

## Submission to Operation Eclipse

**Christopher Knaus and Nick Evershed, Guardian Australia**

Thank you for the opportunity to participate in this inquiry. We offer this submission as an observation of the lobbyist system in NSW, from the vantage of the media. Data editor Nick Evershed and I have worked extensively on lobbyist issues through Guardian Australia's *Transparency Project*.

Lobbying is, of course, a legitimate part of a healthy democratic system. It allows those affected by government to directly communicate their views and expertise to decision-makers.

But ensuring it is properly regulated and open to proper public scrutiny is critical in reducing corruption risks.

The NSW system, in our experience, is relatively strong compared to the federal regime, but remains far below international best-practice.

### Corruption risks

In broad terms, lobbying poses a corruption risk where wealth affords undue influence. The best lobbyists have the greatest access to ministers, ministerial staff, or public servants. They are often former government insiders - either ministers, ministerial staff, or bureaucrats - who use their connections and knowledge of government to benefit their clients.

The best lobbyists are also the most expensive. Their services are typically only affordable to society's most powerful. This can have a distorting effect on the democratic process and can create disparities in access to government.

Wealth already appears to be a factor in levels of access to government. This is exemplified by the comparative access of miners and environmentalists to government. Miners can afford to pay lobbyists and donate to political parties. Environmentalists cannot. The distortion is reflected to some extent in the ministerial diaries. Our analysis suggests the resources sector secured roughly 188 meetings with ministers in 235 weeks. The NSW Minerals Council, the group with the greatest level of access, had 61 meetings in that time. The environmental group with the greatest level of access was the Lock the Gate Alliance. It had just 19 meetings with NSW ministers.

An area of acute risk is the "revolving door", a term used to refer to movement between lobbying and politics. An investigation last year, focussed at the federal level, revealed one in four lobbyists held a prior government role, whether as a minister, MP, staffer, bureaucrat, or political party executive. We found multiple instances where party executives concurrently held roles with lobbyist firms. This means a lobbyist - who is being paid by private interests - simultaneously has influence over a party's candidate pre-selections and policies. The corruption risk is clear. Lobbying rules are supposed to stop this practice, but they are not enforced, carry no real punishment, and are easily avoidable.

The revolving door creates risks in other ways. Ministers and ministerial staff who move immediately into lobbying carry with them critical information and contacts. They possess inside knowledge about imminent government decisions and contract opportunities or requirements. A defence minister who immediately takes up a lobbying role for an arms manufacturer, for example, can give the company an unfair advantage in securing a weapons contract. The minister has inside knowledge of tender specifications, competitor bids, and key government figures involved in decision-making. Again, lobbying rules in most jurisdictions, including NSW, include a cooling-off period, but are rarely enforced and narrow in scope.

## Transparency measures

The main strength of the NSW system is its release of ministerial diaries, a transparency measure which is actively resisted at the federal level. The diaries give a rough approximation of the degree of access that corporate interests are afforded to NSW ministers. It allows an answer to the question: 'who is in the room?'. There are, however, many flaws with the diaries. They are not regularly audited, so NSW ministers are able to include/exclude meetings without consequence. The diaries offer scant information. Typically, an entry will say only who met with whom, and when. They give little detail on what was discussed, or what policy an entity was seeking to influence. They only cover formal, diarised meetings, not incidental catch-ups or encounters, which are commonplace in the halls of parliament. The diaries are also frustratingly inaccessible to data journalists. They are in PDF form, and names of entities are inconsistent across the PDF files. This requires the data to be cleaned and homogenised before any analysis of trends can be undertaken. .

The NSW lobbyist register is weak in many respects. It only covers third-party lobbyists - those professional lobbyists who are working on behalf of an external client. In-house lobbyists, those who work directly for corporations, are not included. The biggest companies in the world - Google and Facebook, for example - hire their own lobbyists, typically described as "government relations" executives. The current system means they are hidden from the public. The premier Barry O'Farrell explained this in 2010 by saying: "There are no transparency issues for in-house lobbyists, as it is self-evident who they represent". This may be self-evident to politicians. But the current system hides in-house lobbyists entirely from the public. It does not allow public and journalists the ability to understand which in-house lobbyists are actively attempting to influence government. This is not only bad for transparency, but it also unfairly punishes third-party lobbyists, who are subject to a higher level of scrutiny with no apparent justification. Victoria has moved to include in-house lobbyists in its register. But it is not without difficulty. Defining "in-house lobbyist" is challenging. The concept is malleable and open to interpretation. Is a chief executive who approaches a government minister seeking to influence policy, for example, an in-house lobbyist? Other jurisdictions (Victoria, for example) have grappled with this issue and found definitions that adequately capture in-house lobbyists.

