

Current mechanisms for the registration of lobbyists

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The title of this article indicates that it is about the registration of lobbyists. But taking my cue from the theme of the conference, concerned as it is with transparency and accountability, I intend to go a lot further. There are a number of resources that provide the details of the current mechanisms for the registration of lobbyists in Australia — among them the Commonwealth Parliamentary Library's 2014 research publication on lobbying.¹ I do not intend to do other than summarise the main features of the systems for regulating lobbyists that have been adopted in Australia at the Commonwealth level and to detail some of the ways in which different states have developed and adapted them. I propose to devote most of the article to an examination of the supposed purpose of these regimes and whether it is sufficient, particularly in the light of international experience. In doing so I will also refer to 'Operation Eclipse' — an examination currently being undertaken by the New South Wales Independent Commission Against Corruption (ICAC) of how the New South Wales Government regulates lobbying, access and influence.

The Commonwealth lobbying scheme

The mainspring of the Commonwealth scheme (and the other state schemes) is the *Lobbying Code of Conduct* (the Code). It provides definitions, establishes a register of lobbyists and sets out the rules governing contact between lobbyists and government representatives. The Code 'is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty'.²

The lobbyists with which the Code is concerned are those people, companies or organisations that conduct 'lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client'.³ This is a very narrow definition, designed to include relatively few of the people who actually lobby government ministers, their staff and senior public servants. Among those the definition says are *not* lobbyists that will be regulated under the scheme are:

1. non-profit organisations 'constituted to represent the interests of their members';⁴

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1 Deidre McKeown, 'Who Pays the Piper? Rules for Lobbying Governments in Australia, Canada, UK and USA' (Research Paper Series, Parliamentary Library, Parliament of Australia, 2014).

2 Australian Government, *Lobbying Code of Conduct*, 1.4.

3 Ibid 3.15.

4 Ibid 3.5.2.

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2. people, companies or organisations and their employees ‘lobbying on their own behalf rather than for a client’; and⁵
 3. professionals such as doctors, lawyers or accountants or other service providers who make ‘occasional’ representations to government in a way that is ‘incidental’ to the provision of their professional or other services.⁶

I will discuss later the consequences and effect on the regulation of lobbyists that flow from these three exclusions.

Those lobbyists who are covered by the definitions are required to register various details about the business, its employees and the clients for which it lobbies. The register is a public document. There is little else about lobbying that is publicly available, other than what can be gleaned from freedom of information searches.

The lobbying scheme is not statutory — it depends for its effectiveness on the Code forbidding government representatives from allowing themselves to be lobbied by a lobbyist (as defined above) who is not on the Register of Lobbyists; and on the willingness of lobbyists to comply with its demands. Being registered facilitates acquiring the necessary pass to enter and roam through Parliament House. ‘Government representative’ is defined to mean ministers and parliamentary secretaries and their staff, agency heads, public servants, contractors and consultants and members of the Australian Defence Force.⁷

The Code bans former ministers and parliamentary secretaries from engaging in lobbying relating to any matter that they had official dealings with in their last 18 months in office, for a period of 18 months after they cease to hold office. Similar bans apply to former ministerial staff, senior Defence staff and senior public servants, though the relevant period is 12 months rather than 18.

A person who has been sentenced to a term of imprisonment of 30 months or more, or convicted of a dishonesty offence in the previous 10 years, cannot be registered as a lobbyist; neither can members of political party executives. Breaches of the Code are punishable only (for lobbyists) by removal from the Register of Lobbyists. The Secretary has power to remove a lobbyist from the register at the direction of the relevant minister.

Policy responsibility for the Code and Register of Lobbyists was transferred from the Department of the Prime Minister and Cabinet to the Attorney-General’s Department in late 2018. The day-to-day operation of the register was moved on 10 May 2019, when the Secretary of the Attorney-General’s Department became responsible for the administration of the Code and register.

