of the author's apparent distaste for the idea of urban development. We have seen no evidence that we received "privileged treatment from politicians and bureaucrats", when compared with equivalent lobby groups arguing opposing viewpoints. We certainly have never argued for "developers to get preferential decisions before due process" and, despite the suggestion of the letter, Justice David Lloyd has never made an adverse finding against the Urban Taskforce.

These letters are evidence of the fact that at least some negative perceptions of lobbying are not based in any reality, but are motivated by opposition to the subject of the lobbying rather than the process itself. **If you are unable to cogently mount an agreement on the substance of an issue, a time honoured tactic will see you attack the messenger and the process.**

4. What persons and organisations act as lobbyists?

4.1-4.4 Skills or knowledge

4.1 What particular skills or knowledge are required to make a successful lobbyist?

4.2 What factors explain the existence of so many lobbyist entities in NSW?

4.3 What factors explain why so many former politicians and political staffers are engaged as lobbyists in NSW?

4.4 What attributes or skills make former politicians and political staffers valuable as lobbyists?

A lobbyist, as defined by the issues paper, needs to know what they're talking about and have sufficient skills and expertise to do a good job.

This might easily involve legal skills when legal issues are at stake or architecture, urban design skills or town planning when matters of that nature are at issue.

As we illustrated with four examples in section 2.2 above, the decisions in the planning system are often more reflective of public opinion than any objectively measurable criteria. This will therefore often necessitate engaging people who are skilled in anticipating and interpreting community sentiment and sufficiently knowledgeable to understand how decision-makers are likely to respond to that sentiment. As decision-makers in the planning system are often politicians and public servants, former politicians, former public servants and former ministerial advisors are likely to posses such skills.

The number of lobbyists in NSW is merely a reflection of the size and complexity of the NSW economy and the consequent size and complexity of the NSW public sector.

4.5 Corruption risks arising from the use of former politicians and political staffers

4.5 Are there particular corruption risks associated with former politicians and political staffers acting as lobbyists and if so how can the risks be managed?

We are not aware of any adverse corruption findings against any registered lobbyist in NSW. Additionally, there have been no adverse findings against any NSW Government public official (elected or unelected) in relation to an urban development approval in last 15 years.

As a result, discussion of "corruptions risks" in a NSW context will either be speculative or draw parallels from other states or jurisdictions that may not be entirely applicable here.

As a general comment, from our own industry's perspective, with the wide range of check and balances in place at a state level, and the enormous public and media scrutiny of state-level decision-making, we do not see any significant corruption risks arising from the existing planning system at state level.

We do perceive there to be corruption risks at a local government level. The ICAC itself has observed that

> research results indicate that local councils face a wider range of corruption risks than state agencies. ... Local councils also appear less likely to use the management controls that are important to sound corporate governance.[27]

However, our observation of the corruption cases relating to development matters that have come before the ICAC, leads us to conclude that the biggest corruption risks arise when unprofessional individuals buy a single site and try to secure a favourable development approval or rezoning. These individuals frequently end up with sites that have restrictions they didn't anticipate. ICAC inquiry reports are littered with the activities of such small-scale unprofessional developers. For example, the whole ICAC inquiry into corruption at Rockdale Council centred on a tailor, who wanted to turn a site slated for four storeys, into eight storeys.[28] Such individuals are unlikely to be professional enough to hire expert staff, such as former politicians to advise or represent them. We are not aware of any evidence that they have done so.

5. Who are the lobbyists' clients?

5.1-5.2 Skills or knowledge

5.1 What factors determine why certain industry sectors are more likely to engage the services of lobbyists?

5.2 Is the industry sector represented by lobbyists related to the value of decisions that might be made and/or the level of discretion exercisable in making those decisions?

The data only relates to the use of registered lobbyists, which are far more narrowly defined than the definition of lobbyist in the issues paper. In particular, a person who is employed by a firm to lobby on its own behalf is not captured by rules for registered lobbyists, but is captured by the issues paper's much broader description. Similarly, lawyers, architects, town planners, engineers and industry organisations are currently excluded from the definition of lobbyist under the *NSW Government Lobbyist Code of Conduct*.[29] The lobbying of community groups and non-profit organisations such as the Urban Taskforce, the Nature Conservation Council and the Local Government and Shires Association is not included because organisations such as ours generally do not hire consultant lobbyists.

As a result the data focuses on those businesses that are likely to use a consultant lobbyist who is not a member of a recognised profession, rather than businesses that use lobbyists generally. For example, under the issues paper definition of lobbyist, even a lawyer exclusively undertaking court work is regarded as a lobbyist, because they are attempting to persuade a public official (i.e. a judge) of their client's viewpoint. Nearly every sector of the economy requires a lawyer at some point or another.

The data presented in the issues paper does not allow any particular conclusions to be drawn, other than that the nominated industry sectors are mostly likely to come from sectors of the economy that have the most direct contact with the public sector.

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[27] ICAC, *Profiling the NSW Public Sector II: Differences between local and state government April 2010* (2010) 5.
[28] Independent Commission Against Corruption, *ICAC Report: Report into corrupt conduct associated with development proposals at Rockdale City Council* (2002) 14.
[29] cl 3.

6. Who are the people and organisations that are lobbied?

6.1-6.5 Scope of lobbying – state government

6.1 Which ministerial portfolios are most susceptible to lobbying by lobbyists and on what matters are they lobbied?

6.2 To what extent are ministers, ministerial chiefs of staff and other ministerial staff subjected to lobbying by lobbyists and on what matters are they lobbied?

6.3 To what extent are other MPs subjected to lobbying by lobbyists and on what matters are they lobbied?

6.4 To what extent are departmental public officials subjected to lobbying by lobbyists and on what matters are they lobbied?

6.5 What levels of departmental officials are subject to lobbying by lobbyists and on what matters are they lobbied?

Again, assuming we still talking about the definition of "lobbying" in the issues paper – which is very broad - it would seem to us that lobbying is likely to occur in any portfolio where public officials are charged with making decisions that impact on people. That is, all of government.

