

REGULATING THE INFLUENCERS: THE EVOLUTION OF LOBBYING REGULATION IN AUSTRALIA

ABSTRACT

Although lobbying is integral to democratic representation, there are concerns regarding the undue influence of professional lobbyists, which may ultimately lead to corrupt conduct by lobbyists and/or officials. In recent times, there has been an increasing emphasis on legal regulation in order to address the democratic risks of lobbying. This article develops a conceptual framework to evaluate lobbying regulation based on the form of regulation, the standards it imposes, and compliance processes. It explores the history and evolution of lobbying regulation in Australian federal and state jurisdictions. The author identifies three distinct phases of lobbying regulation in Australia: the initial phase of minimalist executive regulation; stronger executive regulation of third party lobbyists; and finally, the rise of legislative regulation of third party lobbyists. It is shown that within the Australian federation, there is evidence of policy transfer across jurisdictions, as well as disparate regulatory innovations in the standards of enforcement and compliance processes. However, lobbying regulation remains narrowly focussed due to the effective advocacy of lobbyists.

I INTRODUCTION

Over the past 30 years, commercial lobbying in Australia has ‘grown from a small industry of a few hundred employees’ to become a lucrative ‘multi-billion dollar a year industry’.¹ Third party or commercial lobbyists are paid professionals who are engaged by clients to make representations to influence public officials on their behalf,² while in-house lobbyists are those that seek to influence public officials on behalf of their employer. Lobbying activity is variegated and occurs

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¹ Julian Fitzgerald, ‘The Need for Transparency in Lobbying’ (Discussion Paper No 16/07, Democratic Audit of Australia, September 2007) 2.

² Darren Halpin and John Warhurst, ‘Commercial Lobbying in Australia: Exploring the Australian Lobbying Register’ (2016) 75(1) *Australian Journal of Public Administration* 100, 110.

between government and those external to government, as well as within government (department to department), and across the federal tiers. A Senate Committee in 2008 received evidence indicating that there are approximately 4,000 lobbyists in the broader community.³ If in-house lobbyists are included, an estimate in 2012 indicates that there are about 5,000 lobbyists in the system.⁴ However, the federal Lobbyist Register shows a much lower number as it only applies to third party lobbyists, which means that only approximately 20% of lobbyists are required to register under the scheme.⁵ As of August 2020, the federal Lobbyist Register indicates that 579 individual lobbyists are employed by 266 firms.⁶ Of the 579 lobbyists, 39% (225) are former government representatives,⁷ that is, former politicians, senior public servants or ministerial advisers. This shows that there is a revolving door between government and lobbyists due to the extensive and beneficial networks developed by public officials. The top 10 lobbying firms (by number of lobbyists) in 2014 employed between 10 and 21 lobbyists each, who together had about 20% of lobbyists in the entire industry.⁸ Beyond this impressionistic sketch, there is little clarity as to precisely how many lobbyists there are, how they are structured, and how they operate.

The opaqueness concerning both third party and in-house lobbying in Australia, in fact, points to its vexed role. On the one hand, there is no doubt that lobbying — communication with public officials aimed at influencing public decision-making⁹ — is essential to the proper workings of democracies. As the British Neill Committee on Standards in Public Life recognised, ‘[t]he democratic right to make representations to government — to have access to the policy-making process — is fundamental to the proper conduct of public life and the development of sound policy’.¹⁰ Similarly, the Western Australian Corruption and Crime Commission (‘WACCC’) emphasised that

³ Ibid 101, referring to evidence provided before the Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Knock, Knock: Who’s There? The Lobbying Code of Conduct* (Report, 3 September 2008).

⁴ Senate Finance and Public Administration References Committee, *The Operation of the Lobbying Code of Conduct and the Lobbyist Register* (Report, 1 March 2012) 10 [2.20]–[2.21] (‘*Operation Inquiry*’).

⁵ Evidence to Senate Finance and Public Administration References Committee, Parliament of Australia, Canberra, 21 February 2012, 19 (David Solomon). See Senate Finance and Administration References Committee, *Operation Inquiry* (n 4).

⁶ ‘The Lobbyist Register’, *Attorney-General’s Department* (Web Page) <<https://lobbyists.ag.gov.au/register>>.

⁷ Ibid.

⁸ Halpin and Warhurst (n 2) 105.

⁹ This corresponds with the definition used by the Organisation for Economic Co-operation and Development (‘OECD’), which has defined ‘lobbying’ as ‘solicited communication, oral or written, with a public official to influence legislation, policy or administrative decisions’: OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency through Legislation* (OECD Publishing, 2009) 18 (‘*Volume 1*’).

¹⁰ Committee on Standards in Public Life, *Reinforcing Standards: Sixth Report of the Committee on Standards in Public Life* (Report, 2000) 86.

[t]he right to influence government decisions is a fundamental tenet underpinning our system of government and a form of political participation that helps make ‘the wheels of government’ turn. When managed according to ‘the public interest’, lobbying has not only a legitimate but also an important role to play in the democratic process.¹¹

At the same time, democracies can also be undermined by lobbying. As the Organisation for Economic Co-operation and Development (‘OECD’) has observed, ‘[l]obbying is often perceived negatively, as giving special advantages to “vocal vested interests” and with negotiations carried on behind closed doors, overriding the “wishes of the whole community” in public decision-making’.¹²

There are three main purposes in regulating lobbying. The first is to prevent corrupt behaviour by lobbyists and public officials. The second is a broader notion of political equality in ensuring the fairness of government policymaking and decision-making processes by increasing transparency in the disclosure of lobbying activities. This is aimed at reducing the incidence of secret lobbying by vested interests and reducing the risk of regulatory capture by government. The prevention of corruption and increased transparency leads to the third main purpose of improving the quality of government decision-making and policymaking in ensuring that government decisions are made according to merit, rather than skewed towards narrow sectional interests.¹³ This in turn will increase public confidence in the integrity of political institutions.

Lobbying has the potential to lead to corrupt conduct by both lobbyists and government officials, as brought to light by inquiries by the New South Wales Independent Commission Against Corruption (‘ICAC (NSW)’) and the WACCC, that led to multiple findings of misconduct against lobbyists and public officials.¹⁴ As recently as 2019, ICAC launched a public inquiry into lobbying regulation

¹¹ Procedure and Privileges Committee of the Legislative Assembly, Parliament of Western Australia, *Inquiry Conducted Into Alleged Misconduct by Mr John Edwin McGrath MLA, Mr John Robert Quigley MLA and Mr Benjamin Sana Wyatt MLA* (Report No 5 of 2008, 10 June 2008) 44 [141].

¹² OECD, *Volume 1* (n 9) 9.

¹³ Richard L Hasen referred to this as the ‘national economic welfare rationale’, that lobbyists threaten national economic welfare by rent-seeking, ie ‘devot[ing] resources to captur[e] government transfers, rather than putting them to a productive use’. ‘[L]obbyists tend to lobby for legislation that is itself an inefficient use of government resources’, eg lobbying to keep an obsolete weapons program: Richard L Hasen, ‘Lobbying, Rent-Seeking, and the Constitution’ (2012) 64(1) *Stanford Law Review* 191, 197.

¹⁴ See, eg, New South Wales Independent Commission Against Corruption (‘ICAC (NSW)’), *Investigation into the Conduct of Ian MacDonald, Ronald Medich and Others* (Report, July 2013); ICAC (NSW), *Investigation into the Conduct of the Hon Edward Obeid MLC and Others Concerning Circular Quay Retail Lease Policy* (Report, June 2014); ICAC (NSW), *Investigation into the Conduct of Moses Obeid, Eric Roozendaal and Others* (Report, July 2013).

(Operation Eclipse), as it identified lobbying as a potential corruption risk,¹⁵ following its previous lobbying investigation in Operation Halifax in 2010.¹⁶ The recent revelations that a One Nation political candidate and senior adviser sought political donations from the United States’ (‘US’) National Rifle Association and the Koch brothers in exchange for seeking to water down Australian gun laws provides a strong impetus to examine more closely the regulation of lobbying in Australia.¹⁷

Lobbying may lead to corruption if it sways public officials to decide issues other than on their merits, or leads to the dishonest or partial exercise of public officials’ functions, in breach of public trust.¹⁸ There are several lobbying activities that represent a corruption risk and may produce outcomes contrary to the public interest, including providing ‘cash for access’ to public officials, or making prohibited donations to political parties, particularly those that disguise the true identity of vested interests.¹⁹ A further dubious practice is astroturfing, ie where wealthy vested interests hide behind ‘pseudo grass-roots groups (“astro-turf” groups)’,²⁰ and utilise social media or ‘fake news’ to project the appearance of genuine community support or opposition to an issue, with the ‘intent to mislead decision-makers’.²¹

Beyond quid pro quo corruption, where a payment or inducement is directly made in exchange for an official act, the need to regulate lobbying stems from issues of fairness. There is the potential for regulatory capture, where governments may be

¹⁵ ICAC (NSW), ‘New ICAC Public Inquiry into Lobbying to Start 5 August’ (Media Release, 18 July 2019). See Yee-Fui Ng and Joo-Cheong Tham, *Enhancing the Democratic Role of Direct Lobbying in New South Wales: A Discussion Paper for the New South Wales Independent Commission Against Corruption* (Report, April 2019).

¹⁶ ICAC (NSW), *Investigation into Corruption Risks Involved in Lobbying* (Report, November 2010) (*‘Investigation into Corruption’*); ICAC (NSW), *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* (Report, May 2010).

¹⁷ Paul Karp, ‘One Nation’s James Ashby Filmed Seeking \$20m from NRA to Weaken Australia’s Gun Laws’, *The Guardian* (online, 26 March 2019) <<https://www.theguardian.com/australia-news/2019/mar/26/one-nations-james-ashby-filmed-lobbying-for-20m-in-nra-donations-to-weaken-australias-gun-laws>>.

¹⁸ ICAC (NSW), *Operation Eclipse: Lobbying Access and Influence in NSW* (Interim Paper, October 2019) 4, 16.

¹⁹ ICAC (NSW), *The Regulation of Lobbying, Access and Influence in NSW: A Chance to Have Your Say* (Report, April 2019) 9 (*‘Have Your Say’*). Such issues have arisen in an ongoing investigation by the Victorian Independent Broad-Based Anti-Corruption Commission (‘IBAC’), Operation Sandon, where it was alleged that councillors ‘accepted undeclared payments, gifts or other benefits, including political donations, in exchange for favourable council outcomes’: Transcript of Proceedings, *Operation Sandon Investigation* (IBAC, Robert Redlich QC, 18 November 2019) 1 (Michael Tovey QC).

²⁰ A Paul Pross and Robert P Shepherd, ‘Innovation Diffusion and Networking: Canada’s Evolving Approach to Lobbying Regulation’ (2017) 60(2) *Canadian Public Administration* 153, 169.

²¹ ICAC (NSW), *Have Your Say* (n 19) 9.

granting preferential access and influence to certain groups, who are better resourced and are able to hire well-connected lobbyists to advance their own self-serving agenda. This leads to the danger that government officials will decide issues, not on their merits or the desires of their constituencies, but according to the wishes of certain vested interests — what a High Court majority in *McCloy v New South Wales* called ‘clientelism’.²² This skewing of government decision-making away from the public interest corrodes the quality and integrity of the democratic system.

The regulation of lobbying sits within a broader context of an intricate, interlocking integrity framework for Ministers, Members of Parliament (‘MPs’), and senior public servants, including ministerial standards, political donations legislation, conflict of interest provisions, and post separation employment regulations. These regulatory frameworks may overlap. For instance, lobbyists may seek to improperly influence Ministers by making donations to political campaigns, which is a breach of both ministerial standards and political finance rules. This integrity framework is intended to ensure that Ministers, MPs and senior public servants do not behave corruptly, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice, so that ‘each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose’.²³ If public officials act with probity, this will lead to a more transparent and ethical government.

