

The NSW Independent Commission Against Corruption: Investigation Operation Eclipse

'The regulation of lobbying access and influence in NSW: a chance to have your say'

A Guide to Summary Submissions: May 2019

Lobbying: Corruption Risks

What do you consider to be the actual or perceived corruption risks in lobbying?

It is clear that lobbying can lead to corrupt conduct by both lobbyists and government officials, as brought to light by various investigations by ICAC and the Western Australian Crime and Corruption Commission.

The corruption risk is greatly increased when lobbyists also make significant campaign donations or lavish gifts on government officials, particularly in a context of declining membership of political parties and their resultant lesser ability to raise funds through membership fees.

Lobbyists: Your views on the strengths and weaknesses of the NSW regulatory regime

Please provide us with a summary of your views.

The NSW system is stronger than many other Australian jurisdictions, with stricter standards for both lobbyists and government officials dealing with lobbyists. Alongside the legislative scheme, there is a requirement for Ministers to publicly disclose their diaries, including meetings with lobbyists, which adds a further layer of transparency. The Lobbyists Watch List is an innovation that provides for enhanced compliance through public scrutiny of lobbyists on the list and strict meeting protocols. Furthermore, there is oversight of lobbying regulation through a statutory authority: the NSW Electoral Commission, which is more independent than the regulator being situated within a department.

However, the system could be further strengthened. The lobbyist register only applies to third party lobbyists, and thus excludes the significant number of in-house lobbyists, which is a glaring omission.

There could be increased disclosure obligations on lobbyists and government officials to increase transparency (discussed below). The diary disclosure regime could be extended beyond Ministers to ministerial advisers and senior public servants.

The revolving door ban in NSW is more lax than many other jurisdictions, as it only covers Ministers and parliamentary secretaries, and does not include ministerial advisers and senior public servants.

The Lobbied: Your views on the elected and public officials who are lobbied

Please let us know your views on who is lobbied in government and why?

Ministers, ministerial advisers and senior public servants are logical targets for lobbyists, as they have the ability to make executive decisions and directly influence policy-making.

MPs who hold the balance of power or who hold senior positions within the party may also be target for lobbyists due to their political clout.

Lobbying: Key Issues for Debate

What do you consider to be the key issues which would benefit from debate in a Public Inquiry?

The regulation of lobbying has to balance between the freedom for individuals or corporations to lobby their elected representatives, against the undue influence and corruption risks of powerful and well-funded vested interests who are able to use their resources and connections to further their own interests at the expense of the public interest.

There are a few major issues: the rules/laws/regulatory schemes in many Australian jurisdictions are weak, and the enforcement of some of these rules have been non-existent, such as revolving door provisions. Thus, the key issues could be an appropriate regulatory model based on best practice overseas; recommendations for reform; and appropriate enforcement of the regulatory scheme.

Lobbying: Priorities for Reform

What areas of regulatory reform, if any, do you consider to be a priority?

The lobbyist register should cover both third party and in-house lobbyists, consistent with comparable jurisdictions such as Canada and the United States.

To increase transparency, lobbyists should be required to disclose every lobbying contact. There should be an accompanying requirement for Ministers, ministerial advisers and senior public servants to proactively disclose their diaries. Disclosures should be sufficiently detailed, i.e. required to specify the subject matter, and whether it relates to any legislative bills (which should be specified), grants or contracts.

For a lobbying scheme to be fully effective, there should be integration of the data from:

- (i) political donations made by lobbyists;
- (ii) the register of lobbyists;
- (iii) ministerial diaries;
- (iv) details of investigations by ICAC;
- (v) list of holders of parliamentary access passes;
- (vi) gifts given by lobbyists to government officials; and
- (vii) details of each lobbying contact (if reform occurred).

This is because the corruption risks of lobbyists partly derive from their ability to shower government officials with gifts and large political donations, which leads to their consequential access to government officials and influence on policy-making, justifying further transparency in this area.

Enforcement by regulators is a major issue, as there are some rules in certain jurisdictions, e.g. revolving door provisions, that are not enforced despite many breaches.

Lobbying: Other Regulatory Systems

Do you have insights or experience of regulatory systems operating in other jurisdictions, or overseas?

