

# Corruption

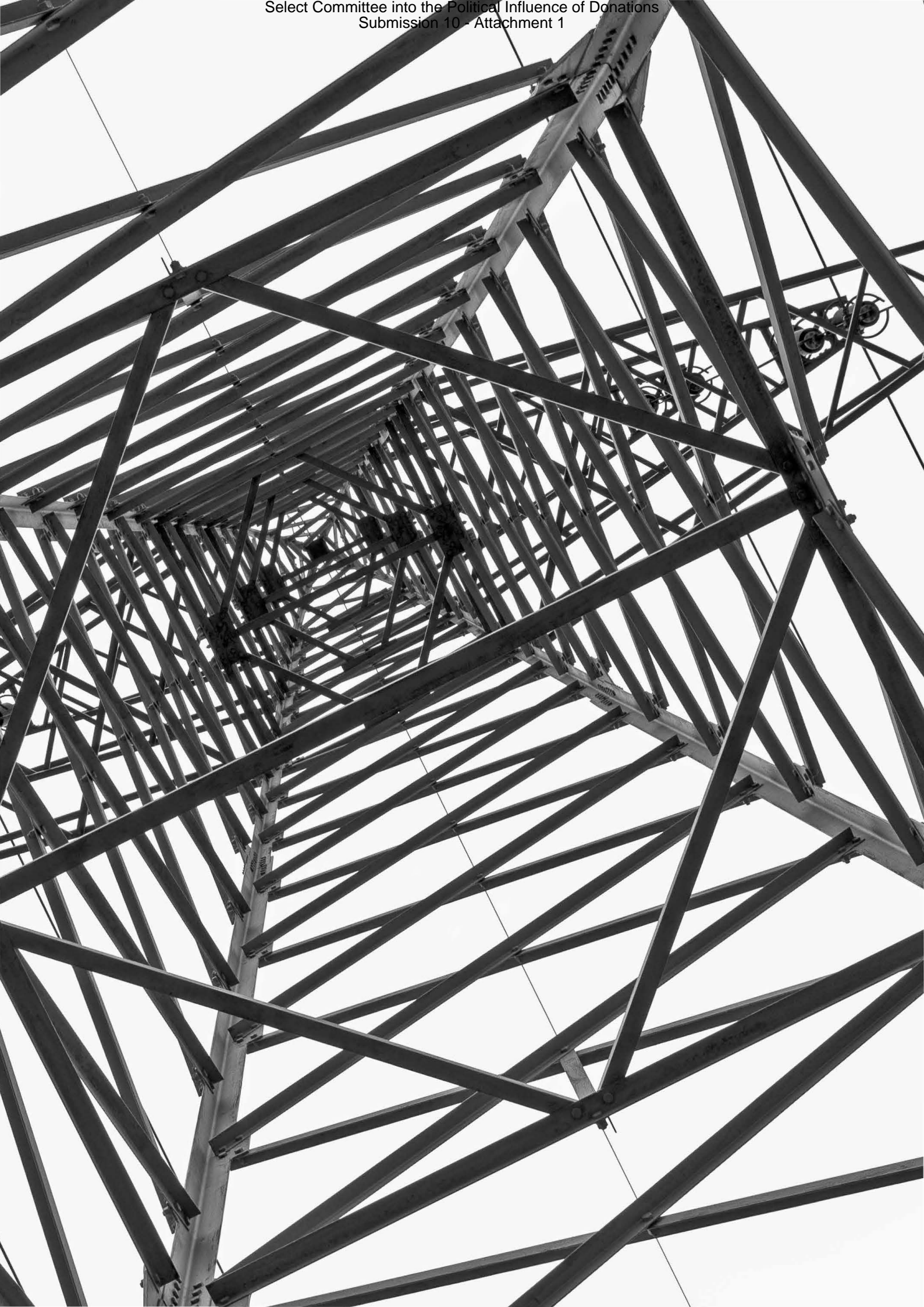
in environmental  
decision-making



**AUSTRALIAN  
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## Executive summary

In 2013, former NSW Minister Ian McDonald and former MP Eddie Obeid were found to have engaged in corrupt conduct. Both were eventually charged, tried and convicted of corruption-related offences. The history of NSW – as well as Australia more generally – is littered with examples of official corruption, going back to the days of the Rum Corps. We have developed important integrity bodies, such as standing commissions against corruption, to tackle this type of behaviour. In July 2017, ABC's *Four Corners* program exposed a high degree of industry capture over water management and rule-making in regional NSW. The *Four Corners* report identified how rules governing the extraction of water from the Barwon-Darling River system were modified and relaxed after 'extensive lobbying by irrigators'. The influence of powerful mining interests has also been instrumental in states such as Queensland in obtaining favourable amendments to mining legislation and resource allocation decisions. The fast-tracking of mining approvals in Queensland, such as for the Adani Carmichael coal mine, demonstrate use of extraordinary public powers in support of large-scale commercial interests, at the expense of accountability measures.

All of these actions pose questions of excessive accommodation of private and commercial interests over the public interest. In the first of these cases, corruption was a matter of outright criminality. The latter three examples are equally examples of corruption. But they signify structural and institutional corruption of decision-making. This is a pattern of

conduct far more expansive than clear and explicit criminality. It nevertheless is corruption – what might be called 'soft' corruption. The transactional character of political donations to parties and candidates, deals amounting to manipulation of legislative or regulatory processes benefiting commercial interests, regulatory capture by industries and their lobbyists, selective public largesse and secrecy favouring private interests, circulation of personnel between public and corporate centres of power – these are all instances of corrupt and corrupting conduct beyond the sphere of direct criminality.

These practices and tendencies fall within our contention of corruption because corruption includes an *excessive* private interest in the exercise of public power. It is a clear departure from 'virtuous', or at least appropriate, conduct of public office. It concerns bad governance as much as criminality whether it be contained in a single act or contributing over time to incremental failure of or compromise to the integrity of public administration.

We identify in this report how principles of 'anti-corruption' can and need to be applied to government decision-making regarding environmental approvals, planning and natural resources. This provides a basis for good governance, an antidote to corrupt conduct, and defence of public trust in environmental and resources decision-making.



## Introduction

This report concerns corruption in environmental decision-making. More specifically, it is concerned with the propensity and opportunity for corruption to occur, and how such risks are best managed and avoided. Our focus is also on how *anti-corruption* is best embedded in systems of environmental and natural resources management. Our conclusions are that a principle of anti-corruption is not only essential to environmental management in a democratic society, but that this can only be achieved by the operation of clear structural and institutional conditions in which corruption is not possible, or at least is difficult.

The problem of corruption is more than a question of criminality. Its avoidance is a matter of effective civic governance – that is to say, good governance. For environment and natural resources management, strong measures inoculating governmental decision-making from corrupt conduct are imperative because this sphere of governance concerns public goods and public resources – water, air, biodiversity, minerals, soils, development rights, ecosystem integrity and so on – held under a form of public trust, guardianship or supervisory power exercised by the state on behalf of all of us.

