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Lobbying

What is the role of lobbyists, particularly in relation to planning matters such as a land rezoning application? In your view, do lobbyists have a legitimate role to play in planning matters?

No.

The best way to think about the function of lobbyists is not as providers of technical information. They are providers of trust signals and coordinators of political opportunity. People who do not have personal relationships with key decision makers can borrow the trust of a lobbyist. They get vouched for.

The rewards of establishing a trusted relationship via a lobbyist go two ways. The clients get access to information about political opportunities for influence. Politicians and key decision-making bureaucrats get loyal supporters who are likely to willingly reciprocate any favourable decisions.

The trust gained by a lobbyist is a coordinating signal to identify reliable allies who are willing to play a long-run game of reciprocity.

We know this is their function because most lobbyists employed in these matters are not planners, nor having any particular technical expertise. They do, however, have extensive political connections.

The question I see as being more important is why lobbyists have magic powers to change planning and zoning decisions. Why are these decisions able to be influenced by the identity of a consultant or the applicant? If planning decisions were made by an independent random jury in a court-style system, then lobbyists may play a role in delivering information to the court. But if they did, they would need demonstrated subject-matter expertise. A system designed to be independent and determine outcomes on their technical merits would have no place for lobbyists, only subject-matter experts.

However, the planning system is intentionally designed not to function that way. Instead, it has evolved to allow great flexibility for insiders while ensuring rigid constraints on outsiders (as is common with regulatory regimes across many areas).

A central premise of your work is to change decision-making methods so that councillors, for example, cannot make decisions that involve potential high economic value (such as land rezoning). How could this work? What are the advantages and disadvantages of your proposed approach?

Planning decisions should either be a) a routine tick-box exercise about whether a proposal complies with the codes in the planning scheme, or b) evaluated independently by an independent group that is newly formed for each decision, like a jury.

Councillors should not intervene in day-to-day enforcement decisions of by-laws. Nor do State MPs intervene in the day-to-day application of state criminal laws. Yet in applying planning laws, local councillors can, and do, often intervene in their day-to-day application. Why is the system this way?

There are two main interventions to stop councillors using discretionary decisions to give away high-value property rights to favoured developers.

First, remove the councillor's ability to make the decisions. This can be done by using a jury system of randomly drawn locals to decide proposals that contravene the codes in the town planning scheme, and a similar citizen jury system for periodically revising local plans.

Obvious such a system is cumbersome and likely to be slow and expensive—but this is a desirable feature. A jury system should be a last resort. The costs, time, and low probability of swaying decisions in such a system would encourage developers to buy sites that are already planned for development, rather than speculate on future political rezoning decisions or make development applications that do not comply with planned uses.

This type of system requires that plans are, in general, written in a way that ensures that what is required for compliance is clear, and that when the criteria are met, the plan is automatically approved by council officials (or denied if the criteria are not met). This goes against the inclination of many planners who often prefer 'performance-based' planning outcomes that have a high degree of flexibility. Unfortunately, it is this very flexibility that is exploited by well-connected developers.

Second, you can remove the economic value of planning decisions. This can involve what is known as a betterment tax. This tax is a way to ensure that the planning system, considered as a whole, is not primarily a mechanism for delivering valuable new private property rights.

Instead, the value of new rights created in the planning system is 'sold' to developers, rather than given away. This is achieved in practice by taxing a share of the difference between land value assuming current uses only, and the land value at the approved use. This system has been in place in the ACT since the 1970s, and was in place in Sydney from 1970-74, raising millions in revenue that would otherwise go to politically-connected developers (the Sydney system was removed by the same government that introduced it due to lobbying of the opposition party). In the ACT the tax rate is 75% of the value, while in Sydney in the brief period in the early 1970s it was 30% of the value gain. Recently, the ACT system has been refined to be a set schedule of tax values in designated areas, rather than a case-by-case calculation, further improving the efficiency of the system and reducing development risk, while maintaining its key functionality.

Here is an example applying the ACT 75% betterment tax. A site is currently used for an industrial shed, with a land value based on that use of $3 million. The planning scheme code allows that lot to be used for high-rise residential up to 10 storeys. The land as a development site for this use is worth $10 million. When the landowner applies for planning approval they must pay 75% of the $7 million value difference ($5.25m) to the territory government, leaving only 25% of the gain, or $1.75 million, for the landowner.

