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**THE REGULATION OF LOBBYING IN NEW SOUTH WALES**

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## **Abstract**

This working paper considers the current regime of regulating political lobbyists in NSW. In considering the NSW statutory regulatory regime this paper addresses the specific background to that regime; the role and content of the Register of Third-Party Lobbyists; and the compliance responsibilities and powers of sanction of the NSW Electoral Commission, which is the statutory regulator. It outlines some of the tools the NSWEC has at its disposal and shows that NSW is making positive steps toward fulfilling ICAC's aims of a regulatory regime that improves transparency and addresses risks of corruption in a practical way.

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## **Introduction**

In the recent High Court decision of *McCloy v New South Wales* [2015] HCA 34, the High Court upheld the validity of the provisions of the NSW *Election Funding, Expenditure and Disclosures Act 1981* [the EFEDA], which impose caps on political donations; prohibit property developers from making such donations; and restrict indirect campaign contributions.

In upholding these provisions the justices of the High Court unanimously held that they were a legitimate means of aiming to remove both the risk and the perception of corruption and undue influence in NSW politics. Indeed, the Court held that they enhance the system of representative government which that implied freedom of political communication in the Commonwealth *Constitution* is intended to protect.

However, for the purposes of considering the current regime of regulating lobbyists in NSW, the more important component of the decision-making process was that noted in the Judgment Summary posted on the High Court website; namely that the majority of the Court held that the prohibition on donations by property developers in the EFEDA was valid, *taking note of a history of corruption in New South Wales*.

At the core of their Honours' concerns was the reality that the money of the wealthy can purchase access to politicians denied to those ordinary NSW citizens who could not hope to be a 'human ATM', as Mr McCloy described himself at an ICAC hearing in *Operation Spicer*. The ability of those wealthy few to magnify their voices by paying lobbyists to speak on their behalf is another important aspect of this access to power, and is therefore the subject of regulation in every Australian jurisdiction, other than the Northern Territory.

This paper will consider the NSW statutory regulatory regime which recently reached its first anniversary. In doing so, it will address the specific background to that regime; the role and content of the Register of Third-Party Lobbyists; and the compliance responsibilities and powers of sanction of the NSW Electoral Commission (NSWEC), which is the statutory regulator.

## **Prelude to a regulatory regime**

In 2010, the NSW Independent Commission Against Corruption (ICAC) undertook a corruption prevention-based investigation named *Operation Halifax* to examine the

corruption risks involved in the lobbying of public authorities and officials. It differed from the usual ICAC investigation in that it was not concerned with whether any particular individual had engaged in corrupt conduct. Rather the aim of Operation Halifax was to:

... examine whether [lobbying] relationships may allow, encourage or cause the occurrence of corrupt conduct, and to identify whether any laws governing any NSW public authority or public official could allow, encourage, or cause the occurrence of corrupt conduct and, if so, what changes should be made.<sup>1</sup>

As a result of the investigation, in November 2010 ICAC made 17 recommendations to improve the regulation of lobbying in NSW. I would suggest that the following are of the most relevance to the current regime of regulating lobbying enforced by the NSWEC:

- the NSW Government enacts legislation to provide for the regulation of lobbyists, including the establishment and management of a new Lobbyists Register;
- all third party lobbyists and lobbying entities be required to register before they can lobby any government representative;
- the NSW Government develops a new code of conduct for lobbyists, which sets out mandatory standards of conduct and procedures to be observed when contacting a government representative; and
- an independent government entity maintains and monitors the Lobbyists Register, and that sanctions be imposed on third party lobbyists and lobbying entities for failure to comply with entry requirements.<sup>2</sup>

No action was taken by the State Government to implement these recommendations for some time. However, on 28 April 2014, ICAC's inquiry Operation Spicer began hearings in Sydney. Operation Spicer was established to investigate allegations that certain members of the NSW Parliament and others corruptly solicited, received and concealed payments from various sources in return for certain members and others favouring the interests of those responsible for the payments. It was also alleged that certain members of Parliament and others solicited and failed to disclose political donations from companies, including prohibited donors, contrary to the provisions of the EFEDA.