Use of, access to, and private benefits derived from the environment and natural resources are a major source of wealth, interests and power. Consider the economic value of mineral resources, water rights and planning consents. They are components of the wealth of the nation – the ‘common wealth’ – and in this respect, just as the supervision and allocation of public revenues is to be defended rigorously from disposition to corrupt and venal interests, so the common resources and benefits of nature must, as vigorously, be secured for the common, public benefit. The distribution of these common goods for public benefit is a hallmark of a just and democratic society.

## The circumstances and scandal of corruption in environmental decision-making

Every year thousands of environmental, planning and resource use decisions are made under dozens of different laws in every Australian jurisdiction. The prevalence of corruption in environmental management and resource use is very hard to quantify.<sup>1</sup> However, the NSW Independent Commission Against Corruption (NSW ICAC) has stated that planning is one of the areas of government most prone to corruption. In 2005 approximately one-third of complaints to ICAC were related to planning matters.<sup>2</sup> In addition, there has been a regular stream of formal corruption cases and other inquiries that have investigated concerns in relation to inappropriate governance involving planning and natural resources decision-making:

- Eddie Obeid and Ian Macdonald and the Mt Penny, Doyles Creek and Glendon Brook mining licenses;<sup>3</sup>
- The Smith’s Beach development and Port Hedland Mine in WA;<sup>4</sup>
- Yeelirrie uranium deposit in Western Australia;<sup>5</sup>
- Rezoning of land at Ventnor on Philip Island;<sup>6</sup> and
- Newman Government legislation to assist significant party donors.<sup>7</sup>

Although an obvious governance problem, governments across Australia appear lackadaisical about responding. In the push to promote resource extraction and development as quickly as possible, governments are inclined to erode environmental governance. In doing so they amplify risks of corruption. This includes anti-‘green tape’ catchcries intended to prevent community participation in the decision-making process, or to remove disinterested decision-makers in favour of politicians.<sup>8</sup>

<sup>1</sup> For example, the NSW Public Service Commission *State of the NSW Public Sector Report 2014* does not even mention corruption.

<sup>2</sup> NSW ICAC, *The exercise of discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005*, ICAC Report (2010) 4.

<sup>3</sup> NSW ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*, ICAC Report (2013); NSW ICAC, *Investigation into the Conduct of Ian Macdonald, John Maitland and Others*, ICAC Report (2013).

<sup>4</sup> WA Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, (2007).

<sup>5</sup> WA Corruption and Crime Commission *Report on the Investigation of Alleged Public Sector Misconduct in Connection with the Activities of Lobbyists and Other Persons – A Ministerial Decision in Relation to Applications for Mining Tenement at Yelirrie* (2009).

<sup>6</sup> Victorian Ombudsman, *Investigation into advice provided to the office of the Minister for Planning by the Department of Planning and Community Development in relation to land development at Phillip Island*, (2014).

<sup>7</sup> Keim SC and McKean, Clive Palmer, Jeff Seeney and Campbell Newman’s Straddie donation, *Independent Australia* (online), 10 June 2014 <<https://independentaustralia.net/politics/politics-display/seeney-palmer-and-campbell-newmans-straddie-donation,6564>>; Willacy and Solomons, Queensland LNP donor Karreman Quarries escapes prosecution for illegal quarrying after Deputy Premier orders legislation change, *ABC* (Online) 23 Jun 2014 <<http://www.abc.net.au/news/2014-06-23/karreman-quarries-escapes-prosecution-for-illegal-quarrying/5543896>>.

<sup>8</sup> For example the Commonwealth Government recently removed made the Minister solely responsible for making ‘methodology determinations’ which had previously been the responsibility of an independent committee when it expanded the *Carbon Farming Initiative to implement the emission reduction fund*, see *Carbon Farming Initiative Amendment Act 2014* (Cth) schedule 1 item 204 new subsection 106(4). See also Tony Fitzgerald, *Queensland must put a stop to the political rot*, *ABC* (28 Jan 2015) <<http://www.abc.net.au/news/2015-01-28/fitzgerald-queensland-must-put-a-stop-to-the-political-rot/6052310>>.



## The concentric circles of corruption

As the case of officials such as Eddie Obeid or Ian McDonald would suggest, corruption can fall within the space of criminality, comparable to theft or expropriation of public resources. This type of behaviour is clearly framed within anti-corruption statutes such as the *Independent Commission Against Corruption Act 1998* (NSW), which, among other things, identifies corruption with bribery, theft, fraud, and a range of other criminal offences. For centuries, English law outlawed such conduct by public officials under criminal and civil (tort) law, such as malfeasance in public office. This type of prohibition was intended to sanction public office-holders who were effectively 'on the take' as well as negligent or derelict in their duties, in what amounts to an abuse of trust or power.

Contemporary examples of such conduct can also be factored into Australia's long history of such corruption – and efforts to combat it – going back to the NSW 'Rum Corps' and its coup in the early 19th century.

There is a pattern of conduct and decision-making far more expansive than clear and explicit criminality that nevertheless falls within the scope of corruption – what might be called an 'outer circle' of 'soft' corruption, as against the 'inner circle' of 'hard', criminal corruption. This manifests commonly and

persistently in collusive dealings, influence, 'gaming' and 'rent-seeking' behaviours favouring private interests, especially powerful commercial interests, in the disposal and distribution of public benefits. Circumstances of corrupt and corrupting conduct beyond the sphere of direct criminality include:

- the transactional character of political donations to parties and candidates in the electoral cycle,
- deals amounting to manipulation of regulatory, legislative or administrative frameworks for the benefit of commercial interests,
- capture of regulatory systems by those interests and their lobbyists,
- selective public largesse and secrecy favouring private interests,
- circulation of personnel between public and corporate centres of power.

These practices and tendencies fall within our contention of corruption. This is a systemic corruption, which we consider further below. There are compelling and spectacular recent examples of these methods of perversion of the public trust, especially in the disposal of rights and access to environmental and natural resources.



## Example 1: Ian Macdonald and the handling of mining licences in NSW

Findings of corruption against former NSW Mining Minister Ian Macdonald by the NSW ICAC are now notorious. In a 2013 report, ICAC made findings that Macdonald had granted a very valuable exploration licence to an associate and friend, John Maitland, and others, effectively for no consideration. Macdonald acted partially, hence corruptly under the Independent Commission Against Corruption Act 1988. Maitland and others had findings of corruption made against them also, for other reasons. In addition, ICAC recommended that Macdonald should be charged with the common law offence of misconduct in public office. He was. He was found guilty of that offence by the NSW Supreme Court in 2017.

