

The Biggest Vested Interest of All:

How Government Lobbies to Restrict Individual Rights and Freedom

Chris Berg
Director, Policy

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Free people, free society

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|---|-----------|
| Executive Summary | 3 |
| 1.0 Introduction | 4 |
| 2.0 Special interests influence public policy | 6 |
| 3.0 Statutory agencies are special interest groups | 10 |
| 3.1 Statutory agencies lobbying for legislative change..... | 13 |
| 4.0 Australian National Preventive Health Agency | 15 |
| 4.1 Origins and purpose | 15 |
| 4.2 Campaigning for legislative change | 18 |
| 5.0 Australian Human Rights Commission..... | 21 |
| 5.1 Origins and purpose..... | 21 |
| 5.2 Campaigning for legislative change | 22 |
| 5.3 An ideologically biased model of human rights..... | 23 |
| 6.0 Taxpayer funded non-government lobbying | 27 |
| 6.1 International examples | 28 |
| 6.1.1 The United Kingdom | 29 |
| 6.1.2 New Zealand | 29 |
| 7.0 Conclusion: lobbying and the clash of ideas | 31 |
| Bibliography | 32 |
| About the author | 33 |

Executive Summary

The Federal Treasurer Wayne Swan wrote in *The Monthly* in March 2012 that:

Australia's fair go is today under threat from a new source. To be blunt, the rising power of vested interests is undermining our equality and threatening our democracy.¹

But not all vested interests are private corporations.

This paper draws attention to two statutory agencies of the Commonwealth Government that have an explicit, legislatively-defined functions to lobby and advocate for public policy change – the Australian National Preventive Health Agency and the Australian Human Rights Commission.

These two agencies are effectively taxpayer funded lobbyists, embedded in the public policy process, enjoying privileged access to the institutions of government.

The Australian National Preventative Health Agency (ANPHA) received \$57,718,000 in the 2012-13 Federal Budget to “driv[e] the national capacity for change and innovation around preventive health policies and programs.”²

ANPHA publically advocates and privately lobbies for a wide range of Nanny State restrictions on alcohol, tobacco, and unhealthy food.

The Australian Human Rights Commission (AHRC) received \$23,133,000 in the 2012-13 Federal Budget. One if its primary tasks is to “promote an understanding and acceptance ... of human rights in Australia ... undertake research and educational programs” and “develop laws, policies and programs”³ for parliament to enact. (Unfortunately, the AHRC does not disclose how much it of its budget it directs towards this task.)

However the human rights that the AHRC chooses to promote and advocate are highly selective, favouring certain rights above others.

As well as being policy lobbyists in their own right, AHRC and ANPHA are central to a pattern of relationships between the government and non-government sectors. Taxpayer money is being used to lobby for the allocation of more taxpayer money.

One-third of the submissions to the Preventative Health Taskforce – which established the Australian National Preventive Health Agency – were from bodies which received large amounts of taxpayer funding.

¹ Wayne Swan, “The 0.01 Per Cent: The Rising Influence of Vested Interests in Australia” *The Monthly*, March 2012

² Australian National Preventive Health Agency, “Promoting a Healthy Australia” available at <http://anpha.gov.au/internet/anpha/publishing.nsf>

³ Australian Human Rights Commission Act 1986, Sect 11, Australian Human Rights Commission, “About the Commission” available at <http://humanrights.gov.au/about/index.html>

1.0 Introduction

On 1 November 2012, the Australian National Preventive Health Agency (ANPHA) released a draft report *Exploring the Public Interest Case for a Minimum (Floor) Price For Alcohol*.⁴ The report called for an increase in taxation on wine, which is taxed according to its price rather than its alcohol content. The effect of such a proposal would be a substantial increase in the tax on cheaply priced cask wine, raising a \$15 four-litre cask up to \$40.

The proposal received national attention. ANPHA is, after all, a statutory agency of the Commonwealth government, and this was a major proposal: alcohol pricing, particularly as it relates to the wine industry, is a controversial area.

It was, however, not Commonwealth policy to increase wine taxation when the report was published. The purpose of ANPHA's paper, and the media blitz which accompanied it, was to push for this taxation change within the government and advocate it in the public sphere, not to implement it.

ANPHA is a statutory agency with a very specific brief: to research, propose, and promote policies which it believes will increase the health of Australians.

To do so, it writes reports, runs seminars, and – most crucially and most jarringly – lobbies the government to implement its preferred policy ideas. That is, ANPHA is a government-funded agency with a specific brief to lobby the government for legislative change.

ANPHA is not the only such institution at the Commonwealth level. The Australian Human Rights Commission was founded in 1986 with a similar function: to research and advocate the introduction of United Nations human rights treaties into Australian law.

Australians are concerned about the influence of private sector lobbyists on the political process. But the discussion about lobbying and politics has, to date, ignored one of the most significant sources of influence upon the policy process; that of bureaucracies, regulators, and government-funded institutions. Government departments can pursue selfish or ideological agendas as much as any private sector lobbying firm. The difference between private and public lobbyists is that

- a) they are funded wholly or largely by taxpayers and;
- b) they are embedded within the formal institutions of government, guaranteeing access and influence.

This paper provides an introduction to the political context about the rise of these hybrid institutions. After the economic reforms of the 1980s, governments have been experimenting with alternative models of policy change. Such institutions are likely to become more common in the future.

⁴ *Exploring the Public Interest Case for a Minimum (Floor) Price For Alcohol*, Draft Report, Australian National Preventive Health Agency, November 2012

The paper then explores the public choice theory that explains their perverse consequences. Government funded lobbyists link two major strands of public choice thought: that of rent-seeking by private agents, and that of bureaucratic incentives.

Then the paper profiles the two major government lobbyists: the Australian National Preventive Health Agency (founded in 2010) and the Australian Human Rights Commission (founded in 1986).

These are by no means the only government-funded organisations that put pressure on parliaments for legislative change. To a large degree, all bureaucracies push an agenda.

Furthermore, there are many Commonwealth research bodies with superficial similarities to ANPHA and AHRC. The Australian Research Council hands out grants for research projects. The National Health and Medical Research Council has a similar role, as well as collating medical research data. Then there are institutions specifically instituted to make policy recommendations. For instance, the Productivity Commission and the Australian Law Reform Commission are policy research bodies. Other regulators have research wings; for example, the Australian Communications and Media Authority.

But while all these bodies do research, none of these aforementioned bodies have an active advocacy role.

The Australian National Preventive Health Agency and the Australian Human Rights Commission have statutory obligations to promote and advocate legislative change.

Even if we agree with the messages broadcast by these agencies, or the legislative proposals they present, it should be of serious concern that there exists taxpayer funded organisations specifically to push policy change from within government.

This paper has been inspired by an Institute of Economic Affairs Discussion paper, "Sock Puppets: How the government lobbies itself and why", by Christopher Snowden, released in June 2012.⁵

Much of the phenomena that Snowden identifies in the United Kingdom are easily identifiable in Australia – charitable interest groups that have subsumed into the state through bureaucratic outsourcing continue to pursue ideological or even partisan agendas. Institute of Public Affairs research has repeatedly identified this phenomenon in environmental and charitable bodies.⁶

Here we look at one way it manifests itself: through statutory bodies and a cycle of grants where taxpayer funded non-government organisations use taxpayer money to advocate greater expenditure on programs that it may benefit from.

Obviously the final say of the legislative agenda rests with parliament. Nonetheless, we need to recognise and come to terms with the fact that parliament is being influenced by lobbyists from within government itself.

⁵ Christopher Snowden, "Sock Puppets: How the Government Lobbies Itself and Why," in *IEA Discussion Paper* (Institute of Economic Affairs, 2012).

⁶ See, for instance, Asher Judah, "Green groups and the government: A dangerous duopoly", Institute of Public Affairs Occasional Paper, April 2011

2.0 Special interests influence public policy

In Western liberal democracies over the last two decades the boundaries between government and non-government sectors have become increasingly vague. That blurring boundary has many implications for public policy which have not been fully realised.

During the twentieth century, government was characterised by executive departments and public ownership of infrastructure and utilities. The economic reform movements of the 1980s and 1990s undermined that unitary model of government.

The model that has replaced it is more complex and fragmented.

Public utilities were privatised and their regulation vested in new government agencies. Bodies which retained state ownership were “corporatised” to inject some of the managerial discipline of the private sector. Social welfare services have been farmed out to non-government bodies. Infrastructure is increasingly built by public private partnerships.