Ultimately, the evidence in Operation Spicer disclosed "a systemic failure in the way in which politicians, political parties and political campaigns are funded in NSW and how that systemic failure encourages and rewards corruption."<sup>3</sup> In the course of the Spicer hearings, on 13 May 2014, Premier Baird acted upon some of the Operation Halifax recommendations from 2010, announcing the following changes to increase transparency and enhance regulation of lobbying:

- the establishment of the NSWEC as an independent regulator of lobbyists;
- the application of a set of ethical standards to all third-party lobbyists and any other individuals and organisations that lobby government;
- empowering the NSWEC to investigate alleged breaches and impose sanctions, which could result in lobbying firms being removed from the

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<sup>1</sup> ICAC Report, *Investigation into corruption risks involved in lobbying*, Executive Summary, p 7.

<sup>2</sup> The full list is available here: <http://www.icac.nsw.gov.au/investigations/past-investigations/article/3788>

<sup>3</sup> Geoffrey Watson SC, Counsel Assisting, Opening address to Operation Spicer hearings, 28 April 2014.

Register, and other organisations placed on a Watch List and their access to government restricted; and

- requirement on Ministers to publish quarterly diary summaries of scheduled meetings with external organisations on portfolio-related activities.

At that stage, lobbying in NSW was regulated under the *Lobbyist Code of Conduct*, which had been introduced by the Rees Government in February 2009. This was an administrative Code – i.e., it had no legislative basis –prohibiting the lobbying of Ministers, Parliamentary Secretaries, Ministerial staff and persons working in public sector agencies by third-party lobbyists who were not registered. The NSW Register of Lobbyists was administered by the Office of General Counsel in the Department of Premier and Cabinet [DPC]. The publicly-available Register indicated the clients that the lobbyist represented, and the names of the persons carrying out lobbying.

I note that ICAC’s recommendation suggested that the Lobbyists Register be administered by the NSW Information Commissioner.<sup>4</sup> However, it was decided that this responsibility should lie with the NSW Electoral Commission, having regard to the NSWEC’s experience both in maintaining public registers and in promoting the transparency of the campaign finance regime in NSW.

On 1 December 2014 the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* commenced, amending the *Lobbying of Government Officials Act 2011* [the LOGO Act] to:

- provide for a Register of Third-Party Lobbyists, a Lobbyists Watch List and a Code of Conduct for third-party and other lobbyists; and
- confer on the NSW Electoral Commission the function of keeping the Register and Watch List and of enforcing compliance with the Code.

Importantly, that Act also amended the *Parliamentary Electorates and Elections Act 1912* [PEEA] and the EFEDA to:

- reconstitute the NSWEC to consist of a former Judge as Chairperson of the Commission (currently Hon Keith Mason AC QC, former President of the NSW Court of Appeal), the Electoral Commissioner *ex officio* (currently Mr Colin Barry) and a member with financial or audit skills (currently Mr Len Scanlan, former Auditor-General of Queensland), instead of it being constituted solely by the Electoral Commissioner; and
- abolish the NSW Election Funding Authority and confer its functions on the reconstituted NSWEC. Accordingly, the new NSWEC is responsible for administering the election funding, expenditure and disclosure scheme in NSW.

These amendments were in line with a 2013 recommendation of the NSW Parliamentary Joint Standing Committee on Electoral Matters.<sup>5</sup> While the Electoral Commissioner retains important and distinct responsibilities in relation to enrolment of electors and the conduct of Parliamentary elections in NSW, it is the NSWEC which has a clear mandate to institute

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<sup>4</sup> See, e.g., ICAC Report, *Investigation into corruption risks involved in lobbying*, p 38.

<sup>5</sup> Joint Standing Committee on Electoral Matters, *Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981*, Recommendation 4.

criminal and civil proceedings for breaches of electoral and lobbying laws, a mandate to which this paper will return.

The LOGO Act established the Register of Third-Party Lobbyists [the Register], which is published by the NSWEC on a website. Practically, since June 2015 third-party lobbyists have been able to access their own Register information through the NSWEC Lobbyists Online Portal. Access to the Portal allows the lobbyist's Responsible Officer to manage the lobbyist's details, and those of the contacts involved, i.e., clients, employees and the owners of corporate third-party lobbyists. Changes made online are monitored by the NSWEC Legal Branch and historical Register information will continue to be kept internally by the NSWEC for the statutory period of two years. The Register can be accessed at <http://www.lobbyists.elections.nsw.gov.au/>.