Macdonald's fate at the hands of NSW ICAC and the NSW criminal justice system was a cause célèbre and demonstrates the effectiveness both of the integrity institutions now well-established in that state and the criminal law in dealing with this form of corruption. Macdonald's conduct represents one end of a spectrum of corruption, arguably a model of corruption that liberal-democratic states must find intolerable: an overweening intrusion of personal motives and influences into the disposal of a highly valuable public, natural resources asset (a right to explore for mineral resources), clearly in breach of a Minister's exercise of public trust. Yet, the conduct ought also be seen in light of the structural and institutional arrangements that permitted Macdonald to act in this manner, the legislative framework for decision-making and disposal of permissive rights under the *Mining Act 1912* (NSW) (*Mining Act*). The NSW ICAC said of the decision-making framework under the *Mining Act*, in a 2013 report on coal resources management:

*In preparing this report, the question facing the Commission was not simply how the state's policy and regulatory framework could allow coal ELs [exploration licences] of great value to be corruptly provided to favoured recipients, but how it could have been so easy to do so. It is inconceivable that in any other portfolio area of government such value could be corruptly transferred from the state to favoured individuals with such relative ease...*

*Importantly, the current policy and regulatory environment creates a set of incentives that encourage manipulation of the system for substantial personal gain in the choice of areas to be released, the direct transfer of state assets to an individual mining company and the renewal of ELs to maintain control over the deposit. This is not a policy and*

*regulatory environment that would be considered acceptable in any comparable state operation.*<sup>9</sup>

One key factor is that the primary decision-maker under the *Mining Act* is the relevant Minister, who is not directly responsible to anyone and on whom there is no other direct oversight mechanisms. There are some limited requirements for registration of interests but, generally, it contains no mechanisms to ensure that the decision-maker, primarily the Minister, is disinterested in decision-making. At the same time, the *Mining Act* gives an extraordinarily large discretion to the Minister to make decisions under it. There are clear links between risks of corruption within the terms of the ICAC Act, and indeed criminality, and poor legislative design and resources governance.



<sup>9</sup> NSW ICAC, *Reducing the opportunities and incentives for corruption in the state's management of coal resources*, ICAC REPORT (2013) 6.



## Example 2: Rule-changes and profiteering in the Murray-Darling Basin

An investigation broadcast by ABC's *Four Corners* program in July 2017 exposed a high degree of industry capture over water management and rule-making in regional NSW.<sup>10</sup> The report identified how changes to rules governing the extraction of water from the Barwon-Darling River system were modified and relaxed after 'extensive lobbying by irrigators'.

These rules are set under Water Sharing Plans and, prior to amendment, intended to restrict extraction, especially by upstream irrigators, in order to bring water management for this system into conformity with the Commonwealth *Water Act 2007* and *Basin Plan 2012*.<sup>11</sup> Those Commonwealth laws establish extraction limits intended to achieve environmental sustainability, as well as social and economic outcomes, over time. A second mechanism under Commonwealth law used to achieve those outcomes is large-scale water buy-backs, using billions of taxpayers' dollars, and undertaking environmental water flows down the Barwon-Darling system.

The NSW rule changes permitted large, oligopolistic irrigators (now controlling around 70% of water in this river system, according to the *Four Corners* report) to appropriate to their private ownership, vast quantities of water, including water funded by

and sent down the river for environmental benefits. According to the *Four Corners* report, this outcome was made permissible by the rule changes achieved from the lobbying efforts of large irrigators. By implication, those changes are at the expense of both environmental benefits and the Commonwealth taxpayer. The original rules were integral to Water Sharing Plans intended to achieve a broad public interest and governed by laudable goals under NSW's *Water Management Act*. Those rule changes are potentially unlawful under Commonwealth law.<sup>12</sup> Nevertheless, through the effective exercise of private economic and political power, a small group of irrigator interests secured regulatory changes leading to immense benefits for themselves and control over a crucial natural resource – or 'profiteering' as it was described in the *Four Corners* report.

<sup>10</sup> ABC Four Corners 'Pumped: who is benefitting from the billions spent on the Murray-Darling?' Transcript, 25 July 2017, <http://www.abc.net.au/4corners/stories/2017/07/24/4705065.htm> (accessed 1 August 2017)

<sup>11</sup> See also EDO NSW 'Barwon-Darling Surface Water – Status and Issues Paper: EDO NSW Submission' 31 March 2017, [http://www.edonsw.org.au/water\\_management\\_policy](http://www.edonsw.org.au/water_management_policy) (accessed 1 August 2017)

<sup>12</sup> Ibid.





## Example 3: Mining industry capture of government in Queensland



Mineral resources are governed under legislation in all Australian State jurisdictions as a public resource to which access is permitted under regulatory (licensing) arrangements. Access rights to these resources ordinarily are granted to very large resources corporations. State governments obtain royalty payments in exchange for the grant of these rights. Mining companies have exceptional access to public decision-makers, including Ministers and governments, to the extent of exercising 'undue influence' over key resource allocation decisions, obtaining beneficial legislative changes, facing few restraints in assessment and approvals processes, and benefiting from circulation of personnel between industry and government.<sup>13</sup> Various legislative anti-corruption measures in Queensland, such as the Crime and Conduct Commission and control of lobbying activity under the *Integrity Act 2009* (Q), appear not to have a major constraining impact on the 'extraordinary access which mining companies have to decision-makers'.<sup>14</sup> The nature and extent of influence wielded by the mining industry over government raises, in the Australia Institute's analysis, concerns over 'the independence of government

decision-making in relation to mining'.<sup>15</sup> It is a state of affairs facilitated in Queensland (and arguably in other jurisdictions) by mining laws, which provide for a high degree of Ministerial discretion over decisions about disposal of rights to mining resources, accompanied by few if any serious controls or oversight on decision-making. The degree of private and corporate control and influence over political and administrative arms of government, in the case of access to development rights over a public resource (sub-surface minerals), is ultimately a distortion of democratic management of public resources for the broad public good. It represents an excess of corporate, commercial power and gain over the public interest.

<sup>13</sup> Hannah Aulby and Mark Ogge, *Greasing the Wheels: The Systemic Weaknesses that allow Undue Influence by Mining Companies on Government: A Queensland Case Study* (The Australia Institute, 2016), <http://www.tai.org.au/content/greasing-wheels> (accessed 1 August 2017)

<sup>14</sup> Ibid, 50

<sup>15</sup> Ibid, 2

## Example 4: Fast-track resources legislation

State governments have shown a propensity to ‘fast-track’ assessment and/or approvals of large-scale resources or development projects. Fast-tracking may concern significant infrastructure projects, such as road or rail projects, or it may concern granting of rights to natural resources, such as logging rights or mineral extraction rights. Infrastructure projects can include the fast-tracking of development rights.

The propensity for fast-track processes to merge into the privileging or prioritising of particular private and commercial interests is evident in examples such as the assessment and approval of a pulp mill in northern Tasmania in the late 2000s<sup>16</sup> and the expediting of approval of a water licence for Adani’s Carmichael coal mine project in Queensland.

A pulp mill in Tasmania’s Tamar Valley was proposed by resources company Gunns in 2004, as a means of establishing a production base for native forest logging in Tasmania, already a highly controversial industry. The proposal was to be assessed by an independent Resource Planning and Development Commission, but its work was subject to political and industry pressure which led to the resignation of the Commission’s chair and an expert member. The Commission refused to fast-track its processes and was critical of the proposal and conduct of the proponent, Gunns. Close, if not collusive, dealings between the proponent and the Tasmanian State Government culminated in calls for an independent corruption watchdog in Tasmania, notably following the Tasmanian Government’s decision to abandon the independent assessment process and pass ‘fast-track’ assessment legislation through the Tasmanian Parliament. The

controversy over and mass opposition to the pulp mill project contributed to the decline of Gunns.

