



# CORPORATE POLITICAL EXPENDITURE IN AUSTRALIA

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*“... if a corporate manager finds a political cause compelling, then she should not use other people’s money to support it. Rather, she should reach into her own pocket and spend her own money.”*

This sentiment was behind the changes to UK corporate law in 2000 and 2006. See Torres- Spelliscy, C & Fogel, K Shareholder-Authorised Corporate Political Spending in the United Kingdom, 2011 University of San Francisco Law review, v 46, p 577.

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# Executive Summary

This paper examines public and shareholder scrutiny and oversight of corporate political expenditure in Australia. It reveals deficiencies in the potential for such scrutiny when careful comparisons are made with the US and the UK. Differences emerge in the relevant law in all three countries, and in their actual practices. The deficiency in Australia becomes more apparent after a detailed examination of the relevant performance of some Australian companies.

Two classes of political expenditure are distinguished. First, 'direct' political expenditure which encompasses donations to candidates or parties (perhaps channelled through associates), and also expenditure on the corporation's own account (for example, to pay for advertising) in support of or opposition to candidates, issues or parties.. Second, 'indirect' political expenditure which encompasses payments channelled through third parties such as trade associations, lobbyists or think tanks which intend to influence attitudes towards candidates, issues or parties.<sup>1</sup>

In the UK a prior shareholder resolution approving direct political expenditure is mandatory. In the US, at the federal level, direct donations to political parties or candidates are banned, and disclosure to shareholders of other direct political expenditure is commonplace. By contrast, should they so choose, Australian boards are free to spend company funds directly on political causes, and this spending is substantially free of shareholder scrutiny let alone oversight.

Expenditure on federal level lobbying is subject to mandatory disclosure obligations in the US. In the UK it has become commonplace for companies to report in detail on their lobbying activities. By contrast, in Australia, there is no mandatory disclosure, and consequently minimal voluntary disclosure of lobbying expenditure.

In the US, companies are moving to disclose to shareholders (often as part of more general political expenditure disclosure) their payments to trade associations used for political purposes. By contrast, this usage of trade associations is still an opaque area in the UK.

In Australia, three particular trade associations<sup>2</sup> have been used as channels for political expenditure by boards of ASX companies seeking to dissuade Australian governments from implementing policies addressing climate change. Australia's current climate change response, often described as 'laggard', reflects the success of these trade associations and this strategy. Disclosure by ASX companies of either the quantum of or rationale for their use of shareholder's funds for this purpose is virtually unknown.

In conclusion, in Australia, for substantial sums of money across many companies it is impossible to tell the full amount of political expenditure or the extent to which the expenditure reflects the personal whim or short-term interests of boards or genuinely advances long-term shareholder interests. It is also impossible to tell how much these contributions actually influence Australian politics. However, analysis and examples considered in this report raise reasonable concern about the corrupting potential of corporate political expenditure in Australian politics. Comparisons with US and the UK highlight these concerns.

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<sup>1</sup> Together, indirect and direct expenditures are referred to as 'political contributions' or 'political expenditure'.

<sup>2</sup> The MCA, the APPEA and the AIGN, see section 2.3.2 below.

# Glossary

AEC	Australian Electoral Commission
APPEA	Australian Petroleum Production and Exploration Association
Astroturf group	An apparently grassroots-based citizen group or coalition that is primarily conceived, created and/or funded by corporations, trade associations, political interests or PR firms.
c4	US term for not-for-profit “social welfare” organisation (registered under section 501(c)(4)) of the US tax code. ‘c4’s cannot make direct donations to politicians, candidates or parties. However, they can make independent expenditures in support of candidates/parties but this cannot be their major activity. They can spend freely on lobbying activity. <sup>3</sup>
CPA	Center for Political Accountability, collaborates with the Zicklin Center for Business Ethics Research, Wharton School, University of Pennsylvania to produce an index scoring US S&P 500 companies performance on political disclosure and accountability.
Direct political expenditure	Donations to, and other payments for the benefit of, politicians, parties, candidates, their associates or party/campaign support organisations and ‘own account’ expenditure (perhaps made independently of candidates or parties) but spent intending to influence public, bureaucratic or elite attitudes to candidates, parties or issues. It includes provision of ‘in-kind’ benefits.
Indirect political expenditure	Expenditure channelled through a third party, for example, a think tank, trade association, hired lobbyist or astroturf group to influence public, bureaucratic or elite support for politicians, candidates or parties or public, bureaucratic or elite attitudes to, or the outcome of, a political issue or an election.
MCA	Minerals Council of Australia
PAC & ‘Super PAC’	US Political Action Committee. A PAC is typically a company sponsored organisation intended to influence election outcomes. It generally receives voluntary contributions paid by employees of the sponsoring company and may solicit further public donations. PAC’s are, in turn, subject to caps on the amount they can donate to candidates and parties. Super PAC’s more often campaign in favour of candidates or issues as (opposed to donating to candidates or parties) and can raise unlimited amounts from any identified US donor and make unlimited independent expenditure.
Pay to Play	Generic American term describing a situation where money changes hands for the privilege to participate. In the political context it refers to political contributions paid to obtain political or pecuniary benefit.
Political contributions	Broad term encompassing indirect and direct political expenditure.
Sleaze	UK tabloid term for ‘pay to play’ in the political context.

<sup>3</sup>Their activities do not fit neatly into Australian political categories. Some ‘c4’s are akin to an Australian party associate, for example, the Republican Main Street Partnership, which is aligned with moderate Republicans. Others are more akin to single issue lobby groups, for example, various pro or anti- gun control groups. Yet others perform a role akin to the political activism of an Australian think tank, for example, the Judicial Crisis Network supports the appointment/election of judges and candidates who support a limited role for government. Yet others perform a role more akin to the ‘government affairs’ staff of a trade association, for example, the Jeffersonian Project which is the lobbying arm of the American Legislative Exchange Council. (See Appendix B.)

# Introduction

Ray Williams was a founder, director and CEO of a major Australian insurance company, HIH, which collapsed in 2001 resulting in the complete loss of shareholders' funds and substantial losses for policyholders. Prior to the collapse, Ray Williams was a generous political donor of HIH shareholders' money, particularly to the conservative side of politics.<sup>4</sup> Asked at a Royal Commission hearing into the collapse about this generosity and changes in financial regulation, Williams said he made the donations because he thought the Liberal party would best look after "Australia's interests, and insurance".<sup>5</sup> It seems likely Ray Williams anticipated his generosity would result in a political predisposition towards lighter scrutiny by regulatory authorities of HIH in particular, as well as of insurance in general. There is no question HIH escaped regulatory action, if not scrutiny, at catastrophic cost to shareholders and policyholders.

This facet of the HIH collapse illustrates the potentially significant difference in attitude to political expenditure between shareholders and boards. If HIH's donation generosity 'purchased' lighter regulatory scrutiny it may well have advantaged, for a time, Williams and his fellow board members, but that benefit came at the long-term expense of shareholders.<sup>6</sup>

Section 1 of this paper deals with the relevant law. If HIH had operated in the US, the political donations it made would have been illegal. If it had operated in the UK they would have required shareholder approval. In the US, disclosure of federal level lobbying expenditure is mandatory. In Australia however there is far less regulation both at the federal and state levels. Though there is some donation capping and mandatory disclosure of direct political donations, compared to other Commonwealth countries the regulation of political finance in Australia has been described as "laissez-faire, to the point of being lackadaisical".<sup>7</sup> Should they so choose, Australian boards can spend company funds directly on political causes substantially free of shareholder scrutiny, let alone oversight.

Section 2 deals with practice in the UK, the US and Australia. In the UK, many boards eschew direct political expenditure, thus avoiding the need to seek shareholder approval but, amongst companies that do seek shareholder approval, public reporting of direct political expenditure is commonplace. At the federal level in the US, direct donations are banned and disclosure to shareholders of other political expenditure is becoming standard in the US as a consequence of shareholder resolutions since the *Citizens United v Federal Election Commission*, 558 US 310 (2010) ('Citizens United').

By contrast, in Australia, shareholder resolutions dealing with either indirect or direct political expenditure are unknown.<sup>8</sup> Section 2 also describes two Australian examples of problems which have resulted from Australia's 'lackadaisical' approach to political expenditure. Section 2.3.1 deals with Operation Spicer, a corruption enquiry which suggests there may be widespread rotting of

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<sup>4</sup> See, for example, <http://periodicdisclosures.aec.gov.au>Returns/1/D471.pdf> , the HIH AEC declaration.

<sup>5</sup> See <http://newsweek.com.au/article.php?id=553> .

<sup>6</sup> It is also an example of the proposition that successful pursuit by directors of corporate political objectives may not benefit the community as a whole.

<sup>7</sup> See Orr, G *The Law of Politics*, 2010 p 239, see also <http://www.smh.com.au/federal-politics/political-news/australias-flawed-political-donations-laws-20150724-gjijll.html> .

<sup>8</sup> Appendices A and B deal with recent shareholder resolutions on corporate expenditure in the UK and the US.

Australian electoral law. Section 2.3.2 focuses on the role of three trade associations which have been used as channels for political expenditure by boards of ASX companies which have been seeking to preclude or defer adoption by Australian governments of policy to address climate change. It is clear they have been successful. However, it is much less clear that such success has been to the long-term advantage of the shareholders of the companies which have funded the activities of these trade associations.

