



Transport for Melbourne: Governance and Decision-making in the Public Interest

Public Forum, Richmond Town Hall, 27 October 2017.

Governance of the Melbourne city-state

by Ken Coghill

In these comments, I will focus on principles affecting governance and decision-making in the public interest rather than commenting on the merits of particular projects. After some introductory comments, I'll first describe some internationally accepted principles to which Australia is party, secondly outline integrated governance and thirdly discuss some features of better governance.

My remarks will reflect the reasons for the creation of the Accountability Round Table. We came together out of a shared concern that governments, by which we meant the Executive Government – ministers lead by the premier or prime minister– was not effectively held to account for the discharge of ministerial responsibility i.e. for decisions they made and actions they took.

Those public sector decisions and actions lie at the heart of the extent, quality and distribution of goods and services available to the people, whether provided directly by government, under contract or subject to laws and regulations.

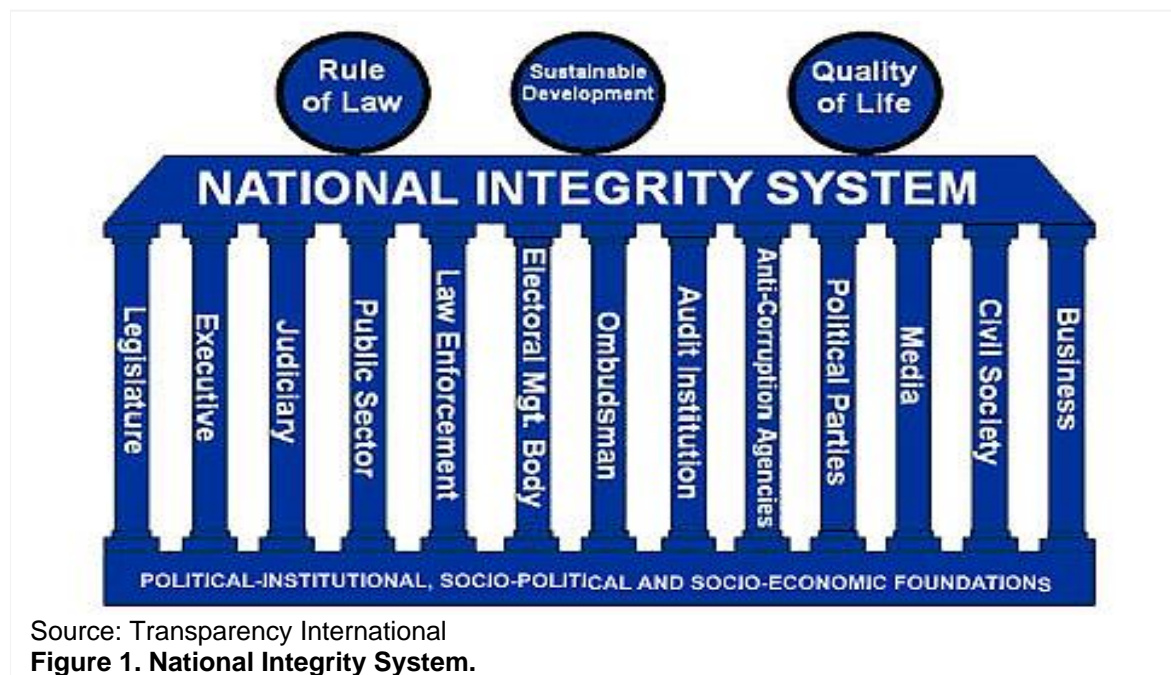
In a parliamentary system of government, that accountability is to the parliament in the first instance. We saw accountability as an important part of the checks and balances that constrain the risks of wasteful, unethical or corrupt misuse of political power and public resources.

Accountability has certainly failed in some instances, but whether or not accountability has got worse overall is a moot point. We say that it could and should be better and that that would lead to better use of resources, better infrastructure and better services.

That concern to improve accountability has led us to a wider concern with integrity and the effectiveness of the integrity system, shown in Figure 1.

The Integrity System has many components, depicted here as pillars of a temple. Our concern today is with the public sector pillars but note that business and civil society also play roles, to which I shall return.