The Carmichael coal mine water licence demonstrates the use of existing fast-tracking legislation in Queensland, in the form of the State Development and Public Works Organisation Act 1971 (Q), amended in 2006 in order to facilitate fast-tracking of developments.<sup>17</sup> Declarations of the coal mine project as a ‘prescribed project’ and as ‘critical infrastructure’ under the Act were unprecedented in support of a private sector proposal and the declarations permitted key accountability measures, such as review and appeal rights and proper assessment processes, to be avoided. This limited full consideration, as well as third party and community interrogation, of the project.<sup>18</sup> Given the scale, likely impacts (social costs) and commercial (private) benefits intended to derive from the Carmichael project, use of expedited, extraordinary powers to approve the allocation of a water licence poses questions of excessive assimilation of public and private corporate interests. This is further to issues of undue influence and inappropriate relationships as noted above.

<sup>16</sup> The Wilderness Society ‘Fast track pulp mill assessment’ <https://www.wilderness.org.au/pulp-mill-fast-track-assessment>; ABC News ‘The rise and fall of Gunns’, 28 September 2012, <http://www.abc.net.au/news/2012-09-25/gunns-timber-company-rise-fall-timeline/4235708>

<sup>17</sup> ABC News ‘Adani coal mine gains ‘critical’ status as Queensland Government moves to kick-start project’ 10 October 2016

<sup>18</sup> EDO Queensland *Legal Implications of the Declarations of Adani’s Carmichael Combined Project as a ‘Prescribed Project’ and ‘Critical Infrastructure’* (2016), <http://www.edoqld.org.au/news/adani-fast-track-powers-must-be-revoked-critical-infrastructure-status-should-not-be-misused/>



## ▼ 'Corruption'

Corruption is conventionally defined as the use of public power for private gain.<sup>19</sup> More detailed definitions of corruption and corrupt conduct can be found in state crime and anti-corruption Acts.<sup>20</sup> The NSW ICAC describes corruption in general terms as 'dishonest or partial behaviour, misuse of information or breach of public trust...' and 'conduct of any person... that adversely affects or could adversely affect the exercise of official functions by public officials.'<sup>21</sup> Particular types of illegal or improper behaviour, such as bribery, extortion, fraud, cartels, abuse of power, embezzlement, money laundering, tax evasion or collusive tendering, are included within the definition of corruption.

But where is the boundary between corruption and legitimate rent-seeking or lobbying? Corruption constitutes a basic threat to well-functioning political systems; it corrodes public trust in political institutions and without that trust the honest and cooperative functioning of society is at best problematic and more likely impossible. Corruption is contrasted to concepts of political and civic virtue. Politics should be about maximising the public good and establishing the structures to achieve those ends.<sup>22</sup> Corruption is antithetical to this state. After all, one of the principles underpinning a democratic political system is the presumption that governments are accountable to citizens.<sup>23</sup> Abuse of the public power entrusted to public officials undermines accountability and efficiency.<sup>24</sup> If public faith in political and administrative systems is undermined, disaffected citizens are liable to withdraw from electoral processes<sup>25</sup> and public participation, and/or produce instability in political systems.<sup>26</sup>

Teachout<sup>27</sup> writes of corruption as founded on moral practices above and beyond the criminal, and a particular orientation of private gain to public power.

In the contemporary setting, 'private' interests should be understood in the sense of including corporate and commercial power and interests – this is commonly how 'private' is contrasted, for instance, to the 'public interest.' 'Corruption', she writes,

*describes a range of self-serving behaviours... An act or system is corrupting when it leads to excessive private interest in the exercise of public power. People are corrupt when their private interests systematically overrides public good in public roles, when they put self-love ahead of group love. This is true if they are lobbyists or politicians, citizens or senators.*<sup>28</sup>

The implication of this approach is not that politics and public administration should be absolutely or ideally virtuous, or perfectly absolved of private interests. Some degree of consideration of personal advancement is inevitable in any human system and the point is not to create some impossible standard of individual virtue. But recognition of this reality should not lead to a confusion of the state's role with private interests. It is not proper that the *discourse and ethic* of the state is confused fundamentally or subsumed into that of private or corporate interests with which the state deals. There is a point – a powerful and emphatic point, definitive of the task of the state – at which public administration and the state stands apart, is distinguishable from and may well be antagonistic to private, corporate and commercial realities.

As Teachout remarks, corruption is a calculus of excessive private interest in the exercise of public power. It is a clear departure from the 'virtuous', or appropriate, conduct of public office; it is a denigration of that 'virtuous' approach, whether it be contained in a single act or contributing over time to incremental failure of or compromise to the integrity of public administration.

<sup>19</sup> Botero and Ponce, *Measuring the Rule of Law*, The World Justice Project – Working Paper Series WPS No. 001 (2010) 20 < <http://worldjusticeproject.org/factors/absence-of-corruption> >

<sup>20</sup> See for example *Crimes Act 1900* (NSW) s249B; *Crime and Corruption Act 2001* (QLD) s 15

<sup>21</sup> ICAC, *Corruption risks in development approval processes*, Position Paper (2007) p14. Such 'adverse effects' have been interpreted as constrained to 'adversely affecting' the probity, or integrity, of the work of public officials, rather than the efficacy (or functioning) of that work: *ICAC v Cuneen* [2015] HCA 14

<sup>22</sup> Zephyr Teachout, 'The anti-corruption principle' (2009) 94 *Cornell Law Review* 341; Zephyr Teachout *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press, 2014)

<sup>23</sup> Adam Przeworski, Susan Stokes and Bernard Manin *Democracy, Accountability and Representation* (Cambridge University Press, 1999)

<sup>24</sup> Pranab Bardhan, 'Corruption and development: a review of issue' (1997) 35 *Journal of Economic Literature* 3 1320

<sup>25</sup> Alberto Chong, Ana De La O, Dean Karlan, and Leonard Wantchekon 'Does corruption information inspire the fight or quash the hope? A field experiment in Mexico on voter turnout, choice and party identification' (2015) 77 *Journal of Politics* 1 55

<sup>26</sup> William Mischler and Richard Rose, 'Distrust and scepticism: popular evaluations of civil and political institutions in post-communist societies' (1997) 59 *Journal of Politics* 2 418; Tatiana Kostadinova 'abstain or rebel: corruption perceptions and voting in East European elections' (2009) 37 *Politics and Policy* 4 691

<sup>27</sup> Zephyr Teachout, 'The anti-corruption principle' (2009) 94 *Cornell Law Review* 341; Zephyr Teachout *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press, 2014)

<sup>28</sup> Teachout, *Corruption in America*, 276





## ‘Anti-corruption’

The antidote to corruption then is not merely the criminalisation of ‘hard’ corruption – abuse of office, theft, bribery and so on. That is necessary but it must also be governance structurally and culturally organised in order to make corruption, if not impossible, difficult, unviable and displaced by encouragement of integrity and ‘virtuous’ administration. As Alexander Hamilton wrote on preparation of the US Constitution: ‘nothing was to be more desired than that every practicable obstacle should be opposed to cabal, intrigue and corruption.’<sup>29</sup> This sentiment informs what Teachout terms the ‘anti-corruption principle’. It is equally a principle of administration, including environmental and resources governance. As much as at the level of government generally, good environmental and resources governance is most likely to exist in the collective (national) choice to ‘provide structural and cultural protections for the virtue of its citizens and its political leaders... those protections derive from the initial commitment to virtue of the citizens. Officials are corruptible, but also capable of great civic virtue – and every effort, including every structural effort, must be made to enable that virtue to flourish.’<sup>30</sup>

Much of the ‘structural and cultural’ response to the potential for corruption in environmental and natural resources governance is to be found in integrity measures and institutions. There are established statutory schemes, institutions and practices in environmental management contributing to the task of integrity and ‘anti-corruption’, such as independent courts and tribunals, judicial and merits review of decisions, ombudsman, independent advisory bodies, and so on. Despite these measures, there are circumstances in which the ‘excess of private interest’ in environmental governance does continue.