Even policy development is no longer the sole purview of the traditional public service: much policy development has been handed over to private contractors.

We call this new model the “regulatory state”, in honour of its two central features (independent regulatory agencies and regulatory growth) but it describes a broader phenomenon than regulation. There has been a fundamental transformation in the structure of government. What was central government has been decentralised.

The fragmentation of institutions and bureaucracies makes contemporary government less a “great public utility” – as WK Hancock famously described Australian government in the 1930s – and more a network of interests, competing for funds, public attention, and the policy priorities of the legislature. These institutions tug back-and-forth on the levers of government.

There are many democratic and policy consequences of this new model of government.⁷ Independent regulatory agencies have been delegated powers by the executive but have little formal accountability. With their broad powers of discretion and a regulatory ideology that emphasises cooperative regulation rather than black-letter law, these independent bodies are uniquely vulnerable to principle-agent problems. They can pursue policy goals not intended by parliament.

We should not conclude from these changes that the state has shrunk. Far from it: the dispersal of policy control and formulation has given government as a whole a firmer base on which to regulate and intervene. The state, argue the Australian political scientists Stephen Bell and Andrew Hindmoor, has not been rolled back.⁸ The size of government – measured traditionally by tax receipts and expenditure - through the “neo-liberal” reform period remained steady or increased.

⁷ Chris Berg, *The Growth of Australia's Regulatory State* (Melbourne, Australia: Institute of Public Affairs, 2008).

⁸ Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (New York: Cambridge, 2009).

The Institute of Public Affairs has demonstrated that the legislative activity of Australian governments has at all levels increased substantially. In 1970, at the start of the reform period, the Commonwealth parliament passed 700 pages of legislation per year. In 2011 that figure was above 7,000 pages. Similar growth is seen in state parliaments as well.⁹

There are now 97 separate regulatory agencies, departments, and associated institutions in the Commonwealth government.¹⁰ The Productivity Commission has estimated that there are more than 600 regulatory agencies – only a subset of the total number of bureaucratic entities – across Australia.

While it is outside the scope of this investigation, it is important to mention that institution-building has occurred outside the national sphere as well. Bodies such as the Organisation for Economic Co-operation and Development and the International Monetary Fund are transnational policymakers and advocates, and can assert substantial influence over domestic policy.

While regulatory agencies are supposed to be purely technocratic bodies, carefully and pragmatically weighing policy evidence outside the corrupting influence of democratic politics, they have substantial political leeway to pursue their own agendas.

In the early 2000s, the Australian Competition and Consumer Commission was widely regarded as aggressively publicity-hungry, to the degree that it was making substantial decisions of policy through its attempts to undermine the reputation of firms it was investigating. This culminated in the 2003 Dawson Inquiry, which recommended that the regulator be forced to adopt its own Code of Conduct to govern its use of the media. The ACCC's media activity quickly dropped after the Dawson Inquiry but has crept up again.¹¹

Of particular importance is the observation that government has grown as much in qualitative as in quantitative terms. In recent decades government has expanded its interests. One clear illustration of this expansion is that much of the regulatory growth has been in areas previously left unregulated – for instance, environmental or health and safety law. Another obvious example is the evolution of “public health” regulation from non-coercive information dissemination about the dangers of smoking to proposed plain packaging for alcohol containers.

While the ambitions of governments have increased, they are increasingly constrained. The new policy emphasis on regulation instead of spending is largely a consequence of the public's hostility to substantial tax increases. Governments have had to be more innovative to develop interventionist policy. Once governments would nationalise industries that they wanted policy control over. Now bringing policy areas into the states aegis involves “industry partnerships”, grant and subsidy programs, national frameworks and plans, quasi-governmental industry boards, and state-sponsored codes of conduct.

Such policy innovation has had the consequence of breaking down the barrier between state and non-state institutions.

⁹ Berg, *The Growth of Australia's Regulatory State*.

¹⁰ Ibid.

¹¹ Ibid.

Organisations that may be “private” can nonetheless draw substantial amounts of their income from the public purse. It is no longer clear whether many such bodies ought to be described as government or non-government organisations. Social bodies – community organisations, religious groups – are increasingly involved in delivering state services, and, through those services, are becoming *de facto* arms of the state.

One clear illustration of this phenomenon is the evolution of the community-based multicultural organisations that sprouted up in the 1970s. The lure of government funding has meant that in recent decades those organisations have morphed from community groups to state service deliverers. Public funding has diverted the business of representing their communities into competing for tenders.

In 2010 the Productivity Commission found that direct funding of non-profit organisations was around \$25.5 billion every year.¹²

Government funding is not limited to service delivery. Many bodies receive large amounts of taxpayer funding through research grants. Research grants can be a powerful tool to pursue already identified public policy goals.

Bodies that receive government funding are less willing to criticise government policy. In some cases, they are prevented from doing so by the terms of their grants.

In 2012, the Queensland Health Department mandated that any organisation receiving more than 50 per cent funding from the department must not advocate legislative or policy change, going so far as to ban them from publishing links on their website to other organisations that do. This new rule has been condemned by public health activists as a restriction on freedom of speech. Mike Daube, a Professor of Public Health at Curtin University, described the Queensland government’s actions as a “descent into the dark ages”. But the lesson should be obvious: organisations that are supported by government funding also become integrated into the political and policy structure of government. That politicians do not like it when organisations they fund attack them should be no surprise.

This minor Queensland Health episode illustrates the uncomfortable relationship between the regulatory state and civil society it seeks to co-opt. Government is a political beast, and the encroachment of government funding and service provision into non-government organisations politicises those bodies.

The many diverse government and semi-government bodies of the regulatory state pursue their own goals. Each have their own interests.

Those interests may not align with the interests of the elected representatives who give the government their legitimacy, or, indeed, the interests of the public that the government is there to serve.

The idea of special interests has a prominent place in our modern democratic consciousness. Many people believe that corporate interests lobby governments to systematically skew public policy in

¹² Productivity Commission, *Contribution of the Not-for-Profit Sector*, (Canberra: Productivity Commission, 2010).

their favour, and that political parties and politicians are beholden to those interests – acting not for the public they are supposed to represent, but for the corporations who donate to their campaign. This belief has led to much policy change in recent decades. The Commonwealth government’s lobbyist register is an attempt to expose potential conflicts of interests. The New South Wales government’s changes to electoral funding are another attempt to remove special interests from the operation of democracy.

The vast majority of discussion about special interests in politics concerns corporate interests. That, indeed, is the focus of the federal lobbyists register. But there are many other special interests trying to influence the direction of public policy for private ends. Unions and non-government organisations can be just as involved in lobbying and favour-seeking practices as the business sector. And, just as critically, not all interest groups are external to government.

There are many influences on public policy formation that exist within government itself; many bodies funded by taxpayers push policy goals within and without the formal structures of government.

3.0 Statutory agencies are special interest groups

The fragmentation in government structure in the last few decades has also seen a fragmentation in policy-making. In a traditional, hierarchical model of policy development, policy flows directly from the bureaucracy to the relevant minister, and thereafter to the parliament. Departments develop and assess competing policy options, and present those policies to a minister for their approval or dismissal according to the government's political goals. Ultimately, it is the minister – an elected representative – who makes the final decision about what will be presented to parliament.

This is an ideal model and, even when governments were structured in clear hierarchical lines, this model was unlikely to represent reality. A democracy is a clash of interests. Throughout the twentieth century policy formation reflected both the desires of the bureaucracy and the desires of the interest groups that parliamentary representatives drew political support from.

Bureaucracies are as much political tools as dispassionate policy advisors. One minor but particularly revealing illustration of this was the episode in early November 2012, when the Commonwealth Treasury leaked purported impact of opposition policies on business to the Fairfax press. The Labor government asked the Treasury to analyse what it assumed were the opposition's election promises.¹³ The result was highly misleading. It only accounted for taxation increases, and completely excluded the two major policies (the repeal of the mining and carbon taxes) which would have lowered business costs. Such political use of the bureaucracy is hardly unprecedented – it is a recurring feature when either side of politics is in power – but it demonstrates the incentives that bureaucracies have to chase the preferences of their political masters.