Section 3 deals with specific Australian companies - their approaches to political expenditure, disclosure and oversight mechanisms. Australian approaches are contrasted with those in the US and UK. Appendix C deals with five Australian companies who are all members of the trade associations described in section 2.3.2. It sets out the company's own professed obligations and attitudes to climate change and the sometimes contrasting conduct of the trade associations they belong to. Appendices D and E deal with the Top 20 ASX listed companies. They are scored using a metric which has been used to score the S&P 500 set of US companies. The Australian companies score noticeably worse. No ASX 20 scored as highly as the average of the US S&P 500 companies.<sup>9</sup>

Corporate political expenditure has the ready potential to corrupt Australian democracy to the detriment of both Australian citizens and shareholders in Australian companies. As lawmakers, Australian politicians have 'dropped the ball' on this issue. To some extent, it is feasible for shareholders to become proactive as they have done in the UK and the US but to date in Australia that has not happened.

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<sup>9</sup> The paper does not attempt to document corporate expenditure on lobbying aka 'government affairs'. This omission is not because it is not an important issue, it is because minimal information is available. Almost certainly, by dollar value, lobbying expenditure dwarfs other forms of corporate political expenditure in Australia.

# 1. Policy context and law in the UK, the US and Australia

## 1.1. Policy context

Corporate political expenditure raises three public policy questions. Firstly, in what contexts should corporations have similar rights of ‘political speech’ as citizens? Secondly, where they do, what is the substance of that right and how, if at all, should it be constrained by the state? Thirdly, if they do have such a right, how should the power to exercise the right be allocated between boards and shareholders? Evidently, across countries the answer to the last question varies with the legal arrangements established in answer to the first and second questions.

It is well recognised by academic commentators<sup>10</sup> and institutional investor groups<sup>11</sup> that there is the possibility of a substantial divergence of interests between directors and shareholders in regard to corporate political expenditure.<sup>12</sup> Directors are prone to sometimes spend money at personal whim, hide expenditure from shareholders and/or to confuse their interests or the corporation’s short-term interests with the longer term interests of shareholders.

Section 1.2 below briefly describes the legal arrangements relevant to corporate political expenditure in the UK, the US and Australia.

## 1.2. Law

### The UK

In the UK direct political expenditure by companies is illegal unless approved by shareholders.<sup>13</sup> “Until 2000, the UK had one of the world’s least regulated political financing regimes.”<sup>14</sup> A perception had developed that UK democracy was ‘for sale’. Since 2000 however, in addition to

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<sup>10</sup> See, for example, Bebchuk, L & Jackson, R *Corporate Political Speech: who decides?* Harvard Law Review, Vol 124 (2010) p 83. Bebchuk & Jackson argue the agency problems are best addressed by a combination of ‘shareholder voting, oversight by independent directors and detailed transparency requirements’. See p 117.

<sup>11</sup> See, for example, International Corporate Governance Network (ICGN) *Guidance on Political Lobbying and Donations*, (2012).) p 14. In their view, shareholders should be able to vote to approve or reject a company’s political donations policy, material changes in that policy and the maximum amount to be spent. See [https://www.icgn.org/sites/default/files/ICGN\\_Political-Lobbying-and-Donations\\_2015.pdf](https://www.icgn.org/sites/default/files/ICGN_Political-Lobbying-and-Donations_2015.pdf), p 14..

<sup>12</sup> Glass-Lewis in *Political contributions 2013* see <http://www.glasslewis.com/special-reports/> describes US academic research and investor concerns regarding corporate political spending. See pp 13 to 20,, see <http://www.glasslewis.com/special-reports/>.

<sup>13</sup> The definition of political expenditure is broad - media companies have to be exempted and a common approach by companies who have no wish to make any expenditure is to seek permission for a small amount in case they inadvertently enter into the territory covered by this law.

<sup>14</sup> See <http://www.transparency.org.uk/wp-content/plugins/download-attachments/includes/download.php?id=1023> p 6, para 17.

disclosure obligations, the UK *Companies Act* has required shareholder approval of public company political donations and expenditure.<sup>15 16</sup>

The tax deductible status of political donations/subscriptions by UK companies, on the other hand, is still a grey area in UK tax law.<sup>17</sup> Donations by foreigners are not permitted<sup>18</sup>, and there are caps on third party electoral expenditure<sup>19</sup> but there is no mandatory disclosure of lobbying expenditure.

## The US

Prior to the decision by the US Supreme Court in *Citizens United*<sup>20</sup> US federal laws and the laws of 22 states had banned corporate political expenditure in the form of political advertisements. That ban was found to violate First Amendment rights to free speech (which had previously been found to extend to corporations). At the federal level, corporations are still banned from making direct donations to candidates or parties.<sup>21</sup> However, using so-called 'super PAC's', working through trade associations, contributing to 501(c)(4) "social welfare" organisations, or acting on their own, corporations can spend an unlimited amount in support of, or opposition to, a candidate for public office so long as they identify themselves and do not coordinate with a candidate's campaign.<sup>22</sup> Though the decision in *Citizens United* upheld the federal and state governments' authority to require disclosure there is still significant concern in the US about 'dark money' - legal routes for undisclosed corporate political donations channelled through 'disclosure exempt' not for profit organisations.<sup>23</sup>

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<sup>15</sup> The law applies to all public companies, encompasses donations and expenditure, traces through holding companies, allows an exemption for subscriptions to trade associations and exempts aggregated donations less than £5k. *Companies Act 2006* part 14 at <http://www.legislation.gov.uk/ukpga/2006/46/part/14>. At first, annual approval was required but since 2006 approval can cover 4 years in advance, see section 368.

<sup>16</sup> Note that somewhat analogous provisions apply to unions in the UK. A union must conduct a ballot of its members if it wishes to operate a 'political fund' and members can choose not to pay dues to that fund. See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/245595/10-817-trade-union-political-funds-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245595/10-817-trade-union-political-funds-guide.pdf).

<sup>17</sup> Formal statements on the subject indicate a lack of deductibility for subscriptions, see <http://www.hmrc.gov.uk/manuals/bimmanual/bim47405.htm>. However, as a matter of practice it appears the UK Tax Authority does frequently, effectively allow a deduction. "The British tax authority simply does not tax [corporate political] donations made in this way, six tax accountants said. The tax authority, Her Majesty's Revenue and Customs (HMRC), said it had the legal right to tax such gifts but would not say why it did not use this right." See <http://www.dailymail.co.uk/wires/reuters/article-3058812/For-UK-political-donors-unintended-tax-break.html#ixzz3uGoTY2vK>. It seems the UK Tax Authority sometimes does allow deductibility for donations but though it would have the capacity to deem a corporate donation by a private company income in the hands of the shareholders (similar to Fringe Benefits Tax in Australia) it declines to do so.

<sup>18</sup> See UK *Political Parties, Elections and Referendums Act 2000* s 54 at <http://www.legislation.gov.uk/ukpga/2000/41/section/54>.

<sup>19</sup> See <http://www.legislation.gov.uk/ukpga/2014/4/contents/enacted> Part 2 Non-party Campaigning etc.

<sup>20</sup> See *Citizens United v FEC*, 130 s Ct.558 US 310 (2010) available at <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

<sup>21</sup> This ban dates back to the 1907 Tillman Act. See <http://www.fec.gov/pages/brochures/fecfeca.shtml>.

<sup>22</sup> See Glass Lewis op cit p 4. The general disclosure threshold is \$200.

<sup>23</sup> See *Confronting Corporate Money in Politics*, 2013, US SIF at [http://www.ussif.org/files/publications/corporate\\_money\\_in\\_politics.pdf](http://www.ussif.org/files/publications/corporate_money_in_politics.pdf) p 2. There is a potential for such 'dark money' contributions to benefit from tax deductibility which is generally precluded by US law.

The US tax code denies a deduction for lobbying and political expenditure.<sup>24</sup> Further, under the federal *Lobbying Disclosure Act* (1995) companies with staff engaged in lobbying activity or using hired lobbyists in the US must make publicly available half yearly estimates of lobbying expenditure.<sup>25</sup> There is a broad prohibition on foreign company expenditure intended to influence US elections.<sup>26</sup>

## Australia

In Australia, at the federal level, donations to candidates, parties or associated entities<sup>27</sup> in excess of \$13,000 must be disclosed to the AEC which publishes such donations.<sup>28</sup> 'Own account' federal level campaign expenditure must also be disclosed.<sup>29</sup> At the federal level there is minimal additional regulation.<sup>30</sup> Unlike in the UK there is no obligation for shareholder approval of public company political activity. Unlike in the US there are no 'Tillman Act equivalent' general federal prohibitions on direct donations. There have been significant reform attempts, in recent years, at the state level in NSW and the ACT.<sup>31</sup> There is no state or federal equivalent to the expenditure disclosure provisions of the US *Lobbying Disclosure Act 1995*.<sup>32</sup>

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<sup>24</sup> See <https://www.law.cornell.edu/uscode/text/26/162> section (e). See also <http://www.propublica.org/article/could-corporations-be-taking-tax-breaks-on-political-dark-money> .

<sup>25</sup> See <http://www.dol.gov/oasam/regs/compliance/lobdiscl.htm> . Corporate lobbying expenditure is estimated to far exceed direct corporate political expenditure. For example, at the federal level during the 2010 election cycle it is estimated corporate lobbying expenditure exceeded campaign expenditure by a multiple of over 14 times. See Glass Lewis op cit p 7.