Lobbying at a ministerial level is more typically going to be confided to the types of decisions Ministers or their direct reportees are likely to make, and will include high public policy decisions as well as major or strategic decisions in particular areas. However, even low level decision-makers may be subjected to lobbying – for example – a community group may lobby a school principal for access to the school hall for community events on the weekend.

6.6-6.9 Scope of lobbying – local government

6.6 To what extent are elected local government representatives (councillors, including mayors) subjected to lobbying by lobbyists and on what matters are they lobbied?

6.7 To what extent are staff of local government councils (including general managers) subjected to lobbying by lobbyists and on what matters are they lobbied?

6.8 Do councillors lobby their own councils and if so should such lobbying be subject to regulation?

6.9 Should the NSW regulatory system for lobbying be extended to cover local government?

Using the broad definition of lobbying and lobbyists in the issues paper it is inevitable that all local councils are subjected to lobbying on a continuous basis.

However, local councils are not as complex as state government, and **it is less likely (in the development industry) for a registered lobbyist to be used to communicate with a local council.**

For example, when a development proponent is dealing with state government on a subject of a major project, it is likely that they will need to deal with a variety of experts across numerous government agencies, such as the Department of Planning, the Roads and Traffic Authority, the Department of Environment, Climate Change and Water, etc. In such circumstances the issues under discussion will be complex and involve different fields of expertise. A consultant (registered) lobbyist may offer generalist skills that allow them to be a constant presence at all of the discussions to be had with government, and co-ordinate government liaison across the various technical consultants employed by the client.

When projects are before local councils, typically they are handled by a very small group of personnel and the fields of expertise are more limited. It will more often be sufficient for a proponent to rely on a consultant town planner, or an architect, to handle most of the liaison.

Nonetheless **we see no reason why the current NSW Government Lobbyist Code of Conduct should not also be extended to local councils.** However, as we will canvass elsewhere in this submission, we do not support a widening of the scope of the Code of Conduct to cover the professions or salaried employees engaged in lobbying activities on behalf of their employer.

7. What matters are subject to lobbying?

7.1 What types of matters are the subject of lobbying in NSW?

The issues paper hypothesises that:

> [i]t is reasonable to expect that the intensity of lobbying may vary according to:
>
> a) the advantage, whether financial or otherwise, likely to be obtained from successful lobbying,
>
> b) the level of discretion afforded to the public official,
>
> c) the possibility of review/appeal of any decision, and
>
> d) the number of participants in the industry.[30]

We do not necessarily disagree with points (a) through to (c). However (d), again, appears to overlook the issues paper's own definition of "lobbying" which is not confined to lobbying by industry. Individuals will lobby government to get their parking ticket withdrawn, to get a beach patrolled by the local council or secure a grant for their local club. None of the people are in an "industry" as suggested by (d).

Similarly, groups such as the Nature Conservation Council, the Total Environment Centre, Save Our Suburbs and the like, would also (we're sure) resent being described as part of an industry. Yet, to this point, the issues paper has not sought to exclude their conduct from the definition of lobbying and no case has been put that their right to lobby is any more legitimate than of the commercial sector.

The issues paper goes onto to say that:

> Consistent with these characteristics, complaints to the Commission and concerns reported by the media in relation to lobbying are more common in the areas of planning, state and regional development, forest and mineral resources and gaming, racing and liquor.[31]

Merely because complaints and concerns in the media are focused in particular areas does not mean that:

- most or more lobbying occurs in these areas; or
- the process of lobbying is substantially different in these areas.

In our submission, the increased rates of complaint reflect areas where the subject matter of the lobbying is more contentious in the community.

Few people will complain in the media or to the ICAC because a community group lobbied a principal to allow it to use the school hall. However, more people are likely to complain because a business lobbied a principal for the use of the school hall. In both instances, the act of lobbying is equivalent. There is nothing morally wrong with either lobbying process. The difference between the two, is that the

[30] ICAC, *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* (2010) 6.
[31] Ibid.

first subject of the lobbying (community use of a school hall) is not particularly controversial, while the second subject (commercial use of a school hall by a local business) will be controversial.

Regretfully, if the principal were to grant both requests (and charge appropriate rent for both) we could expect media (and possibly ICAC complaints) to be critical of both the content of the principal's decision and the mere fact that the private business dared to "lobby" the principal. The fact that the "lobbying" took place will be criticised, when really, the issue should merely be whether or not the principal made a good decision.

We would urge the ICAC to recognise that lobbying in areas where the community is strongly divided (such as urban development policy, liquor policy, gaming policy) are **inherently likely to generate complaints about process. While not all complaints about process are ill founded, often the real gripe of the complainant is with the substance of the decision, rather than the process by which it was made.**

Increased regulation of lobbying will not reduce complaints about process, so long as the community remains divided about the appropriate public policy response to the substantive issues.

8. What corruption risks are associated with lobbying?

8.1 What are the particular corruption risks to which lobbying is susceptible?

8.2 Are some areas of lobbying more susceptible to corruption risks than others?

8.3 Is there evidence of actual corruption associated with lobbying in NSW?

We regard the following as presenting fairly low corruption risks (for the reasons stated):

- *Corruption involving a registered lobbyist.* The registration of lobbyists brings increased media opposition and community attention to the clients of lobbyists. This heightened transparency requires a high level of professionalism by registered lobbyists who wish to keep working in that field. Those that fall short of this standard will be quickly exposed.
- *Corruption involving a member of recognised profession.* While the corruption of town planners and lawyers is not unheard of, corruption risks by members of a recognised profession are lower for several reasons. Firstly, professionals are subject to a formal code of conduct and research suggests such codes reduce the willingness of professionals to engage in corrupt behaviour.[32] Secondly, professionals are educated in ethical practice and, in particular, are taught how to manage and respond to ethical dilemmas. Thirdly, the consequences for a professional who is caught engaging in criminal conduct are severe, and will generally include the loss of their ability to practice their vocation in the future. Generally speaking professionals are subject to elevated regulation akin to that which covers registered lobbyists.
- *Corruption involving a salaried public affairs manager.* A public affairs/government relations manager will generally only be found in the larger, more professionally run businesses. Their businesses are normally sufficiently large that they have a great deal of goodwill attached to their brand and are unwilling to jeopardise it. A salaried public affairs manager has little incentive to engage in criminal conduct in the course of their employment. Such individuals are generally tertiary educated and have experience in the public sector, law or public relations. There is little history of such individuals being named adversely in ICAC proceedings.
- *Corruption involving non-profit organisations, including industry organisations.* Bona fide industry organisations do not speak for individual businesses, but for the industry as a whole. As such, they operate at arm length from day-to-day commercial activities of their members and are not subject to the same commercial pressures their members must undergo. There is little reward, incentive or

