

Submission to NSW ICAC: The regulation of lobbying access and influence in NSW

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Overall comments

There seems to be a fundamental misunderstanding of how the game of political favouritism and corruption works in this discussion paper, which leads to superficial, or ineffective, changes to rules about lobbying, and some changes that may even backfire.

After spending many years spent undertaking empirical analyses of political favours, including conducting controlled experiments about favour-trading behaviour, I realised that many of the standard assumptions about how lobbying works were wrong. I also found the whole idea of corruption to be too vague as to be useful.

Let me be clear.

Standard view

- Favourable new laws or regulations are “purchased” with political donations, gifts, or by lobbyists who offer indirect incentives to key political actors.
- This happens in a clandestine manner because it is known by all parties to be unethical.
- If the public could see this behaviour it would cease, even if it was strictly legal. The internal moral compass of the players would direct them to behave by the ethical norms of society when under public scrutiny.
- Because these external ethical norms of society are clear to everyone, rules that oblige ethical behaviour can change actual behaviour.
- If donations or lobbying were banned, then decisions that were influenced by donations would no longer occur.

This is all wrong! A more realistic and complete view is as follows.

Real view

- New laws or regulations often give economic advantages to some companies and industries, which are a type of gift that comes at no cost to the giver (what I call a “grey gift”).

- These grey gifts motivate economic actors to influence the way laws and regulations evolve. Without them, there is no motivation to sway the hand of government at all, as there is no economic payoff.
- Political actors realise that they often can't help but provide gifts to different parts of the economy when crafting new laws. They therefore rely on social signals and feedbacks about which way to craft laws that appear to satisfy their constituents (not just voters, but industry representatives etc).
- When they get a lot of good social signals about the laws they are discussing or proposing they are motivated to further pursue them.
- Many of the signals come in the form of stories about why a certain law or rule that provides a grey gift to one sector is also in the interest of society as a whole. These stories reinforce that what is good for those in the social circle of the politician are good for society as a whole (e.g. if we don't give tax breaks to housing developers, we won't get any new housing built).
- Lobbyists are able to provide those signals to politicians in a trustworthy way because of their established personal reputations. Clients of lobbyists would otherwise have a hard time accessing the relevant social networks and having their stories taken seriously.
- Likewise, donors are donating to provide credibility to the signals and stories they are telling so that they are taken more seriously. They are not buying individual decisions.
- Those who already have social connections or reputations do not need to donate or hire lobbyists to get their stories heard and believed.
- Politicians and bureaucrats do not have an internal ethical compass that tells them not to enact favourable laws for those in their social circles (except in secrecy). In fact, the opposite is true.
- Those politicians and bureaucrats will often internally believe that helping those in their social circles is what is good for society as a whole, as they keep getting signals and feedback telling them this is the right thing to do, and they are armed with compelling stories about why this is so.

The standard view implies that transparency will solve corruption and that laws requiring ethical behaviour will have some effect because there exists a universally understood benchmark of ethical behaviour that is known by all.

The real view implies that transparency will do nothing, as all actors in this "game of mates" believe that they are acting ethically and have good stories to tell about why this is so. Indeed, all their mates are telling the same stories, so how could it not be true?

It also implies that outlawing one type of behaviours that provide feedback and signals to law-makers will simply increase other behaviours that achieve the same outcome. If you ban private meeting with ministers by lobbyists, they will instead buy a seat at a table with the minister at industry breakfasts. It is pretty hard to stop people earning trust and telling stories?

Transparency warning

I write this submission firstly as a warning about transparency.

Transparency be useful, ineffective, or it can even backfire. For example, publishing more information about lobbyists and their meetings with politicians might backfire when lobbyists begin to use this information to demonstrate their political influence to future potential clients.

It seems obvious to me that publishing ministerial diaries that show dozens of meetings with a certain lobbyist can be used by that lobbyist to advertise their success.