To date, legal regulation has had little role in dealing with the centrality and risks of direct lobbying to democracies, that is, direct communication with public officials through conduct that could include negotiation, interaction, provision of additional information, making submissions and media management (as distinct from indirect lobbying such as political advertisements). This is changing. The OECD, for one, has through a series of publications called for more robust legal regulation of lobbying.²⁴ There is a small but growing number of countries that have enacted legal regulation of lobbying, including recent legislation by major democracies such as the United Kingdom (‘UK’) (2014), Ireland (2015), and Scotland (2016).²⁵ Indeed, Australia is

²² *McCloy v New South Wales* (2015) 257 CLR 178, 204 [36] (French CJ, Kiefel, Bell and Keane JJ).

²³ James Spigelman, ‘The Integrity Branch of Government’ (Lecture Series, Australian Institute of Administrative Law, Sydney, 29 April 2004) 6–7.

²⁴ See OECD, *Volume 1* (n 9); OECD, *Lobbyists, Governments and Public Trust, Volume 2: Promoting Integrity through Self-Regulation* (OECD Publishing, 2012) (‘Volume 2’); OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying* (OECD Publishing, 2014).

²⁵ *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK); *Regulation of Lobbying Act 2015* (Ireland); *Lobbying (Scotland) Act 2016* (Scot) (‘*Lobbying (Scotland) Act*’). See also Transparency International, *International Standards for Lobbying Regulation: Towards Greater Transparency, Integrity and Participation* (Report, 2015).

one of the pioneers on this count, being the third country in the world to adopt legal regulations on lobbying in 1983.²⁶

Yet there is not a great deal of literature on the regulation of lobbying in Australia.²⁷ In part, this may be attributable to the limited data sets available to researchers on lobbying activity, given the narrow coverage of Australian lobbying regulation that is restricted to third party lobbyists, which excludes up to 80% of those who lobby government.²⁸ Accordingly, the existing literature tends to focus on lobbying tactics and strategies, and there is limited scholarship identifying the systemic trends in lobbying regulation in Australia.²⁹ The latter is also somewhat dated as it does not cover the most recent — and significant — developments in lobbying regulation; the Queensland reforms introduced in 2009,³⁰ and the new systems introduced in New South Wales ('NSW') in 2014,³¹ South Australia ('SA') in 2015,³² Western Australia ('WA') in 2016,³³ and the Commonwealth in 2018.³⁴

It is this gap that this article seeks to address. It first provides — in Part II — a conceptual framework for analysing the regulation of lobbying that centres upon

²⁶ The first national regulations of lobbying in the world were adopted in the United States in 1946, with Germany also being an early adopter in 1951: John Hogan, Gary Murphy and Raj Chari, 'Regulating the Influence Game in Australia' (2011) 57(1) *Australian Journal of Politics and History* 102, 102 ('Regulating the Influence Game in Australia').

²⁷ See, eg, *ibid* 102; John Warhurst, *Behind Closed Doors: Politics, Scandals and the Lobbying Industry* (University of New South Wales Press, 2007) ('*Behind Closed Doors*'); Mark Sheehan and Peter Sekules (eds), *The Influence Seekers: Political Lobbying in Australia* (Australian Scholarly Publishing, 2012); Julian Fitzgerald, *Lobbying in Australia: You Can't Expect Anything to Change if You Don't Speak Up* (Rosenberg Publishing, 2006) ('*Lobbying in Australia*'); Halpin and Warhurst (n 2). For comparative literature, see Raj Chari, John Hogan and Gary Murphy, *Regulating Lobbying: A Global Comparison* (Manchester University Press, 2010); Raj Chari, John Hogan and Gary Murphy, 'Report on the Legal Framework for the Regulation of Lobbying in the Council of Europe Member States' (Study No 590/2010, European Commission for Democracy through Law, 31 May 2011).

²⁸ Finance and Administration Committee, Parliament of Queensland, *Oversight of the Queensland Integrity Commissioner 2012 and Review of Lobbyists Code of Conduct* (Report No 26, March 2013) vi.

²⁹ John Hogan, Raj Chari and Gary Murphy, 'Regulating Australia's Lobbyists: Coming Full Circle to Promote Democracy?' (2011) 11(1) *Journal of Public Affairs* 35.

³⁰ *Integrity Act 2009* (Qld).

³¹ *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW) amending *Lobbying of Government Officials Act 2011* (NSW). See Joo-Cheong Tham and Yee-Fui Ng, *Regulating Direct Lobbying in New South Wales for Integrity and Fairness* (Report, August 2014).

³² *Lobbyists Act 2015* (SA).

³³ *Integrity (Lobbyists) Act 2016* (WA).

³⁴ *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITSA*').

three dimensions: the form of such regulation; the standards it imposes; and its compliance processes. Utilising this framework, three phases of the legal regulation of lobbying are identified in Part III: (1) 1983–2006: minimalist executive regulation of third party lobbyists; (2) 2007–09: stronger executive regulation of third party lobbyists; and (3) 2009–16: the emergence of legislative regulation of third party lobbyists. Building upon this analysis, the final part of the article will analyse and explain the variation of legal regulation between the Australian jurisdictions. It is argued that within the Australian federation, there is evidence of policy transfer across jurisdictions, as well as disparate regulatory innovations in the standards of enforcement and compliance processes. However, lobbying regulation in Australia remains narrowly focussed due to the effective advocacy of lobbyists.

II A CONCEPTUAL FRAMEWORK FOR THE REGULATION OF LOBBYING

The regulation of lobbying can be understood according to three key dimensions: the *form of regulation*; the *standards* that regulation imposes; and its *compliance processes*.

A Form of Regulation

Regulation is a protean term that has been applied differently across disciplinary boundaries. Robert Baldwin, Colin Scott and Christopher Hood argue that there are three main conceptions of regulation: (1) regulation as ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, . . . , for monitoring and promoting compliance with these rules’; (2) regulation as ‘all the efforts of state agencies to steer the economy’; and (3) regulation as ‘all mechanisms of social control — including unintentional and non-state processes’.³⁵ While the legal conception of regulation focuses on the first two elements of direct and intentional interventions ‘involving binding standard-setting, monitoring, and sanctioning . . . exercised by public-sector actors on . . . private-sector actors’, the third element of ‘all mechanisms of social control’ explicitly incorporates the element of non-intentionality.³⁶ Based on this broader conception of regulation, this article identifies three main forms of lobbying regulation: (1) informal regulation through the broader political process; (2) self-regulation by the lobbyists and the lobbied; and (3) legal regulation of lobbying.

The first form, *informal regulation through the broader political process* (competitive party politics, elections, media scrutiny) is a form of indirect regulation. This has potential advantages in terms of legitimacy, with the principle of popular sovereignty extending not only to the outcomes of the political process (policies and laws), but also

³⁵ Robert Baldwin, Colin Scott, and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 1, 3–4.

³⁶ Christel Koop and Martin Lodge, ‘What is Regulation? An Interdisciplinary Concept Analysis’ (2017) 11(1) *Regulation & Governance* 95, 97, 105.

to how politics is conducted (including lobbying). Indeed, Australian constitutional law recognises this by conferring substantial autonomy upon the Commonwealth Parliament in relation to the regulation of elections,³⁷ which is given legislative form through the *Commonwealth Electoral Act 1918* (Cth). It prescribes requirements regarding a range of matters including compulsory voting,³⁸ electoral divisions,³⁹ registration of political parties,⁴⁰ and review of decisions.⁴¹

There are potential benefits to informal regulation through the broader political process in terms of effectiveness. The loss of office through the ballot box can act as a powerful sanction against conduct that is viewed adversely by the electorate, and it is possible that political norms generated through political deliberation and debate will prove to be more durable than those norms imposed by legal regulation. However, this only applies to a narrow category of the lobbied, that is, those who are elected officials.

Putting aside the general shortcomings of the broader political process when it is working effectively (its bluntness, its inability to deal effectively with issues that are not priorities for the majority of the electorate), the most significant objection with respect to lobbying is that its key mechanisms have little ‘bite’. This is because lobbying tends to be conducted in secret and, as such, the publicity that is required for effective control through the broader political process is typically absent. Thus, the non-targeted nature of this informal regulation means that it does not effectively constrain the behaviour of lobbyists.

In the absence of mandated transparency, informal regulation of lobbying through the political process, therefore, occurs only in a cursory fashion. Invocations of such limitations can often be a legitimating device for another form of regulation — *self-regulation by the lobbyists and the lobbied*, where lobbyists collectively and consensually agree to abide by certain standards, or alternatively, where government officials agree to avoid conflicts of interest with lobbyists without external policing. For instance, the Australian Professional Government Relations Association, which was established in 2014 as a professional association for consulting and in-house government relations practitioners in Australia, has a Code of Conduct that its members have to abide by as a condition of membership. There are disciplinary procedures within the Association for breaches of the Code, with sanctions including membership suspension or cancellation.⁴² In Europe, there are elaborate

³⁷ Joo-Cheong Tham, ‘Political Participation’ in Adrienne Stone and Cheryl Saunders (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 979, citing *Smith v Oldham* (1912) 15 CLR 355; *Judd v McKeon* (1926) 39 CLR 380.

³⁸ *Commonwealth Electoral Act 1918* (Cth) s 245.

³⁹ *Ibid* pt IV.

⁴⁰ *Ibid* pt XI.

⁴¹ *Ibid* pt X.

⁴² ‘Code of Conduct’, *Australian Professional Governmental Relations Association* (Web Page) <<http://www.apgra.org.au/code-of-conduct>>.

self-regulatory lobbying regimes, such as that of the Society of European Affairs Professionals, which includes a Code of Conduct, education and training, and disciplinary procedures within the Society that incorporate private or public reprimands, or alternatively suspension or expulsion from the Society, which is publicly published on their website.⁴³

There are, of course, benefits from those directly involved in lobbying developing norms for such activity.⁴⁴ Self-regulation by lobbyists and the lobbied is, however, bedevilled by a systemic conflict of interest — those responsible for self-regulation are the same as those who could benefit from lobbying being conducted in ways that undermine the democratic process (through lack of transparency, unfair access and influence, and corruption). In addition, self-regulatory schemes are by nature voluntary, meaning that their coverage may not be comprehensive. For example, Conor McGrath found that self-regulation only applied to around 20–25% of the lobbying industry in the UK.⁴⁵ Further, ensuring compliance within a self-regulatory regime is a challenge as the principal sanction is merely expulsion from the self-regulatory association, membership of which was voluntary in the first place.

The turn to the third form of regulation of lobbying — *legal regulation* — has been prompted by various scandals and controversies, as we will see in Part III. Legal regulation can be promulgated by the legislature (legislative regulation) and/or by the executive (executive regulation).⁴⁶ The benefit of legal regulation is that it ameliorates the shortcomings of regulation through the broader political process and self-regulation by the lobbyists and the lobbied in terms of legitimacy and conflicts of interest, as it introduces independent standards and a third party as regulator to police the system. There are, however, risks to adopting a legal approach to regulating lobbying: legal regulation may detract from the ability of the public to constitute democratic politics and do so in a manner that further distorts the political process (including by favouring one group of lobbyists over another).⁴⁷ It may also prove to be ineffectual as there is certainly no assurance that a legal standard will be accompanied by adequate compliance. The extent to which legal regulation of lobbying can

⁴³ OECD, *Volume 2* (n 24) 47.

⁴⁴ See generally Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

⁴⁵ Conor McGrath, ‘Transparency, Access and Influence: Regulating Lobbying in the UK’ (Meeting Paper, American Political Science Association 2009 Annual Meeting, 13 August 2009) 13.

⁴⁶ Judicial regulation could also occur where actions of lobbyists or the lobbied violate administrative sanctions or criminal law.