<sup>26</sup> It extends to preclude foreign subsidiaries forming PAC's whose funding or operation involves non-Americans. See <http://www.fec.gov/pages/brochures/foreign.shtml#Prohibition> .

<sup>27</sup> There is no grouping provision across recipient state party branches nor across related donor individual entities so a company could make nine donations just below \$13,000 without triggering disclosure obligations, ie \$117,000. Similarly, a director could make a donation in their own name just below the disclosure threshold, then get paid a bonus by the company to cover the donation. See:

[http://www.aec.gov.au/Parties\\_and\\_Representatives/financial\\_disclosure/guides/donors/information.htm#related](http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/donors/information.htm#related) under the heading 'Donations to a party where the party has several federal registrations'.

<sup>28</sup> *Commonwealth Electoral Act 1918* section 305B. There is also a grouping provision for donor companies – section 287(6) of the *Commonwealth Electoral Act 1918* deems body corporates related under the provisions of the *Corporations Act 2001* to be a single entity, so donations must be aggregated across the group and then disclosed on a single return in the name of the parent corporation. However, the data can be quite dated. It is published in February of the following financial year.

<sup>29</sup> See *Commonwealth Electoral Act 1918* section 314AEB. Similar disclosure requirements at the State level are patchy. For example, the NSW *Election Funding, Expenditure and Disclosures Act 1981* section 88 requires disclosure of third-party campaign expenditure, there are no similar provisions in Victoria.

<sup>30</sup> For example, unlike the situation in Sweden receipt of public funding is not conditional on abstention of receipt of corporate funding. See [http://www.idea.int/publications/funding-of-political-parties-and-election-campaigns/upload/foppec\\_p7.pdf](http://www.idea.int/publications/funding-of-political-parties-and-election-campaigns/upload/foppec_p7.pdf) . Unlike the situation in Canada there is no ban on corporate or union donations nor caps on personal donations or candidates 'own-use' funding. See <http://www.elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e> .

<sup>31</sup> NSW caps donations and bans indirect campaign contributions (eg, provision of office space), foreigners, property developers, tobacco, gaming and liquor businesses from making political donations. However, a previous ban on corporate donations was found to be unconstitutional by the High Court. See <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2013/hca58-2013-12-18.pdf> . Nothing in the judgement would limit legislative action to require shareholder approval for corporate political donations. In the ACT, NT, Queensland, SA, Tasmania & WA there are no caps on identified donors. In Victoria the only cap relates to casino and gaming operators - donations from them are capped at \$50k pa.

<sup>32</sup> For a description of the regulation of lobbyist conduct, permissibility of success fees etc in Australia, see [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1415/Lobbying\\_Rules](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/Lobbying_Rules) .

Direct corporate political donations are not tax deductible in Australia.<sup>33</sup> However, ‘own account’ expenditure and subscriptions paid to trade associations (which may then be used for donations or expenditure) are deductible. Unlike in the US and the UK there are no restrictions on donations by identified foreigners in Australia. They are common.<sup>34</sup>

Small differences in legal arrangements can result in major differences in practice.<sup>35</sup> For example, there has been no need to develop ‘super PAC’ equivalents in Australia because direct donations are legal. Section 2 describes practice across the UK, the US and Australia.

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<sup>33</sup> Since 2010 a business taxpayer cannot claim deductions for contributions and gifts to political parties, members and candidates including payments incurred in deriving assessable income. See <https://www.comlaw.gov.au/Details/C2010A00016> . However, ‘own account’ political expenditure and subscriptions to trade associations are deductible. Trade associations can and do make political donations. BHP claims it has a policy of not making political contributions – “we will not make political contributions in cash or in-kind anywhere in the world. Consistent with this approach, we do not contribute funds to any political party, politician, elected official or candidate for public office in any country.” See <http://www.bhpbilliton.com/society/operatingwithintegrity/interacting-with-government> . However, the policy has exceptions. For example, one of the most common forms of political donation in Australia, ‘excess’ payments for access to events is an exception as is ‘own account’ expenditure and payments to think tanks. In 2009/10 BHP spent \$4.1m on an Australian political campaign intended to unseat a Prime Minister planning to impose a mining ‘resource rent’ tax. See <http://periodicdisclosures.aec.gov.au/PoliticalExpenditure.aspx?SubmissionId=24&ClientId=18056> . Similarly, BHP is a member of the NSW Minerals Council, see <http://www.nswmining.com.au/menu/about-nsw-minerals-council/our-members> . The NSW Minerals Council does make political donations - heavily biased to the conservative side of politics. See <http://periodicdisclosures.aec.gov.au/Donor.aspx?SubmissionId=55&ClientId=29719> . Further, in May, 2015 the SEC ceased proceedings against BHP upon payment by BHP of a penalty of \$25m. The SEC claimed BHP had provided benefits to politicians in a number of African companies where BHP operated in violation of US law. See <https://www.sec.gov/litigation/admin/2015/34-74998.pdf> .

<sup>34</sup> For example, in 2013/14 the largest donor to the ALP provided a Chinese address, see <http://periodicdisclosures.aec.gov.au>Returns/55/SLDJ8.pdf> . See also Orr, G *ibid*, p 249. There are restrictions on foreign donations in Queensland reflecting problems dating back to the Fitzgerald Royal Commission.

<sup>35</sup> Of course, there are major differences in practice which reflect historical and cultural differences.

## 2. Corporate political donations and expenditure in practice in the UK, the US and Australia

### 2.1. UK

Donation practice in the UK at listed public companies changed significantly with the introduction of the law requiring majority shareholder consent. Many companies stopped making political donations.<sup>36</sup> Twenty five of the top 40 companies in the FTSE 100 now have some ban on political contributions.<sup>37</sup> The average donation ceiling for which approval was sought in the period 2001 to 2010 was £100k<sup>38</sup> but actual expenditure averaged only one eighth of that.<sup>39</sup> Corporate political donations in the UK are very heavily biased to the conservative side of politics and that bias did not change much with the requirement to obtain shareholder approval.

Asset owner trade associations and proxy advisers generally oppose corporate political donations.<sup>40</sup>

Some examples of resolution practice in the UK are provided in Appendix A.

### 2.2. US

Since the 2004 proxy season, shareholder resolutions seeking disclosure of political contributions and lobbying expenditure have been common in the US.<sup>41</sup> The effort was initiated by the Center for Political Accountability, a non-partisan, non-profit advocacy organisation. Many resolutions have been lead filed by the New York State Common Retirement Fund.<sup>42</sup> Since 2012, the breadth and quality of disclosure has improved.<sup>43</sup> Voluntarily assumed 'good corporate citizenship' restrictions on political spending have significantly increased since 2004. The Center for Political Accountability<sup>44</sup> has published since 2011 an annual survey scoring companies on an index which benchmarks companies on their political spending disclosure, decision-making and board oversight policies and

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<sup>36</sup> See Torres- Spelliscy, C & Fogel, K op cit p 558.

<sup>37</sup> Note though those bans don't always apply to donations in any jurisdiction. See Transparency International <http://www.transparency.org.uk/publications/corporate-political-engagement-index-2015/> p 3 and 12.

<sup>38</sup> See Torres- Spelliscy, C & Fogel, K op cit p 565.

<sup>39</sup> Ibid p 569.

<sup>40</sup> For example, the UK Pension and Lifetime Savings Association Corporate Government's Policy and Voting Guidelines states the association "opposes the payment of, or facilitation of payment of, political donations as usually understood." See <http://www.plsa.co.uk/PolicyandResearch/DocumentLibrary/~media/Policy/Documents/0556-2016-Corporate-Governance-Policy-and-Voting-Guidelines.pdf> . The Investment Association has a similar policy.

<sup>41</sup> For example, in 2014 there were 103 lodged with an average vote in support of around 20%. Seven received support in excess of 40%. See <http://corpgov.law.harvard.edu/2015/01/30/responding-to-corporate-political-disclosure-initiatives/> .

<sup>42</sup> For examples, see [http://www.osc.state.ny.us/press/releases/feb15/eastman\\_marathon\\_valero\\_shareholder\\_proposals.pdf](http://www.osc.state.ny.us/press/releases/feb15/eastman_marathon_valero_shareholder_proposals.pdf) .

<sup>43</sup> See <http://politicalaccountability.net/index> .

<sup>44</sup> The CPA is an independent organization that works closely with at the Zicklin Center for Wharton Business Ethics Research at The Wharton School at the University of Pennsylvania.

practices. In 2015, 25% of companies covered by the index had some restriction on political spending. In 2004, few such restrictions were in effect.<sup>45</sup>

The US investor group CERES lists six political expenditure resolutions filed by its members to date in 2016. Three are for the AGMs of companies in the oil and gas sector. Overall, in 2015 there were 67 political spending proposals.<sup>46</sup> CERES lists 7 of these and, of the four that went to the vote, average support was 23%.<sup>47</sup> In 2013 more than 100 shareholder resolutions on political spending were filed. Proxy adviser Glass Lewis reviewed 81 of these and they recommended clients vote in support of 53% of the resolutions requesting a report on political contributions and expenditures.<sup>48</sup>

Some US examples of recent resolutions and best practice disclosure are provided in Appendix B.

## 2.3. Australia

The situation in Australia stands in stark contrast with that in the US and the UK. Corporate political contributions with no disclosure to shareholders are commonplace. Company attitudes to public disclosure vary widely. Shareholder approval is not sought. Because of a lackadaisical legal approach and the absence of voluntary disclosure it is effectively impossible to quantitatively describe the extent of use of shareholders' funds for political purposes. Likewise, it is impossible to assess the extent to which funds are used inappropriately.<sup>49</sup>

To ACCR's knowledge there has never been a resolution dealing with political contributions at any ASX listed company.