In this article I will not examine the Foreign Influence Transparency Scheme that came into effect last year and, similarly, falls within the responsibility of the Attorney-General’s Department. This also deals with lobbying as defined in the Code together with lobbying

5 Ibid 3.5.6.

6 Ibid 3.5.6.

7 Ibid 3.3.

on a much broader scale (such as general political lobbying for the purpose of political or governmental influence and communications activities for the purpose of political or government influence) on behalf of foreign principals. Some lobbyists will be caught up in both schemes.

The states

The basic structure adopted by the Commonwealth to register and regulate lobbyists — a code, a requirement for third-party lobbyists to register, and restrictions on lobbying access to government officials to registered lobbyists — forms the basis of the regulation of lobbyists in the states. Former ministers and senior public servants are prevented from lobbying for various periods. But there are some important differences between the Commonwealth and some of the states, and among the states, that should be noted.

Three states — New South Wales, Queensland and Western Australia — began with administrative schemes like that of the Commonwealth but later gave them statutory force.⁸ The New South Wales legislation has a penal provision concerning the cooling-off period that former ministers and parliamentary secretaries must observe. The Western Australian legislation imposes a financial penalty for breaches of the registration requirements. The same three states, plus Victoria, ban lobbyists from obtaining what are described as ‘success fees’.

All the states except New South Wales are concerned only with third-party lobbyists, although in Western Australia the definition includes such lobbying when done gratuitously. In Victoria there is a special provision to cover lobbying by Government Affairs Directors (GAD) who lobby (an extended definition applies) in a paid capacity for an organisation or business or professional or trade organisation. Elsewhere, those who lobby for such organisations are not covered by the respective codes. But the definition of a GAD is very restricted and applies only to a person who has previously held a position as a senior staff member of a Commonwealth or a state minister or a parliamentary secretary.

The position is different in New South Wales, where the legislation and the code apply to almost all lobbyists, though only third-party lobbyists (with exceptions for those in the some of the professions) are required to register. A contravention of the code can lead to a lobbyist being placed on the Lobbyists Watch List, which may require special procedures to apply when lobbying takes place.

In Queensland, the legislation covers the lobbying of local government as well as the state government. Queensland’s Lobbyists Code of Conduct requires lobbyists to report monthly (on a publicly accessible online register) their contacts with ministers and government officials, together with some details of the lobbying. Ministerial diaries are published monthly. New South Wales has a requirement for ministers to publish their diaries online quarterly.

8 New South Wales: *Lobbying of Government Officials Act 2011* as amended by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014*. Queensland: *Integrity Act 2009*. Western Australia: *Integrity (Lobbyists) Act 2016*.

The administration of the lobbyist schemes has been given to a variety of bodies. In New South Wales it is the Electoral Commissioner, in Victoria the Public Sector Standards Commissioner, in Queensland the Integrity Commissioner and in Western Australia the Public Sector Commissioner, while in South Australia and Tasmania it is the Department of Premier and Cabinet.

Why regulate lobbyists?

The preamble to the Commonwealth Code says:

1. Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials.
2. Lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the Government and, in doing so, improve outcomes for the individual and the community as a whole.
3. In performing this role, there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.
4. The Lobbying Code of Conduct is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty. Lobbyists and Government representatives are expected to comply with the requirements of the Lobbying Code of Conduct in accordance with their spirit, intention and purpose.⁹

The notion of 'legitimacy' is taken up in most of the state codes as well. For example, the Queensland Lobbyists Code of Conduct includes the following rewording of the second and third items in the Commonwealth Code:

Professional lobbyists are a legitimate part of, and make a legitimate contribution to, the democratic process by assisting individuals and organisations to communicate their views on matters of public interest to the government, and so improve outcomes for the individual and the community as a whole.

The public has a clear expectation that lobbying activities will be carried out ethically and transparently, and that government representatives who are approached by lobbyists are able to establish whose interests the lobbyists represent so that informed judgments can be made about the outcome they are seeking to achieve.¹⁰

Item 2 in the Commonwealth Code and its Queensland equivalent seems designed to reassure lobbyists (and the world at large) that, even though they are being regulated, the government acknowledges that they make a positive contribution to the democratic way of life. However, the following paragraph in each preamble then provides a 'nevertheless' justification for imposing some restrictions on how the lobbyists are allowed to operate.

