Urban Taskforce
AUSTRALIA

10 August 2010

Mr Roy Waldon
The Solicitor to the Commission
ICAC
GPO Box 500
Sydney NSW 2001

Dear Mr Waldon

Re: Supplementary submission in response to
"Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW"

Thank you for the opportunity to appear before the Commission yesterday following the release of the above paper. There are several matters that we wish to raise to supplement both our previous submission and the evidence I gave yesterday.

1. Public reporting of meetings

The Commission appears to be seriously contemplating requiring all meetings with public officials to be publicly disclosed at the time of, or soon after, the meeting has taken place.

We agree with evidence given by other witnesses to your inquiry that this may raise some commercial-in-confidence issues.

However there are four other issues that also should be considered.

Firstly, ministers frequently meet members of the community, including businesses, who are complaining about (or express concern with regard to) the policies, practices or decisions of a government agency under the minister's supervision. Applicants for approvals, licences, etc are often cautious about approaching ministers directly, because public servants can react poorly if they feel that a proponent is 'going over their heads'. Nonetheless, such approaches are sometimes necessary when it becomes apparent that officials are biased, failing to take into account important issues (or taking into account irrelevant issues), etc. Public reporting of meetings will reduce the likelihood of businesses seeking meetings with ministers in these circumstances. Such businesses (fearing retaliation by a government agency once they become aware that a meeting has taken place) will be less likely to disclose information to ministers about problems in their department. **Routine public disclosure will lead to a "chilling effect" on the flow of negative information about the performance of a government agency from the private sector to government.**

Secondly, in the development context, ministers and other public officials will often meet with both proponents and objectors. If all of these meetings were routinely disclosed prior to a decision being made, it could be anticipated that, when a proponent has a meeting, campaigners against the development will issue press releases and attack the government or public officials for allowing the meeting. The proponent will not, in any circumstance, issue a press release criticising public officials for meeting objectors to their development. Therefore the wider community will only read media reports criticising the government for meeting the proponent. As a consequence **the community will be left with a skewed perception that the government is favouring the proponent. The ICAC's intent of improving public perceptions of the process will not be achieved.**

We note the suggestion that increased transparency might always a positive thing. While increased transparency is a noble goal, there still needs to be a workable set of arrangements for the carrying out of the ordinary business of government.

This is not radical idea and is supported by case law in the freedom of information jurisdiction. In that jurisdiction it has been held that it is not in the public interest for a government agency to have member of the public "looking over its shoulder" during the course of a decision-making

process, prior to a decision being made.[1] The fact that a decision-making process is 'on foot' is a public interest factor against disclosure under freedom of information laws.[2]

Thirdly, the routine public release of ministerial meeting information will change the internal practice of ministerial offices. We would anticipate that the Minister's media advisor will have to be routinely consulted before meetings are to be agreed to. **We would anticipate an increased reluctance by a minister to agree to meetings where the minister is likely to be publicly criticised.** Senior and mid level public officials are also less likely to meet proponents on contentious issues if it means they will be personally targeted by campaign groups. New rules that make public officials less willing to meet people will not be beneficial for democratic government.

Fourthly, elected officials meet people in a wide variety of situations all the time, including on the street, at their business premises and in the offices of government agencies. Many of these meetings will be informal discussions. It is important to note that the ICAC's definition of lobbying (and Queensland's definition of lobbying) will include any request or suggestion that the law or government/council policy be changed. **It is not tenable to assume that an elected official can respond to approaches in the same way as a judge does.** When someone starts talking to an elected official and tells them that the law or policy should be changed, the elected official cannot cut them short and change the subject. It's their job to listen.

2. Creating categories of preferred speakers

During the course of the proceedings yesterday, the Commissioner suggested that all lobbying activity may not be regulated equally. That is lobbying by people who are engaged in the course of their employment might be distinguished from lobbying by those who are unpaid. Such an outcome would mean that "volunteers"[3] in antidevelopment organisations would be exempt from the rules, as would property owners objecting to new development to prop up land values. This, in itself, is alarming because **it will further bias the institutional environment in NSW against new development.**

NSW already has Australia's lowest level of per capita housing construction; Sydney has around half the new home approval of Melbourne; and the state trails both Victoria and Queensland in the overall level of building activity, despite those states' smaller population bases. A further bias built into the institutional arrangements is the last thing we need.