⁴⁷ See Committee on Standards in Public Life, *Standards in Public Life: First Report of the Committee on Standards in Public Life* (Report Vol 1, May 1995), 35–6 (‘*First Report*’); William Dinan, ‘Learning Lessons? The Registration of Lobbyists at the Scottish Parliament’ (2006) 10(1) *Journal of Communication Management* 55, 56; Margaret F Brinig, Randall G Holcombe and Linda Schwartzstein, ‘The Regulation of Lobbyists’ (1993) 77(2) *Public Choice* 377; Scott Ainsworth, ‘Regulating Lobbyists and Interest Group Influence’ (1993) 55(1) *The Journal of Politics* 41.

be legitimate and effective goes beyond the question of legal form and very much turns on the standards such regulation imposes and its compliance processes.

B *Standards of Regulation*

A key aspect of the standards imposed by the regulation of lobbying is their coverage of lobbyists and the lobbied. In terms of lobbyists, a variety of individuals, groups and organisations engage in lobbying, including: third party or professional lobbyists; government relations staff of corporations; directors of corporations; technical advisers who lobby as a part of their principal work for clients (eg, architects, engineers, lawyers, accountants); representatives of peak bodies and member organisations; churches; charities and social welfare organisations; community-based groups and single interest groups; MPs; local councillors; head office representatives of political parties; and citizens acting on their own behalf or for their relatives, friends or local communities.⁴⁸ Coverage of lobbyists, therefore, can be narrow or broad: at one end its scope could be restricted to third party lobbyists, and at the other end it could extend to all those engaged in lobbying activity (whether as ‘repeat players’ or otherwise). Similarly, coverage of the lobbied can be narrow or broad. It could be restricted to senior governmental decision-makers (such as Ministers) or extend to all those who hold public office (including non-government MPs).

A further aspect of lobbying standards concerns the *object of regulation*. One option is to target the behaviour and actions of lobbyists themselves, while the other is to target the behaviour and actions of the lobbied, eg government officials. This article argues that ideally both lobbyists and the lobbied should be subject to regulation, as this will enable data to be triangulated to crosscheck and verify the information provided by each party, and more easily detect omissions, thus enhancing the effectiveness of disclosures. Closely related to this is another key aspect of lobbying standards, which is the *conduct required of those subject to these norms*. Broadly speaking, we can distinguish here between standards pertaining to the actual activity of lobbying (eg, the obligation not to misuse confidential information), and those in relation to transparency such as disclosure obligations.

Governments seeking to regulate the market of access and influence through lobbying have several regulatory options in their toolkit. The most radical approach is to ban certain aspects of lobbying activity entirely, either for ‘moral, ethical, strategic or other “public interest” grounds’,⁴⁹ particularly for lobbying activities that are most likely to lead to quid pro quo corruption. For instance, in terms of lobbyists, there are bans on the ability of lobbyists to receive success fees that exist in certain Australian jurisdictions,⁵⁰ which can be justified because fees contingent on success

⁴⁸ ICAC (NSW), *Investigation into Corruption* (n 16) 22.

⁴⁹ Terence Daintith, ‘Regulating the Market for MPs’ Services’ [1996] (Summer) *Public Law* 179, 180.

⁵⁰ See, eg, *Lobbying of Government Officials Act 2011* (NSW) ss 14–16; *Lobbyists Act 2015* (SA) s 14; *Integrity (Lobbyists) Act 2016* (WA) ss 20–2.

give lobbyists an incentive to engage in potentially unethical or corrupt behaviour in order to secure their remuneration.

In terms of the lobbied, in a number of jurisdictions MPs are banned from receiving remuneration for parliamentary speeches, questions, motions, the introduction of a Bill, or amendment to a motion or Bill, as this enables interest groups to utilise money to monopolise a scarce parliamentary resource. Consequently, this may lead to a conflict of interest between the MP's personal financial advancement and the public interest.⁵¹ This is illustrated by the repeated 'cash for questions' scandals that have engulfed MPs in the UK, which have resulted in public consternation and parliamentary inquiries:⁵² salutary examples of MPs being unduly influenced to use their parliamentary duties to secure personal pecuniary benefit.

In addition, there are bans on post separation employment for government officials both in Australia and overseas, where certain government officials (such as Ministers, their advisers, and senior public servants) are prohibited from working for lobbyists in their portfolio area for a certain period,⁵³ although these are not well enforced in Australia.⁵⁴ The post separation employment bans are to prevent corruption by combating the use of confidential information by former government officials, as well as reducing the risk that well-funded industry groups may approach Ministers while they are still in office with promises of lucrative positions after politics if their grants or applications are approved.⁵⁵

⁵¹ See Daintith (n 49).

⁵² Donald Macintyre, 'Cash-for-Questions MPs Suspended by Commons', *The Independent* (online, 21 April 1995) <<https://www.independent.co.uk/news/uk/politics/cash-for-questions-mps-suspended-by-commons-1616440.html>>; Rebecca Lefort, 'Four Labour MPs Implicated in "Cash for Influence" Scandal', *The Telegraph* (online, 21 March 2010) <<https://www.telegraph.co.uk/news/politics/labour/7490787/Four-Labour-MPs-implicated-in-cash-for-influence-scandal.html>>; Committee on Standards in Public Life, *First Report* (n 47); Committee on Standards in Public Life, *Standards in Public Life: Local Public Spending Bodies* (Report Vol 1, May 1996) ('*Second Report*').

⁵³ For example, the 'cooling off period' at the Commonwealth level is 18 months for Ministers taking up lobbying positions in their former portfolio area and 12 months for ministerial advisers and senior public servants: 'Lobbying Code of Conduct', *Attorney-General's Department* (Web Page, 28 November 2019) <<https://www.ag.gov.au/integrity/publications/lobbying-code-conduct>>; Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards* (30 August 2018). Canada has a five-year post separation ban for Ministers, MPs, ministerial advisers, and senior public servants from being third party or in-house lobbyists: *Lobbying Act*, RSC 1985 (4th Supp), c 44, s 10.11 ('*Lobbying Act* (Canada)').

⁵⁴ Ng and Tham (n 15) 32.

⁵⁵ Transcript of Proceedings, *Operation Eclipse* (Independent Commission Against Corruption (NSW), E19/0417 Peter M Hall QC, 7 August 2019) 148T, 149T (Yee-Fui Ng).

These bans on specific lobbying activities seek to reduce the risk of narrow quid pro quo corruption, where public officials receive a direct or indirect benefit in order to advance the causes of narrow vested interests, which then detracts from the public interest and the integrity and legitimacy of democratic governance.

Further, the regulation of lobbying activity can also include both positive and negative ethical requirements imposed on lobbyists through Codes of Conduct. For example, the *NSW Lobbyists Code of Conduct* prescribes ethical standards of behaviour such as the requirement to disclose any conflicts at meetings and the requirement to provide true and accurate information.⁵⁶ It also includes negative stipulations such as the prohibition on lobbyists engaging in misleading and corrupt conduct.⁵⁷ Likewise, codes of ethical conduct for the lobbied (eg, Ministers and public servants) can require compliance with the Lobbyists Codes of Conduct.⁵⁸

Besides bans on the most pernicious of lobbying activities that are likely to lead to quid pro quo corruption and the imposition of ethical requirements, another prevalent regulatory approach is to provide increased transparency of lobbying activities. This takes the form of registers of lobbyists and varying levels of disclosure requirements of lobbying activities across jurisdictions. Increased transparency will enhance the fairness of the democratic system by correcting the information asymmetry that may develop where lobbyists can hide their activities behind closed doors.

Disclosure requirements for lobbyists could include a once off disclosure by lobbyists who register their details, regular periodic confirmation of lobbyists' details, and/or more extensive disclosure of each lobbying contact undertaken. An example of extensive disclosures can be seen in Scotland, where the lobbying register has a searchable database that includes detailed information about each lobbying contact with government officials, including precisely who they met, the subject matter, which legislation they were lobbying in relation to, and what they were hoping to achieve with the meeting.⁵⁹

⁵⁶ *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* (NSW) sch 1 pt 2 ('*NSW Lobbyists Code of Conduct*').

⁵⁷ *Ibid* sch 1 cl 7.

⁵⁸ For example, the Ministers should ensure that dealings with lobbyists are conducted consistently with the Lobbyists Code of Conduct, so that they do not give rise to a conflict between public duty and private interest. Federal Ministers are required to report any breaches: Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards* (n 53) 10–11 cl 8. The Queensland Code of Conduct for public servants provides that public servants will ensure any engagement with lobbyists is properly recorded and ensure that business meetings with persons who were formerly Ministers, Parliamentary Secretaries or senior government representatives are not on matters those persons had official dealings with in their previous employment in accordance with government policy: Public Service Commission (Qld), *Code of Conduct for the Queensland Public Service* (1 January 2011) cl 4.2(b).

⁵⁹ See 'Welcome to the Lobbying Register', *The Scottish Parliament* (Web Page) <<https://www.lobbying.scot/>> ('Scottish Parliament Lobbying Register').

Transparency requirements can also be mandated for the lobbied, including the disclosure of lobbying activity via disclosure of ministerial diaries. For example, in Queensland, ministerial diaries are required to be disclosed on a monthly basis, providing information about the name of the organisation or person the Minister has met with and the purpose of the meeting.⁶⁰

The requirement to disclose lobbying contacts, as implemented in Queensland (as well as Canada and Scotland),⁶¹ or the disclosure of ministerial diaries, as required in NSW and Queensland,⁶² enables civil society and opposing interest groups to be aware of who is lobbying government and for what purpose (provided that the disclosures are timely and provide a meaningful level of detail). This will enable other interest groups to engage in counter lobbying and put forward their opposing views, which will furnish government officials with a more diverse range of views to inform their decision-making. As a result, the quality and integrity of government policy-making and decision-making will be enhanced.

C *Compliance Processes*

As to compliance processes, these are closely associated with the form of the regulation. Regulation through the broader political process institutes the electorate as the entity responsible for compliance (with political norms). The sanctions available for noncompliance are both drastic and limited: there is the ultimate sanction of loss of office, but that only applies to those standing for election (a particular section of the lobbied). Self-regulation by lobbyists and the lobbied, with its absence of governmental intervention, posits the lobbyists and/or the lobbied as the arbiter of standards, with the sanction of peer disapproval. For legal regulation, the options are more diverse. The compliance processes of such regulation could, in fact, be based on a mix of governmental intervention, stakeholder input, and industry self-management in the form of co-regulation, with the legal regulation merely stipulating

⁶⁰ Diary entries exclude personal, electorate or party political meetings or events, media events and interviews and information contrary to public interest (eg, meetings regarding sensitive law enforcement, public safety or whistleblower matters): The Queensland Cabinet and Ministerial Directory, 'Ministerial Diaries', *Queensland Government* (Web Page, 31 August 2020) <<https://cabinet.qld.gov.au/ministers/diaries.aspx>>.

⁶¹ See 'Lobbying', *Queensland Integrity Commissioner* (Web Page, 20 June 2019) <<https://lobbyists.integrity.qld.gov.au/ContactLog.aspx>> ('Queensland Lobbying'); *Lobbying (Scotland) Act* (n 25) s 6; Scottish Parliament Lobbying Register (n 59); 'Advanced Registry Search', *Office of the Commissioner of Lobbying of Canada* (Web Page, 30 July 2020) <<https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/advSrch?lang=eng>>.

⁶² The Queensland Cabinet and Ministerial Directory (n 60); Department of Premier and Cabinet (NSW), Premier's Memorandum M2015-05, *Publication of Ministerial Diaries and Release of Overseas Travel Information* (2015) ('Memorandum M2015-05').

the obligations (but not providing separately for compliance processes).⁶³ Alternatively, legal regulation could provide for criminal and administrative penalties in place of, or sitting alongside, these other sanctions. It could also provide for a dedicated agency responsible for ensuring compliance. Here there are two main options: a government agency (departmental supervision) or a statutory authority (supervision by statutory authority).