### **Who is a lobbyist and what is lobbying?**

In NSW, third-party lobbyists, and individuals engaged to undertake lobbying for them, must be registered in order to legally lobby Government officials. A third-party lobbyist is an individual or body carrying on the business (generally for money or other valuable consideration) of lobbying Government officials on behalf of *another* individual or body. Generally, the following will not be a third-party lobbyist for the purposes of the LOGO Act:

- religious or charitable organisations;
- professionals (such as doctors, lawyers or accountants) who as part of their day to day professional services to a client, represent that client's views to a Government official; or
- individuals making representations to Government on behalf of their relatives or friends about their personal affairs.

It has been the consistent theme of the State Government that members of the public are interested in the 'who' of the lobbying process, i.e., they should be able to know on whose behalf a third-party lobbyist is meeting with a government official. Therefore, in-house lobbyists are not required to be on the Register, the reasoning being that if, for example, lobbyists employed by Coca Cola are meeting with the Minister for Health, it is quite obvious on whose behalf they are there.

The Register contains the following information in respect of each registered third-party lobbyist:

- name and business contact details;
- names of the individuals engaged to undertake the lobbying of Government officials for the lobbyist ('employees');
- names of the persons having a management or financial interest in the lobbyist ('owners');
- names of the third parties who have retained the lobbyist to provide, or for whom the lobbyist has provided, paid or unpaid lobbying services ('clients'); and
- the ABN of each client, where the client has one.

For the purposes of the NSW regulatory regime, 'lobbying' is communicating with a government official for the purpose of representing the interests of others in relation to any of the following:

- legislation or proposed legislation or a government decision or policy or proposed government decision or policy;
- a planning application; or
- the exercise by the official of his or her official functions.

Lobbying extends to any such communication:

- whether or not in the course of carrying on the business of lobbying Government officials,
- by a person who works for an organisation for the purpose of representing the interests of the organisation or its members;
- for the purpose of representing community interests; or
- any added to the definition by the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* [the LOGO Regulation].

However, lobbying does *not* include any communication:

- by a member of Parliament acting in the ordinary course of his or her duties as a member (or any communication by a constituent of a member of Parliament in the ordinary course of seeking electorate advice or assistance from the member);
- by a Government official acting in the ordinary course of his or her duties as a Government official; or
- any which is excluded from this definition by the LOGO Regulation.

As the persons being lobbied, *NSW Government official* is widely defined in the LOGO Act to include:

- a Minister or Parliamentary Secretary;
- a staff member of a Minister or Parliamentary Secretary (including in an electorate office);
- the head of a Public Service agency;
- a person employed in the NSW Public Service, the NSW Transport Service or of any other service of the Crown;
- an individual who is engaged under a contract to provide services to or on behalf of the NSW Public Service, the NSW Transport Service or any other service of the Crown; and
- a member (however expressed) of, or of the governing body of, a statutory body.

However, it does not generally include a local government official.

As a probity measure, statutory declarations must be provided by all third-party lobbyists who are individuals and by any employees, contractors or persons otherwise engaged by the lobbyist, who wish to be on the Register. The statutory declaration must aver that the individual:

- has never been sentenced to a term of imprisonment of 30 months or more;
- has not been convicted, as an adult, in the last ten years, of an offence, one element of which involves dishonesty, such as theft or fraud; and

- is not occupying or acting in an office or position concerned with the management of a political party registered under Part 4A of the PEEA.

The last-mentioned matter is linked to that requirement on third-party lobbyists to keep party political involvement separate from lobbying activities set out in the NSW Lobbyists Code, to which I now turn.

### **The Lobbyists Code**

On 5 December 2014 the LOGO Regulation commenced, the main aim of which was to prescribe the NSW Lobbyists Code of Conduct. This gave a statutory basis to the prior administrative scheme, as s 7 of the LOGO Act provides that it is the duty of a lobbyist to comply with the Lobbyists Code in connection with the lobbying of Government officials.

The Code requires *all* lobbyists who seek to influence government policy or decision-making to observe specified ethical standards. Thus, all lobbyists in NSW must:

- disclose to the government, when seeking a meeting with a government official, the person or body on behalf of whom the meeting is sought, the nature of the matter proposed to be discussed and whether any registered third-party lobbyists will be present;
- disclose any interest in the matter proposed to be discussed at a meeting with a government official prior to the meeting commencing;
- not engage in any conduct that is misleading, deceptive, corrupt, or otherwise unlawful; and
- use all reasonable endeavours to satisfy themselves of the truth and accuracy of all material information provided in a meeting with a government official.