But bureaucracies are not mere agents of the executive. Bureaucracies do not always dispassionately assess policy options in a neutral, technocratic manner according to the requests of their elected superiors. Bureaucracies have their own policy preferences, and can drive elected representatives in certain directions. The classic fictional portrayal of the clash between bureaucratic interests and political interests is the *Yes, Minister* television series. *Yes, Minister* drew heavily on the insights of the public choice school of political economy.

It is worth briefly outlining the classical public choice perspective on bureaucratic behaviour before applying that model to the fragmented regulatory state.

Public choice theory makes one simple claim: individuals who work in the public sector are as driven by self-interest as those who work in the private sector. The basic assumptions of economics – incentives matter, and individuals seek to maximise their own happiness, or wealth, or leisure – apply to actors working in non-market environments too.

Public choice is a corrective to the implied model of bureaucracy that still dominates popular understanding; that is, bureaucracies act solely in the “public interest”, and public servants are servants of the public. But there is no reason to believe that an individual, moving from the private sector to the public sector, abandons their own desires, can act against their own incentives, and

¹³ Ben Packham & Lanai Vasek, “Wayne Swan admits telling Treasury to cost Coalition policies”, *The Australian*, 7 November 2012

stops being driven by self-interest. Public choice is a way of studying government without the romance. If the market is dysfunctional – if it is flawed because of information asymmetries, externalities, or irrational actors – then the public sector is just as deeply, if not more deeply, flawed.

The political economist William Niskanen described bureaus as “nonprofit organizations that are financed primarily by a periodic appropriation or grant”.¹⁴ Bureaucracies are not passive actors in the process of government. Niskanen argued that bureaucracies try to maximise three things: pay, power, and prestige. A successful bureaucracy is one that increases its discretionary budget, increases its powers, and increases its prominence. The central recognition is that principle-agent problems are rife in the public service. It is (often) in the interests of parliament that appropriations are minimised, but it is in the interests of the bureaucracy that appropriations are maximised.

For our purposes, the bureaucracy acts as a special interest embedded within the structure of government. Bureaucracies compete against each other for an increased share of the total bureaucratic budget. But that total budget is not fixed, so bureaucracies can cooperate to influence the total size: as a unified entity they act as a special interest pressuring legislators to raise taxes or reprioritise total government spending.

Dieter Bös offers a compelling model of bureaucratic lobbying that posits antagonistic competition between individual bureaucrats for a share of the budget, but cooperation to grow the pool.¹⁵ Bös makes a further important point for our purposes here. The currency of bureaucratic lobbyists is time, not money. Most discussion of lobbying concerns issues like campaign contributions, as there is a popular perception of private sector actors as dominating lobbying. The calculation of a car company lobbying for subsidies – where it could justifiably spend on lobbying up to the benefit of the subsidy less a reasonable rate of return – does not hold for public sector agents. Bureaucracies have no other means by which to “profit” other than lobbying. Public sector lobbying has one significant advantage over private sector lobbying: access. Corporations donate to campaigns in order to gain access. Bureaucracies, institutionally embedded in the political system, already have that access.

The classical public choice model of bureaucracy was developed in the 1970s; that is, before the fragmentation of the regulatory state.

Some reform to the public service was specifically designed to counter some public choice problems. For example, the corporatisation of government enterprises was intended to introduce market discipline into formerly non-market service provision. The contracting out of government services was supposed to deal with similar problems: a more efficient private sector would be able to perform functions cheaper and more effectively than a politicised public sector. But these reforms have also exacerbated some more challenging and pervasive problems.

Bureaus increasingly act as discrete special interests acting within the formal structure of government. Independent regulatory agencies lobby legislators as much as traditional bureaucracies for more power, money or prominence. But as they are independent entities - disconnected, intentionally, from the political chain of delegation and accountability – their requirements are more

¹⁴ William A. Niskanen, *Reflections of a Political Economist : Selected Articles on Government Policies and Political Processes* (Washington, D.C.: Cato Institute, 2008).

¹⁵ Dieter Bös, "Contests among Bureaucrats," *Public Choice* 119(2004).

opaque. Individual ministers are less likely to personally gain from the prestige of larger regulatory agencies under their portfolios as they might with a department. But on the other side they are less able to judge the necessity of increased power or budgets.

Politicians typically treat the lobbying of an internal body and the lobbying of an external private actor differently. Obviously, they are not treated as “lobbyists” in the common sense of the term: government departments do not appear as clients on the lobbyist register. (The only exception to this is the Victorian Department of Industry, which appears as a client of Executive Counsel Australia.¹⁶) When formal inquiries are being held into new legislation, they typically appear as the final witnesses, long after representatives of civil society have had their say. Even then, policy proposals are formulated in consultation with these independent but internal bodies.

The 2012 parliamentary inquiry into national security reform offers a particularly strong illustration of the role of internal lobbying on the political process.

In July 2012, the Parliamentary Joint Committee on Intelligence and Security was presented with a discussion paper from the Attorney General’s Department, containing dozens of proposals to reform the Commonwealth’s surveillance and national security powers. The paper was vague and lacked little supporting detail for its proposals, particularly for its most controversial one: to require internet service providers to store internet usage data for up to two years.

Submissions were called for, received, then closed. Civil society organisations were the first to give evidence on the proposals. It was however only until those third parties were finished and the committee began to hear the evidence of a range of government bureaucracies that the detail about the proposals began to emerge.

It soon transpired that it was not “national security” that data retention was primarily aimed at; it was all regulatory power. It emerged that corporate and competition regulators, the taxation office as well as ASIO and the federal and state police departments had been lobbying the Attorney General’s Department to increase their power. In committee, it was discovered that the Australian Securities and Investments Commission and the Australian Taxation Office had been pushing for significantly greater powers. The Australian Competition and Consumer Commission wanted to use data retention – presented to the public as a matter of anti-terrorism and child pornography – to pursue far less serious offense like petrol price collusion.

The virtues of data retention are outside the scope of our investigation. But this episode accidentally revealed the extent to which government policy proposals are shaped as a result of lobbying from within government. The ACCC and ASIC are independent regulators, formally separate from the lines of accountability. But as they have close relationships within the government, they are in a position to formulate policy at an early stage – indeed, at a far earlier stage than the high-profile external lobbyists and advocacy groups that receive the lionshare of negative popular sentiment.

Not all inter-bureaucratic lobbying is targeted at the outcomes we have identified – prestige, discretionary budgets and labour force size. Culture matters as well. Just as private sector actors are not rationally-maximising automatons, public sector actors can be driven by a whole range of

¹⁶ Available at http://lobbyists.pmc.gov.au/register/view_agency.cfm?id=160

motives. Many – even most – public servants are inspired by a sense of public duty, for instance. We should not imagine the public choice model predicts a bureaucratic war of all-against-all.

Elected governments come and go, but bureaucracies are constant. Most public servants spend the majority of their careers in a single agency. The consequences of this constancy and length of employment is that bureaucracies develop their own cultures and policy preferences which they advocate to governments of all stripes.

Obviously agencies have an incentive to defend and expand existing programs. But further than that, agencies tend to have a “departmental view” on certain policy positions.¹⁷ As we have seen in the case of data retention, we would expect those preferences to broadly align with policies which expand the power, prestige, or maximise the discretionary budget of bureaucracies. Public servants would systematically favour policies which increase state power.

It is only human that public servants are more likely to see government as the solution to social problems. Individuals who are reliant on taxpayer funding are likely to favour increased expenditure, even in circumstances where they may not directly benefit: it is a rare bureaucrat that wishes to reduce the size of government. We can see this systemic bias in voting patterns in the Australian Capital Territory, which disproportionately favours the Australian Labor Party and the Australian Greens. Peter Saunders has shown that public servants “are less likely to see tax as an important election issue, are less likely to agree that high taxes destroy work incentives, and are less likely to think that taxes could be reduced by cutting wasteful expenditure.”¹⁸

Even within highly hierarchical bureaucratic structures, public servants have a substantial capacity to direct policy towards their own preferences. Ministers tend not to direct the bureaucracy clearly; favouring vague instructions to fully enunciated ones.¹⁹ The lack of clarity enables bureaucrats to nudge policy in their own direction.

3.1 Statutory agencies lobbying for legislative change

Historical experience has demonstrated that the policy lobbying of bureaucracies and independent regulatory agencies is highly effective and influential. Some scholars see independent regulatory agencies as the driving force behind deregulatory movements in the 1980s, particularly in newly privatised industries such as telecommunications, energy and water. One writer argues that “a mode of regulation emphasizing independence and expertise” is able to “push through deregulation when economic and technological change make public oversight no longer necessary”.²⁰

At first blush, it makes sense for specialist regulators to be at the forefront of legislative change. The expertise of an independent regulator lends authority to its policy recommendations. But like traditional bureaucracies these bodies too have their own policy preferences. Their incentives are not to favour the public interest but their own interests: that is, more funding, more statutory powers, more independence, and more prominence in the public eye.