But that is not to say the problems that have prompted stronger public policy as well as shareholder scrutiny and oversight in the UK and the US have not occurred in Australia. 'Operation Spicer', was an inquiry by the New South Wales Independent Commission Against Corruption. There are three trade associations which have long campaigned against the introduction of genuine policies to address climate change.

### Operation Spicer

Operation Spicer is an as yet unfinished enquiry by the NSW Independent Commission Against Corruption (ICAC).<sup>1</sup> Legal challenges have prevented the release of its findings. Still, to date, Operation Spicer has resulted in the resignation of 10 NSW MPs including a former premier.

One subject of the enquiry is the operations of the Free Enterprise Foundation which is an associated entity of the Liberal and National parties. In 2013/14 it raised \$1.4m.<sup>50</sup> Its money-raising

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<sup>45</sup> Id p 18.

<sup>46</sup> See ISS Preliminary 2015 US post – season review p 12

<sup>47</sup> See <http://www.ceres.org/investor-network/resolutions#!/>.

<sup>48</sup> See Glass Lewis op cit p 24.

<sup>49</sup> Undoubtedly, many Australian listed companies go for long periods without making significant direct political expenditure. But that is no consolation to a person concerned with public policy nor to a shareholder. From the public policy perspective, the credible threat of a campaign is a significant influence on the domain of politically acceptable policy proposals. From the shareholder perspective, unless the company has a publicly available policy there is no certainty boards won't abuse corporate rights to political speech tomorrow just because they didn't yesterday.

<sup>50</sup> See <http://periodicdisclosures.aec.gov.au>Returns/55/SKNF4.pdf>.

process has been described by counsel for ICAC as a "systematic subversion of electoral laws".<sup>51</sup> At present, the NSW Electoral Commission has withheld \$4.4m public funding from the NSW division of the Liberal Party because it has failed to disclose the identity of donors who contributed money to the party through the Free Enterprise Foundation.<sup>52</sup>

The revelations of Operation Spicer raise very significant questions as to the probity of the operation of Australian electoral laws. Associated entities like the Free Enterprise Foundation in NSW are common in other states and at the federal level across parties.<sup>53</sup> There seems a very high probability similar 'donor anonymity services' as those provided by the Free Enterprise Foundation for Liberal party donors in NSW have been used by listed companies.<sup>54</sup> At the vast majority of ASX companies no shareholder could ever know if their company was utilising these anonymity services.<sup>55</sup> The absence of restrictions on foreign donors in Australia renders enforcement of private electoral funding law near impossible.<sup>56</sup>

### **Australian trade associations and climate change**

Corporate political contributions are often funnelled through trade associations. In the climate change context in Australia three of the relevant trade associations are the Minerals Council of Australia (MCA)<sup>57</sup>, the Australian Petroleum Production and Exploration Association (APPEA)<sup>58</sup> and the Australian Industry Greenhouse Network (AIGN)<sup>59</sup>.

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<sup>51</sup> The Electoral Commission summary of facts states "Senior officers of the Party's NSW division knew of the scheme and its use to disguise donations, ... ." See

[http://www.elections.nsw.gov.au/\\_data/assets/pdf\\_file/0004/214672/23\\_March\\_2016\\_Liberal\\_Party\\_of\\_Australia\\_NSW\\_Division\\_ineligible\\_for\\_further\\_public\\_funding\\_and\\_supporting\\_information.pdf](http://www.elections.nsw.gov.au/_data/assets/pdf_file/0004/214672/23_March_2016_Liberal_Party_of_Australia_NSW_Division_ineligible_for_further_public_funding_and_supporting_information.pdf) para 15.

<sup>52</sup> The foundation made donations to the branch of the party of an equivalent amount it received from a donor at the request of the donor who nonetheless remained anonymous unless the federal disclosure threshold was exceeded. Subsequently, the NSW division of the Liberal Party has supplied a list of these donors to the NSW Electoral Commission. See <http://www.theguardian.com/australia-news/2016/may/11/icac-new-south-wales-liberals-provide-list-of-free-enterprise-foundation-donors>.

<sup>53</sup> For 2014/15 the AEC lists 182 associated entities filing returns. Many are associated with state branches of the Liberal Party: for example, Vapold P/L, the Cormack Foundation and Outer Easter Platinum Club in Victoria, Altum in Queensland, Bunori in NSW, the Liberal Party of WA P/L and The 500 Club(WA) in WA.

<sup>54</sup> Westfield Corporation/Scentre's predecessor Westfield Group may fall in this category in regard the Free Enterprise Foundation. See <http://www.theaustralian.com.au/national-affairs/state-politics/revealed-the-angry-donors-in-nsw-liberals-scandal/news-story/a71dcd2e30a7accf4f6797a705836a20>.

<sup>55</sup> There are exceptions - for example, Australian Pharmaceutical Industries (ASX ticker: API) donated \$100k to the Free Enterprise Foundation in 2013/14, see <http://periodicdisclosures.aec.gov.au>Returns/55/SKNF4.pdf>.

<sup>56</sup> Because foreign entities can readily provide impenetrable anonymity through, for example, tax haven companies with anonymous shareholders.

<sup>57</sup> The MCA is a private company limited by guarantee whose revenue predominantly derives from subscriptions and sponsorships from companies operating in the minerals industry. Such subscriptions and sponsorships are tax deductible to the member companies. Annual revenue over the past decade has averaged about \$18m pa. See p 10 of *Powers of deduction*, TAI, June 2015 at <http://www.tai.org.au/content/powers-deduction-tax-deductions-environmental-organisations-and-mining-industry>. The MCA itself is income tax exempt. See note (e) of the Annual Report at [http://www.minerals.org.au/file\\_upload/files/annual\\_reports/MCA\\_Annual\\_Report\\_2014\\_FINAL.PDF](http://www.minerals.org.au/file_upload/files/annual_reports/MCA_Annual_Report_2014_FINAL.PDF) and prior years. It is primarily a lobbying organisation. Political candidate and party donations are generally made by the member companies direct, though they are sometimes funnelled through associate members of the MCA, for example, the NSW Minerals Council. See <http://www.australianmining.com.au/news/political-donations-lean-heavily-towards-liberals> and <http://periodicdisclosures.aec.gov.au/Donor.aspx?SubmissionId=55&ClientId=29719>. The MCA counts as one of its principal recent achievements the repeal of the carbon tax which had successfully reduced Australian emissions. See p 13 of the 2014 Annual Report. Over the 5 years to 2010/11 the MCA spent \$21.1m on 'political expenditure'. See Orr, G and Gauja, A *Third party campaigning and issue – advertising in Australia*, Australian Journal of Politics and History: Volume 60, No. 1, 2014, pp 73-92.

<sup>58</sup> The APPEA is a public company limited by guarantee whose revenue predominantly derives from subscriptions and sponsorships from companies operating in the oil and gas industry. See <http://www.appea.com.au/wp->

All three organisations have lobbied long and hard to avoid/weaken any carbon reduction policy or targets under consideration for adoption by Australia.<sup>60</sup> For example, the MCA was a member of the Australian Trade and Industry Alliance which spent \$9.2m in a successful campaign to have Australia's carbon tax repealed.<sup>61</sup> The Australian situation (in 2013 Australia had the second highest per capita emissions levels of any OECD country<sup>62</sup>) reflects the success of this lobbying effort over two decades. Still today Australian policy very strongly emulates the positions adopted by these three trade associations.

In March 2015 the Commonwealth released Australia's 2030 emissions reduction target.<sup>63</sup> See <http://www.dpmc.gov.au/taskforces/unfccc>. The target is for a 26 to 28% reduction on 2005 emission levels by 2030. Currently, minimal detail is available as to the policies the Commonwealth intends to implement to achieve this target.

In the lead up to release of the new target, the MCA released a report *Climate Policy and Australia's Resources Trade*<sup>64</sup>. Similarly, the APPEA made a submission to the policy setting process *Setting Australia's post -2020 target for greenhouse gas emissions*<sup>65</sup> as did the AIGN in its *AIGN submission to Climate Change Authority's review on Australia's emission reduction targets*<sup>66</sup> The Issues paper released by the Commonwealth prior to settling upon the new target, the material accompanying the target announcement and the Minerals Council, APPEA and AIGN papers all have very similar views.

These views can be paraphrased as follows. Despite the fact Australia was one of the first countries to join the United Nations Framework Convention on Climate Change (UNFCCC)<sup>67</sup> all five documents

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[content/uploads/2015/11/APPEA\\_Annual\\_Report\\_2015\\_web.pdf](http://content/uploads/2015/11/APPEA_Annual_Report_2015_web.pdf). Such subscriptions and sponsorships are tax deductible to the member companies. Annual revenue over the past decade has averaged about \$8m pa. See p 10 of *Powers of deduction*, TAI, June 2015 *ibid*. It is primarily a lobbying organisation. Influence Map estimates in 2014/15 the APPEA spent about \$4m on 'obstructive climate lobbying'. See

[http://influencemap.org/site/data/000/172/Lobby\\_Spend\\_Report\\_April.pdf](http://influencemap.org/site/data/000/172/Lobby_Spend_Report_April.pdf). Political donations are generally made by the member companies direct. US based members make direct donations which would be illegal were they to be made in the US. See, for example, the donations by Chevron

<http://periodicdisclosures.aec.gov.au/Donor.aspx?SubmissionId=55&ClientId=29556>.

