

14 May 2015

General Counsel
Department of Premier and Cabinet
GPO Box 5341
SYDNEY NSW 2001

Dear General Counsel,

First State Government and Corporate Relations ("1st State") is pleased to respond to the invitation to make a submission on the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* ("the Regulation").

Broadly speaking, 1st State regards the Regulation as an improvement in the regulatory environment concerning lobbyists in NSW. It acknowledges that, of the options considered to regulate this industry in this state, the option chosen – to apply a Code of Conduct to all lobbyists, professional and otherwise – was probably the best option, in that it strikes a balance between excessive regulation and levelling the "playing field".

We agree that any attempt to register all lobbyists on a formal register would be costly and cumbersome, and equally that separation of lobbyists into a regulated sector and an unregulated one is inequitable. As an operator that strives for high ethical standards, 1st State is distressed that the public perception of the industry has sometimes been tainted by the behaviour of "fringe operators", i.e. those not covered by the previous regulatory regime but still labelled as "lobbyists" in the public mind.

It is our contention that in order to address this discrepancy the definition of a "third-party lobbyist" should be extended to incorporate the activities of individuals and bodies such as industry associations and trade unions. These organisations fall within a common sense test of what constitutes a "lobbyist" in the public mind, and undertake lobbying of government officials on "behalf of another individual or organisations", as consistent with the Act.

The Premier's Second Reading speech on 17 June 2014 highlighted that "the public has a right to know who is gaining access to government"¹ (emphasis added), however it is unclear how the regime as constructed adequately addresses the question of access. To clarify, an individual employed as a "third-party lobbyist" is required to comply with an additional regulatory burden, whilst an individual employed by an industry association, trade union or other organisation is not subject to the same standards.

There is a further question as to whether the "cooling off" period should be extended, or applied more broadly, to government officials upon terminating their existing employment so as to allay any public concerns in relation to "access to government".

¹ Hansard, *Electoral and Lobbying Legislation Amendment (Electoral Commission) Bill 2014*, 17 June 2014.

We welcome particularly the application of the NSW Lobbyists Code of Conduct 2014 to all who engage in lobbying of government officials, although we foresee that this approach will nonetheless carry some practical difficulties, particularly around those whom one might describe as "amateur" or casual lobbyists.

Having said that, 1st State remains concerned that the overall regulatory burden on those engaging professionally in lobbying in NSW remains a heavy one. That conclusion is made against a background of two important observations about the reality of the lobbying sector:

1. **The availability of professional lobbyists is a vital feature of an effective democracy.** While it is not compulsory for anybody to use a lobbyist, many people and organisations, through ignorance of process or a lack of confidence, need a lobbyist's assistance, in the same way that many people need a lawyer when appearing in a court.
2. **Professional lobbying frequently falls victim to political exigencies.** It seems to us that so much of the shift in regulatory burden in recent years has been in response to what ICAC called "community perceptions of corruption" surrounding lobbying, despite the reality that, in ICAC's view, "there was much evidence that demonstrated that, in general, professional lobbyists act ethically, and that lobbying, when done well, can enhance rather than detract from good decision-making by public officials."²

The option chosen as the preferred option could be said to be that which transfers the regulatory cost most from the shoulders of government onto the industry itself. In turn, much of the difficulty here revolves around a lack of clarity about what the Code of Conduct actually requires of those engaging in professional lobbying.

For example, the Code imposes this standard on third-party lobbyists, but not on other lobbyists:

Third-party lobbyists (and the individuals they engage to undertake the lobbying for them) must keep separate from their lobbying activities any personal activity or involvement on behalf of a political party.³

Provisions such as this appear in the Code, we would submit, not because they add significantly to transparency in the sector but because of that "community perception of corruption" of which ICAC spoke. The meaning of this standard is difficult to discern, and can give rise to quite unnecessary uncertainty for lobbyist firms with a heritage in one particular party (a not uncommon phenomenon).

Indeed, last year 1st State had to answer charges levelled under privilege in the NSW Legislative Council that it had breached this provision. Several months on, the outcome of those allegations has still not been resolved, tending to suggest, we would submit, that even the regulator has difficulty understanding quite what obligation this particular standard imposes.

Please find attached the submission which this firm made to the regulator at that time, outlining in more detail the complexity which was given rise to by the lack of clarity in the standard. It goes without saying that responding to such allegations generates cost and can even inhibit the imparting

² RIS, *Need for Government Action*, p6.

³ NSW Lobbyist Code of Conduct, p5.

of frank and honest advice to clients. We say that it should be incumbent on the state to avoid regulatory burdens which are both onerous and imprecise, and whose application in any case must be of doubtful benefit in public policy terms.

We note that the NSW Electoral Commission (NSWEC) released a Lobbying of Government Officials Act 2011 Compliance Policy on 12 May 2015, several days before the submission due date. Whilst the Compliance Policy sets out the processes by which the NSWEC will execute its responsibilities under the Act, there are gaps within the administrative framework. It is of concern that there is no expressed appeals mechanism, given the professional risk to which lobbyists are exposed, with existing and future clients, in the event of an adverse finding by the Electoral Commission.

We submit that, despite the intent of the framework in the Compliance Policy, the system is open to vexatious or politically motivated allegations designed to damage professional standings and therefore a mechanism by which natural justice is afforded is critical.

History demonstrates the inevitability that some regulation will be entered into as a knee-jerk reaction by the government of the day to criticism of its opponents or in the media. While this may explain bad regulation, it does not excuse it. It is important if bad regulation does make it onto the statute books that, when opportunities arise for review, as is the case with this RIS process, such regulation should be modified or even abandoned.

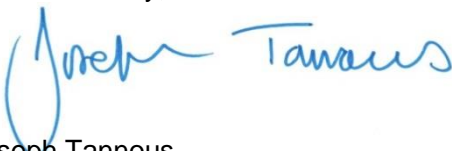
Although it is strictly outside the scope of this present process, 1st State submits that much of the content of the Code, as re-enacted last year, needs root and branch reconsideration. We would welcome the opportunity to participate in such an exercise, and are confident that transparency and accountability would not be victims of such a process.

In summary, we recommend that:

- The Act and Code be reviewed with a view to clarifying ambiguities in the legislative and regulatory framework as identified in this submission; and
- The regulator outline an appeals mechanism in the Compliance Policy in order to improve confidence in the appropriate application of the regulatory framework.

I am available to discuss any issues identified in this submission at your discretion. I can be contacted at joe@1ststate.com.au or on +61 404 022 979.

Yours sincerely,



Joseph Tannous
Executive Director
First State Government and Corporate Relations