¹⁷ B. Guy Peters, *The Politics of Bureaucracy*, 5th ed. (London ; New York: Routledge, 2001).

¹⁸ Peter Saunders, "The Rise of the Opinionators," *Policy* 22, no. 2 (2006).

¹⁹ Edward Page and W. I. Jenkins, *Policy Bureaucracy : Government with a Cast of Thousands* (New York: Oxford University Press, 2005).

²⁰ Giandomenico Majone, *Regulating Europe*, European Public Policy Series (London ; New York: Routledge, 1996). p23

Nevertheless, independent regulatory agencies are concerned with the administration of existing public policy; advocacy for policy change is not their primary focus. The Australian government is increasingly establishing institutions that are specifically designed as policy advocates.

In the next section we shall look at two of these bodies – the Australian National Preventative Health Agency and the Australian Human Rights Commission – that are concerned with policy research, development and, most importantly, policy advocacy as part of their statutory role. Unlike regulatory agencies, the bureaucratic biases behind these forms of institutions are transparent: in both cases they were formed with a specific policy direction in mind, and their role is to pursue that. The Australian National Preventive Health Agency was established to encourage government to intervene in public and preventative health matters, including advocacy of tax increases and regulations. The Australian Human Rights Commission was established to manage discrimination and human rights complaints and encourage parliament to implement more human rights legislation.

While both these bodies have the usual incentives to gather extra responsibility and funding, they are driven significantly by their ideological perspectives. When we study the actions and advocacy of ANPHA and AHRC, we see them urge for all three.

One final model of taxpayer funded lobbying is that conducted by organisations which receive large amounts of government funding. As governments increasingly favour outsourced service delivery to non-governmental organisations, groups which were established as policy lobby groups are now recipients of significant taxpayer money. Despite receiving public funds, many of these bodies have continued to push for legislative change according to their original goals – in other words, the government is sponsoring bodies to lobby it.

Of particular interest here is the self-replicating nature of these taxpayer funded organisations: much of what they lobby for is increased government expenditure, which can often benefit those organisations. This cycle of grants is pervasive in Australian public policy, as we shall see in Section 6.0.

4.0 Australian National Preventive Health Agency

4.1 Origins and purpose

In her Second Reading speech for the *Australian National Preventive Health Agency Bill 2010*, the then-Minister for Health and Aging Nicola Roxon said it would establish “national infrastructure to help drive major change in the way we behave and how we look after (or don’t look after) our own health.” The new agency would “embed preventive health thinking and action, permanently, into the future as an enduring institution.”

At a glance

Established: 2010

Appropriation for 2011-12:
\$57,718,000

Staff: 39

The Australian National Preventive Health Agency grew out of the Preventative Health Taskforce.

This Taskforce was a promise of the 2007 election. Announced in June that year, it was part of a broader healthcare package to “shift Australia’s health focus to preventing lifestyle diseases and illnesses”, and included a commitment to commission a study on the economic costs of chronic diseases from Treasury. The Taskforce would include focus on incentives for general practitioners to practice preventative healthcare.²¹

Chronic disease incentives are a serious issue. Medicare struggles to deal with chronic diseases; its single payment model means there is a disincentive for general practitioners to perform the long-term care which is necessary for chronic disease management.²² As a workaround for these issues, Medicare has been augmented with a range of complex incentive schemes.

This proposal was closely tied into the opposition’s proposal for general practitioner health reform across the board. Just as GP Super Clinics would reduce the administrative burden on GPs and allied health services, a renewed focus on preventative health would reduce the need for those services.

However, after the 2007 election, the focus of the Preventative Health Taskforce shifted from an integrated part of the now-Rudd government’s hospital and general practice policy, to an entirely different beast.

While the Taskforce’s focus was always initially going to be on chronic diseases relating to alcohol, tobacco and obesity, only one of the nine members of the taskforce was a general practitioner, Dr Christine Connors, and even then her professional focus was indigenous health. There was only one representative of industry – Kate Carnell, of the Australian Food and Grocery Council – and no representatives of the tobacco or alcohol industries. Both the Taskforce Chair (Professor Rob Moodie of the University of Melbourne) and Deputy Chair (Professor Mike Daube of Curtin University of Technology) are leading lights in the euphemistically named “tobacco control” movement.

The Taskforce was formally constituted in April 2008. Its Discussion Paper, “Australia: the Healthiest Country by 2020” was released in 2008. Submissions were called for, three “technical” papers were

²¹ “\$1.8bn boost to carers of disabled”, *The Australian*, 28 June 2007

²² Julie Novak, Chris Berg, and Tim Wilson, “The Impact and Cost of Health Sector Regulation,” (Australian Centre for Health Research, 2010). p25

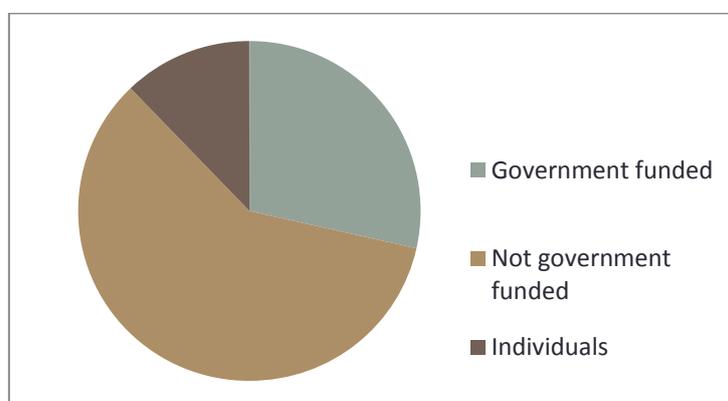
released (dividing the task into tobacco, alcohol, and obesity), and the final report was published in September 2009.

With such an enormous scope, there was a significant response to the discussion paper. There were 376 separate submissions. They were drawn from private firms, medical bodies, public health lobby groups, and peak bodies.

Submissions and public inquiries are formal mechanisms whereby interest groups and affected parties can comment on policy proposals. Policy makers use them to increase their knowledge of the issues, and the stakeholders use them to direct policy makers in their preferred direction.

Nearly one-third of the submissions to the Taskforce inquiry were produced by organisations that received all or a substantial amount of their funding from government – a total of 103 separate submissions.

Figure 1: Submissions to the Preventative Health taskforce by government funding



Source: Institute of Public Affairs

Many government departments placed submissions into the taskforce's inquiry. The Queensland Department of Health argued for the restrictions of junk food advertising.

The Victorian Health Promotion Foundation (better known as VicHealth) receives the vast majority of its income from the Victorian government. VicHealth called for "comprehensive legislation to prohibit all forms of marketing and advertising of foods or beverages, other than healthy foods or beverages, directed to children", traffic light style food labelling, junk food taxes, plain packaging for cigarettes, and a whole host of other interventions.²³

A large number of organisations funded by government put in submissions. To take a sample:

- Aquatics and Recreation Victoria, an organisation funded in part with a grant from the Victorian government to run VICSWIM, recommended that the Taskforce increase funding for Aquatics and Recreation Victoria.²⁴

²³ VicHealth, Submission to the National Preventative Health Taskforce

²⁴ Aquatics and Recreation Victoria, Submission to the National Preventative Health Taskforce; Aquatics and Recreation Victoria, Annual Report 2011-2012

- Dairy Australia, an industry body funded by a compulsory levy on dairy producers and matching government research grants, called for extra collaborative work with organisations like Dairy Australia.²⁵
- Quit Victoria, funded in large part by the Victorian Department of Health, called for an extensive range of anti-tobacco policies, including plain packaging.²⁶ Quit Victoria supported the establishment of a Preventative Health Agency and suggested that the agency could “work together” with Quit Victoria, as well as put the Victorian organisation in charge of a national Quitline.²⁷
- The Australian Association for Exercise and Sports Science represents sports and exercise scientists and psychologists. It receives grants from the Commonwealth Department of Health and Ageing.²⁸ In its submission, the association asked the Taskforce to recommend the mass part time employment of its members across government agencies to provide strategic advice.²⁹

One recurrent theme throughout the submissions is the call on extra government funding – particularly from organisations that already received government funding. Often those calls would be directed towards the submitting organisations themselves. In this way government support for lobby groups is self-reinforcing. Government funding is used to lobby for more government funding.