<sup>59</sup> The AIGN is a cross-industry lobby group antagonistic to policy action on climate change particularly unilateral policy action. Its membership comprises resource industry associations such as the MCA and the APPEA, non- resource industry associations such as the Australian Industry Group (AIG) as well as individual corporate members including BHP, Wesfarmers and ExxonMobil Australia. See <http://aign.net.au/membership/current-aign-members>. AIGN itself puts its position as follows: "...if Australia — with a large share of emissions-intensive production, resource and extractive sectors— raises the cost of production in the Australian economy at a higher rate than other economies, it will put itself at a relative disadvantage and reduce the economic welfare of Australian citizens for no appreciable change in the global level of emissions." See <http://aign.net.au/publications/aign-presentations> which is a presentation by AIGN CEO Gosman, A 26/03/15. A commentator describing past AIGN objectives characterised them as "..., the prevention of any constraints on greenhouse gas emissions, the delay of any constraints for as long as possible, and lastly, exemption and/or compensation should any scheme be introduced." See Hodder, P (2011) *Climate conflict: players and tactics in the greenhouse game* p 153 available at <http://ro.uow.edu.au/cgi/viewcontent.cgi?article=4618&context=theses>. Hodder states "AIGN members have channelled funds to think tanks and front groups such as the APEC Study Centre at Monash University ..., the Energy Forum at the IPA and the IPA's environmental front group the AEF ..." p 185.

<sup>60</sup> See Hamilton, C (2007) *Scorcher The dirty politics of climate change*.

<sup>61</sup> See <http://periodicdisclosures.aec.gov.au/PoliticalExpenditure.aspx?SubmissionId=49&ClientId=30292>.

<sup>62</sup> See

<http://www.iea.org/publications/freepublications/publication/CO2EmissionsFromFuelCombustionHighlights2015.pdf> p 96.

<sup>63</sup> See <http://www.dpmc.gov.au/taskforces/unfccc>.

<sup>64</sup> See [http://www.minerals.org.au/news/climate\\_policy\\_and\\_australias\\_resources\\_trade\\_-\\_a\\_new\\_report](http://www.minerals.org.au/news/climate_policy_and_australias_resources_trade_-_a_new_report).

<sup>65</sup> See <http://www.appea.com.au/wp-content/uploads/2015/04/APPEA-Submission-Post-2020-Greenhouse-Targets-240415.pdf>.

<sup>66</sup> See <http://aign.net.au/publications/australian-international-negotiations>.

<sup>67</sup> In 1992.

are of the view fair international commitment should not focus on emissions per capita. Rather it should 'grandfather' prior emissions, instead increasing conduct and focus on equalising the costs of abatement from today.<sup>68</sup> In 1990 Australian emissions per capita exceeded OECD average levels by 47% and by 2013 that had increased to 75%. In other words, as average OECD levels fell, Australia's had increased.<sup>69</sup>

Over the past few decades these three trade associations have successfully advocated Australia take a 'free rider' attitude<sup>70</sup> to global efforts to address carbon emissions and climate change. Over the next decade or so, in order to achieve 'world average citizen status', deeper, sharper and more expensive cuts in Australian emissions will be required than would have been necessary if Australia had stuck with more responsive policies earlier or adopted others. There is a high chance the burden of these more expensive policies will partially fall on shareholders in the very companies which have successfully delayed response. Like the burden of the collapse of HIH, this is a situation where the long-term interests of shareholders (and the Australian national interest) have diverged from the short-term interests of the boards of the companies funding the trade associations.

Operation Spicer and the role of the MCA, APPEA and AIGN in the setting of Australia's climate change policy illustrate important differences between direct and indirect political expenditure from both public policy and corporate governance perspectives. Whilst it might be desirable to ban direct corporate political expenditure, the same cannot be said of trade association activity. A steadily increasing number of US and UK companies, often as a consequence of shareholder pressure, have voluntarily adopted oversight and disclosure policies dealing with political expenditure whether it be direct or indirect. The more lackadaisical the legal regime the more appropriate such oversight and disclosure policies become. So, a reasonable expectation might be that Australia with its lax legal framework would have stronger corporate governance arrangements. Section 3 below compares individual company conduct in Australia with that in the US and the UK.

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<sup>68</sup> So a late starter on the road to decarbonisation, like Australia, should not be expected to absolutely catch up, just play along. (See [http://www.minerals.org.au/news/climate\\_policy\\_and\\_australias\\_resources\\_trade\\_-\\_a\\_new\\_report](http://www.minerals.org.au/news/climate_policy_and_australias_resources_trade_-_a_new_report) p 35.

<sup>69</sup> The main reason for this divergence is that though the energy intensity of GDP has dropped by similar amounts in Australia as it has across the OECD, Australian GDP per capita has grown faster than the OECD average whilst the carbon intensity of energy supply has changed little in Australia since 1990 whereas it has dropped across the OECD. See IEA op cit p 106.

<sup>70</sup> Known in Australian vernacular as 'bludging'.

## 3. Australian company conduct - international context

### 3.1. Conduct in the UK and the US

The CPA-Zicklin Index<sup>71</sup> report on the political disclosure and accountability policies of US companies in the S&P 500 found:

- 17% of companies had a policy which eschewed ‘own account’ expenditures; (note, presumably near 100% of companies eschewed direct donations at the federal level because they are illegal in the US);
- 45% of companies either had a policy which eschewed state level direct expenditures or themselves disclosed these contributions in an itemised fashion;
- 41% of companies disclosed payments to trade associations, or said they instructed trade associations not to use these payments on election related material;
- 25% of companies disclosed payments to not for profit “social welfare” (c)(4)’s or had a policy forbidding contributions to these groups or instructing them not to use the contributions for political purposes.

Note, in the US, at the federal level, lobbying expenditure is subject to mandatory disclosure.

A Transparency International report<sup>72</sup> on corporate political expenditure in the UK in 2015 by the top 40 FTSE 100 companies found:

63% had a policy which prohibited direct political expenditure, 58% reported their annual global direct political expenditure or stated they made none in the past financial year;

- 40% reported in detail on specific lobbying activities and outcomes, 22.5% reported aggregate lobbying expenditure or reported links to lobbying registers but none provided a full breakdown of their global lobbying expenditure;
- 10% reported details of membership fees and payments to trade associations;

Note: presumably near 100% of companies eschewed direct expenditure or sought shareholder approval to avoid individual board member liability. This report did not cover payments for political purposes to not for profits, think tanks etc

### 3.2. Australian company conduct - five ASX 50 companies

Appendix C describes features of the political expenditure of five companies with resource sector operations all of whom are members of at least one of the three trade associations described in section 2.3.2 above.

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<sup>71</sup> Op cit pp 14 – 19.

<sup>72</sup> See Transparency International, op cit pp 10 -16.

There is a level of ‘corporate schizophrenia’ in the conduct of some of these companies. For example, Wesfarmers via its subsidiary Wesfarmers Resources, is a member of both the AIGN and the MCA. As described in section 2.3.2 both these organisations have lobbied for many years seeking to preclude or delay effective policy action in Australia in response to climate change. Simultaneously, as it belongs to the AIGN and MCA, Wesfarmers is a signatory to the Business Coalition on Climate Change and consequently has committed, regarding climate change, to ‘support the ongoing development and implementation of effective international frameworks and effective domestic policy responses’.<sup>73</sup>

### 3.3. Australian company conduct - ASX top 20

Appendix D describes application to the ASX 20 companies of a scoring metric very similar to the one used by the CPA-Zicklin Index. It rates levels of disclosure and accountability to shareholders of political contributions at US companies.<sup>74</sup> In 2015 the average score across all S&P 500 companies was 39.8%. The average score across the ASX 20 companies in 2016 was 18%. No Australian company scored as high as the average of the US S&P 500 companies.

Amongst this ASX 20 group:

- 5% of companies (ie one company Brambles) had a policy which eschewed direct corporate political expenditure;
- 25% of companies (ie 5 companies – ANZ, Westpac and Woodside either themselves disclosed their direct political expenditure in an itemised fashion or stated they have made none as did Rio 75, Suncorp has committed itself to provide itemised disclosure in its next Annual Review<sup>75</sup>);
- No ASX 20 company disclosed details of its lobbying expenditure;
- No ASX 20 company disclosed payments to trade associations, or said they had instructed trade associations not to use these payments for political purposes;
- No ASX 20 company disclosed payments to think tanks/not for profits or had a policy forbidding contributions to these groups or instructing them not to use the contributions for political purposes.

The chart following sets out comparative UK, US and Australian scoring by category of political expenditure.

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<sup>73</sup> See <http://sustainability.wesfarmers.com.au/our-principles/environment/climate-change-resilience/>.