“I can get you what you want from this government. Look, I got twelve meetings with the minister for my other clients!”

While at the same time, the minister can argue that they are doing a great job by meeting with all the important stakeholders and their representatives.

Transparency about disclosing client payments made to lobbyists may show current politicians just how attractive lobbying can be when they retire from politics, providing them more incentive to build social relationships in the industries they regulate which they can capitalise on later.

And overall, the more regulation, registers, and formal acceptance of lobbying there is, the more the practice of lobbying become legitimised, and any ethical concerns that might exist can be more easily overcome.

“Don’t worry, there is nothing dodgy here. This is all standard practice, and I have all the regulatory permits and official requirements to seek favours from my mates in government.”

Transparency only helps clean up corruption if it is a step in the process of enforcing clear rules about corrupt behaviour that come with significant punishments. Otherwise, it is window dressing.

Key economic levers for combatting political favouritism and corruption

I secondly write this submission to show where the levers are that can reduce political favouritism and/or the economic cost of favouritism.

The obvious place to start is at the other end of the corruption/favouritism process by targeting the ability to give grey gifts via political or regulatory decisions in the first place. Are there ways to enforce decision-making methods that eliminate the ability to give economically valuable political or regulatory decisions?

In many cases it is difficult (like tax reforms). But in many of the areas of government where political favouritism is a major concern, such as in planning decisions by state governments and councils, there are simple ways.

One way is to require that new planning rights are sold to landowners at market value, rather than being given for free.

The average person would not find it very surprising that corruption and favouritism could be a problem in a world where councils and state governments were able to routinely give away highly valuable public land to favoured private entities for free, without any attempt at fetching a market price.

But we don't have that situation, as government agencies are obliged to follow a number of principles, policies, and guidelines that require a market price to be fetched for disposal of public real property. Following such a process makes it difficult to give economically favours (because anyone interested in the acquiring the property must outbid others), and even if they are favoured (or the bid is rigged), the economic payoff is much smaller than if the property was given for free. It also makes the decision to not follow those policies a clear and enforceable case of misconduct or corruption.

Yet when we give from the public highly valuable property rights to vertical space through rezoning decisions, we have no systems in place to require a market price be fetched for them, even though, like the land surface itself, these property rights are highly valuable. I have estimated that rezoning decisions nationally give away new development rights worth \$11 billion! No wonder that lobbying and corruption in planning and development is so rife.

The first lever to pull on to help combat corruption, lobbying and favouritism in the planning system is to remove this \$11billion honeypot around which vested interests will always swarm. This can be done (like it is in the case of the disposal of real property) by introducing regulations that require a market price of the property rights that come from rezoning to be fetched from property owners who wish to use their land at the higher-value rezoned use. Such a system has been in place in the ACT since the 1970s, requiring a payment of 75% of the assessed market price of the accrued zoning rights when properties are converted to these higher value uses.

The second lever to pull is to randomise who has decision-making power so that lobbying cannot be effectively undertaken. Since political favours are a group game, relying on feedback and signals from the trusted social networks of those in power, giving decision-making powers to outsiders can undermine the effectiveness of lobbying in general.

For example, in criminal courts we use randomly drawn juries to ensure a degree of independence and community expectation is maintained in the criminal justice system. This make lobbying judges far less effective in jury trials.

We can enshrine in policies and regulations that certain decisions must be determined by groups of independent field experts. Tax changes, privatisations, toll road proposals, etc. that exceed a certain value threshold could all be required to be decided on by panels of

subject-matter experts, with these experts drawn from an international pool (perhaps as members of the relevant accredited profession) by random. While the process is certainly open to stacking, doing so will require clear breaches of regulations and so should be somewhat enforceable.

This requirement would make lobbying by certain businesses or industries less likely to proceed where it conflicts with overall social and economic objectives that independent experts would be keenly aware of.

