

24 February 2017

Ms Karen Smith
Deputy Secretary, Cabinet & Legal
Department of Premier and Cabinet
GPO Box 5341
Sydney NSW 2001

By email: legalmail@dpc.nsw.gov.au

Dear Ms Smith

Statutory Review of the *Lobbying of Government Officials Act 2011*

The Australian Professional Government Relations Association (APGRA) welcomes the opportunity to provide feedback to the Department of Premier and Cabinet's (the Department) review of the *Lobbying of Government Officials Act 2011* (the Act) and associated *Lobbying of Government Officials (Lobbying Code of Conduct) Regulation 2014* (the Regulation) and *NSW Lobbyists Code of Conduct* (the Lobbyists Code).

APGRA supports the NSW Government's regulatory framework in relation to lobbying in NSW, including the 2014 changes that expanded the application of ethical standards within the Lobbyists Code to all external parties who seek to influence government, as well as the transfer of compliance monitoring to the NSW Electoral Commission (the Commission). Broadly, the Association believes that the objectives of the regulatory framework are being achieved through the Act, Regulation and Lobbyists Code.

Before commenting on specific issues raised as part of the Review, we provide some background below on the APGRA itself, the role it will continue to play in supporting government regulatory frameworks around Australia, and the wide range of activities undertaken by professional government relations practitioners.

1. About the APGRA

The APGRA was established in mid-2014 by a number of longstanding public affairs consulting firms and senior practitioners to promote ethical standards, greater transparency and a binding code of conduct applicable to all members conducting government relations activity.

The aims of the Association are to:

- Promote the highest standards of government relations practice in Australia through the establishment and maintenance of a robust industry code of conduct;
- Complement existing regulation of government relations activity in Australia and provide a basis for regular dialogue between government and the profession; and
- Contribute to greater understanding of professional government relations in Australia, and the legitimate and important role the sector plays.

The centrepiece of the Association is a Code of Conduct (**Appendix**) that regulates the behaviour of members and promotes the highest ethical standards within the government relations profession. The Code operates alongside the NSW lobbying regulatory framework and legislation and codes in place both federally as well as those at a state/territory level, thereby creating a strong co-regulatory framework to ensure the profession continues to operate in an ethical and transparent manner.

Membership of the Association is open to practitioners across all categories – including consultants, ‘in-house’ practitioners at corporations and peak industry groups – provided they are able to satisfy and commit to the Association’s Code of Conduct and Membership Rules. Failure by members to adopt and abide by the Code and Rules are grounds for declining or cancelling membership of the Association or other sanctions as deemed appropriate.

Further information on the APGRA can be found at www.apgra.org.au.

2. Activities of Professional Government Relations Practitioners

Professional government relations practitioners, whether they act for third parties or are in-house, are typically involved in a range of activities that are substantially broader than the common understanding of the term ‘lobbying’ (i.e. advocacy). The elements of government relations practice include:

- Understanding the business and priorities of the organisation they are advising as well as the specific objectives they may have in the area of public policy;
- Researching and advising organisations on current policy settings in areas of interest to them and potential trends in the development of policy by government (e.g. based on changes in other jurisdictions);
- Assisting the organisation formulate ‘the case’ they intend to put forward to government in relation to legislation, a government/parliamentary policy inquiry or some other matter – this often involves factoring in the existing policy settings as well as casting a critical eye over the organisation’s arguments and the justification/evidence they propose to put forward;
- Advising the organisation on relevant government portfolio/agency responsibilities (i.e. who they ought to be engaging with in government) as well as relevant government and parliamentary processes;
- Assisting in the formulation of the organisation’s public policy submissions, correspondence etc. to government;
- Monitoring ongoing developments in public policy, parliament and the broader public discourse of relevance to the organisation’s activities; and
- Lobbying or advocacy activities that include coordinating logistical arrangements for government stakeholder meetings on the organisation’s behalf and, as is often the case, attending these meeting and undertaking relevant follow-up.

Lobbying is a legitimate undertaking in a free and open democratic society. Professional government relations practitioners provide advice and assistance that enhances the effectiveness and free-flow of information between the corporate/industry/not-for-profit sector and government. This is not only of benefit to non-government parties but, importantly, can expose government to new ideas and opportunities beneficial to the broader community.

