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NSW ICAC: Lobbying conduct and regulation in NSW
Draft consultation response

About ACCR

The Australasian Centre for Corporate Responsibility (ACCR) is a not-for-profit association focused on evaluating and improving the performance of Australian listed companies on environmental, social and governance (ESG) issues, including in particular on climate change, human rights, and labour rights. ACCR frequently engages with Australian listed companies, their shareholders, and their investors on these issues.

A large part of ACCR's work involves scrutinising the lobbying activities of Australian listed companies, as well as the industry associations that represent listed companies on various issues (for example, the Australian Petroleum Production and Exploration Association, or the NSW Minerals Council).

ACCR is a shareholder in many companies that make up the ASX100 index. ACCR regularly meets with ASX-listed companies about environmental, social and governance (ESG) issues, and regularly briefs investors about the ESG performance of ASX-listed companies.

Listed companies regularly lobby the NSW government on a range of legislative changes and project approvals. Direct lobbying by companies, and indirect lobbying by companies via industry associations, poses risks to shareholders particularly where transparency is lacking. In instances where industry associations are lobbying on behalf of their members, there are further risks to company shareholders where this lobbying is inconsistent with the stated policies of the company concerned. For this reason, in the interests of shareholders and investors, as well as in the public interest more broadly, ACCR supports reasonable measures to better regulate lobbying activity, by any and all entities hoping to gain a financial benefit from contact with government representatives.

ACCR is grateful for the opportunity to provide input on the discussion around the regulation of lobbying, access and influence in NSW.

Listed companies and lobbying in NSW

ACCR understands that companies across all sectors of the economy seek to influence government, through direct or indirect lobbying. This poses potential problems for many institutional investors, particularly when the lobbying efforts of companies do not reconcile with a company's own stated commitments. For example, many investors have called for policy stability to address carbon emissions, while the companies they are invested in, are actively lobbying directly or through industry associations, to disrupt such policy. This creates risks for investors in the short term, as the transition in the energy sector becomes more unpredictable, and in the long term, as policies to mitigate carbon emissions are delayed. In our view, investors would benefit from greater regulation and transparency around lobbying activities.

In our experience, lobbying activities by companies in the resources industry are highly sophisticated. For example, Rio Tinto and Santos, two companies with which ACCR regularly engages, have continuously and successfully lobbied NSW ministers about the approval of their projects over several years.

In 2014 and 2015, Rio Tinto met with various NSW ministers in relation to the approval of an expansion to its Warkworth mine. Following the Land and Environment Court's rejection of the expansion in 2013, Rio Tinto lobbied the NSW government to escalate the economic significance of coal above impacts on water, biodiversity, etc. Rio Tinto also lobbied for changes to policies relating to biodiversity offsets, that were critical in the subsequent approval of the Warkworth expansion.

Gas company Santos has sought to develop its Narrabri coal seam gas (CSG) project since acquiring the original project proponent, Eastern Star Gas in 2011. Santos has met with various NSW government ministers seeking initially to overturn the existing moratorium on onshore gas development, which was ultimately successful (with the exception of residential exclusion zones) in 2014, and subsequently accelerate the approvals process for its Narrabri project.

Industry associations and lobbying in NSW

Industry associations are member-based organisations comprising of companies operating in a particular industry or region. They are also known as trade associations, business associations, industry bodies, and industry trade groups. Industry associations commonly engage in activities that promote the interests of their members to relevant stakeholders, government and community organisations.

The lobbying activities of industry associations can have a significant impact on politics and society. This may occur through lobbying in relation to regulatory and legislative reviews, for example on climate change and energy policy. Industry associations seeking to influence political outcomes in NSW include the Australian Energy Council, the Australian Petroleum Production and Exploration Association (APPEA), the Minerals Council of Australia and the NSW Minerals Council.

Industry associations operate in an intermediary position between their member companies and public servants and politicians. Their representatives act as spokespeople for the collective interests of a group of companies from a particular industry. Industry associations commonly assert their political influence through direct policy engagement, including public and private engagement with government, media and advertising, and political donations, and indirect policy engagement, such as the sponsorship of think tanks, and by supporting fundraising and campaigning events.