Taken together, this framework emphasising the forms of regulation, standards of regulation, and compliance processes, provides an analytic lens to conceptualise the broad spectrum of options in regulating lobbying as summarised in the table below:

Table 1: Typology of Lobbying Regulation

Form of Regulation	Broader Political Process	Self-Regulation	Legal Regulation
Standards of Regulation	Coverage of lobbyists Coverage of the lobbied Object of regulation (lobbyists/the lobbied) Conduct of lobbyists/the lobbied		
Compliance Processes	Adverse media coverage	Peer disapproval	Administrative and criminal penalties
Compliance Authority	Electorate	Lobbyists	Government agency/ independent statutory authority

Drawing on this conceptual framework, the next section will examine how the legal regulation of lobbying has evolved in Australia.

III PHASES OF LEGAL REGULATION OF LOBBYING IN AUSTRALIA

Although paid lobbyists have operated in Australia for many decades, their lobbying has only been subject to dedicated legal regulation since 1983.⁶⁴ Before then, lobbyists were either not regulated at all, or otherwise self-regulated internally at the individual firm level. There was no collective industry body to set standards to self-regulate the conduct of their members, nor any external regulatory authority that policed their behaviour.⁶⁵ This meant that lobbyists were given free rein to conduct their activities without any governmental supervision.

⁶³ See Ian Bartle and Peter Vass, 'Self-Regulation and the Regulatory State: A Survey of Policy and Practice' (Research Report No 17, Centre for the Study of Regulated Industries, October 2005).

⁶⁴ Halpin and Warhurst (n 2) 101; Sheehan and Sekules (n 27) 10.

⁶⁵ For a discussion on self-regulation: see Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146.

The first phase of legal regulation of lobbying only existed at the Commonwealth level and can be characterised as a minimalist executive model. This was followed by the second phase of executive regulation taken up by the Commonwealth and states, with very similar models in each jurisdiction. Several jurisdictions have since moved forward to the third phase of legislative regulation.

A 1983–2006: Minimalist Executive Regulation of Third Party Lobbyists

The first ever regulation of lobbyists in Australia was adopted at the federal level in 1983 by the Hawke Labor government.⁶⁶ This took the form of two registers of lobbyists: a general register for domestic lobbyists and a separate register for lobbyists representing foreign governments or their agencies, accompanied by guidelines for Ministers regarding their dealings with lobbyists.⁶⁷ The registers contained the names and addresses of lobbyists and their clients, and lobbyists were required to register each time they either accepted a brief or engaged a new client.

This executive regulation was introduced in response to the scandal generated by the Combe-Ivanov affair,⁶⁸ where prominent lobbyist David Combe established a relationship with Soviet diplomat Valery Ivanov, who turned out to be a spy for the Soviet government. This explains the separate lobbyist register established for those dealing with foreign governments. A legislative scheme was considered by the Cabinet, but it was decided that executive schemes offered more flexibility and it was argued that overseas legislative schemes were ineffective due to complex definitional problems, such as who is to be regarded as a lobbyist.⁶⁹

Nevertheless, the Hawke executive lobbyist registration scheme was widely considered to be a failure due to its defective compliance processes.⁷⁰ The flawed assumption seemed to have been that nominal executive regulation would result in adequate compliance. The registers were not made public and were only available to Ministers and government Departments on a ‘need to know’ basis.⁷¹ This was interpreted strictly, with a shadow Minister denied access and a Minister being told that he had to inspect the register at the Department.⁷² The shadow Minister who was denied

⁶⁶ *Regulation of Lobbyists* (Cabinet Minute, Amended Decision No 2570, 5 December 1983) <<http://recordsearch.naa.gov.au/SearchNRRetrieve/Interface/ViewImage.aspx?B=31406136>> (‘Cabinet Minute Amended Decision No 2570’).

⁶⁷ *Ibid*; Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3273 (Kim Beazley).

⁶⁸ For an account of this affair: see Warhurst, *Behind Closed Doors* (n 27) 22–3.

⁶⁹ Cabinet Minute Amended Decision No 2570 (n 66). See also Parliament of Australia, *Lobbyists and the Australian Government and Parliament: A Discussion Paper* (Report, September 1983).

⁷⁰ Fitzgerald, *Lobbying in Australia* (n 27) 108–9; Warhurst, *Behind Closed Doors* (n 27) 25–6.

⁷¹ Cabinet Minute Amended Decision No 2570 (n 66).

⁷² John Warhurst, ‘Locating the Target: Regulating Lobbying in Australia’ (1998) 51(4) *Parliamentary Affairs* 538, 545.

access denounced the scheme as ‘a sham and virtually useless, particularly to the press, the Parliament and those who want to put government decision-making under scrutiny’.⁷³ With such a lack of transparency, regulation through the broader political process has no purchase. Moreover, registration by the lobbyists was voluntary, and although Ministers and Commonwealth officials were prohibited from dealing with unregistered lobbyists, this was not enforced.⁷⁴ All these features warrant the characterisation of this regime as minimalist.

In 1996, the newly elected Howard Coalition government abolished the scheme, arguing that the registers were not being used.⁷⁵ Instead, a section was inserted in a guide for Ministers issued by then Prime Minister John Howard, requiring Ministers and Parliamentary Secretaries to ensure that dealings with lobbyists did not give rise to a conflict between public duty and private interest.⁷⁶ This change signalled a shift in focus from standards dealing with transparency to those based on conflicts of interest. This difference sat alongside key continuities that reflected a minimalist approach. The removal of the lobbyist registers could be said to be a break from the past and a marked decline in regulatory intensity, as it removed all forms of direct regulation of lobbyists. Compliance processes depended upon a model of self-regulation, with the onus principally placed on Ministers and Parliamentary Secretaries to ensure that their dealings with lobbyists were appropriate, and the Prime Minister having the (political) ability to sanction for departures from the guide.⁷⁷ As details of lobbying activities were not publicised, regulation through the broader political process had little or no impact.

B 2007–09: Stronger Executive Regulation of Third Party Lobbyists

More than a decade later, controversy surrounding the lobbying activities of former WA Premier Brian Burke, his former ministerial colleague Julian Grill, and former Senator Noel Crichton-Browne prompted a round of regulation directed at third party lobbyists, that is, those who conduct lobbying activities on behalf of a third party client.⁷⁸ Burke, Grill, and Crichton-Browne were aggressive lobbyists with an

⁷³ Ibid 546.

⁷⁴ Fitzgerald, *Lobbying in Australia* (n 27) 108–9; Warhurst, *Behind Closed Doors* (n 27) 25–6.

⁷⁵ Warhurst, *Behind Closed Doors* (n 27) 27–8.

⁷⁶ Prime Minister John Howard, ‘A Guide on Key Elements of Ministerial Responsibility’ (Guide, December 1998) cl 5.

⁷⁷ Ibid.

⁷⁸ See Commonwealth Government, *Lobbying Code of Conduct* (2008) cl 3.5 (‘2008 Lobbying Code of Conduct (Cth)’). The Commonwealth *Lobbying Code of Conduct* was updated in 2019. New South Wales Government, *NSW Government Lobbyist Code of Conduct* (4 February 2009) cl 3 (‘2009 Lobbyist Code of Conduct (NSW)’). The *NSW Lobbyists Code of Conduct* (n 56) is now contained in *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation* 2014 sch 1. Queensland Government, *Lobbyists Code of Conduct* (12 September 2013) cl 5 (‘Lobbyists Code of Conduct (Qld)’). Department of the Premier and Cabinet (SA), *The Lobbyist Code*

extensive network of ministerial, party and bureaucratic contacts. They exploited these contacts to obtain confidential information and influence governmental decisions for the purposes of their lobbying activities. These activities led to findings of misconduct against various public officials by the WACCC⁷⁹ and prompted the resignations of four Ministers.⁸⁰

Following the controversy, the WA government put into place a new scheme of executive regulation of lobbying in 2007.⁸¹ The *WA Contact with Lobbyists Code* created for the first time a public register of lobbyists, established rules for contact between lobbyists and Ministers, Parliamentary Secretaries, ministerial staff and public sector employees, and established standards of conduct for lobbyists who wished to be included on the register of lobbyists.⁸² Then Premier Alan Carpenter expressly linked the introduction of the register to the activities of Burke, Grill, and Crichton-Browne, and announced a ban on them being registered as lobbyists under the new scheme.⁸³

This form of lobbying regulation was subsequently adopted by the federal⁸⁴ and other state⁸⁵ governments in the following two years, exhibiting a direct policy transfer between jurisdictions. The lobbying registration schemes and Codes of

of Conduct 2009 (1 December 2009) cl 3 ('2009 Lobbyist Code of Conduct (SA)'). The SA *Lobbyist Code of Conduct* was updated in 2014. Tasmanian Government, *Tasmanian Government Lobbying Code of Conduct* (2009) cl 3 ('Lobbying Code of Conduct (Tas)'). Victorian Government, *Victorian Government Professional Lobbyist Code of Conduct* (1 November 2013) cl 3.4 ('Professional Lobbyist Code of Conduct (Vic)'). Western Australian Government, *Contact with Lobbyists Code* (2008) cl 3 ('2008 Contact with Lobbyists Code (WA)'). The WA *Lobbyists Code of Conduct* is now contained in *Integrity (Lobbyists) Act 2016* (WA) s 16.

⁷⁹ Corruption and Crime Commission (WA), *Report on the Investigation of Alleged Misconduct concerning Dr Neale Fong, Director General of the Department of Health* (Report, 25 January 2008) 5 ('Report on the Alleged Misconduct Involving Dr Neale Fong'); Corruption and Crime Commission (WA), *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (5 October 2007) 101 ('Report on Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup').

⁸⁰ Warhurst, *Behind Closed Doors* (n 27) 60.

⁸¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 March 2007, 329–30 (Alan Carpenter).

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *2008 Lobbying Code of Conduct* (Cth) (n 78). The Commonwealth Lobbyist Register and *Lobbying Code of Conduct* were introduced without fanfare as part of an overall political accountability package tackling political donations, government communications, and campaign advertising: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2008, 34 (Melissa Parke).

⁸⁵ *2009 Lobbyist Code of Conduct* (NSW) (n 78); *Lobbyists Code of Conduct* (Qld) (n 78); *2009 Lobbyist Code of Conduct* (SA) (n 78); *Lobbying Code of Conduct* (Tas) (n 78); *Professional Lobbyist Code of Conduct* (Vic) (n 78).

Conduct introduced by these jurisdictions were broadly similar, being schemes of executive regulation involving a lobbyist register and a Code of Conduct. Lobbyists were obliged to register their details and agree to abide with a Code of Conduct set by the government. As the schemes in the Commonwealth and the states essentially replicate each other, they will be discussed concurrently.

In terms of the standards laid down by these schemes, their scope is relatively narrow, covering only third party lobbyists, defined under the registers as any person, company or organisation who conducts lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client.⁸⁶ As to the conduct required of those third party lobbyists, the first set of obligations are directed to increased transparency. Third party lobbyists are required to register their details on a lobbyist register. Only registered lobbyists can lobby government representatives. Broadly speaking, government representatives include Ministers, Parliamentary Secretaries, ministerial advisers and senior public servants,⁸⁷ but exclude MPs and local government officials.

The standards under these schemes also subject third party lobbyists to obligations going beyond those of disclosure. These obligations are provided under the various Codes of Conduct that require third party lobbyists to engage with government representatives in an appropriate manner, including prohibiting corrupt or dishonest conduct and requiring full disclosure of their interests.⁸⁸ Lobbyists who breach the Code of Conduct can be removed from the register.

⁸⁶ *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 3.5; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 3; *Lobbyists Code of Conduct* (Qld) (n 78) cl 5; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 3; *Lobbying Code of Conduct* (Tas) (n 78) cl 3; *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 3.4; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 3.

⁸⁷ Under the registers in Victoria, SA, WA and the Commonwealth, ‘government representatives’ included Ministers, Parliamentary Secretaries, ministerial advisers and senior public servants. In Tasmania, ‘government representatives’ included Ministers, Parliamentary Secretaries, MPs of the political party (or parties) constituting the executive government, ministerial advisers and agency heads appointed under the *State Service Act 2000* (Tas). In one respect, the coverage of the Tasmanian scheme was narrower than the other jurisdictions, as it did not cover all senior public servants, but instead only covered the agency heads; in another respect, it was broader as it covered MPs of the party of the government of the day. See *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 3.3; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 3; *Lobbyists Code of Conduct* (Qld) (n 78) cl 5; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 3; *Lobbying Code of Conduct* (Tas) (n 78) cl 3; *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 3.2; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 3.