Much that should be relevant to the regulatory exercise is missing from these preambles, and I will return to that later. For the moment, however, I want to concentrate on just who is

⁹ Australian Government, *Lobbying Code of Conduct*, Preamble.

¹⁰ Queensland Government, *Lobbyists Code of Conduct*, Preamble.

being regulated in the codes. The lobbyists with whom they are concerned are those that are strictly defined in the codes or the Act — third-party professional lobbyists.¹¹ By limiting their focus in this way, these preambles concern themselves with just a small part of the effect of lobbying on the democratic process. At one point the codes refer to lobbyists they are regulating. They then generalise about the beneficial impact of all lobbying, including lobbying that is not regulated. It is simply not correct to say that *all* lobbying of government is legitimate and/or that lobbying by people and organisations that are *not* third-party professional lobbyists ‘improve outcomes for the individual and the community as a whole’. Because lobbying by those who are not third-party professional lobbyists is not regulated in any way, the public is not and cannot be assured ‘that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve’.¹²

It can be argued — and I return to this later — that governments, federal and state, of both major political parties have chosen to regulate those lobbyists who have the least influence over government policies, actions and administration. The most powerful lobbyists have deliberately been left untouched by regulation — a demonstration perhaps of the strength of their influence over government decision-making. However, the argument that *all* lobbying needs to be regulated is put powerfully in the Commonwealth preamble quoted above: ‘Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials ... The Lobbying Code of Conduct is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty’. But the Code fails to deliver on its promise by being so narrowly focused as to cover only third-party lobbyists.

Who is missing?

Before referring to the categories of lobbyists excluded from scrutiny by the limited and very narrow definitions in the codes, I should note that at least some of those intended to be covered by the scheme have found ways of avoiding its reach. The Queensland Integrity Commissioner reported in his 2016–17 annual report that a slowdown in registration of lobbyists in that state appeared to have been the result of a change in the business model of many lobbyists, who were now offering their services as ‘consultants’ and providing little actual lobbying contact.¹³

The more important of those lobbyists who are excluded from the Commonwealth regulatory system are covered by the exemptions listed in the definition of lobbyists. These are:

1. non-profit organisations ‘constituted to represent the interests of their members’;¹⁴

11 Except, as noted earlier, in New South Wales.

12 Australian Government, *Lobbying Code of Conduct*, 1.3.

13 Queensland Integrity Commissioner, *Annual Report 2016–17*, p 11.

14 Australian Government, *Lobbying Code of Conduct*, 3.5.2.

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2. people, companies or organisations and their employees ‘lobbying on their own behalf rather than for a client’; and¹⁵
 3. professionals such as doctors, lawyers or accountants or other service providers who make ‘occasional’ representations to government in a way that is ‘incidental’ to the provision of their professional or other services.

Non-profit organisations

The non-profit organisations ‘constituted to represent the interests of their members’ include such bodies as the:

- Property Council of Australia;
- Minerals Council of Australia;
- Business Council of Australia;
- Australian Medical Association;
- Medicines Australia;
- Pharmacy Guild of Australia;
- Australian Petroleum Production and Exploration Association;
- Australian Bankers Association;
- Financial Planners Association;
- Association of Superannuation Funds of Australia;
- Australian Institute of Company Directors;
- Australian Council of Trade Unions (ACTU); and
- organisations representing some religions.

These and other peak organisations make frequent representations to government.¹⁶ Often, the government takes the initiative in consulting them to get their views because it considers them to be ‘stakeholders’. In its last annual report, the Property Council of Australia said it spent more than \$8 million on ‘advocacy’.¹⁷ The Minerals Council of Australia regards itself as a lobbyist and declares that it ‘voluntarily adheres’ to the Code (‘where applicable’).¹⁸

Lobbying can be extremely effective. John Menadue, who was Secretary of the Department of the Prime Minister and Cabinet in 1975–76 and of three other departments between 1980 and 1986, has written about the ‘scourge of lobbyists’ and provided ‘three recent instances of how they have corrupted open and good government’:

15 Ibid, 3.5.6.

16 For an extensive review, see Michael West, ‘Corporate Lobbying a Billion Dollar Business’, michaelwest.com.au, 6 November 2017.