The Queensland disclosure regime is more comprehensive than NSW as it combines disclosure of ministerial diaries with lobbyists being required to disclose each lobbying contact. NSW provides for the disclosure of ministerial diaries, but this only discloses the interaction of Ministers with lobbyists, but not other government officials such as ministerial advisers and public servants.

Canada and the United States have well-established lobbying laws, which may be models that could be considered for the Australian context.

The coverage of lobbyists on the register of Canada and the United States is broader than NSW. For instance, the Canadian lobbyists register requires the registration of professional lobbyists or any individual who, in the course of his or her work for a client, communicates with or arranges meetings with a public office holder.¹ This includes third party lobbyists, in-house lobbyists for corporations, and in-house lobbyists for not-for-profit organisations.²

The United States covers lobbyists based on financial thresholds, where lobbyists covered are:

- Persons who receive financial or other compensation for lobbying in excess of \$2,500 per three month period, makes more than one lobbying contact and spends 20% or more of their time over a three month period on lobbying activities on behalf of an employer or individual client. This covers both third party lobbyists and in-house lobbyists; and
- An organisation is required to register if it plans to engage in lobbying activities during any three-month period and during that period incurs at least \$12,500 in lobbying expenses for organisations that employ in-house lobbyists and \$3,000 for lobbying firms.³

The United States and Canada are also broader in terms coverage of government officials, as both legislative and executive branch officials are covered by the lobbying provisions.⁴

The disclosures of lobbying activities are also more extensive in the United States and Canada; both require disclosure of each lobbying contact, and additionally the United States requires lobbyists to disclose their expenditure as well. Registered lobbyists are required to file quarterly activity reports with the Clerk of the US House of Representatives and the Secretary of the US Senate.⁵ Lobbyists must also file semi-annual reports of campaign contributions to federal candidates and events that honour federal officeholders.⁶ The semi-annual report must contain information about the lobbying clients, issues, including bill numbers and executive branch actions, and total income and expenses received from the client.

Canadian lobbyists have an obligation file a monthly return to the Commissioner of Lobbying, not later than 15 days after the end of every month, setting out the details of the lobbying clients, name of the public office holder, subject matter and date of communication.⁷

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¹ *Lobbying Act*, RSC 1985 (4th Supp), c 44 ss 5-7.

² *Ibid* ss 5-7.

³ *Lobbying Disclosure Act of 1995*, 2 USC § 1601-3(10).

⁴ Covered executive branch official, i.e. the President, the Vice President, any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President, any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order, any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37, United States Code; and any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, United States Code: *Lobbying Disclosure Act of 1995*, 2 USC § 1601-3.

Covered legislative branch official, i.e. a Member of Congress, an elected officer of either House of Congress, any employee of, or any other individual functioning in the capacity of an employee of a Member of Congress, a committee of either House of Congress, the leadership staff of the House of Representatives or the leadership staff of the Senate, a joint committee of Congress, and a working group or caucus organised to provide legislative services or other assistance to Members of Congress; and any other legislative branch employee serving in a position described under section 109(13) *Ethics in Government Act 1978* (5 USC App). *Lobbying Act* (Can), section 2.

⁵ *Ibid* § 1601-5.

⁶ Office of the Clerk, *Guide to the Lobbying Disclosure Act* (17 June 2014) US House of Representatives <http://lobbyingdisclosure.house.gov/amended_lda_guide.html>.

⁷ *Lobbying Act*, RSC 1985 (4th Supp), c 44 ss 5-7.

In Canada, lobbyists' donations to political parties are capped at \$1,000,⁸ although there is a loophole within the system that allows lobby groups to provide 'consultancy services' to political parties for free during election times and many lobbyists do so.⁹

These regulatory systems, that include a broader coverage of both lobbyists and government officials, as well as far more extensive disclosure requirements, including disclosures of each lobbying contact, as well as disclosures of income and expenditure by lobbyists, alongside the regulation of political donations by lobbyists through either caps or disclosures, could be considered as possible reform options.

Lobbying: Additional Points

Please provide us with any further points you would like to be raised in the Public Inquiry.

There may be specific higher risk industries that the Public Inquiry might wish to focus on, e.g. gaming, property developers etc.

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Date: 31.5.19

⁸ *Canada Elections Act*, SC 2000, c 9 s 405.

⁹ Chari, Hogan and Murphy, above n 342, 42.