[32] J. McKinney and C Moore, "U.S.A. International Bribery: Does a Written Code of Ethics Make a Difference in Perceptions of Business Professionals", *Journal of Business Ethics*, Volume 79, Numbers 1-2 / April, 2008, 103-111.

opportunity for an officer of an industry organisation to engage in corrupt conduct. Most senior staff in industry organisations are tertiary educated with professional backgrounds.

We regard the following as representing a greater risk of corruption than the above-mentioned cases:

- *Corruption involving an unregistered consultant lobbyist.* A person who is predisposed to engaging in bribery or other official corruption is unlikely to be concerned about the niceties of registering as a lobbyist. In fact, such registration, and the scrutiny it brings, would make it difficult to proceed with any intended criminal behaviour.
- *Corruption involving unskilled individuals engaged in business activities they are ill-equipped to carry out.* Based on past ICAC cases it seems to us that the biggest corruption risks arise when unprofessional individuals buy a single site and try to secure a favourable development approval or rezoning. These individuals frequently end up with sites that have restrictions they didn't anticipate. Such individuals are unlikely to be professional enough to hire expert staff to advise or represent them. We are not aware of any evidence that they have done so.

We note this statement in the issues paper:

> Lobbyists often provide public officials with information to try to persuade them of the value of the interest they represent. This provision of knowledge and information might create a sense of obligation, which in turn can lead to undue influence. Thomas Susman has described this psychological phenomenon associated with lobbying as based on the "reciprocity principle".[33]

Frankly, we find this statement very strange. It seems to suggest that better informed lobbyists present a greater corruption risk than ignorant lobbyists. Even if this was true, such a correlation does not mean there is a causal relationship between these two factors.

It is true that developers may respond to the initial opposition of some decision-makers by providing high quality information. This may include improved information about developments, through additional traffic, environmental, economic or social studies. Surely this is a good thing? Surely the kind of lobbying that is to be recognised as beneficial is the lobbying that imparts good information?

In relation to the Urban Taskforce we are proud of the fact that our work is centred on the principle of collecting and publishing good information. This involves making available detailed submissions and reports that analyse available economic information, social changes and the application of the planning law. In our view, **the best kind of lobbying is one that is based on reasoned logic, backed up by strong evidence and factual information.**

It is illogical to suggest, as the issues paper does, that a lobbyist who demonstrates the truth of their assertions with high quality factual information about either the project, or what's going on (in say the planning system) **presents any form of corruption risk.** On the contrary, such a lobbyist would be adhering to a best practice standard, if such a thing exists.

[33] ICAC, *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* (2010) 14.

9. What is the current NSW regulatory system?

9.1 Are there any other rules, guidelines or procedures that seek to regulate lobbying in NSW?

Generally, the text of the issues paper presents a fair summary, with one notable omission.

Many critics of the lobbying process seek to draw links between political donations and government decisions.

The NSW government banned political donations from large, professional property developers in December last year.[34] The NSW law applies to state and local council elections and also bans property developers or their "close associates" from paying to attend political fund-raising dinners.

Professional property developers respect the law and, as a result, they no longer have any role in financially supporting political parties in NSW.

10. What are the weaknesses of the current NSW regulatory system?

10.1 Do you disagree with any of the weaknesses identified above and if so, why?

We find it surprising that the issues paper should flag "weaknesses" in the current system of registered lobbyists in the absence of any wrong-doing by any registered lobbyist.

We will briefly comment on each of the "weaknesses" identified in the issues paper.

Ministers to be informed of contact between government representatives and registered lobbyists

The issues paper highlights a recommendation by a parliamentary committee:

> That the Premier strengthen the NSW Lobbyist Code of Conduct to require that each minister is informed at regular intervals of contact between government representatives and registered lobbyists.

What would be the purpose of such a provision? It is not, and should not be, the role of ministers to forbid or regulate their public servants contact with individual proponents or their chosen representatives. In particular, there is already a mechanism for lobbyists to be removed from the register in circumstances where they do not comply with the code of conduct. It is therefore difficult to understand why a minister should be apprised of routine meetings between public servants and a lobbyist who has adhered to the code of conduct.

We are concerned that generating such report for a minister enables a minister to instruct public servants to meet or not meet certain lobbyists or groups on political grounds. For example, a registered lobbyist who is not regarded as a political ally of a minister may find it difficult to secure meetings with a department because of a quiet word the minister has had with their agency head, following the receipt of such a report.

This isn't a fanciful idea. The current Environment Minister, Frank Sartor, who we had some disagreements with in the past, has said this on the record:

> The Urban Task Force is just concerned with short-term greed ... **It should be black-balled.** They're the non-violent equivalent of a terrorist organisation (bold added).[35]

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[34] *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW) commenced on 14.12.2009.
[35] "Profile: Frank Sartor on being NSW's most hated man", *The Punch*, 15 October 2009 <http://www.thepunch.com.au/articles/profile-frank-sartor-on-being-nsws-most-hated-man/> at 17 July 2010.