17 Property Council of Australia, *Annual Financial Report*, 30 June 2018, p 14.

18 Minerals Council of Australia, *Code of Conduct: Working with Governments*.

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- The Pharmaceutical Benefits Advisory Committee recommended that, for 143 of the most commonly prescribed medicines, doctors could double the drugs dispensed from a single prescription. This would have saved costs for both the taxpayer and the patient. After lobbying by the Australian Pharmacy Guild (APG), the Minister for Health, Greg Hunt, ran for cover. We now also know that the APG makes donations to One Nation in expectation of support in the Parliament.
 - The National Health and Medical Research Council recommended that a range of 'alternative' clinical services no longer receive government subsidies through private health insurance. As a result, some subsidies were withdrawn. So the industry lobby group, Complementary Medicines Australia, went to work on Minister Hunt and he ordered that a review be made of the withdrawal of the subsidies.
 - The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Hayne Royal Commission) recommended that trailing commissions by mortgage brokers be banned from 2020. The government accepted the recommendation. So 16 000 well-organised and influential mortgage brokers went to work and Treasurer Frydenberg changed his mind. There was no sign that borrowers or the public were consulted in any way. The lobbyists won again.¹⁹

People and organisations lobbying on their own behalf

Menadue's last example, of the campaign against trailing commissions, illustrates this type of lobbying. According to a report published in the *Australian Financial Review*, the campaign was led by Mark Bouris, a friend of the Prime Minister, who personally lobbied both the Prime Minister and the Treasurer and also their departments. He was actively assisted by hundreds of mortgage brokers lobbying their own MPs.²⁰

Most of the lobbying that falls under this heading, however, is for the benefit of single individuals or companies, or small groups. Those with access to ministers, their staff or officials (access is a separate issue, discussed below) are able to press particular concerns about government policies that affect them — beneficially or detrimentally. This is usually done in private. The public is normally not aware of the contacts being made or their subject matter and has no opportunity to voice an opinion about whatever is being proposed.

Many large corporations and firms employ in-house lobbyists. While these people may be employed part-time or even full-time to lobby governments, they are not covered by Australia's lobbying regulations.

Professionals such as doctors, lawyers and accountants

This type includes architects, engineers and town planners in relation to local government. These professions are exempt because the lobbying they may do is characterised as incidental to the provision of their professional services. Applying this definition, it is nevertheless true that many of these professionals should register as lobbyists but do not.

19 John Menadue, 'The Scourge of Lobbyists is Part of Our Political Malaise. An Update', *Pearls and Irritations*, 29 April 2019.

20 John Kehoe, 'How Mortgage Brokers Won', *Australian Financial Review*, 14 March 2019, p 6.

Some of the larger accountancy and legal firms include non-accountants and non-lawyers (and sometimes ex-politicians) among their number who are involved in 'government relations'. The larger firms win contracts to provide various services to government that fall outside their 'professional' fields. This often occurs because of the way the Public Service has been denuded. Some of these professional groups hold boardroom lunches attended by selected clients and to which politicians and senior public servants are invited. But the discussions that take place are unlikely to be restricted to specific legal or accountancy issues.

In the local government area, which is covered by the Queensland legislation, town planners, architects and engineers spend a great deal of time trying to persuade council officers and/or councillors that particular planned developments, or buildings, fall within planning schemes or that those schemes should be amended to permit particular developments. But these professional people understandably resist putting their names down as lobbyists — a black mark, it would seem.