Although today's forum arises from concerns about the governance of transport in Melbourne, these concerns apply to governance more broadly across policy areas and all levels of government.



Firstly, let's look at the fundamental features of what we are considering.

Transport for Melbourne is transport that is part of a global network. Melbourne exists because it is an international seaport and an international airport.

Within Australia, Melbourne is a major national hub and logistics centre. The Federal Government is constrained by its constitutional powers but uses its strong revenue base to influence priorities and the scale of infrastructure spending.

Within Victoria, it is useful to think of Melbourne as a city state – a dominant metropolitan area and a rural hinterland – a zone with fuzzy porous boundaries of economic and cultural influence that stretches across the state's political border, especially into the Riverina.

The metropolitan area is a hodgepodge of fragmented local government areas that are mostly either too weak, too under-resourced or too over-awed by the State Government to provide effective input to Melbourne's overall strategy. Rural local governments are especially under-resourced.

The City of Melbourne is an exception as one of a many major local governments worldwide that are strong enough to take initiatives and collaborate with sister-cities in cultural and other economic activities independently of national or state/provincial authorities.

Let us turn to the governance of this Melbourne city-state, thinking first in the abstract without considering the finer points of who does what.

International principles- Open Government Partnership.

Australia is one of 75 national government members of the Open Government Partnership (OGP). Members are a mix of low, middle and high income democracies. There are threshold membership liberal democratic conditions such as freedom of information laws but importantly each member must commit to a Declaration that includes four principles:

- Increase the availability of information about governmental activities.
- Support civic participation.
- Implement the highest standards of professional integrity throughout our administrations.
- Increase access to new technologies for openness and accountability.

The first principle (*Increase the availability of information about governmental activities*) is entirely consistent with William McDougall's comment that "investment of taxpayers' funds ought to be done with full transparency and accountability." However, it is not just about accountability. One of the founders of OGP quoted Daron Acemoglu and James Robinson (Acemoglu & Robinson, 2012) as arguing "that open political institutions are critical to whether nations succeed or fail". That was the then-Prime Minister of the UK, David Cameron. He went on to cite and compare the economic performance of several countries to support the point (Cameron, 2013).

The second principle (*Support civic participation*) is about doing things very differently than is commonplace in Australia. It is about taking the public, especially people affected by prospective decisions on resource allocation or other policy and actively involving them, using appropriate techniques along the public participation spectrum which ranges from merely informing; or consulting; or collaborating; or involving; to empowering – see **Figure 2** (Victorian Auditor General's Office (VAGO), 2015).

Here in Yarra City, the Council Plan provides that "Transparency, performance and community participation drive the way we operate". The website includes Council's **COMMUNITY ENGAGEMENT SUMMARY REPORT YARRA 2021: HELP SHAPE THE NEXT FOUR YEARS** (Yarra City, 2017).

Elsewhere, councils and governments have found that civic engagement can lead to better decision-making, especially concerning wicked problems. In Australia's case, civic engagement has led to establishment of the Open Government Forum, a body with equal numbers of senior public service and civil society nominees, of which I am one. We are charged with developing reform commitments that advance open government and with overseeing the implementation of those commitments over two-year cycles.

The third principle (*Implement the highest standards of professional integrity throughout our administrations*) brings us to the importance of corruption control or integrity commissions, to back up codes of conduct and statutory provisions in every jurisdiction. In this city-state, it is IBAC within areas of State and local government and the equivalent bodies across the NSW and South Australian political borders. IBAC has uncovered a surprising level of corruption in its short life and currently has at least one allegation affecting a Member of the Victorian Parliament before it.

Victoria's IBAC addresses one of William McDougall's key concerns and NSW ICAC has had well known successes. but it is important to remember that reducing the risk and the reality of corruption is a constant, never-ending task.