Part 3 of the Code provides additional requirements for third-party lobbyists, namely that they must:

- be on the Register;
- disclose if they are third-party lobbyists and the identity of their clients;
- not lobby on matters related to a Government board or committee of which they are members;
- not exaggerate or misrepresent their access to political parties or Government;
- keep party political involvement separate from lobbying activities; and
- not receive or agree to receive success fees for the lobbying of NSW Government officials.

Normal practice in NSW is for a Regulatory Impact Statement [RIS] to precede the making of a Regulation – the RIS balances the compliance burden against the policy objective. However, due to the tight timeframe in drafting the LOGO Regulation, the LOGO Act provided that the RIS process could be completed within 6 months of the making of the regulation.

In its May 2015 submission to the RIS, the NSWEC requested that the Government consider more explicitly detailing the ‘fit and proper person’ test for applicants, and that the requirement to nominate a Responsible Officer be included in the Regulation. The NSWEC also recommended that in the interest of reducing unnecessary compliance burden, the

number of registration detail confirmations be reduced to a single annual confirmation, in conjunction with a compulsory annual requirement that lobbyist responsible officers complete the Lobbyist Register e-learning module.<sup>6</sup> The NSWEC remains sanguine that these proposals will be included in the amended Regulation.

## Compliance

Under s 19(1) of the LOGO Act, the NSWEC has the function of enforcing compliance with the regulatory regime. The NSWEC has drafted a LOGO Act Compliance Policy<sup>7</sup> and is developing a number of means to monitoring compliance of third-party lobbyists with their statutory responsibilities.

One process of monitoring lobbyist activity external to the NSWEC is the quarterly publication of Ministerial Diaries. Since 1 July 2014 all NSW Cabinet Ministers must publish extracts from their diaries detailing scheduled meetings held with stakeholders, external organisations and individuals one month after the end of each quarter. The summary should disclose the organisation or individual with whom the meeting occurred, details of any registered lobbyists present, and the purpose of the meeting. Ministers' meeting summaries are published by DPC on its website.

It is not necessary to disclose information about:

- meetings with Ministers, ministerial staff, Parliamentarians or government officials;
- meetings that are strictly personal, electorate or party political;
- social or public functions or events; or
- matters for which there is an overriding public interest against disclosure.

However, while the requirement to provide meeting summaries does not apply to social or public functions, where substantive discussion of issues takes place and they concern the Minister's ministerial portfolio or concern other policies or decisions made by the Minister in his/her capacity as a member of Cabinet, the meeting should be disclosed. A 12 month review of the process focussed on whether it was meeting its policy objective of providing transparency in relation to lobbying of Ministers and made recommendations about how it could be improved in light of users' experience in the first 12 months of operation.<sup>8</sup> In the wake of that review, the original Premier's Memorandum has been superseded.<sup>9</sup>

The NSWEC has looked to other jurisdictions to see how they monitor compliance. A practical way of obtaining information from the public which the NSWEC will soon be implementing is an Alert/Allegation function on the lobbyists website. The concept came

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<sup>6</sup> The RIS is available here:

[http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0010/170110/Regulatory\\_Impact\\_Statement\\_-\\_Lobbyists\\_Code\\_of\\_Conduct\\_Regulation\\_2014.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0010/170110/Regulatory_Impact_Statement_-_Lobbyists_Code_of_Conduct_Regulation_2014.pdf) ; and the NSWEC submission here:

[http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0008/170756/NSW\\_Electoral\\_Commission\\_Submission\\_on\\_the\\_Lobbying\\_Regulatory\\_Impact\\_Statement.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0008/170756/NSW_Electoral_Commission_Submission_on_the_Lobbying_Regulatory_Impact_Statement.pdf)

<sup>7</sup> The policy is available here: [http://www.elections.nsw.gov.au/\\_data/assets/pdf\\_file/0008/199781/LR\\_00-0819\\_LOGO\\_Act\\_2011\\_Policy\\_V3.pdf](http://www.elections.nsw.gov.au/_data/assets/pdf_file/0008/199781/LR_00-0819_LOGO_Act_2011_Policy_V3.pdf)

<sup>8</sup> The Review Report is available here:

[http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0009/174645/Report\\_-\\_Publication\\_of\\_Ministerial\\_Diaries\\_-\\_12\\_month\\_review.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0009/174645/Report_-_Publication_of_Ministerial_Diaries_-_12_month_review.pdf)

<sup>9</sup> <http://arp.nsw.gov.au/m2015-05-publication-ministerial-diaries-and-release-overseas-travel-information>

from the European Union's Transparency Register, which has an on-line facility for any member of the public to trigger an alert or lodge a formal complaint. Once operational in NSW, any person will be able to lodge an alert - which is notice of some error on an entry or the Register - or lodge an allegation that there has been a breach of the Act, Regulation or Code.