The reality is, Mr Sartor was unhappy with the Urban Taskforce because we publicly criticised some decisions he made. In doing so we were exercising our democratic rights. If Mr Sartor is given the formal power to regulate who his Department does or doesn't meet, we could anticipate that he might carry out his threat and "black-ball" us. **Such a decision would have a chilling effect on the right of any industry organisation or individual lobbyist to say what they think in the public arena.**

Similarly a minister might seek to black-ball lobbyists who have been associated with the Opposition in the past (such as former politicians). This would also be inappropriate and undesirable.

Regular report on registered lobbyist meetings to be published

The issues paper highlights a recommendation by a parliamentary committee:

> That the Premier strengthen the NSW Lobbyist Code of Conduct by publishing a report on the internet at regular intervals detailing contact between government representatives and registered lobbyists. The report should include the name of the lobbyist, date of contact, meeting attendees (if applicable) and issues discussed.

The NSW Department of Planning's *Meeting and Telephone Communications – Code of Practice* already provides that:

> The Department of Planning will disclose all meeting or telephone interactions with registered lobbyists (including names of the people, organisations they represent and the number of meetings or phone calls) in relation to any specific planning proposals and/or development matters in an attachment to the relevant reports which are available online.[36]

Any further measures risk reducing the opportunity for meetings to take place between the private sector and government officials on politically controversial matters. Meetings are not, and should never be considered, a bad thing. Public sector organisations cannot function without meeting people. Yet, if the opponents of controversial developments are given the opportunity to publicly attack public servants every time they dare to meet with applicants, then few public servants will be willing to be involved in such meetings.

Frankly, a meeting in the offices of a state government agency, with public servants present to discuss a major project is highly unlikely to present any serious form of corruption risk. No incidence of corruption of any meeting of this kind has been identified by the ICAC over the past 15 years.

Protocols for meetings

The issues paper highlights a recommendation by a parliamentary committee:

> 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.

We note that, since this recommendation has been made, the Department of Planning has introduced the *Meeting and Telephone Communications – Code of Practice*. The Code is currently confined to the Department of Planning.

We have two observations from the first six months of operation of the code of practice.

Firstly, some of the provisions of the code of practice merely reflect common practice and there was no harm in formalising them. There would also be no harm in extending such common practice provisions across government generally. The common practice provisions are the requirement that at least two officials are present at a meeting and that meetings take place within government premises are reasonable.

[36] <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=oo8oz0dEUll%3D&tabid=95> at 17 July 2010.

Secondly, some of the provisions of the code of practices require significant administrative work for the most minor of contacts. For example, a phone call requires the preparation of a file note. These additional processes have increased the reluctance of some public servants to have contact with the private sector because of the additional paperwork each contact creates. Regretfully, there are some individuals within public sector, who have always sought to avoid dealing with the private sector directly and the additional paperwork that such contact now entails in the Department of Planning has made this situation worse.

Lack of definition of "lobbying" or "lobbying activities" in the NSW Lobbyist Code

This issues paper is mistaken when it asserts there is no definition of "lobbying" in the Lobbyist Code of Conduct.

A "lobbyist" is defined to mean

> 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.[37]

That is, lobbying is representing the interest of a third party to government. This adequately defines what lobbying is.

The definition of "lobbyist" in the Code has a number of exclusions

The issues paper observes that:

> The definition of "lobbyist" in the Code has a number of exclusions such as in-house lobbyists, lobbyists from peak bodies, religious or charitable organisations, and some professions including doctors, lawyers and accountants.

It is true that there are exclusions from the code:

> "Lobbyist" does not include:
>
> (a) an association or organisation constituted to represent the interests of its members;
>
> (b) a religious or charitable organisation; or
>
> (c) 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. [38]

Before any widening of the application of the code is considered it is important to take into account at least four of the NSW Government's seven better regulation principles:

- 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.[39]

To briefly evaluate any proposal for an extension of the code to cover excluded areas in these terms, we would suggest that:

- The need for government action has not been established. There is little modern history of corruption of public officials by or through the excluded groups (industry groups, non-profits generally, professionals such as lawyers, etc). Furthermore, professionals themselves are already subject to a

[37] Department of the Premier and Cabinet, *NSW Government Lobbyist Code of Conduct* (2009) [3].
[38] Ibid [3].
[39] <http://www.betterregulation.nsw.gov.au/better_regulation_requirements> at 17 July 2010.

separate scheme of government and professional organisation regulation, which the *NSW Government Lobbyist Code of Conduct* would merely duplicate. The corruption risks from this group are low (see section 8).

- The objective of government action is not clear. It is difficult to envisage what would be achieved by extending the code to the excluded groups. It seems, for example, that a person wanting to offer a bribe to a public official is less likely to do it in front of his or her lawyer. The risk is more likely to arise at a meeting when the lawyer is not present. Similarly, an industry group would have no interest in being involved in advancing the commercial interests of only one of its members (given that its members generally compete with each other) by corrupt or other means.

On the subject of so-called "in-house" lobbyists, we have difficulty in working out how you could possibly define this role without capturing everyone who, in the course of their working activities, talks to government. Titles typically held by people who talk to government as part of their role are wide and varied and include:

- Managing Director;
- Chief Executive Officer;
- Chairman;
- General Manager (Corporate Affairs)
- Executive Director (Communications);
- Public Affairs Manager;
- General Manager (Government Relations);
- Executive Director (Public Policy);
- Director (Community Affairs);
- General Manager (Operations);
- General Manager (Approvals);
- Manager; and
- Business Development Manager.

Describing an "in-house" lobbyist by their title (the form) will be pointless and will be easily circumvented. Describing an "in-house" lobbyist by substance, for example, by use of the issues paper definition, will capture a very, very large number of business people in a very, very large number of businesses who all have regular dealings with government. This information would swamp the process. What would be the gain? The fact that companies talk to government has never been an issue and the mere carrying out of meetings does not suggest a risk of corruption itself. The logic of the lobbyist register is to promote transparency, so that it is clear which lobbyists are acting for which parties. That is not an issue when the Managing Director of a company turns up for a meeting with a minister and hands across his or her business card.