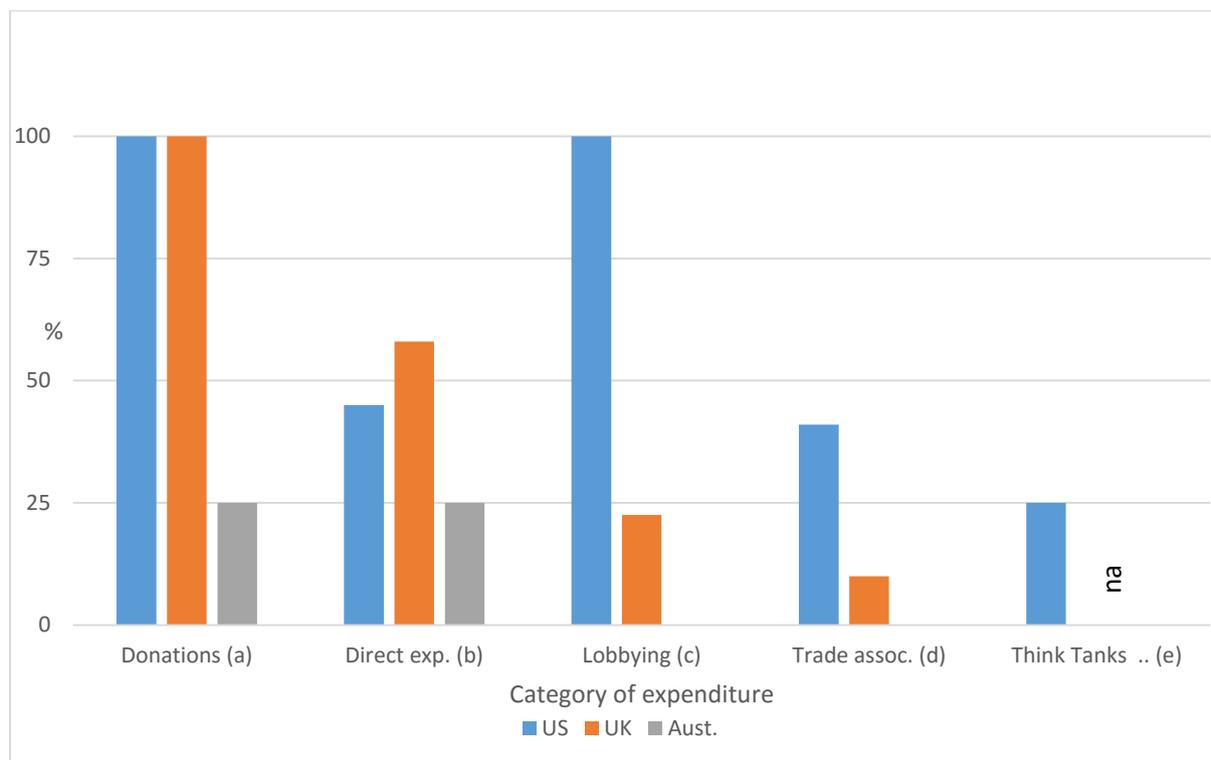
<sup>74</sup> The CPA-Zicklin metric was chosen over the UK Transparency International metric because the US situation is more closely comparable to that in Australia. In the US and Australia there is no requirement for shareholder approval of direct political expenditure.

<sup>75</sup> Also, it has made no AEC disclosures.

<sup>76</sup> See

<http://www.suncorpgroup.com.au/sites/default/files/fm/160602%20Suncorp%20Position%20Statement%20Political%20Donations%20Final.pdf>.

## By country: boards that either eschew category of political expenditure or provide disclosure (%)



### SOURCES:

US: CPA – Zicklin Index, see <http://politicalaccountability.net/index>

UK: Transparency International see <http://www.transparency.org.uk/publications/corporate-political-engagement-index-2015>

Australia: ACCR, see Appendix D

### Notes:

- (a) This category refers to federal level donations ‘company to party’ in the US and Australia. Such donations are illegal in the US, they require advance shareholder approval in the UK which necessarily entails some disclosure.
- (b) This category refers to direct expenditure where lawful, for example state level donations in the US ‘company to party’ in those states where such donations are legal, shareholder authorised expenditure in the UK.
- (c) The US is scored 100% on this category because of the federal *Lobbying Disclosure Act 1995*. The figure would not be 100% at the state level in the US. There is no bar for Australia because no ASX 20 company provides this information.
- (d) There is no bar for Australia because no ASX 20 company provides this information.
- (e) For the US the figure here is for tax-exempt organisations such as ‘501(c)(4)’s - ‘social welfare’ organisations some of which actively engage in the political process. There is no bar for the UK because the Transparency International UK report does not cover this issue so it is not available. There is no bar for Australia because no ASX 20 company provides this.
- (f) The figures for the US refer to S&P 500 companies, for the UK to the FTSE 40 & for Australia to the ASX 20. Note that comparability across the three countries is sometimes difficult, figures for the US and Australia were prepared using a very similar methodology but not those for the UK.

# Conclusion

This paper has reviewed arrangements for corporate political expenditure across the US, the UK and Australia. It construes 'expenditure' broadly to include both direct expenditures (for example, 'plain vanilla' donations, donations provided as well above catering cost payments to attend events, subscriptions to party associated entities and 'own account' political advertising) as well as indirect expenditures through third parties (for example, trade associations and think tanks).

There are significant differences in legal, cultural and historical arrangements and attitudes to corporate political expenditure across the three countries. The most significant legal difference in regard direct political expenditure is between the arrangements in Australia on the one hand and those in the UK and the US on the other hand. In the UK direct political expenditure requires shareholder approval. In the US direct donations from a company to a party are banned. Neither of these restrictions applies in Australia.

A steadily increasing number of US and UK companies, often as a consequence of shareholder pressure, have voluntarily adopted oversight and disclosure policies dealing with direct political expenditure. The more lackadaisical the legal regime the more appropriate such oversight and disclosure policies. So, a reasonable expectation might be that Australia with its lax legal framework would have stronger corporate governance arrangements. Sadly, that is not the case.

Expenditure on federal level lobbying is subject to mandatory disclosure obligations in the US. In the UK it has become commonplace for companies to report in detail on their lobbying activities. By contrast, in Australia, there is no mandatory and minimal voluntary disclosure of lobbying expenditure.

In the US, companies are moving to disclose to shareholders (often as part of more general political expenditure disclosure) their payments to trade associations used for political purposes. By contrast, usage of trade associations is still an opaque area in the UK.

In Australia, for substantial sums of money across many companies, it is impossible to tell the full amount of political expenditure or the extent to which the expenditure reflects the personal whim or short-term interests of boards or genuinely advances long-term shareholder interests. It is also impossible to tell how much these contributions actually influence Australian politics.

## Appendix A: Recent resolution practice in the UK

A political party can currently raise funds in the UK through: membership fees, donations and public funding. Donations of money to political parties or associated entities by individuals or companies are the greatest source of income for political parties, for example, 60% of income for the Conservative Party was sourced through donations in 2012<sup>77</sup>.

Regulation of political donations in the UK has evolved considerably over the last two decades. Prior to 2000, companies had near free rein, being required only to disclose a donation to their shareholders<sup>78</sup>. The introduction of the Political Parties, Elections and Referendums Act 2000 (PPERA 2000) included introduction of provisions in the Companies Act which requires companies to seek shareholder approval before making political expenditure.<sup>79</sup> Directors are directly liable for direct political contributions that exceed the level of shareholder approval.

### Company resolutions

UK companies fall into three categories in regards direct political contributions and shareholder approval. Some companies seek approval but don't spend, some seek approval and do, others don't seek approval (and presumably don't spend).

**BG Group** is highly transparent and open about its political activities. It has a resolution but does not spend politically. Often in the UK companies seek shareholder approval for political spending as the law is broad and they do so to make sure that they do not accidentally breach the legislation. A good example is the BG Group who in 2015 put forward a resolution to: a) make political donations to political parties or independent election candidates up to a total aggregate amount of £15 000; b) make political donations to political organisations other than political parties up to a total aggregate amount of £15 000; and c) incur political expenditure up to a total aggregate amount of £20 000. The resolution covered one year in advance and provided that, in any event, the total aggregate amount shall not exceed £50 000<sup>80</sup>. Even though the group has this resolution they also have a policy that states that they in no way engage in party politics, donate to politicians, parties or organisations and do not incur political expenditure directly or indirectly.<sup>81</sup>

On the other hand, **Canary Wharf Group** is a British property company that does seek shareholder approval for political spending via resolutions but also spends a substantial amount of money on

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<sup>77</sup> <http://www.bbc.com/news/uk-politics-24016634>

<sup>78</sup> This is mentioned in Companies Act 1985, s 235 also see Schedule 7 Matters to be Dealt With in Directors' Report, part See 1 section 3 under Political and charitable gifts. See <http://www.legislation.gov.uk/ukpga/1985/6/enacted>.

<sup>79</sup> In Australian terms shareholder approval is required for direct political expenditure - payments to parties/candidates/associates/political organisations as well as 'own account' political expenditure. Shareholder approval is not required for indirect political expenditure via lobbyists, trade associations, think tanks etc. See PERA 2000 schedule 19 Control of political donations by companies: new Part XA of Companies Act 1985 [http://www.legislation.gov.uk/ukpga/2000/41/pdfs/ukpga\\_20000041\\_en.pdf](http://www.legislation.gov.uk/ukpga/2000/41/pdfs/ukpga_20000041_en.pdf).