⁸⁸ *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 8; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 7; *Lobbyists Code of Conduct* (Qld) (n 78) cl 3; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 8; *Lobbying Code of Conduct* (Tas) (n 78) cl 8; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 5.

In terms of compliance processes, there is a definite shift away from the secretive approach of the previous era. The publicly available information through the registers provides the possibility of regulation through the broader political process. The schemes also provide for a dedicated agency to ensure compliance with two distinct approaches taken. Departmental supervision is provided under the Commonwealth, SA, and Tasmanian schemes,⁸⁹ while the schemes in Victoria and WA are supervised by statutory agencies — specifically public sector commissioners.⁹⁰

These executive schemes were not seen by commentators to be adequately strong in terms of coverage and enforcement. Then Greens Party Leader Bob Brown criticised the federal Code for being unenforceable and stated that the Code ‘should be toughened up and made into law’,⁹¹ whilst academic John Warhurst argued that the scheme was ‘too timid and too narrow’.⁹² As mentioned above, the narrow coverage of the schemes to third party lobbyists exempted from regulation up to 80% of those who lobby the government.⁹³ In addition, the nature of executive schemes based on ‘soft law’, such as aspirational Codes of Conduct, means that enforcement measures are weaker than those available under legislation, with the principal sanction being deregistration from a register that was never complete in the first place. Such weak enforcement mechanisms may not deter improper or unethical behaviour.

C 2009–16: *The Emergence of Legislative Regulation of Third Party Lobbyists*

The third phase of lobbying regulation in Australia is legislative regulation, as reflected by legislation introduced in Queensland (2009), NSW (2014), SA (2015), WA (2016), and the Commonwealth (2018).⁹⁴ Victoria and Tasmania remain regulated by executive schemes, although Victoria introduced an additional register

⁸⁹ The schemes were administered by the Department of the Prime Minister and Cabinet and now the Attorney-General’s Department at the Commonwealth level. The Department of Premier and Cabinet administered the schemes in SA, NSW, and Tasmania. See *2008 Lobbying Code of Conduct* (Cth) (n 78) cl 3.7, 6, 9; *2009 Lobbyist Code of Conduct* (NSW) (n 78) cl 3, 9; *2009 Lobbyist Code of Conduct* (SA) (n 78) cl 9; *Lobbying Code of Conduct* (Tas) (n 78) cl 9.

⁹⁰ *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 9; *2008 Contact with Lobbyists Code* (WA) (n 78) cl 8.

⁹¹ Hogan, Murphy and Chari, ‘Regulating the Influence Game in Australia’ (n 26) 107, quoting Damien Murphy, ‘New Lobbying Rules for Former Government Insiders’, *The Sydney Morning Herald* (online, 14 May 2008) <<https://www.smh.com.au/national/new-lobbying-rules-for-former-government-insiders-20080514-gdsdk4.html>>.

⁹² Hogan, Murphy and Chari, ‘Regulating the Influence Game in Australia’ (n 26) 107, citing John Warhurst, Submission No 4 to Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Inquiry into the Lobbying Code of Conduct* (8 April 2008) 4.

⁹³ Finance and Administration Committee, Parliament of Queensland, *Oversight of the Queensland Integrity Commissioner 2012 and Review of the Lobbyists Code of Conduct* (Report No 26, March 2013) vi.

⁹⁴ *FITSA* (n 34); *Electoral and Lobbying Legislation Amendment Act 2014* (NSW); *Lobbyists Act 2015* (SA); *Integrity (Lobbyists) Act 2016* (WA).

for in-house government affairs directors who have held specified roles in government or a political party.⁹⁵

As opposed to the second phase of executive regulation where the Commonwealth and states essentially replicated similar schemes, the five jurisdictions that have adopted legislative regulation have forged their own paths, which the author has classified into three main streams: (1) the innovative models (Queensland and NSW); (2) the codified executive model (SA and WA); and (3) the selective model (the Commonwealth).

1 *The Innovative Models*

NSW and Queensland have both adopted innovative legislative models to regulate lobbying that have greatly increased the standards of regulation in terms of disclosure and enforcement mechanisms. As the schemes have unique elements, these will be discussed separately.

(a) *Queensland*

Queensland was the first Australian jurisdiction to regulate lobbying legislatively. Like the previous schemes of executive regulation, the Queensland legislative scheme mandates a lobbyist register and Code of Conduct.⁹⁶

In terms of the standards of regulation, the coverage imposed by the scheme in relation to lobbyists is similar to previous executive regulation, that is, the Queensland register only covers third party lobbyists,⁹⁷ which is a significant limitation as it excludes the bulk of the lobbyist population. However, there is broader coverage of public officials under the Queensland register. In addition to Ministers, Parliamentary Secretaries and ministerial advisers, the Queensland register also includes all public sector officers (instead of just senior public servants), local government lobbying, as well as lobbying of certain opposition Members.⁹⁸ Success fees are banned in Queensland and are subject to a maximum penalty of 200 penalty units (\$26,690).⁹⁹

⁹⁵ *Professional Lobbyist Code of Conduct* (Vic) (n 78) cl 5.1(e). The *Professional Lobbyist Code of Conduct* (Vic) requires the registration of government affairs directors who have held the position of National or State Secretary, Director or Deputy or Assistant Secretary, director of a registered political party, who are former Ministers or Parliamentary Secretaries of a state or Commonwealth government; who have been a Chief of Staff, Senior Adviser or Adviser in the private office of a Commonwealth or state Minister or Parliamentary Secretary; Victorian Public Sector Commissioner, 'Register of Government Affairs Directors, *Victoria State Government* (Online Register) <<https://www.lobbyistsregister.vic.gov.au/lobbyists-register/index.cfm?event=whoIsOnRegister>>.

⁹⁶ *Lobbyists Code of Conduct* (Qld) (n 78) cl 3.

⁹⁷ *Integrity Act 2009* (Qld) s 41.

⁹⁸ *Ibid* ss 42, 44–47B.

⁹⁹ *Ibid* s 69.

Like the schemes of executive regulation, lobbyists are obliged to operate consistently with a Code of Conduct that sets out expected standards of behaviour.

A major change is the enhancement of disclosure provisions. In an unprecedented step, third party lobbyists are required to inform the Queensland Integrity Commissioner, within 15 days after the end of every month, details of every lobbying contact, including the name of the registered lobbyist, whether the lobbyist complied with the Code of Conduct in arranging the contact, the date of contact and client of the lobbyist, the title and/or name of the government or opposition representative, and the purpose of contact.¹⁰⁰ This information is made publicly available on the Integrity Commissioner's website. The disclosure regime thus promotes transparency in publishing details of each and every lobbying contact with public officials. This facilitates regulation through the broader political process, enabling the media and interested public to scrutinise the records and make further investigations. Disclosure requirements under the previous executive scheme are also preserved in relation to lobbyists providing their details, keeping them updated, as well as annually confirming their details and lack of serious convictions or imprisonment of more than 30 months.¹⁰¹ In addition, ministerial diaries are published in Queensland on a monthly basis, providing information about the name of the organisation or person, and the purpose of the meeting.¹⁰² However, the quality of diary disclosures is poor, with some entries simply listing 'other' or 'meeting', which does not provide any illumination about the subject matter discussed or the purpose of the meeting.¹⁰³

The Queensland legislative scheme also strengthened the compliance model. The scheme is administered by the Integrity Commissioner, an independent officer of the Queensland Parliament.¹⁰⁴ The Integrity Commissioner is responsible for maintaining the register and monitoring compliance by lobbyists, government and local government with the *Integrity Act 2009* (Qld) and the Code.¹⁰⁵ The Commissioner can impose a broader range of administrative sanctions on lobbyists compared to

¹⁰⁰ Ibid s 68(4); *Lobbyists Code of Conduct* (Qld) (n 78) cl 4.

¹⁰¹ *Integrity Act 2009* (Qld) ss 49(3), 50, 51, 53. These details include the lobbyist's name and business registration particulars; for each person employed, contracted or otherwise engaged by the lobbyist to carry out a lobbying activity, the person's name and role; and if the person is a former senior government representative or a former opposition representative, the date the person became a former senior government representative or a former opposition representative: see *Integrity Act 2009* (Qld) s 49(3).

¹⁰² Diary entries exclude personal, electorate or party political meetings or events, media events and interviews and information contrary to public interest (eg, meetings regarding sensitive law enforcement, public safety or whistle blower matters): The Queensland Cabinet and Ministerial Directory (n 60).

¹⁰³ Transcript of Proceedings, *Operation Eclipse* (Independent Commission Against Corruption (NSW), E19/0417 Peter M Hall QC, 7 August 2019) 154T, 157T (Yee-Fui Ng).

¹⁰⁴ *Integrity Act 2009* (Qld) s 6(2).

¹⁰⁵ Ibid ss 7(1)(c), 49(1).

other jurisdictions, including issuing a warning or suspending the registration of a lobbyist for a reasonable period, in addition to cancelling their registration.¹⁰⁶

There is, however, cause to doubt the efficacy of enforcement of lobbying provisions. The former Queensland Integrity Commissioner, Richard Bingham reported that his regulation of lobbying in 2014–16 was low, partly due to lobbyists strategically restructuring their businesses to offer consulting services rather than direct lobbying, meaning that they no longer fell within the statutory definition of third party lobbyists.¹⁰⁷ The government decided not to expand the ambit of the lobbyists covered by the scheme and instead reduced funding to the Commissioner to regulate lobbying issues.¹⁰⁸

The Queensland scheme is thus a pioneering one in Australia, as the first legislative lobbying scheme. It sets up an independent oversight system in the form of an Integrity Commissioner, who is an officer of Parliament. Lobbyists are required to disclose a broader set of information to the Integrity Commissioner compared to other jurisdictions, including details of all lobbying activity, and this information is made publicly available, which promotes transparency. However, the ambit of the scheme remains narrow, ie confined to third party lobbyists, which limits its efficacy. In addition, the enforcement of the scheme may not be optimal, as lobbyists are able to evade regulation by restructuring their businesses.

(b) NSW

The enactment of the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW) transformed lobbying regulation in NSW. This legislation was prompted by a general ICAC (NSW) investigation into the lobbying industry, as well as ICAC investigations involving former Labor Ministers Eddie Obeid and Ian Macdonald that found multiple instances of corruption by both public officials and the lobbyists involved. Obeid was ultimately sentenced to five years' imprisonment for misconduct in a public office.¹⁰⁹ The investigations also ended the political careers of 10 Liberal MPs following evidence of systematic failure in political funding that rewarded corruption.¹¹⁰

¹⁰⁶ Ibid ss 62, 66, 66A(2).

¹⁰⁷ Queensland Integrity Commissioner, *Annual Report 2015–16* (Annual Report, 2016) 6 (*Annual Report 2015–16*).

¹⁰⁸ Ibid.

¹⁰⁹ Lucy Carter and Kathleen Calderwood, 'Eddie Obeid Sentenced to Five Years' Jail for Misconduct in Public Office', *ABC News* (online, 16 December 2016) <<http://www.abc.net.au/news/2016-12-15/eddie-obeid-sentenced-five-years-jail-misconduct-public-office/8122720>>.

¹¹⁰ Yee-Fui Ng, 'After Operation Spicer, what more needs to be done to Clean Up Political Donations in NSW?', *The Conversation* (online, 30 August 2016) <<https://theconversation.com/after-operation-spicer-what-more-needs-to-be-done-to-clean-up-political-donations-in-nsw-64547>>.

The NSW scheme includes a register of lobbyists and Code of Conduct, but in addition to the previous executive scheme it incorporates certain offences under the *Lobbying of Government Officials Act 2011* (NSW) ('*Lobbying Government Officials Act*'). Alongside the legislative scheme, there is also an executive requirement for Ministers to disclose publicly their diaries, including meetings with lobbyists.