Increasingly, Australian listed companies are making commitments to prohibit political donations as part of their governance and transparency measures. Some companies judge that being associated with overt political lobbying may result in unwanted reputational, operational and governance risks for the company or its investors. However, industry associations may act as a conduit for companies not wishing to publicly or overtly lobby public officials, authorities and parties. While some companies may have made public commitments not to make political donations, they may be paid members of an industry association that does. For example, BHP, Rio Tinto, South32, Orica and Newcrest Mining made no political donations in the 2017-18 reporting year, but are all paid members of the Minerals Council of Australia, which gave a total of AUD 94,900 to political parties in that period, including the NSW Liberal Party.

There are no obligatory reporting requirements relating to the disclosure of membership of industry associations in Australia. Some industry associations choose to publish a list of their members in annual reports, whilst others keep this information confidential.

ACCR is concerned that Australian listed companies in the mining and resources sector, as well as their representative industry associations, have undue influence upon government in NSW. Analysis by *Guardian Australia* recently found that in a 235 week period, a suite of these companies[1], and their representative bodies, had 188 meetings with NSW

[1] These companies included Shenhua, Whitehaven, Glencore, Rio Tinto, BHP, AGL, Origin Energy, Santos, Anglo American and Centennial Coal.

government ministers[2]. This included 61 meetings between the NSW Minerals Council and NSW ministers. In the same period, environmental groups were only granted 19 meetings.

ACCR has catalogued the advocacy of the NSW Minerals Council throughout the previous term of the NSW government. The NSW Minerals Council has been successful in convincing NSW government ministers that taking action on climate change would mean sacrificing jobs and growth. The NSW Minerals Council has criticised emissions reduction targets, sought to prolong the life of existing coal-fired power stations, and encouraged the construction of new coal-fired power stations. This is despite these views not being consistent with those of some of its largest members - including BHP and South32. While ACCR seeks to educate investors in these companies about such inconsistencies, the lack of transparency around lobbying in NSW makes that task quite difficult.

Response to ICAC consultation paper questions

1. Measures to improve transparency

ACCR shares the Commission's concerns about opaque lobbying processes and poor standards of accountability giving way to potential corruption in NSW (p. 9, Consultation Paper). ACCR welcomes the expansion of the lobbying regulatory scheme in NSW to require a greater level of transparency, by improving disclosure requirements generally.

Register of Third-Party Lobbyists

Question 2. Lobbyists employed directly by listed companies or industry associations are not currently required to name themselves as lobbyists, or publicly disclose their lobbying activities. In our view, there is no good reason for this type of lobbying to be excluded from the regulatory scheme. ACCR supports broadening the definition of 'lobbyist' to include any individual or group, representing any entity which seeks to promote a commercial interest, or gain a financial benefit from their engagement.

As well as Third-Party Lobbyists, the following groups should be required to register on the NSW lobbyist register:

- Direct and indirect employees of listed and unlisted companies, including board members and other official representatives of companies.
- Direct and indirect employees of industry associations, including any contractors or subcontractors engaged to undertake lobbying activities.

Question 5. As previously stated, a large proportion of ACCR's work focuses on Australian listed companies and industry associations seeking to influence government decision-making in relation to climate and energy issues (including for example, planning and development approvals in New South Wales). ACCR believes that there should be targeted regulation for the mining and resources industry.

As the 2010 ICAC Issues Paper[3] on this subject noted:

> 'Lobbying is most likely to be concentrated around areas where there are competing significant interests and the discretion to affect those interests. It is reasonable to expect that the intensity of lobbying may vary according to: a) the advantage, whether financial or otherwise, likely to be obtained from successful lobbying, b) the level of discretion afforded to the public official, c) the possibility of review/appeal of any decision, and d) the number of participants in the industry.' - p. 14.

[2] https://www.theguardian.com/australia-news/2019/mar/22/mining-sector-met-nsw-ministers-almost-every-week-over-four-years
[3] ICAC 2010, *Lobbying in NSW: An issues paper on the nature and management of lobbying in NSW,* discussion paper, accessed at https://www.icac.nsw.gov.au/ArticleDocuments/478/Lobbying%20in%20NSW%20-%20issues%20paper.pdf.aspx.