Indeed, as the Independent Commission Against Corruption’s (ICAC) 2010 report on lobbying in NSW found: “There is much evidence that demonstrated that, in general, professional lobbyists

act ethically, and that lobbying, when done well, can enhance rather than detract from good decision-making by public officials.”

3. APGRA’s Response to Review Questions

Question 1: Should the Lobbying Act be amended to include an “object and purpose” provision?

The APGRA agrees with the Department in that the objectives and purpose of the Act and broader lobbying regulatory framework are clear: these are to promote transparency, integrity and honesty in the dealings of non-government parties with government officials. There does not seem to be a persuasive reason to amend the legislation to incorporate an objects and purpose provision.

Question 2: Do you agree with the Department’s views about the policy objectives of the Act (i.e. that the objects of the Act are to promote transparency, integrity and honesty in connection with lobbying of NSW Government officials)?

As per above.

Question 3: Do the definitions of ‘government official’, ‘lobbyist’, ‘third-party lobbyist’ and ‘lobbying’ meet the policy objectives of the Act identified by the Department? If not, what changes should be made to these definitions to meet those objectives?

The APGRA is concerned with the definition of ‘lobbyist’ under the Code; specifically, the exclusion under clause (c) of that definition dealing with entities or people whose business is a recognised technical or professional occupation. These entities and people are not currently required to appear on the NSW Register of Lobbyists (the Register).

Consultants from professional services firms who do not market or brand themselves as professional government relations practitioners may nonetheless regularly advise and advocate to government on behalf of their clients. For example, only one large business services firm currently appears on the Register (KPMG) yet it seems likely that at least some of its direct competitors in this field are undertaking similar activities. There are other professional services disciplines, for instance town planning and licensing consultants, where firms routinely engage with government officials yet such firms do not currently appear on the Register.

The APGRA believes the Code ought to be modified so that these firms are required to appear on the Register – in other words, the definition ought to be based on substance rather than form. Relevant firms then should then be notified about the Code and its obligations by the Commission, an approach we understand has been taken in the past by the Queensland Integrity Commissioner.

Question 4: Does the Lobbyists Code meet the aims and objectives of the Act identified by the Department? If no, what changes should be made to the Lobbyists Code to meet the aims and objectives of the Act?

Subject to the issue raised in response to Question 3, above, the APGRA believes that the Lobbyists Code is fit for purpose in meeting the aims and objectives set out in the Discussion Paper.

Transparency of the interest being represented to government is being successfully achieved through the requirement for third parties to register under the Code of Conduct. As far as the APGRA is aware, at a practical level third party consultants are complying with their registration and related obligations under the Code, with this compliance activity ingrained in the normal course of business. Ethical and honest dealings by both third parties and others dealing with government are being promoted through the articulation of ethical standards that are mandatory when dealing with NSW Government officials under the Code.

Question 5: The amendments to the Code in 2014 mean that ethical obligations apply to all individuals and bodies that communicate with NSW Government officials for the purpose of representing the interests of others. Has this been effective in promoting the objects of the Act? Do the community and stakeholders understand that the ethical obligations have been extended beyond third-party lobbyists?

The 2014 change to make ethical obligations apply to all individuals and organisations that engage with NSW Government officials clearly operates to further the objectives and purpose of the regulatory framework. As a matter of common sense, it contributes to raising standards in engagement by non-government parties with government officials for these ethical obligations to apply to all parties, not simply those who are third party consultants.

APGRA's in-house members are aware of these ethical obligations under the Code and understand that, since 2014, they extend beyond third party consultants.

Question 6: Does the Lobbyists Register meet the aims and objectives of the Act identified by the Department? If not, what changes should be made to the provisions dealing with the Lobbyists Register to meet the aims and objectives of the Act?

The APGRA believes the current Register achieves the transparency objectives of the overall regulatory framework, providing government and the broader community with clear information on third party interests being represented to government officials. The Register is also well-understood by third party consultants and is operated effectively and efficiently by the Commission.

Question 7: Should the NSW Electoral Commission's current practise with respect to the 'fit and proper person' test for registration as a third-party lobbyist be prescribed in the Lobbying Act?

The APGRA cannot see a compelling case to prescribe the 'fit and proper person' test for registration in the Act.