<sup>80</sup> NOTICE OF ANNUAL GENERAL MEETING OF BG GROUP PLC (see resolution 19) [http://www.bg-group.com/assets/files/cms/BG\\_AGM15.pdf](http://www.bg-group.com/assets/files/cms/BG_AGM15.pdf)

<sup>81</sup> See BG Group Standard on Political Donations [http://www.bg-group.com/assets/files/cms/BG\\_ST\\_LEG\\_ECCU\\_007\\_Political\\_Donations.pdf](http://www.bg-group.com/assets/files/cms/BG_ST_LEG_ECCU_007_Political_Donations.pdf).

political donations on an annual basis. Its Anti Bribery and Corruption Policy states that “The Group makes all political donations in an open and transparent manner and discloses annually all aggregate political and charitable contributions. All political donations are approved by the Chief Executive Officer of the Company and recorded in the register of political donations<sup>82</sup>.” From data obtained via the Electoral Commission the company spent approximately £122,000 on political donations during calendar year 2015<sup>83</sup>

Not every company considers approval resolutions. One such example is **BHP Billiton plc** which has put no resolutions forward in recent years in regards to political spending and according to BHP PLC it also does not donate to political parties. BHP has not reported any political donations directly from the company or reported through the UK Electoral Commission. The legislation and approval arrangements discussed here apply only to BHP plc and do not include the Australian arm BHP Billiton Ltd.

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<sup>82</sup> Canary Wharf Group plc Anti-Bribery and Corruption Policy <http://group.canarywharf.com/wp-content/uploads/sites/2/2014/04/2-Anti-Bribery-and-Corruption-Policy.pdf>

<sup>83</sup>Electoral commission Canary Wharf disclosed donations <http://search.electoralcommission.org.uk/?currentPage=1&rows=30&query=Canary%20Wharf%20PLC&sort=AcceptedDate&order=desc&tab=1&et=pp&et=ppm&et=tp&et=perpar&et=rd&prePoll=false&postPoll=true&optCols=AccountingUnitsAsCentralParty&optCols=IsSponsorship&optCols=RegulatedDoneeType&optCols=CompanyRegistrationNumber&optCols=Postcode&optCols=NatureOfDonation&optCols=PurposeOfVisit&optCols=DonationAction&optCols=ReportedDate&optCols=IsReportedPrePoll&optCols=ReportingPeriodName&optCols=IsBequest&optCols=IsAggregation>

## Appendix B: Recent resolution and disclosure practice in the US

Almost all federal campaign finance in the US comes from private sources. Since 1907, the Tillman Act has banned direct ‘company to candidate/party’ donations. Until Citizens United in 2010 federal law banned corporate political expenditure in the form of political advertising. Until 2014, caps were imposed on campaign finance donations ‘individual to party’ - which varied by recipient eg local, state or national party committee. These were deemed unconstitutional by the Supreme Court in *McCutcheon v Federal Election Commission*.

Despite the Tillman Act, there is, still, a substantial flow of corporate monies used to support/oppose political parties via ‘super PAC’s’ and ‘advocacy groups’ such as ‘527’s’, trade associations (also known as 501(c)(6) organisations), and ‘501(c) (4) ’s.<sup>84</sup> Super PAC’s can only independently support parties/candidates but not directly donate to, nor coordinate with, them. ‘c4’s can only independently support parties/candidates but not directly donate to, nor coordinate with, them and only provided political activity does not constitute the major part of their operation.

The corrupting influence of corporate political expenditure is readily demonstrated in the US by the activities of the American Legislative Exchange Council (ALEC)<sup>85</sup> – an ‘advocacy group’ in terms of the categories above which supports a limited role for government. It is a tax deductible not for profit organisation which involves politicians and corporate representatives drafting, voting and agreeing model legislation on a wide range of issues which the politicians then seek to have adopted verbatim in their state legislatures. Two Australian companies Macquarie and Transurban have been and may still be involved with the ALEC.

### The CPA – Zicklin Index

CPA is a non-profit, non-partisan organisation created in November 2003 to bring transparency and accountability to corporate political spending. The Centre’s aims are to encourage responsible corporate political activity, protect shareholders, and strengthen the integrity of the political process. As a result of the efforts of the CPA and its partners, a growing number of leading public companies have adopted political disclosure and oversight measures. The CPA publishes an annual index scoring S&P 500 companies on their political disclosure and accountability policies and practices. The metric used in appendices D and E for Australian companies is based on the CPA tool.

The main findings of the 2015 report are<sup>86</sup>:

- Steady improvement has occurred over recent years;
- Most S&P 500 companies now have policies addressing political spending;
- Those companies that reached agreements after engagement by shareholders received sharply higher scores;
- 25 percent of companies place some type of restriction on their political spending; and

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<sup>84</sup> These numbers referred to the relevant section of the US tax code under which the organisations are established.

<sup>85</sup> See <https://www.alec.org/>.

<sup>86</sup> <https://corpgov.law.harvard.edu/2016/02/26/2015-cpa-zicklin-index-of-corporate-political-disclosure/>

- Almost nine out of 10 companies have some form of political spending policy available on their website.

## Examples of high scoring companies on the CPA – Zicklin index

The CPA – Zicklin index deals with disclosure, policy and oversight. To score well on the disclosure questions of the index, companies should, themselves, disclose all contributions, donations, payments, subscriptions or in-kind benefits provided to politicians, political candidates, political parties, PAC's, super PAC's, 'c4's and trade associations.

**Becton, Dickinson & Co. (BDC)** is an example of a high scoring US company on disclosure. See [http://www.bd.com/investors/corporate\\_governance/](http://www.bd.com/investors/corporate_governance/). There are three political expenditure documents accessible at URL's under the heading 'Other Documents'.

To score well on the policy questions the company should disclose a detailed policy governing all its political contributions from corporate funds. A detailed policy explains who makes decisions, based on what public policy priorities, to which entities the company may or may not give, and if there is board oversight.

**CSX Corp** is an example of a high scoring US company on this set of questions which does spend. It has a detailed policy regarding its political contributions, see <https://www.csx.com/index.cfm/library/files/responsibility/political-contributions/policy/>.

**Morgan Stanley** is an example of a high scoring US company on this set of questions which does not spend. See <https://www.morganstanley.com/about-us-governance/policy-polcontr>.

To score well on the oversight questions the company should disclose arrangements for board committee approval, review and oversight of political contributions.

**Noble Energy Inc.** is an example of a high scoring US company on this set of questions. See [http://files.shareholder.com/downloads/ABEA-2D0WMQ/0x0x689595/ce6a50f3-fe38-47bf-bb13-b2cf1395d84d/Political\\_Activity\\_Guidelines.pdf](http://files.shareholder.com/downloads/ABEA-2D0WMQ/0x0x689595/ce6a50f3-fe38-47bf-bb13-b2cf1395d84d/Political_Activity_Guidelines.pdf).

## Recent examples of resolutions dealing with political contributions

**Occidental** is a US oil and gas company which provided support for a Californian ballot initiative proposing the suspension of a law requiring companies cap their greenhouse gas emissions. Shareholders filed a resolution in 2011 requesting "that the independent members of the Board of Directors institute a comprehensive review of Occidental's political expenditures and spending processes and present a summary report for investors by September 2011. Items for review include:

- The process used for determining the approval of expenditures supporting or opposing candidates and an assessment of the impact such expenditures may have on the company's reputation, public image, business sales and profitability;
- Direct or indirect expenditures, including payments made to trade associations, such as the U.S. Chamber of Commerce, social welfare organisations and political organisations, supporting or opposing candidates or for issue ads aimed at affecting political races.

- Expenditures for state level ballot initiatives, including an analysis of its impact on the company and the environment of any such initiative;
- Oversight processes by management and Board for all political spending.”

The resolution attracted 31% support. Since 2011, Occidental’s score on the CPA-Zicklin Index has improved from 19% to 53%.

**AT&T** is a US telco. Since 2005 shareholders have filed resolutions each year dealing with various aspects of disclosure and oversight of its corporate political expenditure.<sup>87</sup> Resolution support has increased from 12.5% in 2005 to around 25 to 30% in recent years. Since 2004, it has disclosed \$28m state level direct political expenditure.

In 2015, the resolution requested the Company provide a report, updated semi-annually, disclosing the Company’s: 1. Policies and procedures for expenditures made with corporate funds to trade associations and other tax exempt entities that are used for political purposes ("indirect" political contributions or expenditures). 2. Indirect monetary and non-monetary expenditures used for political purposes, i.e., to participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, and used in any attempt to influence the general public, or segments thereof, with respect to elections. The report shall include: a. An accounting through an itemized report that includes the identity of the recipient as well as the amount paid to each recipient of the Company’s funds that are used for political contributions or expenditures as described above; and b. The title(s) of the person(s) in the Company who participated in making the decisions to make the political contribution or expenditure.

Since 2011, AT&T’s score on the CPA index has improved from 29% to 73%.

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<sup>87</sup> See [http://files.politicalaccountability.net/reports/transparency-and-accountability-2/ATT\\_Transparency\\_Report\\_2016.pdf](http://files.politicalaccountability.net/reports/transparency-and-accountability-2/ATT_Transparency_Report_2016.pdf).

## Appendix C: Sample of ASX companies

The conduct of a sample of five ASX companies with resource sector operations - use of trade associations and lobbyists is shown in table below. Table C1 sets out:

- relevant trade association membership;
- their score on a disclosure and accountability metric, see Appendix D;
- obligations assumed to provide responsible policy input on climate change;
- quantum of political donations declared to the AEC in 2014/15; and
- the identity of federal lobbyists they have used. No information is available in Australia on expenditure on lobbying activity.