At times the fact that meetings have taken place between government and private sector proponents has, itself, been raised as evidence of wrong doing. So much so, that in one well-known inquiry, the ICAC saw the need to explain that

> [t]here is of course nothing wrong with anyone organising or attending a presentation on a proposed project. There is no evidence to suggest that anything that was done in organising the attendance of Government Ministers at the presentation was improper or that anyone acted corruptly.[40]

We urge the ICAC to stand by this previously articulated principle when considering in response to the issues paper.

[40] ICAC, *ICAC Report: Report on investigation into conduct concerning the Woodward Park project* (2003) 27.

We do not support the extension of the *NSW Government Lobbyist Code of Conduct* to currently excluded groups.

It is worth highlighting the threat to free expression if industry groups, such as the Urban Taskforce, were to be subject to a system of government registration and regulation in order to be able to meet with public officials.

Such a system would create an opportunity for a government to control the affairs of (and make decisions adverse) non-government organisations. These organisations are essential to the normal operations of a democratic civil society.

We note that, from time-to-time, relationships between governments and industry groups can and do seriously deteriorate. We have already quoted (above) the Environment Minister's comments about our own organisation. For other examples, we would highlight comments made by the former Prime Minister Kevin Rudd. In relation to the Minerals Council of Australia's campaign against the mining super tax Mr Rudd said that the government has a "long memory".[41] In relation to another industry group which was critical of Labor industrial relations policy, the Australian Chamber of Commerce and Industry (ACCI) Mr Rudd (in September 2007) said:

> ... I've said to [business leaders] quite bluntly and directly, don't expect for us to treat [ACCI chief executive] Mr Hendy as some bona fide independent spokesman for an industry organisation, we all know he's an extension of the Howard political office.[42]

Any regime that allows government to initiate deregistration-style proceedings against any industry group would allow the government to threaten to blacken a group's reputation and discourage frank and fearless public criticism of government policy.

State owned corporations and local councils

The issues paper observes that:

> The NSW Lobbyist Code and related memoranda that comprise the NSW regulatory regime currently do not apply to state owned corporations (SOCs), local council officials or councillors.

Provided the scope of the *NSW Government Lobbyist Code of Conduct* is not broadened, we see no reason why it shouldn't be extended to state owned corporations and local councils.

The definition of "Government Representative" in the Code

According to the issues paper:

> The definition of "Government Representative" in the Code does not include MPs who are not ministers or parliamentary secretaries. These are included by virtue of Memorandum M2009-03

Under the memorandum referred to:

> All Ministers, Parliamentary Secretaries, Ministerial staff, staff working for a Parliamentary Secretary, staff of public sector agencies and Government Members of Parliament and their staff must comply with the Code.[43]

We are concerned at any suggestion that the code should be extended to cover parliamentarians who are not part of executive government, and in particular, members of an opposition.

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[41] <http://www.theaustralian.com.au/news/opinion/say-werent-you-left-wing/story-e6frg6zo-1225887103691> at 17 July 2010.
[42] <http://www.abc.net.au/news/stories/2007/09/19/2037333.htm?site=news> 17 July 2010.
[43] Premier's Memorandum: *M2009-03 Lobbyist Code of Conduct and Register,* <http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/2009/m2009-03_lobbyist_code_of_conduct_and_register> at 17 July 2010.

The *NSW Government Lobbyist Code of Conduct* allows executive government to black-ball lobbyists. This power could be abused if individuals, who are professional lobbyists, or their clients, are out of favour with the government of the day.

The risks of abuse would be compounded if the government was able to regulate access to opposition parliamentarians through denial of registration.

Under the Code, oversight is conducted by the Director-General of the Department of Premier and Cabinet

The issues paper highlights the oversight of the NSW Government Lobbyist Code of Conduct conducted by the Director-General of the Department of Premier and Cabinet, rather than an independent body.

We would favour a right of appeal being made available to any person adversely affected by a decision of the Director-General to the Administrative Decisions Tribunal.

11. What are the current regulatory systems in other States and the Commonwealth?

11.1 Are there any other rules, guidelines or procedures in other Australian jurisdictions that seek to regulate lobbying that should be considered?

11.2 Is it desirable that regulatory regimes be harmonised across Australian jurisdictions, how should this occur and what should be the coordinating authority?

We have no specific comment on these matters.

12. How do regulatory systems operate in other countries?

12.1 Are there any specific features of regulatory systems in other jurisdictions that should be considered in NSW?

12.2 How should a regulatory scheme operate?

We have no specific comment on these matters.

13. What should be the guiding principles of any regulatory scheme?

13.1 Is it desirable that any regulatory system be based on broad, paramount guiding principles? If so, what should these principles be?

The existing *NSW Government Lobbyist Code of Conduct* includes a provision making it clear that the code

> does not serve to restrict contact in situations where the law requires a Government Representative to take account of the view advanced by a person who may be a Lobbyist. [44]

In environmental and planning context, the principles of administrative law will frequently require a decision-maker to accord procedural fairness to an applicant, land owner or objector, notwithstanding the fact that the individuals chosen representative may or may not be acceptable to any regulatory regime for lobbyists. Additionally, many environmental and planning laws set out statutory consultation processes which can create obligations on a decision-maker to consider representations made.

[44] cl 2.2.

The code currently seeks to regulate the forms of communication that would be essential for a person to be ensured a fair hearing in any matter requiring procedural fairness or proper consultation, including telephone contact, electronic mail contact, written mail contact and face-to-face meetings.[45]

Should the ICAC recommend a statutory scheme, (and particularly if the recommended statutory scheme has a wider application that the current code) it will be crucial that the existing obligations on public officials to accord procedural fairness, consult and consider matters are not weakened. In our view, there are some public officials who would welcome the opportunity to avoid having to consider concerns raised by developers – any scheme of regulation for lobbyists should not set up a regime which would allow such officials to escape the need to properly deal with matters that come before them.