Under the new scheme, the compliance regime has been strengthened. The scheme is administered and enforced by a statutory authority: the NSW Electoral Commission ('NSWEC').¹¹¹ With the coercive power to compel documents and information, the NSWEC has ample powers to enforce the *Lobbying Government Officials Act*.¹¹² The NSWEC also has a range of administrative sanctions at its disposal; it may cancel or suspend the registration of a third party lobbyist if they breach the *Act* or Code, or fail to update information on the Register.¹¹³

The NSW scheme also provides for a novel compliance mechanism. The NSWEC is required to maintain a Lobbyists Watch List, which is a public document published on the same website as the Lobbyist Register, listing any third party or other lobbyists who have breached the *Lobbying Government Officials Act* or Code.¹¹⁴ This is a pioneering mechanism to 'name and shame' errant lobbyists and to enable stronger controls to be implemented for lobbyists who have previously breached their obligations, as lobbyists on the Watch List are subject to stricter controls by regulating the conduct of the lobbied. Codes of Conduct of government officials may specify special procedures for communication by officials with lobbyists on the Watch List.¹¹⁵ The Premier's Memorandum on the Code provides that the lobbying activities of entities on the Watch List are to be subject to strict meeting protocols, that is, having two NSW government officials present during any communication with the lobbyist.¹¹⁶ One of those officials is required to take notes of the communications with the lobbyist and provide the notes to the agency head.¹¹⁷ Premier's Memoranda are a form of executive self-regulation, and much depends on how the Premier enforces these standards politically.

In addition to bolstered compliance mechanisms, the standards of regulation have also improved significantly. Coverage of the *NSW Lobbyists Code of Conduct*

¹¹¹ *Electoral and Lobbying Legislation Amendment Act 2014* (NSW) sch 3 pt 4 s 19, amending *Lobbying of Government Officials Act 2011* (NSW).

¹¹² *Electoral and Lobbying Legislation Amendment Act 2014* (NSW) sch 3 pt 4 s 19(2), amending *Lobbying of Government Officials Act 2011* (NSW); *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 110A as repealed by *Electoral Funding Act 2018* (NSW) s 157. The power to compel documents was given to the Election Funding Authority, whose role was replaced by the NSWEC by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW).

¹¹³ *Lobbying of Government Officials Act 2011* (NSW) s 9(7).

¹¹⁴ *Ibid* s 12.

¹¹⁵ *Ibid* s 12(2).

¹¹⁶ Premier's Memorandum M2014-13, *NSW Lobbyists Code of Conduct* (2014) 2.

¹¹⁷ *Ibid*.

(‘*NSW Code*’) has been expanded to apply to both third party and other lobbyists (broadly defined as any other individual or body that lobbies government officials), meaning that all individuals and corporations seeking to influence governmental policy and legislation are covered by the NSW regime. The coverage of the *NSW Code* is hence broader than other jurisdictions, which are confined to third party lobbyists. There is a disjuncture, however, with the coverage under the register of lobbyists with only third party lobbyists coming within its scope.¹¹⁸

Additional disclosure requirements apply to the lobbied as well. The Premier’s Memorandum requires all Ministers to publish extracts regularly from their diaries detailing scheduled meetings held with stakeholders, including third party lobbyists.¹¹⁹ The Department of Premier and Cabinet (NSW) administers the publication of diaries, and will notify the Premier if the Memorandum is not complied with. The Premier is then able to reprimand the errant Minister and request that they comply or face the displeasure of the Premier. This approach, however, does not cover lobbyists who explicitly target and meet with ministerial advisers and public servants rather than Ministers. Yet these government officials are logical targets for lobbyists, as they often have great power and influence in decision-making and policymaking due to their privileged positions within the Westminster advisory system.¹²⁰ There is strong justification to require disclosure of lobbying interactions between ministerial advisers and public servants who are senior, as well as those who provide significant public policy advice or make significant decisions. There may be less justification, however, to subject more junior public servants and ministerial advisers to extensive disclosure requirements, as they would generally not be targets for lobbyists. The Queensland regime that obligates lobbyists to disclose each and every lobbying contact provides for more fulsome disclosure requirements.¹²¹ At any rate, the quality of diary disclosures has been poor, with minimal to non-existent information about the purpose of the lobbying contact.¹²²

Certain lobbying activities are prohibited by the *Lobbying Government Officials Act*. It is an offence for a former Minister or former Parliamentary Secretary to lobby

¹¹⁸ *Lobbying of Government Officials Act 2011* (NSW) s 9.

¹¹⁹ The extracts must disclose the organisation or individual with whom the meeting occurred, details of any registered lobbyists present, the name of the lobbyists’ client, and the purpose of the meeting: Memorandum M2015-05 (n 62).

¹²⁰ Yee-Fui Ng, *The Rise of Political Advisors in the Westminster System* (Routledge, 2018) 75; Yee-Fui Ng, *Ministerial Advisors in Australia: The Modern Legal Context* (Federation Press, 2018) 48–53.

¹²¹ Furthermore, diary disclosures in NSW are currently limited to scheduled meetings with external stakeholders who are seeking to influence government policy or decisions, but do not cover official events, town hall meetings, and community functions, where lobbying frequently happens. By contrast the diary disclosures in Queensland include these events, and thus provides more comprehensive data: see *The Queensland Cabinet and Ministerial Directory* (n 102).

¹²² Evidence to the Independent Commission Against Corruption (NSW), Sydney, 7 August 2019 in *Operation Eclipse*, 154T, 157T (Yee-Fui Ng).

a government official in relation to an official matter dealt with by them in their portfolio responsibilities during the 18 months before they ceased to hold office.¹²³ The maximum penalty for this offence is 200 penalty units (\$22,000).¹²⁴ The Act also bans success fees being paid to, or received by, a lobbyist,¹²⁵ with a maximum penalty of 500 penalty units for corporations (\$55,000) or 200 penalty units for individuals (\$22,000).¹²⁶ Similar to other jurisdictions, the *NSW Code* prohibits lobbyists from engaging in misleading, dishonest, corrupt or unlawful conduct, and requires lobbyists to provide true and accurate information.

The NSW scheme is thus unique in Australia, with stricter standards for both lobbyists and government officials dealing with lobbyists. Alongside the legislative scheme, there is a requirement for Ministers to disclose their diaries publicly, including meetings with lobbyists, which adds a further layer of transparency. The Lobbyists Watch List is an innovation that potentially provides for enhanced compliance through public scrutiny of lobbyists on the list and strict meeting protocols. In addition, the *NSW Code* is broader than other Australian jurisdictions, incorporating all lobbyists seeking to influence government officials rather than just third party lobbyists. Furthermore, there is independent oversight of lobbying regulation through a statutory authority: the NSWEC.

2 *The Codified Executive Model*

The SA and WA lobbyist legislation both merely codify the previous executive scheme and introduce stricter penalties.¹²⁷ Both schemes are still limited to third party lobbyists, and the compliance regime for each jurisdiction remains the same: the register is still managed by the Chief Executive of the Department of the Premier and Cabinet in South Australia,¹²⁸ and the Public Sector Commissioner in WA.¹²⁹

The standards of regulation are slightly tightened, as lobbying activities in SA and WA are more restricted, with sanctions imposed for giving and receiving success fees,¹³⁰ as well as for engaging in lobbying except in accordance with the registration requirements (\$30,000 or imprisonment for 2 years for individuals and \$150,000 for a body corporate in SA,¹³¹ and a \$10,000 fine in WA¹³²). In WA, a penalty of

¹²³ *Lobbying of Government Officials Act 2011* (NSW) s 18.

¹²⁴ *Ibid.*

¹²⁵ *Ibid* s 15.

¹²⁶ *Ibid.*

¹²⁷ *Lobbyists Act 2015* (SA); *Integrity (Lobbyists) Act 2016* (WA).

¹²⁸ *Lobbyists Act 2015* (SA) ss 3, 10.

¹²⁹ *Integrity (Lobbyists) Act 2016* (WA) ss 3, 10.

¹³⁰ *Lobbyists Act 2015* (SA) s 14; *Integrity (Lobbyists) Act 2016* (WA) ss 20–2.

¹³¹ *Lobbyists Act 2015* (SA) s 5.

¹³² *Integrity (Lobbyists) Act 2016* (WA) s 8.

\$10,000 also applies to those who supply false or misleading information to the Commissioner.¹³³

3 *The Selective Model*

At the Commonwealth level, the legislation regulating lobbying activity is selectively targeted at combating foreign influence, with the vast majority of lobbyists still remaining under executive regulation.

The introduction of the foreign agent register for lobbyists was sparked by allegations of Chinese interference in Australian politics. In particular, Labor Senator Sam Dastyari was forced to resign after it was revealed that he advocated in favour of China's position on the South China Sea against his own party's policy, following a meeting with a Chinese lobbyist, Huang Xiangmo.¹³⁴ Dastyari later travelled to Huang's home to warn him that his phone might be tapped. These incidents sparked the introduction of then Prime Minister Malcolm Turnbull's foreign interference legislative package, including creating a new public register for agents acting on behalf of a foreign principal through the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('FITSA').¹³⁵ Turnbull stated that '[f]oreign powers are making unprecedented and increasingly sophisticated attempts to influence the political process, both here and abroad'.¹³⁶

The FITSA deals with persons and entities who lobby on behalf of foreign principals and requires them to be registered as foreign agents.¹³⁷ Details of individuals and entities lobbying Commonwealth public officials or seeking to influence Commonwealth political or governmental processes on behalf of foreign principals are required to be published on a public register administered by the Attorney-General's

¹³³ Ibid s 24.

¹³⁴ Aaron Patrick, 'Sam Dastyari is a Chinese "Agent of Influence": Ex-Intelligence Chief', *The Australian Financial Review* (online, 4 December 2017) <<https://www.afr.com/politics/sam-dastyari-is-a-chinese-agent-of-influence-exintelligence-chief-20171203-gzxktb>>.

¹³⁵ The foreign interference package also included laws banning foreign political donations and increasing offences for foreign interference and espionage: *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth); *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).

¹³⁶ Claire Bickers, 'Foreign Interference: Malcolm Turnbull Launches Fiery Attack on Sam Dastyari in Question Time', *News.com.au* (online, 5 December 2017) <<https://www.news.com.au/national/politics/foreign-interference-malcolm-turnbull-launches-fiery-attack-on-sam-dastyari-in-question-time/news-story/36f7732cddf516bd81ce607cc72170bc>>.

¹³⁷ FITSA (n 34) ss 22–3. See 'Foreign Influence Transparency Scheme Public Register', *Attorney-General's Department* (Web Page) <<https://transparency.ag.gov.au/>>.

Department,¹³⁸ which represents departmental regulation. This is a selective legislative approach that only targets a small category of lobbyists.

In terms of compliance processes, the *FITSA* gives the Attorney-General's Department a large range of enforcement measures. The Secretary of the Attorney-General's Department has broad powers to require a potential registrant to provide information if it reasonably suspects that person to be liable to registration.¹³⁹ Furthermore, the Secretary may require *any* person to give them information and documents if they reasonably believe the person (whether a registrant or not) has information 'relevant to the operation of the scheme'.¹⁴⁰ It is not an excuse to claim that the information may incriminate the person.¹⁴¹ Failure to comply with these notices may result in six months' imprisonment,¹⁴² while providing false or misleading information may lead to three years' imprisonment.¹⁴³ The Secretary may consequently issue a 'Transparency Notice' ('TN'), which allows the Department to declare that a person is a foreign principal.¹⁴⁴ If the Secretary remains satisfied of this fact after the person has made submissions, the Secretary *must* make the TN public on a website.¹⁴⁵

Penalties for failure to apply for or renew registration are imprisonment from 12 months to 5 years, depending on whether the omission was intentional or reckless, if the person knew they had to register, and whether the registrable activity was actually undertaken.¹⁴⁶ Similar penalties apply for informing the Secretary that the person ceases to be liable when this is not true.¹⁴⁷ Penalties for failure to fulfil one's responsibilities under the *FITSA*, such as by failing to keep or destroy records, range from 60 penalty units (\$13,320) to 2 years' imprisonment respectively.¹⁴⁸ These are very comprehensive compliance mechanisms that can be deployed to enforce the legislation.