A better approach

The three exemptions I have referred to above mean that perhaps five out of every six people involved in lobbying in Australia are not required to register as lobbyists. This is an estimate I made almost a decade ago, based on a comparison with the Canadian (national) system of regulating lobbying.²¹ The Canadian approach is not to specify the groups that should be registered and indicate exemptions but, rather, to require everyone who spends 20 per cent or more of their time actually lobbying to register.

The definition of 'lobbyist' in Canada's national system is as follows:

[A 'Lobbyist' includes a person] any part of whose duties is to communicate with public office holders on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary, in respect of:

- (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons;
- (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament;
- (iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*;
- (iv) the development or amendment of any policy or program of the Government of Canada; or
- (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada ...²²

21 For example, in evidence I gave to the Senate Finance and Public Administration References Committee inquiry into the operation of the Lobbying Code of Conduct and the Register of Lobbyists, 21 February 2012, p 19 of the Committee's report.

22 *Lobbying Act* 1985 (Canada) (RSC, 1985, c 44 (4th Supp)) s 7(1).

The Canadian *Lobbying Act* 1985 identifies three types of lobbyists:

Consultant Lobbyist

- A person who is hired to communicate on behalf of a client. This individual may be a professional lobbyist but could also be any individual who, in the course of his or her work for a client, communicates with or arranges meetings with a public office holder.

In-House Lobbyist (Corporations)

- A person who works for compensation in an entity that operates for profit.

In-House Lobbyist (Organizations)

- A person who works for compensation in a non-profit entity.²³

In Australian terms, a ‘consultant lobbyist’ is what I have referred to in this article as a third-party (professional) lobbyist; an ‘in-house lobbyist (corporations)’ is a lobbyist falling within the second category of exemption that I have referred to — people, companies or organisations lobbying on their own behalf; an ‘in-house lobbyist (organizations)’ is a lobbyist within the first of those categories, involved with a non-profit organisation representing the interests of their members. (In Canada, this includes professional organisations, trade unions, religious groups and charitable organisations). Australia’s third exemption — lawyers, accountants and other professionals — would fall within the ‘in-house lobbyist (corporations)’ category. Canada requires registration when a person, or group of people, is involved in lobbying as defined above for 20 per cent of the time of one person or its equivalent.

As at 1 July this year, the Canadian register had on its books 1068 consultant lobbyists (representing 3572 clients), 2080 in-house corporation lobbyists (from 412 firms) and 2963 in-house organisation lobbyists (from 581 organisations).²⁴ The ratio of lobbyists who would be required to register under the Australian schemes to those lobbyists who would not but are required to do so in Canada remains about the same as when I first measured it — one to five.

The revolving door

The Australian codes acknowledge in their rules one of the public criticisms made about lobbying — namely, that some politicians and senior public servants move seamlessly into lobbying shortly after they cease to hold office. To quote one such complaint:

The ministerial code ostensibly prohibits ministers from joining the industries they were responsible for in their portfolio for 18 months. Yet when Ian Macfarlane retired from [the Commonwealth] Parliament to head the Queensland Resources Council, having been industry and science minister just before retirement, and formerly the resources minister, the Prime Minister’s office found there was no conflict.

This is the stuff of farce. Macfarlane clearly breached the wording and spirit of the code, but its application is subject to wholly partisan arbitration. There is also an enforceability issue here: the ministerial and lobbying codes contain no details on the punishment for breaches.

23 *Lobbying Act* 1985 (Canada); Office of the Commissioner of Lobbying of Canada <lobbycanada.gc.ca>.

24 *Ibid*, ‘Active Lobbyists and Registrations by Type’.

As a result, while a lobbyist may be deregistered, there are few theoretical consequences for a former minister. In practice, the proliferation of revolving doors suggest there are no consequences at all.²⁵

Three issues are mentioned here: the revolving door, the regulator and enforcement. Once again I will draw on Canada's answers to these problems.

As mentioned above, the Australian codes set times ranging from 12 to 18 months as quarantine periods between when a minister or senior public servant leaves their position and when they may take up a position to lobby their former government. The adequacy of these provisions may be judged by comparing them with Canada, where there is a five-year ban on public office holders taking on such positions.