Nevertheless, after this extensive submission process, more than 23 days of consultations across the country from Dubbo to Mt Gambier, the final document largely affirmed the policy recommendations of the Discussion Paper.

The Preventative Health Taskforce report was released in September 2009 and offered 122 policy recommendations. Some of these policies included:

- Making smoking a “classifiable element” in movies and video games, similar to the way the classification scheme treats sex and violence.
- Plain packaging for cigarette packets
- “Nationally consistent” laws for late night liquor outlets, outlet density and responsible serving of alcohol laws
- A “Healthy Food Compact” between governments, industry and non-government organisations to “drive change within the food supply”
- Increased and simplified food labelling
- Phase out junk food advertising on television before 9pm either voluntarily or by regulation.

A very large number of the recommendations were calls on the public purse. The Taskforce wanted more taxpayers’ money to go towards: monitoring liquor laws, monitoring drink driving, increasing the resources of Quitline, health care for alcohol problems, campaigns to build a national consensus on alcohol consultation, to “de-normalise” intoxication, and so on.

²⁵ Dairy Australia, Submission to the National Preventative Health Taskforce

²⁶ Quit Victoria, “About”, available at <http://www.quit.org.au/quit-victoria-online/about-quit-victoria>

²⁷ Quit Victoria and VicHealth Centre for Tobacco Control, Submission to the National Preventative Health Taskforce

²⁸ Exercise & Sports Science Australia, Annual Report 2011

²⁹ Australian Association for Exercise and Sports Science, Submission to the National Preventative Health Taskforce

Then there were a very substantial number of calls for more research, campaigns and advocacy programs.

But the key policy was the establishment of “critical infrastructure” to pursue public health policy. The Taskforce proposed a statutory body which would “be independent”, but work closely with government and report to parliament through the Minister for Health.³⁰

The government’s response stated that “The lack of national and local infrastructure working cohesively on preventative health has hindered effective action on key chronic diseases and their associated risk factors.” The Preventive Health Agency (the spelling has curiously changed from “preventative” to “preventive”) “will work across jurisdictions and portfolios to drive the changes required to turn the tide on the escalating burden from these conditions.”³¹

Of the 122 proposals of the Preventative Health Taskforce, the only major ones to have been implemented are the establishment of the Australian National Preventive Health Agency, and the introduction of plain packaging for cigarettes.

4.2 Campaigning for legislative change

The Australian National Preventive Health Agency Act 2010 established the new institution, a statutory authority which reports to the Minister for Health.

The Australian National Preventative Health Agency calls itself “Promoting a Healthy Australia”. It has a policy jurisdiction over healthy lifestyle promotion, “reducing tobacco use”, “minimising the harmful drinking of alcohol”, “discouraging substance abuse”, and “reducing the incidence of obesity”.

ANPHA is likely to be a permanent fixture of the Australian policy landscape. The Coalition supported the bill in 2010 and there appears to be no political desire on either side of politics to close this new body.

This new agency is a statutory agency of the Commonwealth government, with all the funding, institutional support and capacity that implies. In the 2012-13 Federal Budget, ANPHA received \$57,718,000. The chief executive of the agency is appointed by the Minister for Health, and the staff of the agency is public servants employed according to the Public Service Act. It is responsible to parliament through the Minister for Health.

Yet at the same time the government has repeatedly affirmed the desire of the taskforce that the ANPHA should be “independent”. ANPHA’s explicit purpose is to “drive major change” in public health policy. On its own initiative and on instructions from the health minister, it advises and recommends policy for local, state, territory and federal governments. It collects statistics and other information on preventative health. It has a generous grant budget to hand out for preventative health research. It conducts “educational, promotional and community awareness” campaigns. It develops national standards and codes of practice.

³⁰ Preventative Health Taskforce, National Preventative Health Strategy – The roadmap for action 30 June 2009 p69-70

³¹ Australian Government, Taking Preventative Health Action: A Response to the report of the National Preventative Health Taskforce, p7-8

It also acts to disperse government money to researchers and public health organisations. While there has only been one funding round of the Preventive Health Research Grants Program, their dispersal suggests the direction that future rounds may take.

The Preventive Health Agency has a research committee and four internal committees on alcohol, tobacco, obesity and national evaluation. One of the most generous grants has been given to a member of the agency's committees. Professor Tanya Chikritzhs, from Curtin University is a member of the Expert Committee on Alcohol specialising in "alcohol research".³² In March 2012 she received a grant of \$224,792 to investigate "the public health impacts of liquor outlets in Queensland communities".³³

Other grants have gone to external organisations that conduct significant government lobbying. The Cancer Council Victoria and the Cancer Institute NSW has been given \$348,093 to research and develop advertisements promoting health weight. The Cancer Council Victoria (in a partnership with the University of Melbourne) has also received \$389,640 to investigate international trade laws and regulations that "have the potential to undermine public health initiatives" – a clear reference to the legal challenges to tobacco plain packaging in Australian courts and international bodies.

With both these latter grants, the advocacy role of the Preventive Health Agency is clear. The agency is not primarily a health research body. Australia has had the National Health and Medical Research Council since 1937. While the agency does research, it is research directed towards public policy rather than medical research. Rather than assessing the need for policy intervention, it takes that need as granted and seeks to design policies to suit.

ANPHA also has a marketing purpose as well. It runs campaigns – The National Tobacco Campaign, which released an iPhone application, MyQuitBuddy; Swap It Don't Stop It, an anti-junk food campaign with extensive print and broadcast advertising; and the National Binge Drinking Strategy, which has a substantial marketing wing.

But first and foremost the Preventive Health Agency is a lobbyist for whom the government is both client and target. Goal 1 of the agency is to "promote and guide the development, application, integration and review of public, organisation and community-based prevention and health promotion policies". According to the 2011-12 Annual Report, not only did the agency meet with all state and territory health ministers, but has had 110 separate "consultations" with government officials to push its agenda. This is an extraordinary large number, and suggests that the impact of the agency will not be its research grants, or its social marketing campaigns, but its internal lobbying.

On top of that internal work, the agency also reports that it has had over 200 meetings with non-government organisations and industry bodies.

As if to demonstrate how circular the cycle of funding, lobbying and institution building has become, the Annual Report lists as one of its major achievements in 2011-12 that it provided expert advice by

³² An archive of the ANHPA website confirms that Professor Chikritzhs has been a member of the Expert Committee on Alcohol since October 2011, available at <http://web.archive.org/web/20120323190535/http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/alcohol-committee>

³³ Preventive Health Research Grant Program 2011-12 Grant Recipients, available at <http://www.anpha.gov.au/internet/anpha/publishing.nsf/Content/research-recipients>

writing a submission to the House of Representatives Standing Committee on Health and Ageing inquiry into plain packaging. Plain packaging was one of the major recommendations of the taskforce that also recommended the agency.

In other words, the Preventative Health Taskforce recommended both a major public policy and the formation of an institution to advocate that public policy.

The agency is certain to apply a deeply ideological approach to health policy. Preventative health is, itself, a controversial field. The Preventative Health Taskforce recommendations were uniformly characterised by an interventionist approach – the 122 recommendations included substantial tax increases, substantial public expenditure, a large number of new regulations and public campaigns.

As the IPA argued in its submission, the taskforce:

- a) downplays the positive role individual choices can play in the health sphere,
- b) pays little attention to the rights of individuals to consume legal products of their choosing, and for commercial vendors to provide consumers with those legal products,
- c) fails to interrogate the extent to which the management of individual risk should be appropriated by the state,
- d) neglects to properly assess the evidence base of its policy prescriptions, and
- e) presents policies that fail to live up to the framework of evidence-based public policy.³⁴

The agency was only established in 2010. It has already pushed itself to the forefront of the debate over wine taxation. Any push for future Nanny State regulation will be aided by the substantial resources the agency has at its command. Given the dispersal of research funding in its first year – directed largely at the obstacles to implementing increased restrictions on what we drink, eat and consume – it is likely that the establishment of the agency will be a watershed moment.

The Preventive Health Agency is a classic illustration of the importance of institutions within government. It is a taxpayer funded special interest with privileged access to all levels of government.