Question 8: Should the Lobbying Act be amended to require third-party lobbyists to designate a Responsible Officer for compliance purposes and require those officers to undertake online training?

The APGRA understands that third party consultants who are currently listed on the Register are required to nominate a responsible person to the Commission. There does not seem to be a compelling reason to amend the Act to further codify arrangements that are already working well in practice.

In relation to the proposal for the development of online training for parties on the Register, the APGRA believes this is a positive initiative and would welcome the opportunity to work with the Department and Commission in developing relevant content. Indeed, there would be merit in pursuing a national approach to an online training module through the forum of the Annual Meeting of Lobbyist Regulators.

Question 9: Should the frequency with which information in the Lobbyists Register is confirmed by a third-party lobbyist be changed from three times a year to once a year, noting that third-party lobbyists are required to update their information within 10 days of a change occurring?

As noted in the Discussion Paper, parties listed on the Register have an obligation to update their information within 10 business days of a change occurring. Based on member feedback, the APGRA believes this obligation is well understood and observed.

Accordingly, the APGRA strongly supports the proposal to modify the Register confirmation requirements from three times a year to annually. This would streamline unnecessary administrative activity for the Commission and the compliance burden for registered parties, bearing in mind that for many registered parties they are also filing updates on a periodic basis with regulators in other jurisdictions (federal and state/territory).

Question 10: Does the Lobbyists Watch List meet the aims and objectives of the Act identified by the Department? If not, what changes should be made to the provisions dealing with the Lobbyists Watch List to meet the aims and objectives of the Act?

The APGRA believes the key principle that should underpin sanctions under the regulatory framework is proportionality. We agree that the Lobbyist Watch List is an appropriate sanction that should be available to the Commission for significant misconduct and that this power is consistent with the objectives and purpose of the regulatory framework. Equally, it is important that the Commission continue to have the discretion to deal with minor or inadvertent non-compliance through administrative action.

Question 11: Does the ban on success fees for lobbying meet the aims and objectives of the Act identified by the Department? If not, what changes should be made to Part 5 to meet the aims and objectives of the Act?

The APGRA acknowledges the rationale for banning success fees, which was incorporated into the Act in 2011.

Question 12: Should section 18(2) of the Lobbying Act be amended to make reference to federal Government officials or members of Parliament?

The APGRA does not believe there is a strong case to amend the Act to refer to Federal Government officials or MPs unless there has been, or is, a situation in practice that has occurred and gives rise to concern.

Question 13: Does this additional restriction on lobbying meet the aims and objectives of the Act identified by the Department? If not, what changes should be made to the provision to meet the aims and objective of the Act?

The cooling off period that applies to Ministers and Parliamentary Secretaries under Part 6 of the Act is broadly consistent with restrictions that apply in other Australian jurisdictions. The APGRA does not believe further restrictions are necessary in order to achieve the objectives of the regulatory framework.

Question 14: Do the provisions about enforcement and offences noted above meet the aims and objectives of the Act identified by the Department? If not, what changes should be made to the provisions to meet the aims and objectives of the Act?

The APGRA believes that the existing enforcement and offences provision in Part 7 of the Act are robust and appropriately achieve the objectives and purpose of the regulatory framework.

Question 15: Are there any additional issues that should be considered in the course of this Review?

The APGRA is of the view that there are a small number of additional issues that should be addressed as part of this Review:

- Informal 'policies'. There appears to be informal policies on the part of some Ministers not to engage with parties who are listed on the Register for no other reason than the fact that they appear on the Register. The APGRA believes that this practice serves to undermine the standing of the Code and Register system that operates in NSW. It could also operate to incentivise people undertaking government engagement on behalf of third parties to

brand or position themselves differently, and not register in the first place. While the APGRA acknowledges that no Minister or government official has an obligation to engage with an external party, it is not appropriate to exclude an entire category of professionals from dealing with particular government officials.