Corrupt practices require two essential factors: motivation and opportunity. Opportunity is the focus of this report. This can be a product of lax regulatory systems that prioritise speed and discretion over rigour and accountability. A satisfactory ‘structural and cultural’ response is essentially a matter of good governance. This necessarily includes important and powerful anti-corruption measures, such as controls on political donations, controls on lobbying and access by proponents to decision-makers, powerful anti-corruption and investigative agencies, mechanisms for complaint and the protection or reward of complainants, and adequate penalties for identified corruption.

A wider layer of anti-corruption devices is also instrumental to the project of good governance,

alongside direct combat of and disincentive to corruption. This layer includes:

- independent voices in decision-making;
- constraints on discretion;
- transparency; and
- accountability.

These are tools of an ‘anti-corruption’ approach. To be effective they must facilitate and contribute to the operation of key underpinning themes.

The first of these is that governance and administration operate within broad standards of integrity, which include legal standards of appropriate public conduct but also de facto and proxy standards maximising public virtues and outcomes in the design of practices and institutions. As the Murray-Darling Basin controversy noted above attests, the design of water plan rules favouring particular private and commercial interests, at the expense of the environment, other users and a wider public interest is an affront to a broad concept of public good and integrity in the disposition of public resources.

Secondly, these measures contribute to dispersal of public power. The more power is dispersed the more resistant it is to corruption. Dispersal of power is an antidote to corruption because it renders conspiracy, control and concentration of power difficult. Widening the base of actors with at least some power in decision-making means there is scope for accountability in how that decision-making power is exercised. In the case of disposal of mining interests by corrupt Ministers in NSW, such a transaction would likely be considerably more difficult where a grant of licence triggers independent assessment or advice, for instance, potentially frustrating capture by self-serving, well-connected interests.

Thirdly, a condition of dispersed power is public participation, including through civil society, which is to say participation in an organised fashion, through nongovernmental and community-based organisations orientated to the public interest. This idea extrapolates on a democratic principle that the citizenry itself is an important public entity; it bears obligations to demonstrate and to uphold integrity and the public good. The public-mindedness of the citizenry is essential to an ‘anti-corruption’ approach. Part of providing for expansive accountability on decision-makers, such as via merits or judicial review of environmental approvals or resource allocations, is diverse voices of challenge, contest or engagement capable of pursuing accountability. Those voices are to be in the citizenry.

<sup>29</sup> Cited in Teachout, ‘The anti-corruption principle’, 353

<sup>30</sup> Teachout, ‘The anti-corruption principle’, 375

## ▼ Designing environmental, planning and natural resources laws to minimise corruption risks

Every system depending on human decision-making and the distribution of resources is susceptible to corruption. Certain legislative schemes governing development, resources or environmental approvals contain prophylactic measures of 'structural and cultural' protection more than others.

NSW ICAC's report *Anti-Corruption Safeguards and the NSW Planning System* proposes 'six key corruption safeguards'.<sup>31</sup> These are:

1. providing certainty;
2. balancing competing public interests;
3. ensuring transparency;
4. reducing complexity;
5. meaningful community participation and consultation; and
6. expanding the scope of third party merits appeals.

These safeguards are a good starting point to identify design features in the law that can serve to minimise corruption opportunities and risk. We might consider them basic categories of risk management. They inform the analysis below, although we do not adopt all of them. The safeguards we propose are:

1. independence;
2. controlling discretion;
3. transparency; and
4. accountability.



## ► 1. INDEPENDENCE

An obvious risk to corrupt conduct in the making of decisions about resources allocations, development, planning or approvals is for the interests of the decision-making to overlap or intersect with those who may benefit from the decision. This is a classic situation of a conflict of the decision-maker's duty to make a decision in the public interest and the fact of them acquiring a private interest from the same decision.<sup>32</sup> For the sake of considering corruption, this conflict of interest (or more accurately, conflict of interests and duties) can be said also to extend beyond interests to factors such as improper motivations or inappropriate influences on the decision-maker. For instance, just as a Minister or official should not have a direct financial interest in a decision they are making,<sup>33</sup> they should also not make a decision in order to receive favourable opinions or because they are being extorted to make a particular decision. Also, decision-makers should not be appointed, for instance, because their views on certain issues are known to be favourable to the appointer or because the appointer knows the decision-maker will reciprocate for the benefits of the position with favourable decisions.

These are more obvious examples of the need for independence in decision-making – independence of decision-makers from particular and especially personal interests, and the requirement for them to uphold a general, or public, interest.

The idea of an independent decision-maker means not only are they *disinterested* and not subject to any inappropriate influence, but that they are free to exercise the discretion given to them motivated only by the correct application of the law and public interest.

Independence can function by way of rules or by design of the structures of decision-making or both.

### Rules to expand independence and minimise corruption risk

Rules to manage conflicts of interest are one of the main techniques employed to ensure degrees of independence in decision-making and thereby limit corruption risks. Prohibition and/or declaration of the giving of gifts is one set of rules. Any gifts or other benefits given to decision-makers should require declaration and

<sup>31</sup> ICAC, *Anti-Corruption Safeguards and the NSW Planning System*, ICAC Report (2012) 5.

<sup>32</sup> One generally accepted definition of a conflict of interest that illustrates the descriptive approach is: 'A conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities.' *Managing Conflicts of Interest in the Public Sector*, Organisation for Economic Cooperation and Development, 2003 15.

<sup>33</sup> The scope of conflicts of interest ordinarily also encompass family and personal relationships and associations: see for example See NSW ICAC, *Investigation into the Conduct of Ian Macdonald, John Maitland and Others*, ICAC Report (2013).

automatically exclude the recipient from participating in the decision. This issue is usually most focussed on gifts to politicians,<sup>34</sup> however recent examples such as the East-West Link road project in Victoria have illustrated how it is equally applicable to public officials.<sup>35</sup>

If declarations of gifts are kept on internal registers that are not publicly available, it will do little to prevent corruption. Public scrutiny is vital for proper accountability. Equally it is important to be aware of the risk that having declared something does not then justify making a conflicted decision. Receipt of a gift should mean prohibition on participation in relevant decision-making.

A well-established set of rules should prohibit someone making a decision where there is a risk they will not do so with an open mind or impartially; that is, the rule against bias. Its Latin origins are instructive – *nemo iudex in causa sua*: ‘no-one shall be a judge in their own cause’. This is a relatively narrow constraint. It applies to the decision-maker personally, not to the structural, cultural or institutional conditions in which decisions are made, nor to any (dys)functionality in the decision-making process.<sup>36</sup> If an advisor to the decision-maker, for instance, inappropriately benefits from the decision this does not necessarily affect the validity of the decision.<sup>37</sup> Obligations of disclosure and disqualification can go further than this where legislation requires, such as extension of those obligations to any direct or indirect interests which may give rise to a perception or concern about the propriety of the person’s involvement in any part of the decision-making process.<sup>38</sup>

In addition to expanded disclosure and disqualification rules, relevant legislation could establish an offence to fail to disclose an interest, with a sufficient penalty to

deter non-compliance. Such criminalisation would add greater force to sanctions than simply relying on the misconduct provisions of the relevant public service Act.