That is, **the existing principle that ensures lobbying regulation does not derogate from the legal obligation on decision-makers to accord procedural fairness, consult and consider representations, must remain.**

14. If lobbyists are regulated should they be self-regulated, regulated by government or a combination of both?

14.1-14.6 Advantages and disadvantages of self-regulation

14.1 What are the advantages and disadvantages of self-regulation?

14.2 Is there evidence that mandatory regulation is required to achieve desirable standards of transparency, accountability and fairness?

14.3 If codes of conduct are to form part of the regulatory system should compliance be mandatory and if so how should this be monitored and enforced?

14.4 If legislation is to form part of the regulatory regime what should it cover?

14.5 If legislation is to form part of the regulatory regime to what extent should the Queensland Integrity Act 2009 and the Canadian Lobbying Act be considered as models and what provisions in those Acts should be considered for adoption in NSW?

14.6 Are there any other legislative regimes that should be considered for adoption in NSW?

We have no specific comment on these matters beyond the comments we have already made in this submission.

14.7 Planning and development

14.7 Do some types of lobbying activity (e.g. in relation to planning and development) pose a greater risk than others to the extent that there is a need for different levels or types of regulation?

It's clear that in any field where government decision-making is highly discretionary and subjective will pose greater corruption risks than areas where there is limited discretion.

The modern planning system was created, in part, as a response to protests and civil disobedience campaigns of the 1970s. The planning system attempted to create a more ordered system for taking into account the public's opinion of new development proposals. This aspect of the planning system has been entrenched (see section 2.2 above for more detail).

[45] cl 4.2.

For this reason, many of the rules and prohibitions inherent in the planning system have no objective basis. They were introduced as either:

- a consequence of public opinion; and/or
- the ideological or philosophical disposition of various decision-makers,

at the time that the rule was made.

In the *Principles of Planning Law* Stein observed that

> The object of town planning is the implementation of a plan to carry out goals that encapsulate and describe idealised future states. The goals reflect ideological orientations ... It is tempting for all regulators to speak of a 'sustainability agenda' because it summarises a set of indisputable goals ... the difficultly in the precise formulation of it components is secondary to the sentiments it evokes. ... [I]t is difficult to describe the 'policy' of planning: goals and values, in words of clear expression.
>
> Planners still envisage themselves to be agents of social change but their agenda of economic sustainable development or New Urbanism depend upon effective implementation in legal instruments. Unfortunately, the devices of the regulatory system are primarily designed as a means of control restriction and permissibility. The implementation of planning agendas by restriction does not necessarily encourage and promote; it often prevents and denies.[46]

Such rules and prohibitions lack rigour. Unsurprisingly they can come under challenge when either:

- public opinion changes;
- the market demand for new development changes (e.g. the emergence of widespread consumer demand for apartment living in Sydney); and/or
- the social and economic costs of a given restriction or prohibition have increased or have become more apparent.

The social and economic costs of rules originally imposed for subjective reasons often involve:

- inefficient use of public infrastructure;
- increased motor vehicle use;
- increased congestion;
- reduced competition in the retail sector;
- reduce competition amongst land owners to sell potential development sites to developers;
- an inadequate supply of housing;
- higher residential, retail and commercial rents; and
- lack of housing affordability.

For this reasons planning decisions are subjective and will vary depending on how a decision-maker decides to weight the criteria used. The Land and Environment Court itself recognised this reality when it observed that:

> [T]here is room for opinions to differ in weighing the same objective criteria. [47]

As long as public opinion or ideology is a guiding factor in setting planning rules and assessing projects against those rules, a high level of subjectivity will inherently exist in the system. This necessarily means the discretionary nature cannot be eliminated. It also means that rules will continue to be fluid because **rules set by reference to public opinion or ideology will not stand robust scrutiny in the long run if/when it becomes apparent that they carry high social and economic costs.**

[46] L Stein, *Principles of Planning Law* (2008) 87-12.
[47] *New Century Developments Pty Ltd v Baulkham Hills Shire Council* [2003] NSWLEC 154 (Lloyd J) [60]

For example, rules prohibiting apartment development, or only allowing low-rise apartment development, within the walking distance of high quality public transport services in Sydney are generally not tenable in a public policy sense. Ultimately such rules are likely to be set aside, as the costs of not doing so become increasingly apparent.

Similarly, formal and informal "urban growth boundaries" designed to prevent the outward expansion of major cities generally come under extreme pressure. This is because many members of the community are not truly prepared to give up on the idea of owning a detached house with its own backyard. Urban growth boundaries eventually place intolerable price pressure on their form of housing.

It will be the Urban Taskforce, and individual developers, who highlight the social and economic costs of such arbitrary prohibitions to both government and the community. This has and will continue to contribute to a process where such rules are gradually revised to reflect modern community needs.

For this reason, the fact that planning rules are not stable and are subject to reasoned-argument and regular departure is evidence of the haphazard nature of existing rules and the inability to withstand robust scrutiny when high quality development proposals are put forward.

Rigid rules are the enemy of good urban outcomes. The quote the *Principles of Planning Law* again:

> The tendency towards rigid enforcement of rules expressed as development standards is perhaps the most frustrating and destructive aspect of planning.[48]

Clearly, "lobbying" is a process that allows this robust scrutiny to take place and rigid rules to be varied. It is nonetheless an essential part of the process. Rules that prevent or reduce lobbying or limit the discretion of decision-makers to approve development, prevents necessary scrutiny being applied to arbitrary or unjustified restrictions and prohibitions.

On the other hand, **planning rules that limit the discretion of decision-makers to refuse development, and in particular limit the ability of decision-makers to make rules or refuse development by reference to public opinion, are likely to reduce the need for lobbying, reduce discretion and therefore reduce perceived corruption risks.**

14.8 Different levels or types of regulation

14.8 Is there a need for different levels or types of regulation depending on the type of lobbyist involved (e.g. external contracted lobbyist, in-house lobbyist, interest group lobbyist, employee or employer group lobbyist)?

In section 10.1 above, we expressed the view that the extension of the *NSW Government Lobbyist Code of Conduct* to currently excluded groups was inappropriate. In addition to our earlier comments, we have some additional points.

