

8 December 2016

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By email: marlice.johnson@icgn.org

Dear Ms Johnson

ICGN Guidance on political lobbying and donations

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies. They frequently are those with the primary responsibility for dealing and communicating with regulators such as the Australian Securities and Investments Commission (ASIC), and in listed companies have primary responsibility to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our members have a thorough working knowledge of the operations of the markets and the needs of investors. We have drawn on their experience in our submission.

We commend ICGN in its efforts to promote effective standards of corporate governance and welcome the opportunity to provide feedback on this ICGN *Guidance on political lobbying and donations* (Guidance).

Governance Institute agrees that the issue of political donations and lobbying is an area which requires strong corporate governance. The Guidance provides useful principles for companies to consider in terms of managing these issues to promote good governance. We strongly support the Guidance's call for corporate political activity to be supported by a transparent and robust governance framework and for robust policies and procedures frameworks to be publicly transparent and overseen by the board. A transparent policy concerning political lobbying and donations should include disclosure to and engagement with stakeholders as to the political activities undertaken by the company.

The issue of political donations is already under active consideration by many companies in Australia. As your Guidance notes, regulation differs across jurisdictions, and in Australia, political donations are subject to rules which vary from state to state and, in the case of NSW, has a clearly defined class of prohibited donors. We recently considered the governance implications of political donations and developed a *Good Governance Guide: Issues to consider in relation to political donations*, which we attach to this submission for your information. Our Good Governance Guides are developed by our members to assist the broader business community to make good decisions in relation to governance issues and made freely available on our website.

We note that political donations and political lobbying may be linked, but this is not a given. We agree with the Guidance that corporate political activity may be legitimate and positive. Business has a role to play in the democratic process and political lobbying for proper business purposes forms part of that. For example, in Australia, regulators and the government frequently hold stakeholder consultations on issues of public policy of relevance to business, and also hold roundtables on various issues. Business will respond to the public consultations, attend the roundtables, and will frequently also participate in industry body submissions and roundtables with regulators and government on various issues. Businesses may have government relations personnel who seek to build proactive relationships to enable the company's economic and strategic value to be understood by key policy makers and regulators. The necessary feature is transparency as to the form of lobbying — and political donations if made in support of that lobbying — so that investors and other stakeholders can assess if it is being undertaken for proper business purposes. Transparency provides clarity to investors and other stakeholders that the political lobbying or donations do not constitute undue influence from business on government.

However, due to the fact that the community may perceive political donations (even if they are not prohibited under legislation) as constituting undue influence from business on government, we note in our *Good Governance Guide* that effective alternatives to political donations should be considered by companies.

We agree with ICGN that political lobbying is acceptable when undertaken in the company's interests, but do not consider that the Guidance should provide a detailed definition of what comprises the corporate interest. A prescriptive definition of what comprises the best interests of the company will be subject to jurisdictional bias and could create inconsistencies with existing legislative and judicial definitions. This could put the Guidance at odds with directors' duties. We note that the Guidance is aimed at raising the standards of corporate governance worldwide and across different legal and regulatory jurisdictions and recommend that the Guidance not be overly prescriptive in this regard. We are of the view that the principles set out in the Guidance assist companies to ascertain what would be considered to be in the company's best interests, with transparency provided to investors and other stakeholders as to why this is so.

We do not support the Guidance's call for shareholder voting on a company's political lobbying or donations policy. We are of the view that transparency as to the policy and engagement with stakeholders will mitigate the risk that misconduct or political bias is in place. We recommend that the part of the preamble which refers to shareholder voting on a company's political lobbying policy be changed to requiring stakeholder engagement on the political lobbying policy of the company.

Kind regards

A handwritten signature in black ink, appearing to read 'J Fox', with a stylized flourish above the 'x'.

Judith Fox FGIA
National Director, Policy & Advocacy

It is **good governance** for a company to establish a policy or protocol in relation to political donations in Australia. This may be contained in board or committee minutes (following discussion at a board meeting), in a code of conduct or in a dedicated policy. It is important that the directors have the opportunity to discuss and agree how they would like the protocol or policy to operate.

Legal context

There is complex legislation in place at the federal and state level in Australia in relation to political donations, with different restrictions, obligations and penalties applying. Most states have cap regimes and disclosure requirements in place, while New South Wales (NSW) has implemented particularly restrictive prohibitions (for example, political donations by property developers, tobacco industry business entities and liquor or gambling industry business entities are prohibited). It is important that companies understand the regime that applies to the jurisdictions in which they operate, seeking legal advice if necessary.

Companies also need to be aware that if they decide to donate at the federal level, they may not have control over the ultimate allocation of the donation by the political party, which may put them in breach of the political donations legislation within a particular state.

Civil and criminal penalties apply to breaches of the legislation. In NSW, for example, penalties include a fine and/or imprisonment for up to two years.

Directors may be able to make political donations in their personal capacity, depending on the particular corporate structure and prohibited donor status of the companies in their group. However, if in any doubt, they should seek legal advice prior to making any donation.