The lobbyist register in NSW has other flaws. A critical weakness is that, unlike other jurisdictions, it gives us no idea of whether a lobbyist has previously worked in government, their former role and when they left.

The register does not include details of "lobbyist contacts", unlike Queensland, which requires lobbyists to regularly list recent interactions with government.

The strengths of the register include its inclusion of ABNs for clients and lobbyist firms, which allow for better comparative analysis with other datasets by removing the need to fix messy/inconsistent names prior to data analysis. Details around the dates a client or individual lobbyist has become involved with a lobbyist firm are also useful. The ability to export the lobbyist register as an Excel file is also handy and allows for greater data analysis.

Another window into the influence of lobbyists is through the public declaration of gifts to NSW politicians. Gifts are declared in pecuniary interest registers. NSW fails significantly in this regard. The pecuniary interest documents are handwritten and only accessible to the public if they are tabled in NSW parliament. This makes them enormously difficult to access and/or analyse, and reducing transparency.

Lobbyists routinely declare donations to major political parties. Unfortunately, the disclosure regime does not require lobbyists to make any declaration of whether they are donating on behalf of a client and, if so, who. This creates the risk that lobbyists are acting as a conduit for donors who are prohibited or wish to hide their identity from public disclosure.

Even when the client of a lobbyist is known, determining the beneficial owner of the client in the case of a company can be difficult. As it stands, the cost of ASIC searches to establish the ultimate ownership of a company are a significant barrier to such research, even when the concessional rates available to journalists are taken into account. There is some hope this situation will be improved as the Turnbull government announced that concessional access for media organisations would be extended to cover all searches, but this has not yet been implemented.

### **Lobbyist rules**

The lobbyist rules in NSW are weak relative to international best-practice. The punishments for a contravention of the lobbyist code of conduct involve placing a lobbyist on a watch list - designed to inflict reputational damage - and suspending or cancelling their registration. Offences punishable by fines exist only for accepting success fees in relation to the lobbying of a government official or breaching the 18-month cooling off period designed to prevent former ministers and parliamentary secretaries immediately lobbying government.

The current system in NSW risks simply pushing lobbying activities underground. Those who have their registration suspended or cancelled appear to face no consequence if they continue to lobby while unregistered. There appears to be no discrete offence for this in NSW law. In Western Australia, lobbying by unregistered persons can lead to a fine of \$10,000.

The cooling-off rules are also deficient. It only applies to ministers and former parliamentary secretaries. This ignores political staffers, bureaucrats, and backbench MPs, who can also trade on inside knowledge and connections to enhance their value as lobbyists. The time period of 18-months is also well short of international best-practice. Canada's lobbying laws prevent designated public office holders from lobbying for a period of five years.

Enforcement is a strength of the NSW system, compared to other Australian jurisdictions. Last year, Guardian Australia asked the federal, state, and territory governments for evidence of their enforcement activities. NSW, where the NSW Electoral Commission assumes responsibility, was by far the most active. In 2017-18 NSW took 54 enforcement actions, including placing lobbyists on a watch list, issuing formal warnings, or suspending or cancelling registrations. It has been less active in other years.

The NSW Electoral Commission has a greater degree of separation from government than the federal system, where lobbying is overseen by government departments. Canada has a wholly-independent lobbying commissioner - the Office of the Commissioner of Lobbying of Canada - which enforces the laws and metes out punishments.

### **Priorities for reform**

In our view, the single-greatest reform available to build transparency and restore confidence in government would be the creation of an integrated transparency register. This system would act as a searchable database that incorporates lobbying, donations, NSW government contracts, gifts to politicians, and ministerial diaries. Transparency campaigner Rosie Williams, who runs AusGov.info, has attempted to build such a system manually at a federal level.

This would be a major overhaul. But it would bring together disparate systems and give a complete picture of corporate influence on democracy. Lobbying, donations, gifts, and access should not be viewed in isolation. Rather, they should be viewed as cogs in a broader effort to influence.

Other incremental reforms open for consideration:

- a greater level of detail in NSW ministerial diaries, including a proper description of a meeting's subject and purpose. The homogenisation of names and the inclusion of ABNs to allow for ease of analysis.

- greater frequency of release for ministerial diaries. The current quarterly release is too slow and does not allow for real-time transparency.
- the inclusion of in-house lobbyists on the lobbyist register
- a longer cooling-off period, and an extension of the cooling-off period to staffers and bureaucrats.
- an offence for lobbying while unregistered, similar to that in existence in Western Australia.
- expand the definition of “government official” under the act to include MPs and senior staffers.
- an annual analysis by the NSW Electoral Commission of the levels of access to NSW ministers, showing trends and disparities.
- the digitisation and mandatory release of pecuniary interest registers, in a format that is searchable and easily retrievable.