### Features of 5 company's political expenditure activities

Company	Trade Association membership <sup>88</sup> , <sup>89</sup>	Disclosure & accountability score (%) <sup>91</sup>	Climate change responsible policy input obligation <sup>90</sup>	Federal electoral authority declared donations 14/15	Federal lobbyists
<b>AGL</b>	MCA	37 <sup>91</sup>	WMB # 3 & BCCC <sup>92</sup>	\$38,040 <sup>93</sup>	Craig Emerson Economics <sup>94</sup>
<b>Origin Energy</b>	APPEA, AIGN	19	WMB # 3	\$133,280 <sup>95</sup>	
<b>Santos</b>	APPEA, AIGN	9	BCCC	\$168,755 <sup>96</sup>	Craig Emerson Economics
<b>Wesfarmers</b>	AIGN, MCA <sup>97</sup>	16	BCCC <sup>98</sup>	0 <sup>99</sup>	Craig Emerson and ECG
<b>Woodside</b>	APPEA, AIGN	24	Nil known	\$266,820 <sup>100</sup>	

<sup>88</sup> MCA membership list, see [http://www.minerals.org.au/corporate/mca\\_member\\_companies](http://www.minerals.org.au/corporate/mca_member_companies) , August 2013

<sup>89</sup> For APPEA membership list see <http://www.appea.com.au/about-appea/members/> .

<sup>90</sup> For example, being a signatory to the third 'We mean business' (WMB) commitment – responsible engagement on climate change policy. See <http://www.wemeanbusinesscoalition.org/content/responsible-corporate-engagement-climate-policy> .

<sup>91</sup> Of the 23 companies scored by the ACCR this was the highest score.

<sup>92</sup> Business Coalition on Climate Change.

<sup>93</sup> See <http://periodicdisclosures.aec.gov.au>Returns/56/UAKD8.pdf> p 6. Note that in August 2015 AGL adopted a policy of prohibiting political donations. See <https://www.agl.com.au/~media/AGL/About%20AGL/Documents/Media%20Center/Corporate%20Governance%20Policies%20Charter/FINAL%20Political%20Donations%20Policy%20%20%20August%202015.pdf> .

<sup>94</sup> Craig Emerson is a former Australian government trade minister.

<sup>95</sup> <http://periodicdisclosures.aec.gov.au>Returns/56/UADC4.pdf> p 8.

<sup>96</sup> <http://periodicdisclosures.aec.gov.au>Returns/56/TZRI5.pdf> p 3.

<sup>97</sup> Via Wesfarmers Resources Ltd which is part of the Wesfarmers group.

<sup>98</sup> See <http://sustainability.wesfarmers.com.au/our-principles/environment/climate-change-resilience/> .

<sup>99</sup> Note, however, the Wesfarmers subsidiary, Coles does appear to make political contributions, for example, in 2013/14 the Liberal Party of Australia discloses receipts from Coles of \$55,000. See

<http://periodicdisclosures.aec.gov.au>Returns/55/SLCE8.pdf> .

<sup>100</sup> See <http://periodicdisclosures.aec.gov.au>Returns/56/TZRU8.pdf> p 4.

## Appendix D: Disclosure and accountability scoring results

ACCR scored the ASX 20 companies using a metric similar to that developed by the US Center for Political Accountability. Three companies outside the ASX 20 - AGL, ORG and STO were also scored. All 23 companies were approached for comment on their scoring. All but six companies provided comment. ACCR thanks the staff of all those companies who provided comment.

Details of the 24 questions in the metric are set out in Appendix E.

Results for the ASX 20 companies scored are set out in table D1 below. A spreadsheet which sets out the scores on each question for each company can be found at <http://www.accr.org.au/politicsreport>

### Scoring for ASX 20

Company ticker (name)	Score(%)
AMP	11
ANZ	33
BHP	19
BXB (Brambles)	31
CBA Commonwealth Bank)	10
CSL	19
IAG	9
MQG (Macquarie Group)	16
NAB	21
QBE	9
RIO	31
SCG (Scentre)	9
SUN (Suncorp)	29
TLS (Telstra)	10
TCL (Transurban)	13
WBC (Westpac)	20
WES (Wesfarmers)	16
WFD (Westfield)	9
WPL (Woodside)	24
WOW (Woolworths)	19

## *Appendix E: Disclosure and Accountability scoring metric*

This scoring metric is an ‘Australian customised version’ of a metric developed by the CPA in the US. To ease comparability the questions and scoring have been kept as close as possible to those used by the CPA.<sup>101</sup>

A number of points about this scoring metric should be noted in the Australian context:

firstly, the approach is deliberately ‘shareholder’-centric. The questions are not about compliance with legal obligations carefully construed. A company which fully discloses its lawyer’s interpretation of its political donations in its AEC declaration but omits to disclose, for example, payments under the threshold or payments to an associate, is not assisting its shareholders understand the use of corporate funds. A company which says it makes ‘no cash donations’ but does pay well over catering cost to attend functions is confusing shareholders not assisting them;

secondly, the questions rely on public disclosure. Many companies have policies which deal with some of the issues raised in the metric but they are not available to the public, such as posted on the company’s intranet. That is of no assistance to shareholders;

thirdly, the metric construes the term ‘political contributions’ broadly, for example, it poses questions about donations as well as subscriptions to trade associations. A company which has a policy on donations but not trade association subscriptions does not have a ‘detailed policy’. A ‘detailed policy’ covers all potential forms of political contributions. It explains who makes decisions, based on what public policy priorities, to which entities the company might give and the nature and timing of board oversight.

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<sup>101</sup> See <http://politicalaccountability.net/index> p 29.

## Disclosure

Question	Max. score
1. Does the company publicly disclose corporate contributions to political candidates and parties, including recipient names and amounts given?	4
2. Does the company publicly disclose payments to party associated entities <sup>102</sup> , for example, '500 clubs' including recipient names and amounts given.	4
3. Does the company publicly disclose political expenditures made on its own account in direct support of or opposition to a campaign <sup>103</sup> , including recipient names and amounts given?	6
4. Does the company publicly disclose payments to trade associations <sup>104</sup> the recipient organisation may use for political purposes?	6
5. Does the company publicly disclose payments to other not-for-profit organisations, such as think tanks, that the recipient may use the political purposes?	2
6. Does the company publicly disclose a list of the amounts and recipients of payments made by trade associations or other tax-exempt organisations of which the company is a member, event- sponsor or donor?	4
7. Does the company publicly disclose details of its global lobbying expenditure, for example, payments made to influence the outcome of politically controversial issues, ballot initiatives, referenda including recipient names and amounts given?	4
8. Does the company publicly disclose the company's senior managers (by position/title of the individuals involved) who have final authority over the company's political spending decisions?	2
9. Does the company publicly disclose an archive of past political expenditure reports, including all direct and indirect contributions, for each year since the company began disclosing the information?	4

**Maximum possible Disclosure score: 36**

<sup>102</sup> See [http://www.aec.gov.au/parties\\_and\\_representatives/financial\\_disclosure/guides/associated-entities/index.htm](http://www.aec.gov.au/parties_and_representatives/financial_disclosure/guides/associated-entities/index.htm) for a definition of associated entities in the *Commonwealth Electoral Act*.

<sup>103</sup> Note that the term 'campaign' extends to attempts to influence issues specific political outcomes for example the campaign of the Australian Trade and Industry Alliance in opposition to the carbon tax. See [http://www.minerals.org.au/news/australian\\_trade\\_and\\_industry\\_alliance\\_carbon\\_tax\\_advertising/](http://www.minerals.org.au/news/australian_trade_and_industry_alliance_carbon_tax_advertising/).

<sup>104</sup> Relevant trade associations might include the Minerals Council of Australia (MCA), the Australian Petroleum Production and Exploration Association, the Financial Services Council (FSC), the Property Council etc.

## Policy

10.	Does the company disclose a detailed policy <sup>105</sup> governing all political expenditures from its own funds and all subsidiaries over which it has operational control?	6
11.	Does the company have a publicly available policy which precludes involvement in any political contributions other than by permitting staff to arrange for direct debit out of remuneration to nominees of their choice?	Not scored
12.	Does the company have a publicly available policy stating that all of its contributions will promote the interests of the company and will be made without regard for the private political preferences of executives or board members?	2
13.	Does the company publicly described type of entities considered to be proper recipients of the company's political spending?	2
14.	Does the company publicly describe its public policy positions that become the basis for its spending decisions?	2
15.	Does the company have a publicly available policy requiring senior managers to oversee and have final authority over all the company's political spending?	2
16.	Does the company have a publicly available policy that the Board of Directors regularly oversees the company's corporate political activity?	2

**Maximum possible Policy score: 16**

## Oversight

17.	Does the company have a specified board committee that reviews the company's policy on political expenditures?	2
18.	Does the company have a specified board committee that reviews actual political expenditures?	2
19.	Does the company have a specified board committee that reviews the company's payments to trade associations and other not-for-profit organisations that may be used for political purposes?	2
20.	Does the company have a specified board committee that approves political expenditures?	2
21.	Does the company have a specified board committee, composed entirely of nonexecutive directors, that oversees political activity?	2
22.	Does the company post on its website a detailed report of its political spending at least semi-annually?	4
23.	Does the company make available a dedicated political disclosure webpage readily accessible from its homepage?	2
24.	Does the company disclose an internal process for an affirmative statement on ensuring compliance with its political spending policy?	2

**Maximum possible Oversight score: 18**

**Total possible raw score: 70**

<sup>105</sup> Such a policy might be included in its code of ethics, in its ASX governance report or in a specific political expenditure focused policy document.