The responsibility for overseeing the regulatory system in Australia varies between regular public service departments (the Commonwealth) and (existing) independent authorities (as in New South Wales and Queensland) that have another primary function.

In few jurisdictions is any penalty other than removal from the lobbyists registry available. Canada has opted for a stand-alone statutory body (the Commissioner of Lobbying) that has a full range of investigative powers. Penalties of up to \$50 000 and six months imprisonment can apply to breaches of reporting requirements.

The need for regulation

The NSW ICAC is currently conducting its second inquiry into lobbying in a decade. The first — Investigation into Corruption Risks Involved in Lobbying — reported in November 2010. It made 17 recommendations, but only five were adequately implemented by the state government. In its report ICAC said:

The Commission found that lobbying attracts widespread community perceptions of corruption and involves a number of corruption risks ...

A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust. Those who lobby may be entitled to private communications with the people that they lobby, but they are not entitled to secret communications. The public is entitled to know that lobbying is occurring, to ascertain who is involved, and, in the absence of any overriding public interest against disclosure, to know what occurred during the Lobbying Activity.

The primary aim of any lobbying regulatory system must be to improve transparency and address other corruption risks in a manner that is practical and not unnecessarily onerous, and one that does not unduly interfere with legitimate access to government decision-makers.²⁶

And it referred to the principles underlying its recommendations:

Any regulatory system for lobbying should address the relevant corruption risks. To do so it must be based on the principles of transparency and accountability. These are the broad principles the Commission applied in reviewing the current lobbying regulatory system in NSW, and in determining what changes to recommend in order to address relevant corruption risks and the community's adverse perceptions of lobbying.²⁷

25 George Rennie, 'Australia's Lobbying Laws are Inadequate, But Other Countries are Getting It Right', *The Conversation*, 21 June 2017.

26 ICAC, *Investigation into Corruption Risks Involved in Lobbying: ICAC Report*, November 2010, p 7.

27 *Ibid*, p 16.

I note in passing that, while the primary focus of ICAC is on investigating and preventing corruption, it is also required by its Act to promote the integrity and good repute of public administration and it has to have regard to the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.²⁸ That is, when making recommendations, it is not concerned only with corrupt conduct. One of its aims is good government. As part of its current inquiry, ICAC has included a discussion paper by two academics,²⁹ to which I will refer later.

The 2010 ICAC report also referenced (favourably) a study by the Organisation for Economic Cooperation and Development (OECD), of which Australia is a member, that resulted in the OECD's development of the *Principles for Transparency in Lobbying*.³⁰ The principles are divided into three sections:

1. Building an effective and fair framework for openness and access;
2. Enhancing transparency; and
3. Mechanisms for effective implementation, compliance and review.³¹

These are the OECD principles most relevant to this discussion:

1. *Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.*

Public officials should preserve the benefits of the free flow of information and facilitate public engagement. Gaining balanced perspectives on issues leads to informed policy debate and formulation of effective policies. Allowing all stakeholders, from the private sector and the public at large, fair and equitable access to participate in the development of public policies is crucial to protect the integrity of decisions and to safeguard the public interest by counterbalancing vocal vested interests. To foster citizens' trust in public decision making, public officials should promote fair and equitable representation of business and societal interests.

4. *Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.*

Definitions of 'lobbying' and 'lobbyist' should be robust, comprehensive and sufficiently explicit to avoid misinterpretation and to prevent loopholes. In defining the scope of lobbying activities, it is necessary to balance the diversity of lobbying entities, their capacities and resources, with the measures to enhance transparency. Rules and guidelines should primarily target those who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However, definition of lobbying activities should also be considered more broadly and inclusively to provide a level playing field for interest groups, whether business or not-for-profit entities, which aim to influence public decisions.

Definitions should also clearly specify the type of communications with public officials that are not considered 'lobbying' under the rules and guidelines. These include, for example, communication that is

28 *Independent Commission Against Corruption Act 1988* (NSW) ss 12, 13.