The Urban Taskforce as an industry organisation has a strong public advocacy role. We share feature with many other groups, including the Minerals Council and the Australian Chamber of Commerce and Industry.

Our work in the public arena is a mechanism by which the people working in the urban development industry may exercise their right to free speech and be heard in democratic debate. We do not lobby on behalf of individual companies in relation to their individual projects. While, from time-to-time we do cite well known projects as part of case studies, they may be the project of companies that are not members of the Urban Taskforce, and, in any event (whether a member or not) no payment to us is sought or given in relation to a project used a case study. All members pay the same membership fee and all potential members, prior to joining, are advised that we will not lobby for individual projects.

[48] L Stein, *Principles of Planning Law* (2008) 76-77.

Should the ICAC consider extending any form of regulation to groups such as ourselves, it is vital that the regulation does not interfere with our right to speak freely and frankly on government policy in the public arena. It is also vital that the public sector is not given legal powers that can be misused to sanction groups that have fallen out of favour with officials because of criticism levelled at the government.

For example the *NSW Government Lobbyist Code of Conduct* (which currently does not apply to industry groups) says that lobbyists must not

> cause or threaten any detriment ...[49]

This word "detriment" is undefined. Most politicians and public servants feel that we cause them detriment whenever we publicly criticise their decisions and/or policies. Would such conduct therefore place us in violation of the code, were it to apply to us? **Prohibiting us from exposing poor public policy to the wider community is contrary to the interest of good government.** Clearly, some people will dispute our viewpoint, but this is not a reason to deny us from speaking out. Indeed, the wider community is intelligent enough to evaluate our augments (and those who argue against us) and make their own decisions.

Earlier this year, in *Citizens United v Federal Election Commission*[50], the United States Supreme Court had an opportunity to consider the constitutional validity of statutory provisions that limited the ability of corporations to engage in political expression.

In this case, a United States law prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate.[51] The law was set aside by the US Supreme Court on the grounds that it violated that country's constitutional right to freedom of expression. We make reference to this case, not because US constitutional law is directly transferrable to NSW (it clearly isn't) but because some important policy questions were considered by the Court and their conclusions are relevant to any regulatory system you might wish to recommend for this state.

For example, if the ICAC recommended that it be unlawful for an unregistered lobbyist or industry group to communicate their objections to a proposed or actual government decision, either privately or publicly, the right of that party to freely express their views would be overridden. We note that the current non-statutory code of conduct does not do this, but that a statutory code with criminal sanctions might have this effect.

The Supreme Court found that the corporate expenditure ban had a "chilling effect".[52] Any speech arguably within the reach of rules created for regulating political speech is chilled. The regulatory scheme at issue may not have been an outright prohibition on speech in the strict sense. However, given its complexity and the deference courts show to administrative determinations, a speaker wishing to avoid criminal liability threats and the heavy costs of defending against enforcement by the regulator must ask a governmental agency for prior permission to speak. The restrictions thus function as a restraint, giving the regulator power analogous to the type of government practices that the constitutional right to freedom of speech was drawn to prohibit.[53]

The Court also found that speech is an "essential mechanism of democracy".[54] It is the means to hold officials accountable to the people - political speech must prevail against laws that would suppress it by design or inadvertence.[55] Laws burdening such speech are subject to strict scrutiny, which requires

[49] cl 7.1(a).
[50] 558 US 50 (2010).
[51] 2 USC §441b.
[52] *Citizens United v Federal Election Commission* 558 US 50 (2010), 17.
[53] Ibid 12-20.
[54] Ibid 23.
[55] Ibid.

the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."[56]

The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers.[57] There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavoured speakers.[58]

The Court observed that the American constitutional right to freedom of speech was inconsistent with a law that bans political speech because the speaker is an association with a corporate form. Political speech is "indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation."[59]

In the Court's opinion, the rationale for treating corporations differently from individuals (to prevent corporations obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace) did not stand up to scrutiny.[60] Freedom of speech does not depend on the speaker's "financial ability to engage in public discussion."[61]

Distinguishing wealthy individuals from corporations based on the latter's special advantages of, e.g., limited liability, does not suffice to allow laws prohibiting speech.[62] It is irrelevant that corporate funds may have little or no correlation to the public's support for the corporation's political ideas.[63] All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech.[64] The law was struck down because it was held that a probation on free expression by corporations was censorship; vast in its reach, suppressing the speech of both for-profit and non-profit, both small and large, corporations.[65]

We would urge the ICAC to be mindful of the above policy issues. **Any regime that made particular forms of communication with public officials or the wider community unlawful would, unquestionably, be an erosion of the principles of freedom of speech.** We note that the current not-statutory code cannot and does not interfere with freedom of speech because it cannot make any conduct unlawful, and subordinates itself to the existing law.

15. How should the term "lobbyist" be defined in a regulatory system?

15.1 Should the definition of lobbyist extend beyond those representing third parties and include entities such as public affairs consultancies, law firms, non-government organisations, think-tanks, corporate lobby units, in-house lobbyists, and trade associations?

15.2 Who should be excluded from the definition?

15.3 What form of words should be used to describe the type(s) of lobbyist that should be subject to the regulatory system?

In section 10.1 above we expressed the view that the extension of the *NSW Government Lobbyist Code of Conduct* to currently excluded groups was inappropriate. We also provided significant additional commentary on this matter in section 14.8 above.

[56] Ibid.
[57] Ibid 24.
[58] Ibid.
[59] Ibid 33.
[60] Ibid 35.
[61] Ibid 34.
[62] Ibid 34-35.
[63] Ibid 38.
[64] Ibid 37-38.
[65] Ibid 39.

16. Should those who are lobbied be included in the same regulatory regime as that applying to lobbyists?

16.1. What are the advantages and disadvantages of including those who are lobbied in the same regulatory regime as that applying to lobbyists?

We have no comment on this matter, other than to highlight the "chilling effect" on free speech (see section 14.8) and the need for public officials to hear criticisms of the proposed or actual decisions.