Furthermore, the Commissioner suggested that perhaps not all companies might be covered by the new rules. He suggested, for example, that perhaps only public companies would be covered. This creates an uneven playing field where the companies that present the greatest corruption risks, unprofessional one-person outfits, are exempt from the rules, but companies that represent the lowest corruption risks are exposed to the toughest lobbying impositions.

Suggesting, for example, that small business cannot access ministers is not correct. Ministers *do* regularly meet small businesses – both in the community and in their offices. Secondly, the lobbying rules don't just relate just to ministers, they relate to all public officials in executive government. Small businesses that need licences, approvals, certification, accreditation, grants, concessions, etc for their operation have extensive contact with public officials, and much of this contact would be characterised as lobbying under either the ICAC issues paper definition or the Queensland definition. Generally speaking, ICAC's adverse corruption findings have related to the conduct of small businesses, not large businesses.

We believe the much of the foreshadowed regulation of lobbying is a regulation of free speech. While any move to weaken free speech needs to be carefully thought through and justified, we are particularly concerned at suggestions to limit the free speech of some parts of society and not others.

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[1] *Simpson v Director General, Department of Education and Training* [2000] NSWADT 134 [87].

[2] NSW Department of Premier and Cabinet and the NSW Ombudsman, *The NSW FOI Manual* (2007) [13.1.31].

[3] It's worth noting that many "volunteer" lobbyists in the anti-development movement, may not formally be remunerated as part of their lobbying work, but nonetheless are effectively remunerated through other roles they have, such as positions in the public service, as parliamentary staff to anti-development MPs, academia, etc.

In the United States the idea of creating a category of "preferred speakers" under law is a violation of free speech.[4] There, the United States Supreme Court held that the government may not impose restrictions on certain disfavoured speakers.

In yesterday's proceedings there was some criticism of the mining industry in relation to their recent public campaign against the mining tax. We submit there was nothing inappropriate about that campaign. The reason it was successful was that the proposal was not sufficiently robust to stand up to the public scrutiny that the public campaign brought about. Some campaigns by other industry groups have not been so successful, in part, because their case was not sufficiently robust (consider, for example, the public reaction to the recent campaign launched by the Alliance of Australian Retailers, funded by tobacco companies).

We note the proposition that the policies of governments and oppositions should be formulated without reference to the views articulated by those who are lobbying. Our submission is that such a proposition is not practicable if our society is to remain a democracy. No democratic society has functioned without a strong civil society where many voices speak up and compete for the attention of elected officials. Political parties should be responding to concerns articulated in the community, including the business sector. We submit that the ICAC should not attempt to formulate policy recommendations that reduce the ability of business to play its role in civil society.

3. <u>Complaints about registered organisations</u>

The proposal to deprive organisations such as ourselves of the right to communicate with the public sector unless we are "registered" will remove a key element of our right to free speech, and replace it with a "privilege" which may be revoked.

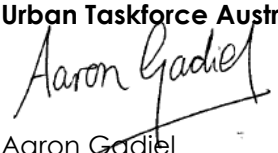
Under such an arrangement, we would anticipate those who disagree with our views will agitate strongly for our registration to be cancelled. **Any future lobbying commissioner, etc, can expect to spend a lot of time dealing with spurious complaints about us and other organisations.** Similarly, we and others will have to allocate significant resources defending our right to be registered.

For example, we would anticipate the climate change deniers will make complaints that environmental groups are lying about the likelihood of climate change. Anti-immigration groups will make complaints that we are lying about the benefits of population growth. The list will go on.

To date, parliament has avoided enacting laws which would require administrative decision-makers to rule on the truth of statements made in the course of public policy debates. While it's important that every person involved in such debates only makes statements that they believe to be true, we question the utility in empowering a government official to decide who is being truthful in controversial areas. Inevitably administrative determinations of this kind are highly subjective. Such a system will have a chilling effect of free speech and the right to freely communicate with elected and other public officials.

We appreciate the opportunity to participate in your investigation into lobbying in NSW. We would welcome any opportunity to further discuss these issues, answer questions or provide further comment.

Yours sincerely
Urban Taskforce Australia



Aaron Gadiel
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[4] *Citizens United v Federal Election Commission* 558 US 50 (2010), 24.