- Education and dialogue. In connection with the previous point, the APGRA believes it is important that government officials generally maintain a contemporary and accurate understanding of government relations practice and advocacy (lobbying). For example, in Western Australia leading local government relations practitioners have recently provided a seminar to senior government officials on lobbying and how it is undertaken; the APGRA would welcome the opportunity to participate in a similar process in NSW.
- National coordination and streamlining. In 2016, the APGRA developed a preliminary proposal concerning the current situation of a register system in operation at the federal level as well as in each of the six states and the Australian Capital Territory, which was tabled with the Federal Department of Prime Minister and Cabinet. The APGRA proposed to create a single national register of firms, practitioners and clients along the lines of the national electoral roll, which it believes presents significant benefits for both regulators and regulated parties in eliminating duplication and streamlining administrative resourcing. This could be complemented by a single statutory declaration process, with this form including the variation in wording required in each jurisdiction. Further, this administrative proposal would not inhibit the prerogative of any individual jurisdiction to modify the obligations it imposes on government relations practitioners.

The APGRA understands this proposal was tabled for consideration at the Annual Meeting of Lobbyist Regulators in September 2016, and would be pleased to develop this proposal further with the Commission.

Thank you once again for the opportunity to provide comment in relation to the Review and should the Department have any questions in relation to this submission or the APGRA more generally, please do not hesitate to contact me on 02 8353 0400.

Yours sincerely

[signed]

Les Timar
President
(CEO & Founding Partner of GRACosway)

APGRA



Australian Professional Government Relations Association

APPENDIX: Code of Conduct

Introduction

The individual and firm members of the Association believe that government relations practitioners must be honest, open and transparent at all times in their dealings with government and clients, and are committed to high standards of integrity in the conduct of their businesses and activities.

This Code of Conduct has been developed by the Association to clearly articulate the professional and ethical framework for the way in which members relate to government in Australia. Members' primary obligations are to abide by the relevant legislation and government codes in place around Australia. It is intended that this Code will operate alongside those schemes, but in any and all cases of inconsistency, relevant legislation and government codes will prevail to the extent of that inconsistency.

Membership of the Association is open to any firm or person for whom the making of representations to government in Australia constitutes part of their professional activities, and who is prepared to abide by and implement this Code of Conduct and Membership Rules, and continues to comply with them on an ongoing basis.

This Code of Conduct covers the activities of members in their interaction with Australian governments at all levels. Members can include specialist government relations firms and their staff, professional communications firms that also offer government relations support as part of their services, 'in-house' and individual government relations practitioners as well as any other professionals who make representations to government.

It is a pre-requisite and condition of membership of the Association that members adopt and abide by this Code of Conduct, and that all practitioners involved in providing government relations services and making representations to government observe the duties and principles set out in the Code. Members will be required to renew their commitment to the Code each year as a condition of membership.

Failure to adopt and abide by this Code of Conduct and Membership Rules will be grounds for declining or cancelling membership of the Association, or other sanctions deemed appropriate and proportionate.

Definitions

"Consulting Practitioner" means a Government Relations Practitioner who is engaged as a third party to Make Representations on behalf of an individual, a company or an organisation.

"Client" means an individual, association, organisation or business who:

- a) has engaged the Practitioner, or the organisation for whom the Practitioner works, on a professional basis to Make Representations to an Government Representative; or
- b) in relation to an 'in-house' Practitioner, means the Practitioner's employer.

"Executive Role" is any leadership, office-bearer, fundraising or decision making role in a registered political party or associated entity but does not include ordinary membership of a political party.

“Government Institutions” includes Parliament, local government, the ministry, the bureaucracy, and government owned trading organisations.

“Government Relations Practitioner” or **“Practitioner”** is an individual who may be a person, body corporate, unincorporated association, or partnership who Makes Representations.

“Government Representative” means a Government Institution or a person elected to be a member of a Government Institution such as a Member of Parliament or local councillor as well as their staff, such as Ministerial staff, staff employed by a Member of Parliament, staff employed by a local or shire council, or staff employed in the public sector.

“Lobbying Rules” means rules established by legislation or a Government Institution to regulate lobbying or government relations practitioners or their activities. For an up to date list, see the Association’s website.

“Making Representations” includes substantive contact with a Government Representative for the purpose of influencing government decision-making including making or changing legislation, developing or amending policy or programs, the awarding of a tender, a grant or allocation of funding, and meeting or other requests, but does not include non-substantive matters such as requests for publicly available information or modifying logistical arrangements for a meeting.