29 Dr Yee-Fui Ng and Professor Joo-Cheong Tham, 'Enhancing the Democratic Role of Direct Lobbying in New South Wales', NSW ICAC, Sydney, April 2019.

30 OECD, *Principles for Transparency and Integrity in Lobbying*, 2013, <<https://www.oecd.org/gov/ethics/oecdprinciplesfortransparencyandintegrityinlobbying.htm>>.

31 *Ibid.*

already on public record — such as formal presentations to legislative committees, public hearings and established consultation mechanisms.

5. *Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.*

Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny. It should be carefully balanced with considerations of legitimate exemptions, in particular the need to preserve confidential information in the public interest or to protect market-sensitive information when necessary.

Subject to Principles 2 and 3, core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process. Supplementary disclosure requirements might shed light on where lobbying pressures and funding come from. Voluntary disclosure may involve social responsibility considerations about a business entity's participation in public policy development and lobbying. To adequately serve the public interest, disclosure on lobbying activities and lobbyists should be stored in a publicly available register and should be updated in a timely manner in order to provide accurate information that allows effective analysis by public officials, citizens and businesses.

7. *Countries should foster a culture of integrity in public organisations and decision-making by providing clear rules and guidelines of conduct for public officials.*

Countries should provide principles, rules, standards and procedures that give public officials clear directions on how they are permitted to engage with lobbyists. Public officials should conduct their communication with lobbyists in line with relevant rules, standards and guidelines in a way that bears the closest public scrutiny. In particular, they should cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse 'confidential information', disclose relevant private interests and avoid conflict of interest. Decision-makers should set an example by their personal conduct in their relationship with lobbyists.

Countries should consider establishing restrictions for public officials leaving office in the following situations: to prevent conflict of interest when seeking a new position, to inhibit the misuse of 'confidential information', and to avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post.³²

The current ICAC discussion paper says the New South Wales legislative and regulatory framework does not fully accord with the 10 principles.³³ The same may be said of all the Australian codes. They clearly need to be strengthened to begin approaching, let alone meet, these criteria.

Funding

In point 5 above there is a passing mention of 'funding'. This is an area that does not appear to have been addressed in the Australian lobbying codes, despite its obvious importance. This is where actual or potential corruption, or the perception that corruption could arise,

³² Ibid.

³³ ICAC, *The Regulation of Lobbying, Access and Influence in NSW*, ICAC, Sydney, 2019, p 6.

should enter the discussion. ICAC refers to it in its two investigations of lobbying and raises several questions about funding in its latest discussion paper.³⁴ It is also mentioned in the discussion paper appended to the 2019 ICAC paper on lobbying (referred to above), where the authors point out that:

The risks of corruption and misconduct are heightened when the financial interests of government officials (and those closely related to them) are implicated in the process of lobbying — these situations throw up the prospect of improper gain that defines corrupt conduct. They include situations when lobbyists or their clients make political contributions to the elected official or his or her party. These contributions do not necessarily need to be made proximate to a particular decision. Systemic practices of contributions can give rise to a form of corruption which the High Court has described as ‘clientelism’. As the High Court puts it, clientelism ‘arises from an office holder’s dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest’. The regular contributions made to the major political parties by organisations that also lobby government are of particular concern here.

Another situation implicating financial interests of government officials that risk undermining the integrity of direct lobbying results when parliamentarians are engaged in secondary employment (employment in addition to their parliamentary duties) involving lobbying. A further situation occurs when government officials have a reasonable prospect of being employed by lobbyists and/or their clients after leaving government (post-separation employment). As NSW ICAC has observed, ‘(t)wo corruption risks arise from former public officials becoming lobbyists: relationships they developed with other public officials may be used to gain an improper or corrupt advantage; and confidential information, to which they had access while public officials, may also be used to gain such an advantage’. These risks are particularly significant given the high proportion of lobbyists who are former government officials.