In general, the structure of the economic payoff from political favours and the social group dynamics of those involved in public decision making should be key targets for reforms. I would hope that ICAC is able to make recommendations and push for such changes within the government.

Specific responses to questions

Register of Third-party Lobbyists

1. Are there any examples of lobbying laws/practices in other jurisdictions (interstate or overseas) that seem to work well?
2. Who should be required to register on the Register of Third-party Lobbyists?
3. Should there be a distinction between lobbyists on the register and lobbyists bound by the code of conduct?
4. Should there be a distinction between “repeat players” and “ad hoc lobbyists”?
5. Should there be targeted regulation for certain industries? If so, which industries should be targeted?

It is not clear to me that formalising lobbying as a legitimate business practice with these registers achieves much in the way of changing behaviour. The major industry groups are perhaps the most effective lobbyists, but it seems almost impossible to have all industry associations comply with regulations designed for consultant (third-party) lobbyists. Then there are in-house lobbyists that are impossible to include in these registers.

Disclosure of lobbying activity

6. What information should lobbyists be required to provide when they register?
7. Should lobbyists be required to provide, or at least record, details of each lobbying contact they have, as well as specify the legislation/grant/ contract they are seeking to influence? Should this information be provided only to regulatory agencies or be publicly available?
8. Should lobbyists be required to disclose how much income they have received and/or how much they have spent on their lobbying activities?
9. How should lobbying interactions with ministerial advisers, public servants, and members of Parliament be recorded and disclosed?
10. What information should ministers be required to disclose from their diaries and when?

I don't believe that disclosure of the activities that any interested observer could infer are occurring based on LinkedIn profiles, and the laws under discussion in parliament, changes anything.

One economic lever to make third-party lobbying unattractive is to require clients who use them to pay additional fees or taxes on domestic turnover for the social privileges they are getting. Without a clear economic incentive tied to the lobbyist registration and disclosure I believe the transparency itself will not change behaviour.

Promoting accessibility and effectiveness

11. How can disclosures of lobbying regulation best be presented and formatted to better enable civil society organisations to evaluate the disclosure of lobbying activities?
12. Should there be greater integration of lobbying- related data? For example, should there be integration of:
 1. (i) information on political donations made by lobbyists
 2. (ii) the register of lobbyists
 3. (iii) ministerial diaries
 4. (iv) details of investigations by the Commission
 5. (v) list of holders of parliamentary access passes
 6. (vi) details of each lobbying contact (if reform occurred)?
13. Should the NSW Electoral Commission be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament?

While this data integration is quite interesting and should be a key principle of any public disclosure register of lobbyists and political donors, I think the bigger fish here involve corporate record keeping at ASIC.

Clients of lobbyists can pick and choose which of their various subsidiaries and shell companies to engage lobbyists. A key metric for any interested observer is the financial payoff from successful lobbying, which cannot be observed for most private companies who are not obliged to publicly disclose financial records.

If corporate financial records were freely and openly available, alongside individual tax records (as is the case in Norway), very little of this additional lobbying-specific disclosure would be required.

Regulation of the lobbyists

14. What duties should apply to lobbyists in undertaking lobbying activities?
15. Should NSW members of Parliament be allowed to undertake paid lobbying activities?
16. Should lobbyists be prohibited from giving gifts to government officials?

Parliamentary members should not be allowed to undertake lobbying activities, and lobbyists should be prohibited from giving gifts. Though, it is worth bearing in mind that gifts can be in the form of promises to be looked after post-politics with a cozy job in the

sector being lobbied for. These much more valuable gifts are more difficult to control but can be made more difficult with broad and lengthy (say 3 year) cooling-off periods for politicians and senior departmental staff.

Regulation of the lobbied

17. Should the definition of "government official" be expanded to include members of Parliament?

Yes.

18. What obligations should apply to government officials in relation to lobbying activities?

19. Should public officials be obliged to notify the NSW Electoral Commission if there are reasonable grounds for suspecting that a lobbyist has breached the lobbyist legislation?