Other rules reinforcing independence in administrative decision-making include controls on the activities of, and registration requirements for, political lobbyists, including prohibition periods on Ministers and senior public officials becoming lobbyists.<sup>39</sup>

### Arms-length practices in response to gaming and rent-seeking

Rules supporting good governance will mitigate corruption risk. However, formal rules seeking to expand independence in decision-making and constrain decision-makers’ conflicts of interest will not necessarily avoid or mitigate more institutionalised ‘gaming’ of decision-making systems, or manipulation of flows of wealth which may be strictly legal but ethically problematic. Cameron Murray and Paul Frijters<sup>40</sup> have analysed this type of economic rent-seeking behaviour in planning and rezoning decisions, in which well-connected and powerful networks (often across industry, lobbying and political circles) bring influence to bear on public authorities (such as local councils) in order to achieve windfall financial gains from planning decisions. This conduct is also sometimes referred to as ‘land banking’. Its consequences include what the authors refer to as ‘grey corruption’.<sup>41</sup>

Extrapolating from their direct study into economic rents derived from favourable rezoning decisions in six locations, Murray and Frijters argued that it is likely that billions of dollars in economic rents are being transferred from the ‘general population’ to well-connected landowners. This type of ‘gaming’ the

<sup>34</sup> See for example a list of mining company gifts in Queensland prepared by the Centre for Media and Democracy, available at <[http://www.sourcewatch.org/index.php/Gifts\\_to\\_Queensland\\_Government\\_ministers\\_from\\_coal\\_related\\_companies\\_and\\_key\\_individuals](http://www.sourcewatch.org/index.php/Gifts_to_Queensland_Government_ministers_from_coal_related_companies_and_key_individuals)>.

<sup>35</sup> Clay Lucas, ‘Questions raised over gifts and hospitality for East West Link public servants’ *The Age*, (Victoria) 27 October 2014. < <http://www.theage.com.au/victoria/victoria-state-election-2014/questions-raised-over-gifts-and-hospitality-for-east-west-link-public-servants-20141027-11abts.html>>.

<sup>36</sup> See e.g. Aaronson, Dyer, Grove, *Judicial Review of Administrative Action*, 4th Edition (2009), 640: ‘Neutrality cannot simply be an attitude on the part of the decision-maker. It must extend to the wider process within which the person operates. That distinction highlights an important limitation of the bias rule because it can be argued that many of the cases focus on the perceived neutrality of the decision-maker and pointedly shy away from any assessment of the wider process.’

<sup>37</sup> *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51.

<sup>38</sup> See for example *The Wilderness Society of WA (Inc) v Minister For Environment* [2013] WASC 307, where the Supreme Court of Western Australia found decisions made by the Environment Protection Authority (EPA) and a consequent decision made by the Minister relying on the decisions of the EPA were invalid because the EPA officers, including the chairperson, who made the decision had direct and indirect interests in the matters that they were required to decide. Under the *Environment Protection Act 1986* (WA), EPA members must disclose any direct or indirect pecuniary interests and if they do have any such interest they are prohibited from participating in the consideration of the matter.

<sup>39</sup> NSW ICAC, *Investigation into Corruption Risks Involved in Lobbying*, ICAC report (2010).

<sup>40</sup> Cameron Murray and Paul Frijters, ‘Clean money, dirty system: connected landowners capture beneficial land rezoning’ (2016) 93 *Journal of Urban Economics* 99

<sup>41</sup> See their blog at <https://renegadeinc.com/game-of-mates-nepotism-is-costing-the-economy-billions/>



system can occur in any planning or resources law framework in which decision-making is discretionary and lacks transparency and independence.

Murray and Frijters propose certain economic tools to mitigate against this conduct, such as the auctioning development rights or taxing land values. But a further proposed approach is to have rezoning decisions made by a panel of (international) experts, comparable to a randomly selected jury, rather than by political allocation. This mechanism would give the decision-making panel two potential buffers against captured interests: an ad hoc connection with the decision and the culture and norms of professional expertise.

## ► 2. CONTROLLING DISCRETION

The risk of corrupt decision-making is greater where the scope of lawful decision-making is broader, unconstrained, or unchecked.<sup>42</sup> 'A greater degree of subjectivity and flexibility in the planning system (including the potential for established controls to be overridden) leads to greater likelihood of corrupt behaviour.'<sup>43</sup> Excessive discretion provides 'a convenient cloak for corrupt behaviour, which makes detection more difficult'.<sup>44</sup> This conclusion was reinforced two years later in a further report which said that, 'corrupt approval of building projects was achieved through the device of discretionary aspects of the *State Environmental Planning Policy*'.<sup>45</sup>

The Productivity Commission also conducted an inquiry into major project development assessment processes in 2013, including in its findings, among other things, that the existence of broad ministerial discretion in these circumstances increases 'the proclivity to corrupt practices'.<sup>46</sup> These are large-scale projects, often the subject of and politicised decision-making and concerning large amounts of public monies. The broad discretion typically accompanies a form of exceptional, 'fast-track' decision-making.

Corruption risk in the exercise of administrative or executive powers in planning, natural resources

or environmental governance lies in concentrated, vaguely qualified or unaccountable power. This is a corollary of the old adage that power corrupts and absolute power corrupts absolutely. It is more common than not that discretion is a prominent feature of schemes established under environmental and natural resources laws, even where such discretionary decision-making contains conditions or qualifications.

There is a range of techniques of law and policy that can or do serve to ameliorate corruption risk lying in broad decision-making power.

The first set of techniques is the existence and operation of conditions or controls on the exercise of discretion. A species of this approach is relatively commonplace under Australian environmental and natural resources laws. The common approach is to include a list of factors that must be considered when making a decision. This leaves a broad discretion for decision-makers. For example the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) lists a comprehensive range of both general factors for all actions and additional specific factors that must be considered for each controlling provision.<sup>47</sup> This is undoubtedly a better approach to managing Executive discretion, although a broad discretion remains. Take for example the decision on Victorian Government's alpine grazing trial. A Commonwealth Labor Minister found this trial to be 'clearly unacceptable'.<sup>48</sup> A subsequent Coalition Minister found it sufficient to allocate the same action to the lowest level of assessment and approved it.<sup>49</sup> This example illustrates how easily the system can deliver variable results depending on the decision-maker's motivations.

There are fewer legislative schemes that go beyond simply listing factors that must be considered and set binding conditions or qualifications on decision-making. Yet it is likely such controls on the exercise of Executive power are needed to contribute to the accountability of power. This is an approach, for example, typical of US environmental laws, such as the Endangered Species Act, where Congress

<sup>42</sup> ICAC, *Corruption risks in development approval processes*, Position Paper (2007) p23; This issue is also described as the 'certainty' of decision-making ICAC, *Anti-Corruption Safeguards and the NSW Planning System*, ICAC Report (2012) 5.