The reason this decreases the incentive for corruption is because it greatly reduces the payoff from it. Even if the planning system is manipulated in favour of a landowner, their payoff is only marginally increased. For example, if the landowner of the industrial site in our above hypothetical was able to manipulate the planning system (corruptly, or through legal favouritism) to get a rezoning for 20 storeys, making the land worth $15 million, they would now be liable to pay a betterment tax of (15-3)*0.75, or $9 million. Of that, $5 million gain compared to the previous 10-storey zoning, $3.75 million is paid as a tax and only $1.25 million goes to the landowner. In other states without betterment taxes, the landowner would gain $5 million from the efforts to change the

planning system. Keep in mind that this is a simple hypothetical, and that for many large sites the value gains (betterment) from planning decisions can be worth hundreds of millions.

What are the key elements of an effective registration system for lobbyists? Are there elements of registration systems in other jurisdictions that you consider work effectively?

It is not clear to me what the anti-corruption (anti-influence) function is of publicly registering a category of people called lobbyists.

The broader point to consider regarding these types of transparency initiatives is that transparency alone can legitimise certain activities that would otherwise be perceived as corrupt. My research has shown that unless transparency is used as a step in the enforcement of other rules, it will not reduce favouritism. In fact, a register of lobbyists could be used to help signal the value of those lobbyists who are able to publicly verify their wares and their other successful clients on this register.

In addition to the legitimising function of such registers, these 'third party lobbyist registers' can be easily avoided by directly employing the person who will put their reputation on the line to vouch for you as an in-house lobbyist rather than a third-party lobbyist. This is a common way to avoid lobbyist registration by those who desire to avoid it (not all do desire this).

A recent review of Australian lobbyist registers, for example, found that:

> 'None of the registers required in-house lobbyists to register or to be bound by the Lobbying Codes of Conduct. None required that informal lobbying (e.g. by government relations staff within a company) be recorded, and none provided detailed information about the nature and extent of lobbying activities.'[1]

I see no practical way of modifying the scope of information in a lobbyist register to make it an effective anti-corruption mechanism.

What other controls do you believe would be effective to mitigate the risk of corruption associated with lobbying activities?

A better alternative to lobbyist registration is to have broadly applicable cooling-off periods for elected officials and senior decision-makers in councils (this should also apply to other levels of government) before they can be registered as a lobbyist. Currently, most states have limited cooling-off requirements, if any, that apply to elected officials and only in relation to their future role as a third-party lobbyist. Industry groups, such as the Property Council of Australia, are not considered lobbyists, even though they proclaim that one of their primary functions is to lobby on behalf of members.

Commonwealth, Queensland, and New South Wales regulations currently require an 18-month cooling-off period for a narrow range of elected official and/or ministerial staffers. But these apply only to third-party lobbyist roles.

1 Robertson, N., Kypri, K., Stafford, J., Daube, M., Avery, M. and Miller, P., 2018. Australian lobbyist registers are not serving the purposes they were designed for. Drug and alcohol review, 37, pp.S218-S222.

Canada, for example, has a five-year post-separation ban for Ministers, MPs, ministerial advisers, and senior public servants from being either third party or in-house lobbyists (though with some loop-holes about the degree to which lobbying is their primary in-house role).

The *Honest Leadership and Open Government Act of 2007* in the United States goes further and applies to the actions of former officials rather than their employment role.

> 'No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.' HLOGA 5 CFR § 2641.201.

Why would cooling-off periods function as a deterrent to favouritism via relationships when disclosure and registration does not? Recall that the function of lobbying is to vouch for the reputation of a party seeking political favours by putting their own reputation on the line. The longer a former official is unable to either work in that official role or as a lobbyist (of any sort), the less valuable their reputation becomes and the less credible it is when they try and vouch for someone years later—election cycles occur, the policy environment changes, their trusted personal friends retire or die.

A four-year cooling-off period that covers all personal communications or appearances for senior departmental staff, elected officials, and ministerial staff could apply at a state level. At a council level, this requirement could apply to councillors and executive staff.

Another problem is the flow of personnel in the other direction through the revolving door. There is nothing to limit people who perform the same function as lobbyists—either third-party consultant lobbyists, industry group lobbyists, or planning consultants for private developers—being employed by any level of government. In town planning, it is common for planners to consult to developers, then rotate into councils and use the discretion they have in that position to approve applications made by the same developer, then later work for that developer again in the private sector.