Such allegations may be referred to the inspectors in the NSWEC's Funding Disclosures & Compliance Branch. Reading together the EFEDA, the PEEA and the LOGO Act, the inspectors have statutory powers which include:

- requiring information or the production of documents reasonably required for the purpose of the enforcement of the LOGO Act;
- entering premises at which relevant documents or records are or might be kept;
- questioning persons in connection with the enforcement of the LOGO Act and Regulation; and
- in some instances, requiring persons to attend at a specified place and time for questioning.

Depending on the results of any investigation, the matter ultimately may be referred to the members of the NSWEC for the appropriate sanction. Those which can be applied are the suspension or cancellation of the registration of a third-party lobbyist, or any individual engaged to undertake lobbying for one. Under the LOGO Act these sanctions can be invoked where:

- the lobbyist (or an individual so engaged) contravenes the Code or the LOGO Act;
- in the case of a third-party lobbyist - the lobbyist fails to update the information in the Register when required to do so or they no longer carry on the business of lobbying;
- in the case of an individual engaged to undertake lobbying - the individual is no longer so engaged; or
- the NSWEC is authorised to do so by the LOGO Regulation.

Given that an individual or company cannot legally lobby if unregistered, or for the duration of any suspension, these are serious sanctions. Once a breach has been identified - either through a preliminary review and assessment of the matter, or a full investigation - a decision will be made by the members of the NSWEC on the appropriate enforcement response. The following factors are relevant to this decision:

- the severity or seriousness of the breach;
- public interest considerations; and
- any aggravating or mitigating factors which may warrant a more or less severe response.

The NSWEC is also required to maintain a Lobbyists Watch List, which will contain the names and other identifying details of any lobbyist whom the NSWEC determines should be placed on it because of contraventions of the LOGO Act or of the Code. Pursuant to a Premier's Memorandum, a NSW Government Official must not permit lobbying by a lobbyist whose name has been placed on the Lobbyists Watch List, unless:

- at least two NSW Government Officials who are not a NSW Minister or Parliamentary Secretary or a staff member of a NSW Minister or Parliamentary Secretary are present during any communication with the lobbyist; and
- one of those NSW Government Officials takes notes of the communications with the lobbyist, and provides a copy of those notes to the head of the relevant NSW Public Service Agency.<sup>10</sup>

To date, no lobbyist has been placed in the Watch List. However, it is thought that the potential for reputational risk of this process will be an effective means of promoting compliance with the regulatory regime.

Finally, the LOGO Act provides for two offences: success fees in relation to the lobbying of a Government official are banned; and there is a cooling off period of 18 months during which any former Minister or Parliamentary Secretary cannot lobby in relation to an official matter dealt with by them in the period of 18 months immediately before ceasing to hold office.

## **Conclusion**

In his May 2014 press release announcing the proposed changes to the lobbyists' regulatory regime, Premier Mike Baird claimed that these changes constituted "nailing shut the back door to government" in NSW.<sup>11</sup> This paper has outlined some of the tools the NSWEC has at its disposal to keep that door shut.

While it is undoubtedly the aim of the NSWEC to continue to improve the technological aspects of the Register, and to enhance our ability to monitor compliance and enforce the provisions of the LOGO Act and Regulation and the Lobbyists Code, experience over the past 12 months shows that NSW is making positive steps toward fulfilling ICAC's aim of a regulatory regime that will "improve transparency and address other corruption risks in a manner that is practical and not unnecessarily onerous" while not unduly interfering with "legitimate access to government decision-makers".<sup>12</sup>

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<sup>10</sup> <http://arp.nsw.gov.au/m2014-13-nsw-lobbyists-code-conduct>

<sup>11</sup> <https://www.nsw.gov.au/media-releases-premier/tough-new-rules-lobbyists>

<sup>12</sup> ICAC Report, *Investigation into corruption risks involved in lobbying*, Executive Summary, p 7.