<sup>43</sup> ICAC, *The exercise of discretion under Part 3a of the Environmental Planning And Assessment Act 1979 and the State Environmental Planning Policy (Major Development)* (2005), ICAC Report, (2010), 6.

<sup>44</sup> ICAC, *The exercise of discretion under Part 3a of the Environmental Planning And Assessment Act 1979 and the State Environmental Planning Policy (Major Development)* (2005), ICAC Report, (2010), 9.

<sup>45</sup> ICAC Report, *Anti-Corruption Safeguards and the NSW Planning System* (2012) 8.

<sup>46</sup> Productivity Commission, *Major Project Development Assessment Processes*, Research Report, Canberra (2013) p115 (reference omitted).

<sup>47</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Part 9 Division 1 Subdivision B.

<sup>48</sup> EPBC Reference Number: 2011/6219 < [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=6219](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=6219)>. That is, the 'action' was so environmentally damaging that it was not even worth assessing under the Act and could not go ahead.

<sup>49</sup> EPBC Reference Number: 2013/7069 < [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=7069](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=7069)>.

has established strong direction and controls on Executive decision-making. The consequences have been relatively successful environmental laws, subject to a high degree of scrutiny.<sup>50</sup>

A second technique is to bring within the framework of decision-making requirements for decisions to be informed by independent, including expert, advice or concurrence. The involvement of independent actors ensures others are aware of the issues associated with the proposed decision and/or approval. It adds rigour to the process and it is more difficult for decisions merely to reflect private interests.

By having to adopt or at least consider the independent views of experts on the merits of any decision or element of it, a hurdle is created for anyone seeking to misuse a discretion or inappropriately influence a process.

The type of advice required may vary considerably. Examples include advice from council officers,<sup>51</sup> from other government agencies, from impact or other assessments, or other subject-matter expertise.<sup>52</sup> Requirement for the concurrence of an advisory body is an exceptional, but powerful, control<sup>53</sup> on any improper exercise of decision-making power. Even requirement for consultation of an expert or advisory body is a valuable integrity tool.<sup>54</sup>

Where a decision-maker is required to consider or consult on advice provided, an additional integrity measure of significance is an obligation on them to justify a material departure from the advice. This measure may operate alongside a requirement on a decision-maker to provide reasons to deter impropriety.

A third approach to the management of discretion, which might overlap with the use of expert bodies, is the dispersal of decision-making power among more than one decision-maker. Giving decision-makers joint responsibility for decisions or responsibility for constituent parts of decisions, rather than sole responsibility for all the approvals required to be able to undertake a particular activity or development, also indicates a lesser corruption risk. This may be for example by having decisions made by a vote of a local council or by having different decision-makers responsible for

different regulatory approvals required for the project to be undertaken. This is by no means infallible and certainly local councils have not proven to be above corrupt decision-making but it is an element of the process that can, in conjunction with others, be used to reduce risk.

NSW ICAC has given support to reforms involving multiple agencies and decision-makers in decision-making processes.<sup>55</sup> In a similar manner, under Victorian planning law, specialist departments and agencies (such as water authorities or the Environment Protection Authority) are often required to act as 'referral authorities' in development decisions. This provides both specialised input into decisions and a measure of external oversight.

There may be criticism of this approach for increasing complexity and delaying development. There can be validity in those criticisms. However, what is being advocated here is not duplication but divisions of responsibility. The point to note is that trade-offs for any potential benefits can increase the risk of corruption and poor governance. Calculations within this balancing act (expediency versus caution) should take care to arrive ultimately at an outcome that strongly favours integrity and long-term legitimacy in the decision-making process.

### ► 3. TRANSPARENCY

Public awareness of, and public participation in, decision-making are basic anti-corruption measures. These factors are an integral to the 'disinfectant' qualities of transparency and accountability in public administration. As the NSW ICAC has remarked:<sup>56</sup>

*Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision.*

Public awareness of decisions being made, together with the opportunity to engage with applications, provide meaningful ways of protecting against decisions being made quickly and quietly, hidden in the vast volume of administrative activity.

<sup>50</sup> Centre for Biological Diversity, 'The Endangered Species Act: A Wild Success', [http://www.biologicaldiversity.org/campaigns/esa\\_wild\\_success/](http://www.biologicaldiversity.org/campaigns/esa_wild_success/)

<sup>51</sup> ICAC has noted the concerns it has received about council decisions giving development consent against council officer advice and recommended that statements of reasons for all decisions be given (see below under criterion 5). ICAC, *Corruption risks in development approval processes*, Position Paper (2007) 6.

<sup>52</sup> E.g. advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development: *Environment Protection and Biodiversity Conservation Act 1999* s 131AB

<sup>53</sup> See e.g. the role of the Domestic Offsets Integrity Committee under the now repealed section 106 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*

<sup>54</sup> For example the function of the Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development noted above

<sup>55</sup> ICAC Report, *Anti-Corruption Safeguards and the NSW Planning System* (2012) 30.

<sup>56</sup> Ibid, 19

## Disclosure of environmental information

Information ought to be available in accessible, relevant and manageable forms. At one level, transparency concerns public disclosure, by proponents of actions as well as public agencies and officials. Information on actual or potential environmental impacts, for instance, should be disclosed alongside conflicts of interest in decision-making processes. Such obligations should be broad, as we have noted above, such that exposure of interests includes figures such as associates<sup>57</sup> and the scope of disclosure might include records of environmental management,<sup>58</sup> overseas practices,<sup>59</sup> or conduct in other industries or contexts. This type of information can be crucial to transparency, as can more mundane requirements for, say, notice of applications for grants or approvals, or publication of decisions on applications and the reasons for them.

## Proactive provision of environmental information

It is insufficient that environmental Information is disclosed merely on request. Vast quantities of environmental information, material to the public and environmental management, are held by private actors and government. Such material is essential to properly informed governance. Environmental information itself is frequently part of the 'commons' of resources intrinsic to good governance. The functioning of public 'trusteeship' over the environment is not possible without an information base from which to do so and this implies certain, key rules and institutional approaches: in particular, that public authorities obtain, disseminate publicly and update environmental information relevant to their functions. Transparency requires this proactive model of disclosure.<sup>60</sup>

## Accessibility

Accessibility of information can also mean having information readily available in a manner that permits scrutiny and response. For instance, the granting of permits or licences or development rights can provide opportunities for corrupt conduct where knowledge of these processes is obscure or secretive. Obligations for mandatory registration of applications for permits or licences, available on the internet, are one tool for ensuring public knowledge of these decision-making processes.

## Practices of transparency underpinned by legislative obligation

Practices and cultures of disclosing relevant information on and around a decision are important in themselves but, to be effective and authoritative, those practices and cultures need to be underpinned by clear obligations to do so, in particular legislated obligations. High standards of disclosure on both proponents and on public officials are consistent ultimately with the fact that what is involved here – what underpins transactions and dealings around natural resources, environmental impacts and/or development – is very often resources and benefits held on public trust. Public resources and facilities, whether minerals resources, development rights, emission or waste disposal rights, should not be traded or transacted as though they were private commodities. To that end, high standards of accessibility and governance of information are essential. Additionally, effective transparency requires information to be in a form appropriate to managing the interests at stake. For instance, applications for licences or approvals will not be transparent if key issues of concern are buried in volumes of technical information that is not explained to lay audiences who may be affected by them. Rules concerning transparency should not at the same time facilitate strategies of obfuscation, which can then be used as opportunities for improper conduct. Those rules should make clear, as far as practicable, the real issues and interests of concern in any decision-making process.