The resources industry in New South Wales has a high degree of all of the above characteristics. Companies and their representative industry associations in this sector are active, well organised, and prominent. Representatives from this industry enjoy frequent and direct access to members of parliament, including government ministers[4]. The legislation, regulations, contracts, grants and projects which these groups seek to influence are often highly contentious, and commonly contend with local community opposition, as well as broader contests with civil society groups over issues such as climate change, environmental damage and biodiversity, Indigenous land rights, jobs, and public health and safety.

Combined, all of these realities heighten the corruption risks involved in the lobbying of public authorities and officials, by representatives of companies and industry associations in the mining and resources sector.

Disclosure of lobbying activity

Question 6. ACCR supports the adoption of mandatory standards of conduct and procedures for lobbying activities. It is reasonable to require lobbyists to provide their names; the name of the entity that they are representing; their involvement in or with that entity (whether they are directly employed or indirectly employed, for example); and the general and specific purpose of any lobbying activity. They should also be required to submit identification numbers, such as ABNs and/or ACNs, and full formal business names in addition to the names under which they operate, to support the cross-checking of entities across government and other data sets.

Question 7. Lobbyists should be required to provide details of each instance of lobbying contact that they have, and make a note of any policy, legislation, grant, contract, regulation or project that is raised during this contact. This should include any prospective policy, legislation, grant, contract, regulation and/or project. This information should be made publicly available.

Question 8. Lobbyists seeking a financial benefit from lobbying (including membership fees paid to an industry association) should be required to disclose how much income they have received and which entity paid them, as well as how much they have spent on their lobbying activities over what timeframe.

Question 9. Collection and disclosure services should be implemented using the Australian Government's Digital Service Standard and NSW Government's own Digital Design Standard, with the advice or involvement of *digital.nsw*, the government's experts in creating accessible digital services. Disclosure data should be published as Open Data, inline with the NSW Government Open Data Policy.

In the interests of consistency, fairness, and transparency, lobbying interactions should be recorded and disclosed in a standardised way through an online form. Such a form or template should have mandatory fields, including the data points mentioned at Questions 6 and 7. Disclosures should be published in as close to real time as possible. ACCR stresses the need for standardisation of data, and how a lack of standardisation can be used to manipulate the process. For example, there were several entries in the NSW ministerial diaries in 2015 of "Coal" being entered as the name of the concerned party[5]. Such information is clearly designed to obfuscate.

Question 10. ACCR supports the publication of lobbying information by ministers through the periodic release of ministerial diary records, which already occurs. However, we consider that these records are currently too minimal, and do not give members of the public a sufficient understanding of the lobbying which has taken place.

[4] See: https://www.theguardian.com/australia-news/2019/mar/22/mining-sector-met-nsw-ministers-almost-every-week-over-four-years
[5] https://www.theguardian.com/australia-news/2019/mar/22/mining-sector-met-nsw-ministers-almost-every-week-over-four-years

For example, on 25/02/2019, the NSW Minister for Resources, Minister Energy and Utilities and Minister for the Arts recorded a meeting with the Business Council of Australia[6]. The recorded purpose of the meeting was 'energy'. From the BCA's most recent publication[7], it could be assumed that 'energy' could relate to extending the life of existing coal-fired power stations or scrapping "green schemes" (presumably renewable energy targets). However, given that the BCA has approximately 140 members nationally, and represents a number of companies with energy-related interests (such as AGL, Origin Energy, Santos and Woodside), due to the minimalist reporting requirements, it is impossible to understand what was discussed at the meeting, and which company or companies the BCA was representing.

Ministers should be required to disclose the following details of their meetings with lobbyists: who was present at the meeting; the date, time and duration of the meeting; any relevant legislation, grants, contracts, regulations, projects or policies which were discussed; the meeting agenda; and minutes from the meeting. Narrow exemptions for genuine commercial-in-confidence information would be reasonable.