These circumstances, where financial interests of government officials are implicated, may lead to bias, or at least an apprehension of bias, where decision-makers with a financial interest to them (or their party) may be seen to be more favourably predisposed to make decisions to benefit those lobbying.³⁵

The High Court case to which the authors refer is *McCloy v New South Wales*³⁶ (*McCloy*). This concerned New South Wales legislation that banned developers from making electoral donations in that state. In upholding the ban, the majority justices (French CJ and Kiefel, Bell and Keane JJ), in their joint judgment, relied in part on the fact that since 1990 ICAC had made eight adverse reports concerning land development applications and quoted Commissioner Roden QC: ‘A lot of money can depend on the success or failure of a lobbyist’s representations to Government.’³⁷ That statement could be applied to lobbyists in other fields.

To date, however, the only limits that have been placed on lobbyists, in just a few jurisdictions, concern success fees. But there are risks that should be addressed concerning political donations and other gifts, whether by lobbyists or their clients. Public disclosure of the donations, often many months after the lobbying occurs, is insufficient. As the majority said in *McCloy*:

34 Ibid, pp 10–11.

35 Yee-Fui Ng and Joo-Cheong Tham, above n 29, pp 8–9 (footnotes omitted).

36 (2015) 257 CLR 178.

37 Ibid [51].

Whilst provisions requiring disclosure of donations are no doubt important, they could not be said to be as effective as capping donations in achieving the anti-corruption purpose of the [New South Wales law].³⁸

A related matter, discussed by Gageler J in *McCloy*, concerns the payment of money for access, where the only object is to gain access to a minister so that a presentation can be put to him or her. However, given that Australian governments raise money by selling, at fundraising dinners, such access to the most senior ministers and even the Prime Minister (as does the opposition, by selling access to members of the shadow cabinet and the Leader of the Opposition), it is difficult to imagine that this corruption risk will be addressed by any Australian government in the near future.

Nevertheless, the fact is that any donor of a significant sum to a major political party is a potential lobbyist on their own or someone else's behalf. But few, if any, will appear on any lobbyist register. This is an important and significant inadequacy of the present system.

Transparency

The Commonwealth Code says, 'there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve'. But, by 'transparently', the Commonwealth means only what is said in the second half of the sentence — that government representatives should know on whose behalf the lobbyist is operating.³⁹ This may be compared with these words from the preamble to the Canadian Lobbying Act: 'it is desirable that public office holders *and the public* be able to know who is engaged in lobbying activities'.⁴⁰

The OECD principle states:

5. *Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.*

Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny ...

... core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process.⁴¹

38 Ibid [61].

39 This was the government's response to a recommendation in a minority report of a Senate committee in 2008 'that coverage of the Code be expanded to embrace unions, industry associations and other businesses conducting their own lobbying activities'. It said in part, 'The purpose of the Register of Lobbyists is to allow Ministers and officials to establish whose interests a lobbyist represents when they seek to influence Government officials': government response to the Senate Standing Committee of Finance and Public Administration report, *Knock, Knock ... Who's there? The Lobbying Code of Conduct*, January 2009, p 4.

40 Emphasis added.

41 OECD, above n 30.

Transparency demands no less. As ICAC says, 'A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust'.⁴² But nothing approaching this standard is provided in Australia.

Worse still, the systems nationally and in the states deliberately avoid regulating most of the lobbying that takes place — lobbying that is undoubtedly undertaken in order to influence government decision-making:

The Lobbying Code of Conduct is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty.⁴³

The problem in Australia is that, while the various codes correctly identify a public trust issue associated with lobbying that needs to be addressed, the codes seek to regulate only a limited number of lobbyists. For the codes' objective to be achieved, it is essential that the behavior that is monitored and opened to public scrutiny is lobbying generally. As in Canada, the regulatory regime should cover all *lobbying*, not merely some small group of narrowly defined *lobbyists*. And, to be effective, it must be based in legislation that is enforceable (with penal provisions) by a body independent of government that has broad investigative powers.

⁴² ICAC, above n 26, p 7.

⁴³ Australia, *Lobbying Code of Conduct*, Preamble.