“Management Committee” means the Management Committee of the Association or their designate.

Operation of this Code

1. This Code applies in respect of all circumstances in which a Government Relations Practitioner is Making Representations on behalf of a Client.
2. Any breach of this Code of Conduct will be dealt with in accordance with the Membership Rules and it is an obligation of membership that each member (and their relevant staff) is bound by those Rules.
3. This Code commences on 1 July 2014.

Professionalism

4. Practitioners will act with honesty and decency at all times towards Government Representatives.
5. Practitioners will not act in a manner detrimental to the reputation of the Association or the professional practice of government relations in general.
6. Practitioners will not engage in any conduct that is corrupt, dishonest or illegal.
7. Practitioners will use reasonable endeavours to satisfy themselves of the truth or accuracy of all statements made or information provided to Government Representatives and will exercise proper care to avoid giving false or misleading information.
8. Practitioners will diligently advance and advocate their Client’s interest.
9. Practitioners will devote time, attention, and resources to the Client’s interests that are commensurate with Client expectations, agreements, and compensation.

Interactions with Government

10. When interacting with Government Representatives, Practitioners will disclose on whose behalf they are acting, and will not misrepresent their interests.
11. Where the proposed or actual activities of a Client may be illegal, unethical or otherwise contrary to a Lobbying Rule or this Code, Practitioners will advise the Client accordingly and refuse to act in relation to the relevant activity.
12. Practitioners will not make misleading, exaggerated or extravagant claims regarding, or misrepresent, the nature or extent of their access to, or relationship with, Government Representatives, political parties, or members of political parties. This clause extends to claims of 'guaranteed' access to, or outcomes from, particular Government Representatives.
13. Practitioners will not offer or give, or cause a Client to offer or give, any financial or other incentive to any Government Representative that could be construed as a bribe or inducement.

Personal Political Activity

14. Practitioners will keep strictly separate their professional activities and any personal activity or involvement on behalf, or as a member, of a political party.
15. Practitioners will not serve in an Executive Role with a political party.
16. Practitioners will not play a senior management role in the conduct of an election campaign.

Employment of Government Representatives

17. Practitioners will not employ, or otherwise commercially engage, any current Government Representative.
18. Practitioners who were formerly elected Government Representatives will not, for a period of 18 months after they ceased to hold office, Make Representations on behalf of a client, with respect to any matter on which they had official dealings in the 18 months prior to leaving that role.
19. Practitioners, who were formerly non-elected Government Representatives will not, for a period of 12 months after they ceased their former role, Make Representations on behalf of a Client, with respect to any matter on which they had official dealings in the 12 months prior to leaving that role.

Compliance with Laws, Regulations and Rules

20. Practitioners will comply with any relevant Lobbying Rules and with this Code. Where any conflict exists between this Code and a Lobbying Rule, Practitioners must abide by the Lobbying Rule.
21. Practitioners will comply with any legislation, government resolution or rule relating to donations to political parties and any other matter.

22. Practitioners will conduct themselves in accordance with the rules of parliament or any other Institution of Government while within their precincts (including rules relating to any access pass that might have been issued to them).
23. Practitioners will abide by the rules for obtaining, distribution and release of parliamentary and governmental documents.
24. Practitioners will not obtain information from Government Representatives by improper or unlawful means.
25. Practitioners will not cause a Government Representative to breach any law, regulation or rule applicable to them.

Obligations Only Applying to Consulting Practitioners

26. Consulting Practitioners will have a written agreement with their Client regarding the terms and conditions for their services, including the amount of and basis for compensation.
27. The fees charged by a Consulting Practitioner will be reasonable, taking into account the facts and circumstances of the engagement.
28. Upon termination of their relationship, Consulting Practitioners will take steps to the extent reasonably practicable to protect a Client's interests, such as giving reasonable notice to the Client, allowing time for employment of another Practitioner, and surrendering papers and property to which the Client is entitled.
29. Consulting Practitioners will indicate to their Clients their membership of the Association, and the existence of obligations under this Code and the Lobbying Rules.
30. Consulting Practitioners will avoid conflicts of interest in Making Representations on behalf of a Client to a Government Representative.
31. Consulting Practitioners will disclose any known conflict of interest to their relevant Clients and resolve the conflict issue promptly.