## ► 4. ACCOUNTABILITY

Within the ambit of transparency and accountability, there is a second major feature of decision-making crucial to minimisation of corruption risk: scrutiny. Scrutiny and accountability mechanisms have evolved along four pathways in relation to environmental, resources and planning decisions.

### Parliamentary scrutiny

The first method is the traditional accountability and supervisory approaches of the Parliamentary system. If decision-makers such as Ministers are invested with powers by Parliament they are, as members of the Executive Government, accountable to Parliament for the actions. Scrutiny in Parliament

<sup>57</sup> NSW ICAC, *Investigation into the Conduct of Ian Macdonald, John Maitland and Others*, ICAC Report (2013) 8.

<sup>58</sup> See for example *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(4).

<sup>59</sup> See for example *Environmental Justice Australia The Adani Brief* (2017), <https://envirojustice.org.au/adani-brief-documents>

<sup>60</sup> See by comparison, *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention), Article 5



occurs by interrogation of Ministers, via committees reporting to the House, or disallowance of delegated legislation. As weakened as Parliaments may be by strong Executive control, they do provide at least some degree of accountability.

### Judicial scrutiny

The other powerful mechanism of accountability occurs through the courts and their supervisory jurisdiction to review government decisions and ensure they accord with the law. Improper, unlawful, or unreasonable decisions (all of which might characterise corrupt decisions) can be exposed in the courts, where challenged, and where appropriate invalidated.

### Administrative scrutiny and the 'integrity branch of government'

The limitations on Parliamentary and judicial accountability over public administration gave rise from the 1970s onward to the now-entrenched accountability mechanisms of the 'new administrative state', including Ombudsman and independent review tribunals. These exist in all Australian jurisdictions. They are cornerstones of the 'integrity branch of government'. They reach into decision-making on resources, planning and environmental matters.

Merits review of decisions improves the quality of decision-making. One of its key attributes therefore is its contribution to governance generally. Within this broader scope the value of merits review before independent tribunals must also be then contributed to the integrity of decision-making and to propriety. As ICAC has noted:

*[ICAC] considers that the availability of appeal rights for objectors introduces the possibility that a development approval obtained by corrupt means can be overturned on appeal, and can inhibit corrupt conduct. It therefore favours broader third party appeal rights for certain categories of significant development.*<sup>61</sup>

Such safeguards are realised through inherent features of the merits review systems: public participation, the re-making of decisions in a public forum, the

quasi-judicial testing and scrutiny of decision-making, and reasoned outcomes. As valuable as these features are, of course they are invoked only where review of an original decision can be or is initiated. Independent tribunals do not conduct their own inquiries and investigations. They do not challenge untoward actions on their own initiative.

Emerging from this pathway has been the third wave of integrity measures and institutions essentially constituted to tackle issues of corruption head-on. This is the development of anti-corruption commissions as a form of standing Royal Commission intended to combat corruption. Such initiatives arose largely from corruption scandals in the 1980s and 1990s in jurisdictions such as NSW and QLD. They have been described as representative of the 'new morality in public administration', one by which not only should public office not be employed for private gain but that those 'with wider powers, such as Ministers, should observe higher standards than others'.<sup>62</sup> Within this context, ICAC-type machinery has been at the forefront of insisting on high public standards of governance, including through rigorous investigation and inquisitorial procedures – that is, proactive scrutiny by the state into improper conduct. This type of vanguard machinery is not available in all jurisdictions, however. Most notably, it is absent in the sphere of Commonwealth decision-making.

### Performance monitoring, or technocratic scrutiny

There is a fourth domain of accountability and scrutiny which can be said to be specific to environmental and natural resources decision-making. These are the tools of environmental monitoring, reporting, and scrutiny of performance. Not strictly concerned with probity in decision-making, but rather its *efficacy*, the value and force of these mechanisms in decision-making is structural or cultural: they contribute to effectiveness, competence and rigour in the performance of obligations. For actors, managers or 'users' operating under environmental and natural resources schemes that scrutiny of performance is likely to contribute to *norms* of proper conduct.

<sup>61</sup> ICAC, *Corruption risks in development approval processes*, Position Paper (2007) 6.

<sup>62</sup> Allars, 'In search of legal objective standards: the meaning of *Greiner v Independent Commission Against Corruption*' (1994) 6 *Current Issues in Criminal Justice* 1107, 127

## Conclusion

At its best and most innovative environmental law can supply a complement of tools and mechanisms that, well aligned, comprise 'practicable obstacles... opposed to cabal, intrigue and corruption'. These are seen in structural and cultural features contributing to independence of decision-making, strict controls on the exercise of Executive discretion, proactive transparency, and broad-based accountability.

Governments presently are reluctant to proceed in this direction. We see legislation and conduct to fast-track development rights or resource allocations in favour of particular commercial interests, legal tax loopholes advantaging large corporate actors,<sup>63</sup> systemic and tenacious rent-seeking by developers or resource holders, government favours to particular businesses or sectoral interests, entrenched clientelism among politicians and powerful corporate resources interests, and business lobby campaigns against important tools and conditions for environmental advocacy. All of these are representative of tendencies within politics and public administration corrosive of public virtue and interests, the moral authority of government, and standards of integrity to be reasonably expected in an advanced democratic society.

Given the potential for personal gain and the number of high-profile instances of proven corruption, vigilance against corruption must be a permanent fixture of environmental and resources governance.

In spite of the challenges there are a number of relatively simple yet significant measures that could be taken to reduce corruption risk. It is unlikely that other areas of government would tolerate such a risk.<sup>64</sup> We have sought to outline some of these above.

Corruption risk in Australia can, to a significant degree, be said to coincide with excessive concentration of decision-making power in the hands of Executive Government and perhaps an accompanying, if historical, trust in the integrity of the Executive. Our constitutional system that draws members of the executive from the legislature naturally enough means that parliaments are more likely to trust the members of the executive. This can be contrasted with the system that exists for example in the US system where the legislature and the executive are clearly separated.

Despite recent corruption findings and general community concern about the issue, the current trend seems to be away from protections and accountability measures. Increasingly governments are favouring 'streamlining' and reducing 'green tape'. This agenda emphasises concentrations of decision-making power. By extension, it increases corruption risk.

An important way to deal with these issues is at the governance design stage. Much of Australia's environment and planning legislation is in need of updating. As part of this exercise significant changes should be made to address the corruption risk, which will also improve the quality of decision-making.



<sup>63</sup> Michael West 'Exploring the rise of private power: Senate inquiry told zero tax or royalties paid on Australia's biggest new gas projects' *The Conversation*, 10 May 2017

<sup>64</sup> NSW ICAC, *Reducing the opportunities and incentives for corruption in the state's management of coal resources*, ICAC REPORT (2013) 6.

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