D Overview

In the first phase of regulation, only the Commonwealth regulated lobbying. This first phase of regulation from 1983 to 2006 can be characterised as minimalist. The Hawke government period involved a voluntary and private register without

¹³⁸ See generally Chris Draffen and Yee-Fui Ng, 'Foreign Influence Registration Schemes in Australia and the United States: The Scope, Risks and Limitations of Transparency' (2020) 43(4) *University of New South Wales Law Journal* 1100.

¹³⁹ *FITSA* (n 34) ss 45–6.

¹⁴⁰ *Ibid* s 46.

¹⁴¹ *Ibid* s 47.

¹⁴² *Ibid* s 59.

¹⁴³ *Ibid* s 60.

¹⁴⁴ *Ibid* s 14A(1).

¹⁴⁵ *Ibid* s 43(2A).

¹⁴⁶ *Ibid* s 57.

¹⁴⁷ *Ibid* s 57A.

¹⁴⁸ *Ibid* ss 58, 61.

enforcement, while the Howard government period dispensed with all lobbyist registration requirements. Although Howard did introduce for the first time a Ministerial Code of Conduct that required Ministers to avoid conflicts of interest with their dealings with lobbyists, this essentially left the responsibility to Ministers to manage their relations with lobbyists.¹⁴⁹ The secretive nature of the Hawke and Howard schemes, combined with the lack of enforcement, meant that it was essentially up to the lobbyists and government officials to individually self-regulate their own behaviour. Following this, in the second phase, the executive model introduced in WA was adopted in a similar form by the Commonwealth and the other states, exhibiting direct regulatory transfer across jurisdictions.

Finally, in the legislative regulation phase, there was a fracturing and disaggregation of legislative schemes across jurisdictions, with each adopting their own regulatory framework. What we can see from the new legislative models is a general trend towards more stringent regulation of lobbying. This is consonant with the history of evolution of lobbying rules in Canada and the US, where each iteration of lobbying legislation imposed more rigorous rules over time.¹⁵⁰ There are three main models of legislative regulation: the ‘innovative models’ exhibited in Queensland and NSW, that include new structural or operational innovations; the ‘codification model’ exhibited in SA and WA, that merely replicates existing executive schemes, albeit with tougher penalties; and the ‘selective model’ at the federal level that only targets those who lobby on behalf of foreign principals. Victoria and Tasmania have lagged behind and have remained with schemes of executive regulation, although Victoria has introduced an additional register for in-house government affairs directors. These regulatory schemes are summarised in Table 2.

IV THE CONVERGENCES AND DIVERGENCES OF LOBBYING REGULATION ACROSS THE AUSTRALIAN FEDERATION: AN EXPLANATORY ACCOUNT

So, how are we to account for the regulatory changes that have occurred within the Australian federal system, and the departures in direction in legal regulation between the jurisdictions?

The first observation that can be made is that drastic changes to the lobbying schemes in Australian jurisdictions have tended to be in direct response to crises and scandals. The first ever lobbying regulation in Australia, in the form of the Commonwealth executive register, was introduced by the Hawke Government following a scandal involving a Soviet spy.¹⁵¹ Similarly, the trigger for the second phase of lobbying regulation via executive regulation was the findings of misconduct by the WACCC stemming from the shady activities of former Premier Burke, former Minister Grill

¹⁴⁹ Prime Minister John Howard (n 76).

¹⁵⁰ Chari, Hogan and Murphy, *Regulating Lobbying: A Global Comparison* (n 27) 102.

¹⁵¹ Warhurst, *Behind Closed Doors* (n 27) 22–3.

Table 2: Lobbying Regulation in Australian Jurisdictions

	NSW	Commonwealth	Victoria	SA	WA	Tasmania	Queensland
Lobbying regime	Law	Law (foreign influence)/ Administrative	Administrative	Law	Law	Administrative	Law
Code of conduct	✓	✓	✓	✓	✓	✓	✓
Lobbyists covered	Third party (register), Third party and other lobbyists (Code of Conduct)	Lobbyists for foreign principals (legislative)/ Third party (administrative)	Third party lobbyists and government affairs directors that have held specified positions	Third party	Third party	Third party	Third party
Revolving door bans	✓ 18 months for Ministers and Parliamentary Secretaries	✓ 18 months for Ministers and Parliamentary Secretaries, 12 months for senior public servants	✓ 18 months for Ministers and Cabinet Secretaries, 12 months for Parliamentary Secretaries, senior public service executives, and ministerial staff	✓ 2 years for Ministers, 12 months for Parliamentary Secretaries, ministerial staff and public servants	✓ 1 year for MPs, senior public service executive	✓ 12 months for Ministers, Parliamentary Secretaries and agency heads	✓ 2 years for senior government representatives i.e. Ministers, ministerial staff, councillors, opposition representatives, senior public service executives
Administrative responsibility	NSW Electoral Commission	Department of the Prime Minister and Cabinet	Public Sector Commissioner	Department of Premier and Cabinet	Public Sector Commissioner	Department of Premier and Cabinet	Integrity Commissioner

continues

Table 2: Lobbying Regulation in Australian Jurisdictions *continued*

	NSW	Commonwealth	Victoria	SA	WA	Tasmania	Queensland
Sanctions	Suspension or deregistration, named on public Watch List (additional meeting protocols apply)	Deregistration	Deregistration	Deregistration; an offence against <i>Lobbyists Act 2015</i> (SA) also constitutes corruption for the purposes of the <i>Independent Commissioner Against Corruption Act 2012</i> (SA)		Deregistration	Warning by Integrity Commissioner, suspension or deregistration
Meetings with lobbyists	Ministerial diaries published	X	X	X	X	X	Ministerial diaries published. Lobbyists required to report monthly to the Integrity Commissioner details of every lobbying contact, including, the date, client, title and/or name of government or opposition representative, the purpose of contact. Information published on Commissioner's website.

and former Senator Crichton-Browne, discussed above.¹⁵² Legislative regulation in NSW¹⁵³ was triggered following the resignation of the Premier and 10 MPs over the ICAC investigation ‘Operation Spicer’, which also led former Minister Obeid to be sentenced to five years’ imprisonment for misconduct in public office.¹⁵⁴

The trigger for legislative regulation in Queensland¹⁵⁵ followed from extensive public consultation on large-scale integrity reforms for the State,¹⁵⁶ which exhibited a desire to undertake far-reaching accountability reforms. The discussion paper from that consultation remarked that Queensland had come a long way 20 years after the explosive Fitzgerald Inquiry into corruption in the police service and public sector, which uncovered large-scale corruption that led to the resignations and imprisonments of various former Ministers and officials.¹⁵⁷ Thus, the indirect trigger for Queensland’s legislative regulation of lobbying was an explosive scandal that resonated through the State for several decades, leading to wide scale integrity reforms.

By contrast, the more lacklustre codification of the executive schemes in WA and SA did not reflect any scandals, and thus did not introduce any radical changes to the pre-existing scheme. Based on these trends, if further scandal and controversy erupts in a jurisdiction, we might expect to see further reform and tightening of lobbying regulation.

Unique issues can also be observed in the federal sphere. A predominant concern at the Commonwealth level seems to be the influence of foreign actors on Australian democracy. As mentioned above, the first regulation of lobbyists in the Hawke era involved two executive registers of lobbyists: a general register for domestic lobbyists and a separate register for lobbyists representing foreign governments or their agencies, based on a scandal involving a Soviet spy. The more recent

¹⁵² Corruption and Crime Commission (WA), *Report on the Alleged Misconduct Involving Dr Neale Fong* (n 79) 5; Corruption and Crime Commission (WA), *Report on Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (n 79) 101.

¹⁵³ *Electoral and Lobbying Legislation Amendment Act 2014* (NSW).

¹⁵⁴ See Yee-Fui Ng, ‘After Operation Spicer, what more needs to be done to Clean Up Political Donations in NSW?’, *The Conversation* (online, 30 August 2016) <<https://theconversation.com/after-operation-spicer-what-more-needs-to-be-done-to-clean-up-political-donations-in-nsw-64547>>; Carter and Calderwood (n 109).

¹⁵⁵ *Integrity Act 2009* (Qld).

¹⁵⁶ See Queensland Government, *Response to Integrity and Accountability in Queensland* (Report, November 2009); Queensland Department of the Premier and Cabinet, *Discussion Paper: Integrity and Accountability in Queensland* (Report, August 2009).

¹⁵⁷ Queensland Department of the Premier and Cabinet (n 156). See ‘Players in a Vast Drama’, *Courier Mail* (online, 14 May 2007) <<https://www.couriermail.com.au/news/players-in-a-vast-drama/news-story/9271190b1c687ec7a76571395f6421b0?sv=7d60de3363144b968d3a60ad3dfff7ca>>.

legislative public register for lobbyists representing foreign interests was in response to a scandal involving Senator Dastyari, who was forced to resign following revelations about his dealings with a Chinese lobbyist.¹⁵⁸ Having a register of foreign agents is ultimately founded in the concern that decisions regarding the direction of one's nation should be driven by those who will ultimately be affected by those decisions: citizens and residents. The language often employed is that of preserving a country's self-determination and national sovereignty.¹⁵⁹ Although the focus is on overseas interests affecting Australian officials, foreign agent registration schemes are driven by the same underlying concerns as domestic lobbying — the prevention of corruption and undue influence of public officials. As foreign affairs traditionally take place at the federal level, the issue of foreign influence seems to be a preoccupation of the Commonwealth government.

A further question is why certain regulatory choices were made in constructing the standards of regulation of lobbyists in Australia. The coverage of lobbyists required to register in all Australian jurisdictions is confined to third party lobbyists. This means that a large proportion of lobbyists are not covered by regulation, such as those that operate in-house as employees, peak groups, and community groups. Such restrictive coverage fails to provide proper transparency of government decision-making in terms of direct lobbying by 'repeat players'. For instance, Dr David Solomon — former Queensland Integrity Commissioner — estimated that the Queensland regime, which only extended to third party lobbyists, covered 'only a small proportion — perhaps 20 per cent — of the corporate lobbying that does occur'.¹⁶⁰ Such restrictive coverage also constitutes unfair treatment of third party lobbyists, as there is no justifiable basis for distinguishing their direct lobbying activities from those by other 'repeat players' (eg, in-house lobbyists). By contrast, comparable jurisdictions that have a long history of regulating lobbyists, such as Canada and the US, cover both third party and in-house lobbyists.¹⁶¹

The justification for confining the register to third party lobbyists, from the Hawke era to the present, has been that for third party lobbyists it is not clear which interests they represent, whereas for in-house lobbyists it is obvious who they represent, thus a register was not required for those that work in-house.¹⁶² This is a very narrow reading of the purpose of regulating lobbying, which as discussed above, has broader purposes of preventing corruption and enhancing political equality through transparency, enabled through public disclosure.

¹⁵⁸ Patrick (n 134).

¹⁵⁹ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations* (Interim Report No 2, March 2017) ix.

¹⁶⁰ David Solomon, 'Ethics, Government and Lobbying' (Speech, Transparency International Seminar, 21 June 2013) 5.

¹⁶¹ *Lobbying Act* (Canada) (n 53) ss 5, 7 (Canada); *Lobbying Disclosure Act 1995*, 2 USC § 1602(10) (2007) ('*US Lobbying Disclosure Act*').

¹⁶² Cabinet Minute Amended Decision No 2570 (n 66) 7.