³⁴ Chris Berg, "Submission to the Preventative Health Taskforce's Discussion Paper 'Australia: The Healthiest Country by 2020'," (Institute of Public Affairs, 2009).

5.0 Australian Human Rights Commission

5.1 Origins and purpose

The Australian Human Rights Commission, established in 1986, is a Commonwealth statutory agency with responsibilities under federal human rights and anti-discrimination legislation: the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992 and Age Discrimination Act 2004. It also has roles under the Fair Work Act 1996 and the Native Title Act 1993. A predecessor organisation (titled simply the Human Rights Commission) was established 1981.

At a glance

Established: 1986

Appropriation for 2012-13:
\$23,133,000

Staff: 150

Unlike the Australian National Preventive Health Agency, the commission has a wide set of functions – it is not merely a statutory lobbyist. It has two primary roles: to handle individual complaints about human rights breaches and to ensure Australians “benefit from human rights education, promotion and monitoring and compliance activities”.

To fulfil its first role, the Australian Human Rights Commission has a quasi-judicial function – it runs conciliations to resolve complaints about discrimination, harassment or bullying, on the grounds of age, disability, sex, race, as determined in anti-discrimination law. In this manner, the commission is of the same category as many other state and federal quasi-judicial agencies, for instance, the Refugee Review Tribunal, or the Administrative Appeals Tribunal.

Yet it is in its second role that the commission is more unusual: to educate and promote human rights in Australia. These rights are defined by the international human rights legislation which Australia is a party to, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

The commission’s promotional material declares that it is interested in “setting and advancing national agendas”.

We have a track record of drawing national attention to pressing human rights issues, raising community awareness and encouraging positive action by governments, service providers and others.³⁵

To do this, the commission has an extensive education and advocacy focus. It lobbies for legislative change. It produces “independent” research pushing its own agenda. It runs education campaigns to promote its preferred model of human rights thought.

In the 2012-13 Federal Budget, the AHRC was provided with \$23,133,000. Unfortunately the AHRC does not break down the expenditure between its compliance and advocacy functions.

³⁵ Australian Human Rights Commission, *About Us: Know Your Rights*

5.2 Campaigning for legislative change

One clear illustration of the power of a taxpayer-funded statutory agency promoting its own legislative agenda is the long campaign to introduce Commonwealth limitations on freedom of speech along racial and religious lines.

The commission and its 1981 predecessor led the advocacy for the introduction of hate speech laws in the Racial Discrimination Act.

It published a report in November 1983, *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*.³⁶ In that report, the commission urged parliament to make “incitement to racial hatred” a crime, and expand defamation to include group defamation according to race, colour, descent or national or ethnic origin.

The commission repeated this call in its major 1991 report *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, arguing that the government should fully accede to the Committee on the Elimination of Racial Discrimination and remove its reservations that limiting discriminatory speech would be a limitation on freedom of speech.³⁷ By doing so, the commission exceeded even its own self-written Terms of Reference, which was directed at “acts of violence or intimidation based on racism”. Group defamation surely exceeds those limitations.

The commission was a major participant in the inquiry into the Racial Hatred Act 1995, which amended the Racial Discrimination Act to add provisions that made unlawful acts which “offend, insult, humiliate and intimidate” on racial or ethnic grounds. When that legislation was passed, it was also accompanied by a significant funding increase for the commission itself, to promote awareness of the new law and campaign for its acceptance.

This is one of the most prominent examples of the commission campaigning, but it is hardly the only one.

In June 2012, the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda backed a Greens bill to amend Native Title legislation.³⁸ In 2010 he called for constitutional reform.³⁹ The Age Discrimination Commissioner, Dr Susan Ryan, argued in May 2012 for substantial age discrimination reform.⁴⁰ The commission has been a long-time advocate of increased Commonwealth human rights legislation.⁴¹ It protested the abolition by the Howard government of the Aboriginal and Torres Strait Islander Commission after the organisation was mired in corruption allegations.⁴²

³⁶ Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act*, Report No. 7, 1984

³⁷ Human Rights and Equal Opportunity Commission, *Racist violence: report of the national inquiry into racist violence in Australia*, 27 March 1991

³⁸ Mick Gooda, “Native title reform could go closer to fulfilling Mabo's legacy”, *Sydney Morning Herald*, 4 June 2012

³⁹ Mick Gooda, “Indigenous inclusion is good for our constitution”, *Sydney Morning Herald*, 9 July 2010

⁴⁰ Susan Ryan, “Removing the grey areas of age discrimination” *ABC The Drum*, 7 May 2012

⁴¹ See, for instance, Catherine Branson, “Take judges out of human rights process”, *The Australian*, 8 May 2009 and John von Doussa, “Bill of rights is essential to best serve human rights”, *Sydney Morning Herald*, 9 October 2008.

⁴² William Jonas, Statement on ATSI, 16 April 2004

In 2010, it contributed 15 submissions to parliamentary and independent inquiries. In 2011 it contributed 18, and in 2012 contributed 30. These covered everything from insisting human rights be recognised as a core value of the Australian Public Service, to arguing that the National Curriculum's Geography subject "investigate geographical events using an ethical lens."⁴³ In a submission to a parliamentary inquiry into cyber-safety, the commission even argued that in order to teach the elderly about online safety, it would be necessary to take out print advertisements – elderly people did not use the internet.

The commission has been explicit about its policy advocacy role and its opposition to government policy. In 1996, Sir Ronald Wilson, then President of the Human Rights and Equal Opportunity Commission, told a parliamentary committee how his body would respond to the Bringing Them Home (stolen children) Report: "it is important within the Human Rights Commission to pursue the selling of the recommendations, the monitoring of their implementation, consultation with government and other participants in the political process."⁴⁴ As Gary Johns wrote in response: "an appointed official is suggesting that he will sell the recommendations of the commission, apparently regardless of the views of the Government [and] will consult only with the Government as if it is somehow above government and will work with other participants in the political process."⁴⁵

In its 26 years of activity, the Australian Human Rights Commission has done an extremely wide range of marketing and promotion. It holds events. It gives out awards to individuals, young people, legal organisations, businesses, community groups, authors and broadcasters. It sets up committees and "ambassadors", such as the Male Champions of Change group. It runs education campaigns and awareness campaigns.

Like all bureaucracies, one major theme of its policy advocacy is to attract more prestige, funding, influence and power.

This was no clearer than in the AHRC's submission to the Rudd government's 2009 National Human Rights Consultation.⁴⁶ Apart from a strong advocacy for an extensive set of new legislatively enshrined rights, the AHRC strongly urged the government to increase its financial support of the AHRC, along with new powers and an increased prominence in the legislative system.

Regardless of whether the Commonwealth decided to pass a *Human Rights Act*, the AHRC wanted to be empowered to consider a wider array of "rights", be given guarantees that parliament would respond to its reports, increased power to intervene in court cases, extended jurisdiction over private employers, state laws and any other bodies it deemed fit, and be empowered with a formal inquiry function, as well as enforceable remedies.

5.3 An ideologically biased model of "human rights"

The AHRC is highly selective about what human rights issues it pursues.

⁴³ Australian Human Rights Commission, *Refining the Australian Public Service Values: Submission to the Australian Public Service Commission*, 2 August 2010; Australian Human Rights Commission, *Strengthening human rights education in the geography: Recommendations on Shape of the Australian Curriculum: Geography curriculum*, 7 July 2011

⁴⁴ Ronald Wilson, Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, 20 September 1996

⁴⁵ Gary Johns, "Who's watching the watchdog?" *The Australian*, 31 July 1997

⁴⁶ Australian Human Rights Commission, *Submission to the National Human Rights Consultation*, June 2009

One current awareness campaign, *Something in Common*, encourages visitors to its website to share human rights related stories. On the site, human rights issues are grouped into themes – Freedom, Respect, Equality, and Belonging. The distinctions made betray a particular ideological approach by the sites founders. The Freedom theme describes itself like so:

We all want to freedom and to be safe from harm. [sic] This means being able to live our lives without fear.

As of November 2012, the four “issues to read and discuss” of the Freedom theme are activism against gender violence, bullying and harassment, seeking asylum, and violence against women.

These are legitimate issues. However, it is not clear that they are the sum total of, or even representative of, the challenges to freedom on Australia in the twenty first century. Where is, for instance, freedom of speech, freedom to own property, to participate in the political process, or freedom to observe a religion? With the exception of the asylum seeker discussion point, the site authors appear to have reframed “freedom” as a feeling of security. This however makes it hard to distinguish from equity, respect, and belonging.