What is a political donation?

In developing a policy or protocol, companies will need to decide the scope of coverage. However, it will be important to take into account the legislative

requirements in the jurisdictions in which they operate. It is important to note that there are differing definitions of 'political donation' across the jurisdictions.

For example, in NSW a political donation includes a gift or payment made to, or for the benefit of:

- a political party, or
- an elected member of parliament or of a local council, or
- a candidate or group of candidates, or
- a third-party campaigner.

Accordingly, specific examples of political donations in NSW might include:

- a donation of money
- a contribution, entry fee or other payment to participate in a fundraising event or function where it is primarily a political fundraiser and payment forms part of the proceeds of the event
- a subscription paid to a political party for membership or affiliation
- non-cash payments such as gifts or prizes for a political fundraiser or purchasing items at a political fundraiser
- the provision of services or goods, for example, the use of a company vehicle, at no charge or at a discounted rate, or
- uncharged interest on a loan.

It should be noted that whether or not a payment constitutes a political donation will not always be clear and any proposed payment must be considered based on its particular circumstances. The Australian Electoral Commission provides some guidance on its website (for example, if an attendee of a political party function did not receive services or adequate services equal to the value of the attendance payment made, the payment may be considered a political donation).

Board members and senior management need to be aware that donating to an affiliated entity of a political party, such as corporate memberships of related or associated bodies of political parties or dinners or

public forums which raise funds for political campaigns or individuals, might be considered a political donation.

Governance and risk management issues

While engagement with political parties by corporate memberships of related or associated bodies or attendance at dinners and forums can provide advantages to companies (for example, stakeholder networking opportunities and insight into the issues which may have potential impact on the company), these advantages are often countered by the negative reputational impacts of an organisation being identified publicly as a political donor.

It is **good governance** and risk management practice to consider:

- the reputational risk to the company and directors, should the community perceive political donations (even if they are not prohibited under legislation) as constituting undue influence from business on government
- the likelihood of shareholder bodies such as the Australian Shareholders' Associations (ASA) questioning the political donation at the company's annual general meeting or in shareholder engagement meetings, as the ASA takes strong issue with political donations, even where there is board approval.

The benefits of developing a protocol or policy or including the matter in the code of conduct are that:

- it mitigates the risk of allegations of misconduct or political bias being made against the company and directors, and
- all employees have clarity as to what is and is not permitted in relation to political donations.

Companies should also consider any policy or protocol in relation to political donations with reference to their policy on bribery and corruption. For example, political donations may be captured under the UK Bribery Act 2010 if a company has operations in that jurisdiction. See Governance Institute's *Good Governance Guide: Issues to consider when developing a policy on bribery and corruption*.

Policy or protocol in relation to political donations

In developing a policy, protocol or code of conduct, the issues to consider might include:

- Ensure that the scope of the policy or protocol is clear, that is, what is meant by 'political donation'.
- Subsidiaries of the entity may fall within the prohibited donor category.
- Consideration needs to be given to whether there is a cap on political donations for those entities that are not prohibited donors. Care needs to be taken that any donations in aggregate do not breach the cap.
- If corporate donations are permitted, the policy should establish a clear process for obtaining approval for the donation to ensure that the donation does not breach the legislation.
- If corporate donations are permitted, the policy should provide direction as to whom a director or employee can consult to ensure that the proposed donation does not breach the cap in aggregate.

Alternatives to political donations

Given the complexity of the legislation on political donations, the potential penalties for breach of the requirements and the reputational risks involved with donating to political parties, consideration should be given to alternatives to political donations. For example, engagement with government stakeholders could be assisted by:

- establishing a dedicated role within the company to focus on building proactive relationships to enable the company's economic and strategic value to be understood by key policy makers and regulators
- membership of industry and professional groups which build proactive relationships with policy makers and regulators on behalf of the industry or professional group, or
- contributing to the public debate on policy issues that may affect the company.

Disclosure

Should donations be made by companies, consideration needs to be given to how disclosure will be undertaken. The information must be made available to the Australian Electoral Commission for disclosure on its website (failure to disclose may result in penalties), but a company should consider if it will also disclose the fact of a donation or donations in the annual report.

If donations take place, transparency allows investors and other stakeholders to be fully informed and shows that the board has turned its mind to the issue and has confidence that the donations do not pose a risk to the company. Consideration should be given to:

- whether the disclosure will be in the corporate governance statement or in the annual report (if the corporate governance statement is not included in the annual report)
- whether the amount and type(s) of the donation or donations will be disclosed.

If the entity is an Australian-based business with operations overseas, the company will need to seek advice on the reporting obligations in each jurisdiction in which it operates. For example, the UK regime requires disclosure of the amount of any political donation made in the directors' report and shareholder pre-approval.

When disclosures are made, companies should consider whether the form and content are sufficient for shareholders to adequately understand the company's approach to donations.