17. Should restrictions be placed on former ministers, ministerial staffers, MPs and public servants acting as lobbyists?

17.1 Should former ministers, ministerial staff, MPs and other public officials be restricted from acting as lobbyists for a period of time after leaving public sector employment and if so for how long?

17.2 Should former ministers, ministerial staff, parliamentarians, and other public officials be restricted from lobbying in relation to matters they dealt with when in the public sector?

17.3 Should former ministers, ministerial staff, parliamentarians, and other public officials be restricted from lobbying public officials they dealt with when they were in the public sector?

17.4 Should any other restrictions be placed on former ministers, ministerial staff, parliamentarians, and other public officials acting as lobbyists?

17.5 How should any restrictions be monitored and enforced?

In section 2.2 above we explained how public opinion and ideology is accepted by the planning system as a legitimate input in the planning process. Therefore, businesses participating in the planning process must have staff and/or consultants skilled at, anticipating interpreting and responding to public opinion and ideological arguments. We provided examples illustrating the need for development proponents to hire people who have expertise in public administration and/or the nature of anti-development political campaigns, in addition to people with expertise in areas such a law, urban design, etc.

If the intent of any regulation is to make people with such skills unemployable in the development industry it will not only be unjust for them, but it will make it harder for developers to anticipate and respond to community objections to development proposals.

18. Should lobbyists be prohibited from organising or arranging the organising of fund raising activities and campaigns for MPs, local councillors, political candidates or political parties?

18.1 What if any restrictions should be placed on lobbyists organising or arranging the organising of fund raising activities and campaigns for MPs, local councillors, political candidates, or political parties?

18.2 How should any restrictions be monitored and enforced?

We have no comment on this matter. The Urban Taskforce does not, and never has, carried out fundraising activities for any political party, etc. We are a non-partisan organisation.

19. Should lobbyists be prohibited from serving on government committees or boards?

19.1 Should lobbyists be banned from holding government-funded positions?

19.2 If not banned from holding such positions, what controls, if any, should be put in place to manage conflicts of interest and how should these be overseen?

If the definition of lobbyist is extended to include current excluded groups it will not be practicable to exclude such a wide range of people from government committees or boards. For example, the Chief Executive of the Urban Taskforce, Aaron Gadiel, is an (unremunerated) member of the Minister for Planning's Implementation Advisory Committee, as are a large number of other industry group representatives. Such committees could not function without the involvement of industry groups.

Similarly, so called in-house lobbyists will often include senior executives in major businesses who would and do have a lot to contribute on government board and committees. They should not be precluded from carrying out this role merely because they also talk to government separately on behalf of their business.

20. Should giving gifts or other benefits be banned?

20.1 Should lobbyists be prohibited from giving gifts or other benefits to those they lobby?

This matter is already dealt with by the codes of conduct to which all public officials are subject. They generally forbid bribery and the receipt of gifts that could give rise to a conflict of interest.

21. What information should be disclosed by lobbyists?

21.1 Should lobbyists be required to disclose to a regulator who they lobbied, when they conducted the lobbying, and the matter on which they lobbied?

21.2 What, if any, financial information should lobbyists be required to disclose to a regulator?

21.3 Is there any other information lobbyists should disclose about themselves, their clients or their activities?

21.4 When should lobbyists be required to disclose information to a regulator? Should there be different timelines for disclosure depending on the type of information disclosed?

21.5 To what extent should information disclosed by lobbyists be made public?

21.6 Are there particular types of information that should be publicly disclosed to make the activities of lobbyists more resistant to corrupt conduct?

21.7 At what stage should information be made public?

21.8 What format would best allow publicly disclosed information to be easily accessed, compared and analysed?

We dealt with this issue in section 10.1.

22. What information should be disclosed by those lobbied?

22.1 Should public officials who are lobbied by a lobbyist be required to record information about that activity?

22.2 If so, what information should be recorded and how should it be recorded?

22.3 At what stage in the lobbying process should public officials be required to disclose information and to whom should they disclose it? Should there be different timelines for disclosure depending on the type of information disclosed?

22.4 To what extent should information disclosed by public officials be made public?

22.5 Are there particular types of information that should be publicly disclosed to make the activities of lobbyists and the public officials who are lobbied more resistant to corrupt conduct?

22.6 Would it be possible to impose a uniform format for public disclosure so that information recorded by public officials can be more easily compared and analysed?

22.7 At what stage should information be made public?

22.8 How should the public be able to access any publicly available information?

We dealt with this issue in section 10.1.

23. Should lobbyists be able to charge a success fee?

23.1 To what extent is payment of success fees prevalent in NSW?

23.2 Do success fees pose a potential corruption risk?

23.3 Are success fees likely to create perceptions of corruption?

23.4 Should payment of success fees to lobbyists be banned?

23.5 How should any ban be monitored and enforced?

23.6 If payment of success fees is not banned should they be subject to public disclosure?

We have no comment on this matter.

24. What roles are there for training and education and who should undertake those roles?

24.1 Should training be available or mandatory for public officials, and if so what matters should be covered by the training and who should be responsible for providing it?

24.2 Should training be available or mandatory to lobbyists, and if so what matters should be covered by the training and who should be responsible for providing it?

We have no comment on this matter.

25. How should any regulatory regime be overseen?

25.1 Who should be responsible for overseeing lobbying?

25.2 Should the oversight body be independent?

25.3 What powers should the oversight body have?

25.4 What sanctions should apply for breaches of the regulatory regime?

25.5 How should sanctions be imposed?

25.6 Who should impose/enforce sanctions?

We do not object to the continued administration of lobbyist regulation by the Director-General of the Department of Premier and Cabinet, provided there is a right of appeal available to any person adversely affected by a decision of the Director-General to the Administrative Decisions Tribunal.

26. What mechanisms should exist to regularly review the functioning and effectiveness of the regulatory regime?

26.1 Who should be responsible for reviewing the regulatory regime?

26.2 Should reviews be conducted on a mandated regular basis or only if a particular issue warranting review is identified?

We have no comment on this matter.

27. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

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