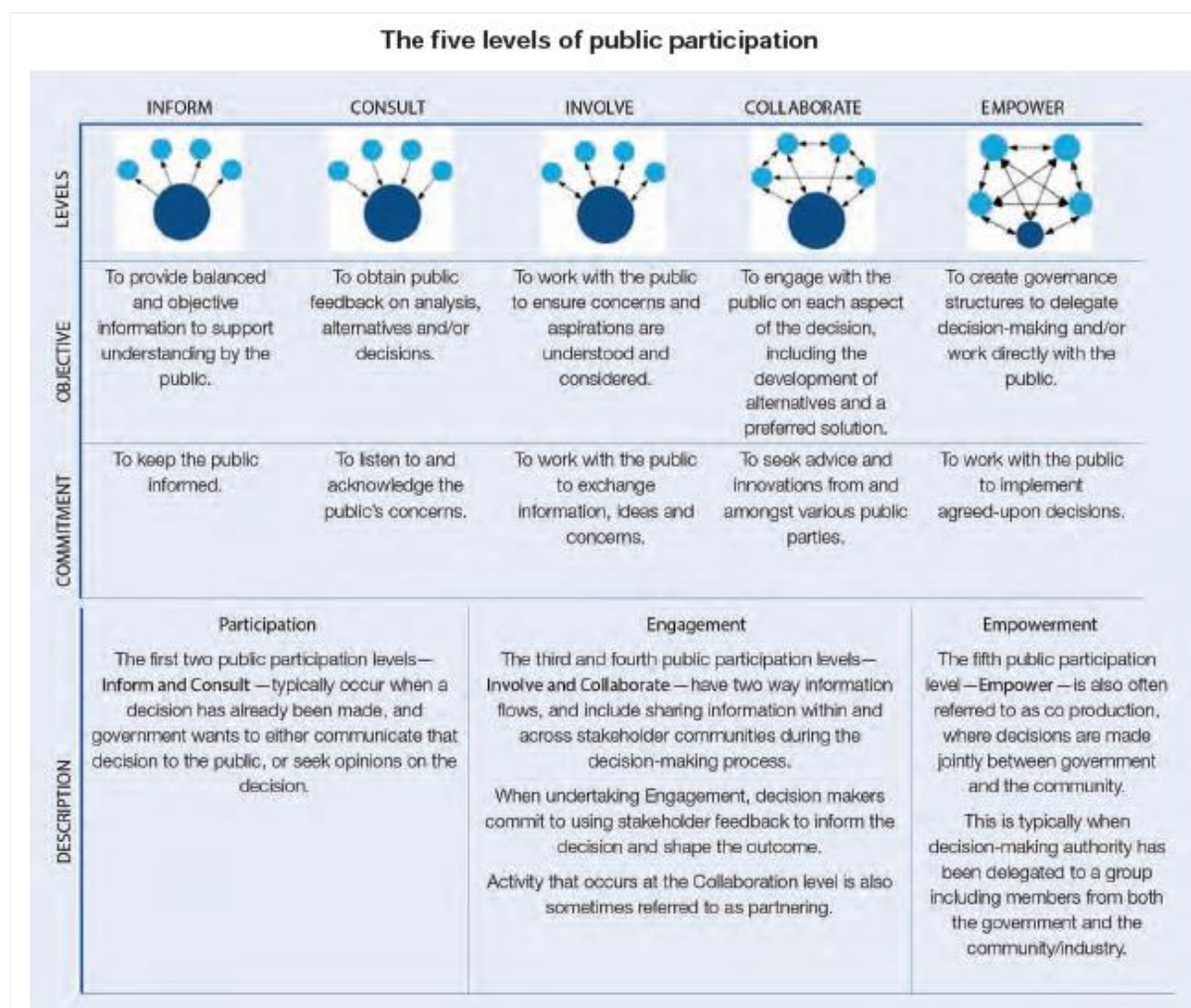
There is no Federal body with equivalent comprehensive powers. However, the Melbourne transport projects discussed today are not Federal government projects. In a different context, we should be concerned at the resistance to a Federal commission.

The fourth principle (*Increase access to new technologies for openness and accountability*) needs little explanation to a Melbourne audience.

All four of these principles can be seen as about more than civil and political rights. The Declaration is based on the premise that open government will enhance social and economic conditions.