Yes.

20. Should government officials be required to comply with certain meeting procedures when interacting with lobbyists? If so, what procedures are appropriate?

I think this requirement would be very difficult to enforce and of little value.

Regulation of post-separation employment

21. Should there be a cooling off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers, and senior public servants from engaging in any lobbying activity relating to any matter that they have had official dealings in? If so, what length should this period be?

Yes. Three years or more is ideal. Long enough for the value of personal and social connections to erode.

22. How should a post-separation employment ban be enforced?

One way could be to require a statutory declaration to be made each year about the sources of income and any formal or informal meetings with the industry bodies or businesses. This declaration would provide an avenue for criminal charges if false statements are made. Random checks can be made, and cash bounties offered to anyone who can provide evidence of false statements or failure to comply.

23. Should lobbyists covered by the NSW Register of Lobbyists be required to disclose whether they are a former minister, ministerial adviser, member of Parliament or senior government official and, if so, when they left their public office?

Yes.

24. Should lobbyists covered by the NSW Register of Lobbyists, who are former government officials, be required to disclose their income from lobbying if it exceeds

a certain threshold? If so, what should be the threshold? And for how long should this obligation apply after the lobbyist has left government employment?

Yes. With no time limit. If you want to go down the path of disclosing lobbying income, that is fine too.

Promoting the integrity of direct lobbying – other measures

25. Should there be a requirement on the part of the NSW Government to make a public statement of reasons and processes in relation to significant executive decisions? If so, what circumstances would trigger such a requirement and how might it operate in practice?

I'm not so sure of the value of producing "excuses" documents. I'd rather create regulations that limit such executive decisions or require them to be vetted by independent panels.

Fair consultation processes

26. Should there be NSW Government guidelines on fair consultation processes?
27. If so, what should be provided under these guidelines in terms of these processes being inclusive, allowing for meaningful participation by stakeholders and promoting adequate responsiveness on the part of government officials?
28. If so, how should these guidelines be integrated with a requirement to provide a statement of reasons and processes with significant executive decisions?

Resourcing disadvantaged groups

29. How can disadvantaged groups be supported by the NSW Government in their lobbying efforts (for example, ongoing funding of organisations, and public service dedicated to supporting community advocacy) to promote openness in the political process and to promote advocacy independent of government?

Promoting the balance of freedom, restrictive measures and proportionality

30. How can the measures to promote the democratic role of direct lobbying be designed so as to have a proportionate impact on the freedom to directly lobby?
31. Should there be provision for exemption from restrictions on direct lobbying such as the ban on post-separation employment when undue hardship can be demonstrated?
32. Could existing or new regulatory requirements drive improper lobbying practices underground or have a dampening effect on legitimate lobbying?

Promoting the role of education and training

33. Is there adequate support for lobbyists and government officials to enable them to understand their obligations under the lobbying legislation?
34. To understand their obligations in relation to lobbying, should there be training and/or education programs for:
(i) lobbyists
(ii) public servants
(iii) ministers

(iv) ministerial advisers?

If so, what sort of training or education program is needed?

It seems unlikely to me that officials or politicians fully understand their obligations and I think whichever system is in place, ICAC should take a strong educational/outreach role in make sure that all actors on both side so the equation are fully informed of their obligations.

I think programs for all of these individuals. Perhaps like any company that does induction programs, these can be integrated into the operations of parliament and departments.

Promoting independent supervision to enforce lobbying laws

35. Does the NSW Electoral Commission have adequate powers and resources to enforce lobbying regulations in NSW?
36. How can the enforcement of the lobbyist regime be improved?
37. Are the sanctions under the lobbyist legislation adequate (that is, suspension of lobbyists, placement on the Watch List and deregistration)?

In general, I think that significant cash bounties for whistle-blowers who help uncover wrongdoing will go some way to reversing the incentive for them to keep their mouth shut due to immediate career and family consequences.