An online poll published in February 2013 on the Something in Common website demonstrates clearly the absence of these basic human rights in the ideological mindset of the AHRC. The poll asked site visitors “What is THE most important human rights issue for the 2013 federal election?”

The possible answers included “Treatment of asylum seekers”, “National Disability Insurance Scheme”, “Closing the Gap”, “Equal Marriage”, or “Other”.

The sole reference on the Something in Common website to one of the oldest and most fundamental rights, freedom of speech, is only mentioned to justify limits on that freedom. In a discussion about the feminist campaign Destroy the Joint, the site explains:

Freedom of speech is a fundamental human right. However, internationally and under Australian laws there are limits to that right – for example, to protect against defamation and vilification.

Why are these laws limiting free speech important? Why does harassment matter?

Because sometimes abuse isn’t just hurtful, it’s harmful to your health.

Such reluctance to defend freedom of speech is found throughout the Australian Human Rights Commission’s output. A Google search for “freedom of speech” on the humanrights.gov.au site returns 413 hits. A search for “vilification” returns nearly twice that: 1,130. Of those mentions of freedom of speech, the discussion is always about how that liberty should be limited (“Freedom of speech should not trump the right to safety”, “The Racial Hatred Act ... Free speech comes at a price”, “Extremist Ideology is Not Freedom of Speech”, “Freedom of speech and race hate speech in Australia”, “Exercising permissible limits on free speech”.)

Figure 2: Poll of the week, Something in Common, February 2013



Source: <http://somethingincommon.gov.au/>

In its Intervention in the Federal Court case *Clarke v Nationwide News Pty Ltd*, which concerned the application of Section 18C of the Racial Discrimination Act to a series of user comments on a newspaper website, the AHRC explicitly argued for the court to favour anti-discrimination over freedom of speech in its interpretation of the law. The exemptions in the Racial Discrimination Act that protect freedom of speech should be “construed narrowly ... because anti-discrimination legislation, as beneficial and remedial legislation, should be given a liberal construction”⁴⁷

A further suggestion of the peculiarly political perspective on human rights held by at least some at the AHRC appears in a 2009 paper “Freedom of Religion and Belief in a Multicultural Democracy: an inherent contradiction or an achievable human right?” co-authored by the then Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma.⁴⁸ (The paper offers a standard rider that the views may not represent those of the commission’s but given that it was written by a commissioner and published on its website, it is a good indication of the philosophical perspective that characterises the commissions’ view on human rights.)

In this paper, Calma and his co-author, mount a case for government intervention in private religious matters, proposing a role for the state in “moderation of the public sphere”. In religious matters, “the hand of government, even if gentle and gloved, may be required to ensure the public good”.

Freedom of religion – that is, freedom of conscience and the liberty to express that conscience – was the first liberty fought for in the modern era.⁴⁹ Religious liberty is the quintessential “negative” liberty, in Isaiah Berlin’s famous model: it requires nothing but the government get out of the way. However, the Calma paper suggests that its model of religious liberty is centred on state action. It even goes so far as decrying the “persistence” of religious belief in the modern world.

The Australian Human Rights Commission has a very particular philosophical and ideological perspective – one that sees human rights as a matter for government action, not government restraint. It speaks more about the progressive concept of “social justice” (8,130 Google hits on its website) than it does the liberal and conservative concept of “liberty” (1,260 hits).

Ideological preferences are fine, of course, but the commission is a heavily resourced government agency.

One influence on the unbalanced approach is the structure of the agency itself. The AHRC is divided into six commissioners who direct the policy work of the agency. They are the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Age Discrimination Commissioner, the Disability Discrimination Commissioner, the National Children's Commissioner, the Race Discrimination Commissioner and the Sex Discrimination Commissioner.

This is a remarkably unrepresentative of the human rights issues the agency is supposed to promote. There is no Freedom of Speech Commissioner, Freedom of Religion Commissioner, Property Rights

⁴⁷ Australia Human Rights Commission, ‘Intervener’s outline of submissions’, Submission in *Natalie Clarke v Nationwide News Pty Ltd T/A The Sunday Times*, WAD 195/2012, 10 August 2011.

⁴⁸ Tom Calma and Conrad Gershevitch, *Freedom of Religion and Belief in a Multicultural Democracy: an inherent contradiction or an achievable human right?*, AHRC Paper, August 2009

⁴⁹ See, generally, Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton, N.J.: Princeton University Press, 2003).

Commissioner, or Freedom of Association Commissioner, all of which are recognised in international human rights law.

One particularly clear illustration of how one-sided AHRC campaigns are occurred during the debate over Gillard government's 2012 draft exposure of the Human Rights and Anti-Discrimination Act.

Released in late November 2012, the draft bill was purportedly a simple consolidation of Australian discrimination law, but went much further: making it unlawful to "offend [or] insult" on the basis of their "political opinion" in any "work-related" environment. The limitations that such a law would place on the expression of opinion and freedom of speech are obvious, as the Institute of Public Affairs pointed out the day after the draft bill was published.⁵⁰

However, in its submission to the Senate Legal and Constitutional Affairs Committee that was inquiring about the draft bill, the AHRC urged the government to go much further. It called for political offense to be made unlawful in all areas of public life, and did not raise any issues that the draft bill might have had concerning freedom of speech.⁵¹

There is some indication that the attitude of the AHRC has changed in response to the vast public outcry around the draft bill. In an opinion column in January, the AHRC president Gillian Triggs suggested that "it might be wise to amend the bill, so far as it applies to acts that offend or insult".⁵²

While this is a welcome change, it is a disturbing reflection on the values of the AHRC that this clear infringement on freedom of speech is only objectionable to the commission if, for political reasons, it ends up scuttling the draft bill as a whole.

⁵⁰ Simon Breheny, "Andrew Bolt law to be supercharged by Gillard government's anti-discrimination changes" IPA Media Release, 21 November 2012

⁵¹ For more, see Chris Berg & Simon Breheny, *Submission to Senate Legal and Constitutional Affairs Legislation Committee on Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, Institute of Public Affairs, December 2012.

⁵² Gillian Triggs, "Tweaking the draft bill could preserve core reforms", *The Australian*, 22 January 2013

6.0 Taxpayer funded non-government lobbying

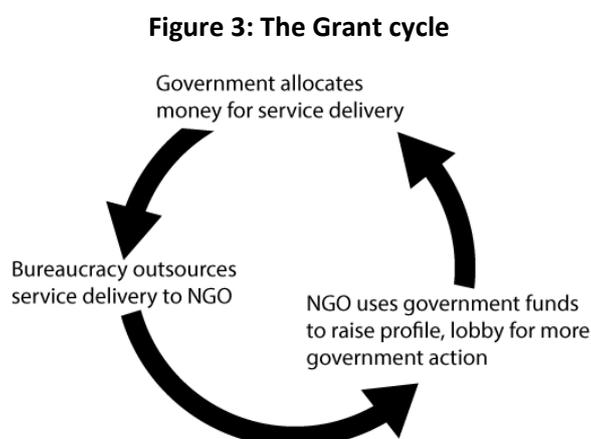
As we have seen, the two statutory agencies discussed in this paper, the Australian National Preventive Health Agency and the Australian Human Rights Commission, are also key agencies in the relationship between governments and the taxpayer funded non-government sector.

There exists a large network of publicly funded organisations, researchers and activists who draw substantial amounts of money from government in the form of grants. They then use that money to advocate their policy preferences, and, just as much, propose increased grant programs for them to take advantage of.

In their 1985 book, *Destroying Democracy: How Government Funds Partisan Politics*, James T Bennett and Thomas J DiLorenzo describe this process as follows:

- a) Politicians allocate taxpayer funds for programs under the guise of alleviating the plight of the poor, the sick, the elderly, the unemployed ... and serving the "public interest";
- b) The bureaucrats who administer the programs provide taxpayer funds to political advocacy groups through grants and contracts ostensibly intended to carry out program objectives;
- c) However, much of the money received by political activists is used to lobby, campaign, and organize support for new programs for the bureaucracy to manage, additional funding for existing programs, and the (re)election of politicians who favor the appropriations which fund the political advocacy.
- d) The political advocacy groups proselytize for their programs to persuade the public through the media that greater spending is essential to deal with a pressing social problem; sympathetic politicians receive campaign contributions and assistance in their re-election efforts; these politicians appropriate more funds for existing programs and initiate new programs; the bureaucracy awards more taxpayers' funds to the advocacy groups, and the process recycles from step 1.⁵³

Figure 3 shows this graphically: the cycle of outsourcing, funding, advocacy and further funding which drives grant programs.