Promoting accessibility and effectiveness

Question 11. Online disclosures need to be as close to the time of relevant action as possible. Timeliness is one of the most crucial elements to identifying and correcting problematic practices. As in our response to Question 9, disclosure services should be implemented using the Australian Government's Digital Service Standard and NSW Government's own Digital Design Standard, with the advice or involvement of *digital.nsw*, the government's experts in creating accessible digital services. This will ensure a collaborative design process and a resulting service that is accessible and useful to us and the broadest range of users. Disclosure data should be published as Open Data, as a feed and in bulk on data.nsw.gov.au, and inline with the NSW Government Open Data Policy.

Question 12. It would be useful to integrate lobbying related data including: information on political donations made by lobbyists; the register of lobbyists; ministerial diaries; details of investigations by the Commission; list of holders of parliamentary access passes; and details of each lobbying contact.

Crucially, when records are submitted, they must be required to include the information that enables the cross-referencing with other datasets, such as ministerial diaries, business registers, political donations etc. (see response to Questions 6 and 9 above).

Question 13. To incentivise compliance, ACCR supports the annual or biannual publication of lobbying trends and compliance to the NSW Parliament. Such reporting should be publicly available online.

Regulation of the lobbyists

Question 15. NSW members of Parliament should not be allowed to undertake paid lobbying activities during their term of Parliament. See Questions 21 and 22 below for ACCR's comments on the regulation of post-separation employment.

Question 16. Lobbyists should be prohibited from giving gifts to government officials. It is ACCR's view that gifts and expenditure on "entertainment" have been intrinsically linked with previous corruption scandals in NSW.

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6 https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/January-March-2018-1409/0218aa9452/Minister-for-Resources-Minister-Energy-and-Utilities-and-Minister-for-the-Arts-January-2019-March-2019.pdf

7 https://d3n8a8pro7vhmx.cloudfront.net/bca/pages/4678/attachments/original/1554878192/A_plan_for_a_stronger_Australia_-_vol1_-_noembargo.pdf?1554878192

Regulation of the lobbied

Question 17. The existing definition of "government official" should be expanded to include ministers, members of Parliament, parliamentary secretaries, ministerial advisers and senior public servants. This expanded definition should apply to all members of parliament, including the government (or ruling coalition), opposition and minor parties.

Question 18. Government officials attending a meeting with lobbyists should be accompanied by at least one other government official, one of whom should be responsible for taking minutes (see Question 20).

Question 19. Public officials should be obliged to notify the NSW Electoral Commission of potential breaches of the lobbying legislation. There should be appropriate protections for whistleblowers, in order to avoid repeat cases like that of former Department of Planning manager Rebecca Connor, as reported by The Newcastle Herald in November 2018[8].

Question 20. A minimum of two government officials should be required to attend any meeting with a lobbyist. One of those officials should be required to take minutes, which should be submitted to the NSW Electoral Commission (as the existing regulator) via an electronic form within a week of the meeting taking place.

Regulation of post-separation employment

Question 21. ACCR supports a cooling off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers and senior public servants from engaging in any lobbying activity relating to any matter that they have had official dealings in. We suggest that this cooling off period should be for at least one term of government — currently four years.

Question 22, Question 23. In order to enforce a post-separation employment ban, lobbyists should be obliged to declare any previous role as a government official when seeking to register as a lobbyist. The NSW Electoral Commission should be permitted to conduct simple investigations to determine whether lobbyists have been truthful in their applications to the lobbyists' register.

Question 24. ACCR supports requiring lobbyists who are covered by the NSW Register of Lobbyists, who were former government officials, to disclose any income that they receive from lobbying. In the absence of a four year cooling off period, this disclosure should be required for a period of at least one term of government.

Promoting independent supervision to enforce lobbying laws

Question 35. ACCR supports the establishment of an independent 'Integrity Commissioner', charged with oversight and enforcement of lobbying laws. In ACCR's view, the NSW Electoral Commission is not the appropriate body to regulate lobbying in NSW. An Integrity Commissioner would be responsible for collecting and disclosing lobbying activities, investigating potential breaches of lobbying laws, prosecuting minor matters, and referring serious matters to the Independent Commission Against Corruption (ICAC).

Yours sincerely,

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[8] https://www.theherald.com.au/story/5757672/i-wouldnt-play-ball-sacked-department-of-planning-manager-alleges-corruption/