Although OGP membership is primarily national government, there are pilot projects extending to sub-national government – state or provincial and city – but there are not any yet in Australia.

Each principle is relevant to the governance of the Melbourne city-state.



Source: VAGO, *Public Participation in Government Decision-making*, January 2015, adapted from IAP2.

Figure 2. Public Participation Spectrum.

Integrated governance

Let us now turn to the governance system to which such principles are applied. I'll begin at a quite abstract level which I hope assists understanding of how governance operates in the Melbourne city-state. I call this Integrated Governance. In this model, the community is the population living within the geographic area, the society is the social structure through which the community organises its activities and relationships.

Political science recognises three basic social sectors in contemporary communities – the state, civil society and the market. Each sector performs certain social functions rather than being defined by institutions which perform those functions.

Thus

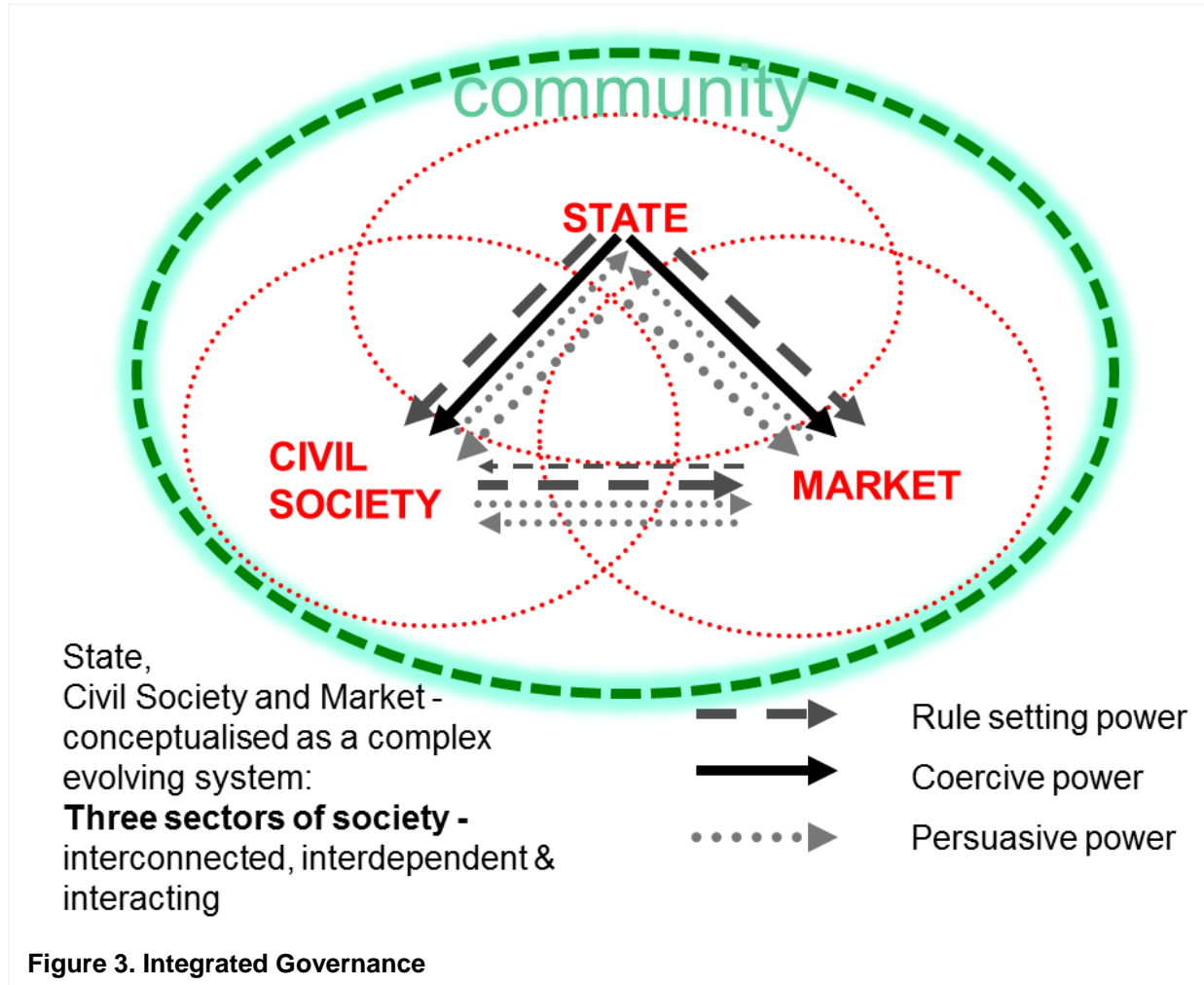
- the State takes policy action and has a monopoly on rules setting via primary legislation and the use of coercive force.
- Civil Society performs functions such as advocacy, mutualism, spiritualism and specifying occupational standards.
- The Market provides and supplies goods, service and externalities.