⁵³ James T. Bennett and Thomas J. DiLorenzo, *Destroying Democracy: How Government Funds Partisan Politics* (Washington, D.C.: Cato Institute, 1985).

We can see this phenomenon most vividly in the submissions to the Preventative Health Taskforce, where a large number of bodies which already receive government funding used the process to advocate more government funding – funding which, no doubt, they would like to be directed at them.

The Australian government runs a wide range of grant programs. Many of these grants are used to outsource service delivery, as discussed above. There has been long running criticism that organisations that receive government funding for service delivery use that funding to advocate policy change, often contrary to the views of the government of the day.

The extent of such grant programs should not be underestimated. A NSW government audit of government grants identified at least 164 grant programs in that state alone. They found that approximately 70 per cent of state grant funding was deployed for service delivery.⁵⁴

Another major stream of government grants subsidise research. Higher education providers can receive research block grants. Individual academic researchers can apply for competitive grants through the Australian Research Council. In the health sphere, the National Health and Medical Research Council offers a large number of grants to health researchers.

More common are individual project grants, administered by a wide array of agencies in order to achieve agency goals. We have seen how the Australian National Preventive Health Agency has a research grant program focused on behavioural change.

But many other agencies and departments offer grants. For instance, the Department of Immigration offers Living in Harmony project grants to non-government organisations of between \$5,000 and \$50,000 to “promote Australian values”. The Department of Families, Community Services and Indigenous Affairs’ Sporting Heroes project distributes \$1 million to high-profile athletes to deliver positive messages - including those relating to “healthy lifestyle choices”.

6.1 International examples

Few transformations in governance and political economy have happened in Australia alone. The reforms of the 1980s were experienced, to a greater or lesser degree, almost simultaneously in the Western English-speaking democracies. New Zealand, the United Kingdom, and the United States all went through a period of reform that saw not only the headline privatisations and tariff reductions, but also the expansion of regulatory institutions and public sector reform.

Accordingly, the problems identified in this report – of government bodies and publicly funded non-profit organisations pushing policy agendas at taxpayer expense – are present around the world. To understand the challenges Australia faces it will be useful to survey how these problems have manifested in similar countries. Here we briefly survey the experience of the United Kingdom and New Zealand.

⁵⁴ Auditor-General New South Wales, *Grants Administration*, Auditor-General’s Report Performance Audit, May 2009

6.1.1 The United Kingdom

The contracting out of public services to non-government organisations has been particularly significant in the United Kingdom.⁵⁵ British charities are now predominantly funded by government grants. A 2006 study by the Centre for Policy Studies analysed a three year period between the financial year 2000-01 and 2003-04 and discovered a massive increase in government reliance. In that period, Britain's large charities increased their fundraising and marketing expenditure by 76 per cent. In that time, donations from the general public only increased 7 per cent, but grant money increased 38 per cent.⁵⁶

There are now 27,000 charities which are dependent on government funding for more than 75 per cent of their income. As the British National Council of Voluntary Organisations has argued, there is a very real risk "the voluntary sector may be perceived as little more than an agent of the state".

Many charities that were founded, and still primarily function, as lobby groups have been caught up in this massive wave of government largess. Christopher Snowdon identifies the Pedestrians Association (now called Living Streets) as one clear example of an independent lobbyist group that now receives more than fifty per cent of its income from government, supported by grants from the Department of Health, the Department of Transport, the Scottish government and the National Lottery. However, even with this significant increase in government support, Living Streets has maintained its ideological and policy preferences; calling for reduced speed limits, year-round British Summer Time (which is supposed to lower accident rates by making peak hour travel in lighter periods) and even planning restrictions for high street shops.⁵⁷

One particularly interesting governance structure in the British context is charities which are set up by the government, and funded entirely with taxpayers' money. For instance, the School Food Trust was founded by the Department of Education in response to the Jamie Oliver campaign about school food quality; as Snowdon writes, bodies such as this act as "special advisors to the government and are essentially part of the bureaucracy".⁵⁸ The similarities with the Australian National Preventive Health Agency are obvious. Australia's innovation is to have made these bodies into such large, prominent and broad-based institutions with full statutory authority.

6.1.2 New Zealand

New Zealand too has a substantial government funded non-profit sector. For example, the Ministry of Health and District Health Boards allocates between NZ\$2 and \$4 billion a year to the non-government sector for service delivery.

In 2003 it was revealed that a number of the government contracts with health-related non-government organisations specifically identified "advocacy" as an output to receive taxpayer funding. A wide range of groups, including Action Smoking and Health, Aparangi Tautoko Auahi Kore, Smokefree Coalition, Alcohol Healthwatch, Manakau City Council, & the Obesity Action Coalition had activities such as "visit key portfolio MPs and Maori MPs" and "make formal submissions and presentations to the select committee considering legislative changes" in their government

⁵⁵ Much of this section is drawn from Snowdon, "Sock Puppets: How the Government Lobbies Itself and Why."

⁵⁶ Richard Smith and Philip Whittington, *Charity: The Spectre of over-Regulation and State Dependency* (London: Centre for Policy Studies, 2006).

⁵⁷ Snowdon, "Sock Puppets: How the Government Lobbies Itself and Why."

⁵⁸ Ibid.

contracts. As Rodney Hide argued, this was an explicit use of government funds to lobby for legislative change.⁵⁹

A Ministry of Health review into these contracts found that they violated the NZ civil service principle of “political neutrality”, and NZ Treasury’s contract guidelines line include that principle.

Nonetheless, as David Farrar has pointed out, despite this apparent policy change advocacy organisations that receive significant amounts of government funds still appear to deploy this money to agitate for policy change.⁶⁰ Action on Smoking and Health New Zealand receives NZ\$578,000 per year from the NZ government – 89 per cent of its funding - and runs campaigns for policy changes such as plain packaging of cigarettes and tobacco tax increases. This even includes an online petition to send mass emails to politicians. The Public Health Association received \$311,967, a large percentage of which appears to be deployed for “Advocacy/Healthy Public Policy”. The Smoke-Free Coalition also receives substantial government funding - \$167,213 – 98 per cent of its total budget.

⁵⁹ New Zealand House of Representatives, Hansard, Volume 612, 8 October 2003, Page 8958

⁶⁰ David Farrar, “Taxpayer Funded Lobbying”, *Kiwiblog*, 14 March 2012

7.0 Conclusion: lobbying and the clash of ideas

Democracy is a clash of interests and ideas. Non-government bodies are an important input into public policy: democracy does not merely constitute elections but it should encourage continuous public debate over government action.

However that clash can be diverted and distorted if government embeds special interests within the public policy framework.

As IPA research has demonstrated in the past, there is nothing necessarily representative about non-government bodies – they are *of* civil society but do not represent it.⁶¹

If taxpayer-funded non-government organisations divert the public policy process, then statutory agencies undermine it.

The Australian National Preventive Health Agency and the Australian Human Rights Commission are institutionalised lobbyists, embedded within the structure of government, and designed to pursue a particular, highly-ideological agenda.

The ultimate decision-making power for legislation rests with parliament, and these bodies do nothing to alter that.

However, if we are sensitive to the power of private sector lobbyists, we should be even more sensitive to the power of publicly funded lobbyists that work within the structures of power rather than try to influence it from outside.

⁶¹ See, for instance, Gary Johns, *Participatory Democracy: Cracks in the Façade*, IPA Backgrounder, July 2005, Vol. 17/3

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About the author

Chris Berg is a Research Fellow with the Institute of Public Affairs. He is a regular columnist with the *Sunday Age* and *Sydney Morning Herald*, and ABC's *The Drum*, covering cultural, political and economic issues. He is an award-winning former editor of the *IPA Review*.

His latest book is *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt*.

A monograph, *The Growth of Australia's Regulatory State: Ideology, Accountability and the Mega-Regulators*, was published in 2008. He is also the editor of *100 Great Books of Liberty: The Essential Introduction to the Greatest Idea of Western Civilisation* (with John Roskam) published by Connor Court Publishing in 2010, and *The National Curriculum: A Critique* (2011).