The cause of this narrow reasoning being actively deployed to justify regulation limited to third party lobbyists, from the initial regulation in the Hawke era in 1983¹⁶³ which has continually been reiterated throughout the years,¹⁶⁴ is due to the effective advocacy of lobbyists and public relations firms, as well as lawyers and community groups, who have managed to keep the ambit of regulation narrow in their own self-interest. In the last 30 years, lobbyists have been active and vociferous in campaigning about the level of regulation they should be subject to, and have made numerous submissions to government about the appropriate scope of regulation in their best interests, that is, minimal regulation.¹⁶⁵ This is hardly surprising as it is the nature of their profession to lobby effectively to achieve beneficial outcomes for the party they represent — in this case themselves.

Yet the question of who should be covered by lobbying regulation goes to the normative question of significance, that is, whether they undertake a significant level of activity that warrants closer public scrutiny. If the coverage of lobbyists is too narrow, regulation is ineffective to achieve the purposes of political equality and the prevention of corruption, as it does not encompass those who undertake significant lobbying activities. If too many individuals and groups are caught within the regulatory framework, including those that approach government for minor or personal matters that are not of interest to the wider public, it could create a burden on small bit players and obscure the major players.

To confine the categories of lobbyists to significant players, the coverage of lobbyists can be narrowed based on the intensity of lobbying activity, for instance, the amount or percentage of time spent lobbying, or the amount of money spent or income received from lobbying activities. For example, in the US, there are two main thresholds that need to be met before the requirement to register is triggered. The first is based on the level of lobbying activities, where a person is only required to register if they make more than one lobbying contact for the client over the course of its representation, and the lobbying activities consume at least 20% of that person's time for that client over a three-month period.¹⁶⁶ The other requirement is based on differential financial thresholds for third party and in-house lobbying firms, based on how much they earn

¹⁶³ Ibid 7–9.

¹⁶⁴ The Commonwealth Special Minister of State outlined the rationale for the federal lobbyist code of conduct: 'The objective of the code is not to make every company whose staff or executives visit a Minister sign a register. Rather it is to ensure Ministers and other Government representatives know whose interests are being represented by lobbyists before them and to enshrine a code of principles and conduct for the professional lobbying industry': see Commonwealth, *Parliamentary Debates*, Senate, 13 May 2008, 1510 (John Faulkner). See also Senate Finance and Public Administration References Committee (n 4) 7–10; Transcript of Proceedings, *Operation Eclipse* (Independent Commission Against Corruption (NSW), Peter M Hall QC, 6 August 2019) 111T (Annabelle Warren).

¹⁶⁵ See eg Cabinet Minute Amended Decision No 2570 (n 66) 8–9.

¹⁶⁶ *US Lobbying Disclosure Act* (n 161) § 1602(10).

or spend on lobbying activities.¹⁶⁷ In Canada, a similar element of significance is required, where only persons whose lobbying activities constitute a significant part of their duties are required to register, which has been interpreted to be greater than 20% of employee duties.¹⁶⁸

Another approach could be tiered regulation based on risk, such as adopting a risk assessment framework to assess whether each person should register, or alternatively, to determine higher risk industries (eg, property developers and the gambling and mining industries), which are then subject to more onerous regulation. Certain low risk groups could also be exempted from regulation, such as charities or not-for-profit organisations. This was the approach taken for electoral funding in NSW, where property developers, tobacco businesses, and the liquor and gambling industry are banned from making political donations.¹⁶⁹

Finally, compliance and enforcement processes remain key to a successful system of lobbying regulation. *The Guardian* has reported dismal enforcement efforts by Australian regulators, where not a single lobbyist has been punished for breaching rules in the past five years federally, or in Victoria, WA, Queensland, or SA.¹⁷⁰ In 2018, the Commonwealth Auditor-General found that the Department of the Prime Minister and Cabinet, which oversaw the federal Lobbyist Register at the time, had not suspended or removed the registration of a single lobbyist since 2013, despite identifying at least 11 possible breaches.¹⁷¹ The Auditor-General recommended that the Prime Minister's Department assess risks to compliance with the Code and provide advice on the ongoing sufficiency of the current compliance management framework.¹⁷² The Secretary of the Department of the Prime Minister and Cabinet responded that they considered their role to be merely administrative rather than regulatory: 'As you are aware, the Lobbying Code of Conduct, as established in 2008 and continued by successive Governments, is an administrative initiative, *not* a regulatory regime'.¹⁷³ This weak enforcement points to a need for an independent regulator administering a legislative scheme, rather than the responsibility residing

¹⁶⁷ Ibid § 1603(a)(3)(A)(i).

¹⁶⁸ *Lobbying Act* (Canada) (n 53) ss 7, 10(1). See 'A Significant Part of Duties ("The 20% Rule")', *Office of the Commissioner of Lobbying of Canada* (Web Page, July 2009) <<https://lobbycanada.gc.ca/eic/site/012.nsf/eng/00115.html>>.

¹⁶⁹ *Electoral Funding Act 2018* (NSW) s 51.

¹⁷⁰ Christopher Knaus, 'Not a Single Lobbyist Punished for Rule Breaches in Five Years', *The Guardian* (online, 18 September 2018) <<https://www.theguardian.com/australia-news/2018/sep/18/not-a-single-lobbyist-punished-for-rule-breaches-in-five-years>>.

¹⁷¹ Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists* (Report No 27, 14 February 2018) <<https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>>.

¹⁷² Ibid.

¹⁷³ Stephen Easton, 'PM&C Shrugs off Audit of Toothless Federal Lobbying Rules', *The Mandarin* (online, 15 February 2018) <<https://www.themandarin.com.au/88434-pmc-shrugs-off-audit-of-toothless-federal-lobbying-rules/>> (emphasis in original).

within a government department that does not have sufficient independence from the core executive.

The implementation of the more selective federal scheme, *FITSA*, has also faced criticism. By November 2019, the scheme had resulted in only one notice (requiring information to satisfy the Secretary whether a person is liable to register under the scheme under s 45) being sent out to a potential registrant, despite sending out more than 1,500 letters.¹⁷⁴ The Attorney-General was forced to defend the scheme after former Prime Minister Tony Abbott was asked to join the register, with respect to an address he was to make at the inaugural Australian Conservative Political Action Conference, an organisation founded by the American Conservative Union and linked to the US Republican Party, in August 2019.¹⁷⁵ Event organiser Andrew Cooper was the only person to have received a notice under s 45 from the Secretary. Both Abbott and Cooper strongly declined to cooperate with the request, causing the Attorney-General to clarify that he ‘expect[s] [the Department] to demonstrate a focus on the most serious instances of noncompliance’.¹⁷⁶ While *FITSA* does not ostensibly ‘target any particular country, nationality or diaspora community’,¹⁷⁷ the Australian government appears to have had particular actors in mind when formulating the *Act*, none of which are likely to have been Abbott. Although it is too early to make a definitive evaluation about the Attorney-General’s Department’s long-run enforcement of *FITSA*, the apparently muddled early enforcement of the legislation leaves much to be desired.

By contrast to other Australian jurisdictions, since the NSWEC became responsible for regulating lobbyists on 1 December 2014, it has undertaken a number of compliance actions, where five matters of potential breaches of the *NSW Code* were subject to a compliance review or investigation. All resulted in no further action. In addition, during 2017–18, a number of registered lobbyists received warnings (45), had their registration suspended (four) or cancelled (one), or were placed on the Watch List (four) for failing to confirm their registered details were up to date.¹⁷⁸ This may indicate that an independent statutory authority may take a more active

¹⁷⁴ Anthony Galloway, ‘Foreign Interference Scheme Targets Just One Potential Agent of Influence’, *The Sydney Morning Herald* (online, 28 November 2019) <<https://www.smh.com.au/politics/federal/foreign-interference-scheme-targets-just-one-potential-agent-of-influence-20191127-p53ep5.html>>.

¹⁷⁵ Max Koslowski, ‘Foreign Influence Laws Won’t Change After Tony Abbott Targeted, Porter says’, *The Sydney Morning Herald* (online, 5 November 2019) <<https://www.smh.com.au/politics/federal/foreign-influence-laws-won-t-change-after-tony-abbott-targeted-porter-says-20191105-p537m5.html>>.

¹⁷⁶ Janet Albrechtsen and Joe Kelly, ‘Tony Abbott Declares: I’m not an Agent of Foreign Influence’, *The Australian* (online, 1 November 2019) <<https://www.theaustralian.com.au/nation/politics/tony-abbott-declares-im-not-an-agent-of-foreign-influence/news-story/da7994187fc74acd6797c3d5918b77a0>>.

¹⁷⁷ Revised Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth) 9.

¹⁷⁸ Ng and Tham (n 15) 42.

role in ensuring compliance with the regulatory regime compared with departmental supervision. Although the Queensland regime is overseen by an independent statutory officer, the Integrity Commissioner, as discussed in Part III, lobbyists have been able to evade the regime by restructuring their businesses. Furthermore, the Queensland regime is poorly funded, leading to no enforcement actions being taken.¹⁷⁹ Thus, other key aspects of effective enforcement include sufficient funding of the regulatory body and setting up standards of regulation without loopholes.

In short, enforcement of the lobbying schemes has been patchy across jurisdictions, with largely minimal enforcement, with the exception of NSW. A reason for the lacklustre enforcement could be that departmental supervision is less effective as departmental officials may regard themselves as mere administrators, rather than regulators that actively enforce statutory regimes. By contrast, independent statutory authorities are separate from the core executive, and may take a more active role in monitoring and enforcing compliance with the legislation, as can be seen in NSW. In addition, the level of funding provided to regulators may also affect compliance outcomes, which is a salutary lesson from the Queensland experience.

V CONCLUSION

Australia is one of the world's pioneers in regulating the activity of lobbyists. This article has developed a typology of lobbying regulation based on the form of regulation, the standards it imposes, and compliance processes. In terms of the form of regulation in Australia, it can be seen that there has been a gradual move from executive regulation towards legislative regulation. The standards of lobbying have also increased over time, as Codes of Conduct that promote ethical behaviour are accompanied by legislative requirements that mandate registration and impose obligations on lobbyists, such as bans on success fees. Finally, the compliance processes vary across jurisdictions, with some jurisdictions moving to an independent statutory authority, whereas others remain with departmental regulation.

Three phases of Australian regulation of lobbying can be discerned since dedicated regulation was adopted in the early 1980s: the initial phase of minimalist executive regulation (1983–2006), stronger executive regulation of third party lobbyists (2007–09), followed by the rise of legislative regulation of third party lobbyists (2009–16). It has been shown that lobbying regulation in Australia has gradually evolved and intensified over time as a response to various crises and controversies. Within the Australian federation, there is evidence of policy transfer across jurisdictions, as well as disparate regulatory innovations in the standards of enforcement and compliance processes. However, lobbying regulation remains narrowly focussed on third party lobbyists, who amount to only 20% of the total lobbyist population, meaning that there is no transparency about the activities of major repeat players in the system. This is due to the effective advocacy of lobbyists over the years, who have successfully argued for a narrow purpose of regulating lobbying that is limited

¹⁷⁹ Queensland Integrity Commissioner, *Annual Report 2015–16* (n 107) 6.

to identification of the interests being represented by lobbyists. However, this article has argued that there are broader purposes of regulating lobbying, that is, to prevent corruption and to promote political equality, which justifies a broader regulatory scope beyond third party lobbyists.

As part of the impetus to improve the declining public faith in democracy and political institutions in Australia,¹⁸⁰ governments should seek to regulate the strong influence of vested interests and influence peddlers that can drown out other less resourced and connected voices within our democracy. Reform of lobbying regulation in Australia to enhance the scope of its coverage and the level of disclosure of lobbying activity will shine the light of transparency in an area currently hidden in the shadows, reduce the risk of corruption by lobbyists and public officials, and ultimately promote the democratic norms of political equality and fairness.

¹⁸⁰ The most recent Australian election study found that only 59% of Australians are satisfied with democracy, and trust has reached its lowest level on record, with only 25% believing people in government can be trusted: Sarah Cameron and Ian McAllister, *The 2019 Federal Election: Results from the Australian Election Study* (Report, December 2019) 15–16.