For example, in Queensland, a State statutory authority, the Urban Land Development Authority (ULDA), was created with strong powers to rezone and approve developments, overriding council powers. This authority was staffed with former employees of property developers. The then CEO of the ULDA, Paul Eagles, was a former employee of Lendlease. The ULDA rezoned land that Lendlease had previously sought to rezone.[2] Logan City Council sought a judicial review in the Supreme Court, which was later discontinued after Logan City Council was dissolved in 2019 due to various integrity offences by councillors.[3]

This is a classic regulatory capture problem, with limited known ways to curtail it. One way is to hire from outside the local area, drawing upon international or interstate expertise that is less likely to have local conflicts of interest. Long cooling-off periods can also help here, as the elimination of the option to return to local private roles after working in regulatory agencies will make the position less attractive to those who are trading on their networks on reputation.

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[2] Cameron K. Murray, Paul Frijters, Clean money, dirty system: Connected landowners capture beneficial land rezoning, *Journal of Urban Economics* (2016)

[3] https://www.couriermail.com.au/lifestyle/bias-claim-in-yarrabilba-land-deal/news-story/bb8a6ceb7d84cc33cfbeecbc9715b7bb

What recording or disclosure obligations should apply to politicians and government officials who may be lobbied?

It is not clear how effective these disclosures are at reducing political favouritism. Again, like lobbyist registers, this sort of public information can backfire. You can imagine that a record of many meetings with elected officials would be a great piece of marketing for a lobbyist—hard evidence of their track record and the value they can provide to future clients.

The main point is that the planning system can be designed in a way that ensures that there is no pay-off from successful lobbying because the hands of a councillor are tied to a system that either prices decisions or takes them out of their hands.

Donations

How do you believe political donations can be most effectively regulated?

a. **Should donations be capped?**
b. **Is there value in anonymising donations?**
c. **Should there be any differences in the regulation of donations in state government compared to local government?**
d. **Should donations from property developers be banned? Why/why not?**
e. **Should donations from companies or trusts be banned?**
f. **What are your views on disclosing donations in real time?**

The function of donations needs to be understood to know how best to regulate them in a way that reduces political favouritism in planning (or any other sector). One big lesson is that most political donors donate to both sides of politics equally, and many donate to clear electoral favourites where their small amount of money provides little electoral benefit. If donations don't help people get elected, they aren't providing a benefit. They can't be bribes. So what are they?

They are signals of trustworthiness. By burning money with donations, attending expensive industry breakfasts, or multiple other ways, you can signal loyalty to a group. Just like a lobbyist vouches for someone's loyalty and reputation, donations are another signal of one's loyalty to a group and willingness to reciprocate favours within that group over the long term. They are one of many signals.

Capping donations, banning donations from certain groups, like property developers, companies or trusts, may seem like very effective rules under a donations-are-bribes model. But in a donations-as-loyalty-signals model, the effectiveness of such bans is not clear cut. In a study of six major rezoning decision in Queensland, I found that political donations were a poor indicator of the likelihood of gaining a rezoning favour. There are simply many better substitute ways of signalling loyalty.

The donations-as-loyalty-signals model does suggest that anonymising donations through a clearinghouse at the relevant electoral commission, would have more of an effect of reducing their functionality. Donors would be unable to prove that they have burnt money on donations, even to the recipients, and would need to use alternative loyalty signalling methods instead. Whether this substitution between loyalty signals would provide better planning outcomes is unclear.

a. Should donations be capped? No.
b. Is there value in anonymising donations? Yes, but with limited effects on favouritism.
c. Should there be any differences in the regulation of donations in state government compared to local government? A common system is usually better.

d. Should donations from property developers be banned? Why/why not? This is ineffective. Developers receiving the most valuable favours often do not donate at all.
e. Should donations from companies or trusts be banned? This may be useful as donations that are hidden are usually from those who have other reasons not to attract public attention.
f. What are your views on disclosing donations in real time? If donations are to be disclosed, real time is the best way.

Drawing on your knowledge of how other jurisdictions manage donations, is there a model for regulation this area that you think could work well in Victoria?

I don't think that any changes to donations regulation are going to stop political favouritism in the planning system, or even decrease it to a noticeable degree. With $5 billion in private gains being given out each year through these decisions in Victoria, those who stand to gain a share will find a way to influence decisions.

In your view, what are the key mechanisms that could be put in place to prevent parties from disguising donations from particular interest groups?'

Again, donations are weak mechanisms in the loyalty-signalling game, with donations typically amounting to pocket change for most donors. Only for some players who perhaps have other reputational stakes at risk is there a need to disguise donations.

What entity do you consider should be responsible for overseeing (ie monitoring and taking enforcement action in relation to) the donation regime at both the state and local levels of government?

The Victorian Electoral Commission seems like the sensible choice.