These sectors interact and are interdependent with each other.

The relative strength and size of each varies between communities and over time - for example, the Victorian State sector exercises less intervention in the market now than before the Kennett Government and the Church's influence is weaker.

The sectors overlap. For example, Yarra City functions like civil society in advocating its community's interests to State Government and business, as a market actor if it were to hire out its machinery and as state sectors within its boundaries.

The relationships between sectors and their actors are crucial to the functioning of governance. These relationships involve three types of power: rules-setting power; coercive power; and persuasive power (Figure 3). The ways in these relationships operate determines how the governance system operates.



If we apply this framework to Melbourne city-state transport, we see that the Victorian State Government is the dominant institution performing the state function and that there are powerful market sector business interests involved in the design, construction and operation of transport, controlled by Government. Civil society exerts its persuasive power through scholars, interest groups such as Transport for Melbourne, through political parties and through professional associations.

Some business interests donate to political parties. These donations tend to favour political parties in government or expected to win the next election.

Actors in each sector are subject to certain legal and ethical rules and cultural norms which drive relationships and hence outcomes of governance.

The governance system is more effective when there are good, constructive and trusting relationships between actors. In economic jargon, there are reduced transaction costs.

Conversely, transaction costs are increased by poor communications or corrupt relationships: good decision-making is undermined or distorted.

Let us now turn to some of the more important rules and norms.

Steps towards better governance

The very purpose of a democracy is to serve the aggregate interests of the community. As Saward puts it, democracy is “responsive rule” being the “necessary correspondence between acts of governance and the equally-weighted felt interests of citizens with respect to those acts” (Saward, 1996). This contemporary understanding of democracy goes hand in hand with an ancient legal principle dating from the Justinian code created early in the sixth century AD - the public trust principle, or public trust doctrine as it is known in USA.

According to this public trust principle in our common law, all holders of public office are under a public trust. Holders of public office – public officers - are all those elected or appointed to exercise state sector functions. The principle applies to members of the Executive – ministers – their staff and public servants, and others empowered to act in accordance with the law.

In other words, public officers are trustees, entrusted with responsibility for the common interests of the community. Responsibility for the public trust requires that the public interest must be put ahead of personal or other private interests.

Breaches of this common law can lead to prosecution for misconduct in public office. This law has been rarely invoked until quite recent times in cases such as Obeid’s conviction and imprisonment.

Litigation in US courts is seeking to extend its application in rulings that through

government's affirmative actions that cause climate change, it has violated the youngest generation’s constitutional rights to life, liberty, and property, as well as failed to protect essential public trust resources (Our Children’s Trust, 2017).

In terms of better governance, I argue that the public trust principle should be rigorously applied at every level, from members of parliament to throughout the public sector and its contractors. Those contractors would include consultants engaged to advise Government and public sector agencies.

The public trust principle underlies democratic government and an effective public service. Sadly, it has faded away as part of the political amnesia of which Laura Tingle (2015) has written. There have been declines in department expertise and loss of institutional memory and, with that, reduced abilities to provide frank and fearless independent advice.

She quotes Ken Henry, former Secretary of the Treasury, as saying “I think many departments have lost the capacity to develop policy; but not just that, they have lost their memory. I seriously doubt there is any serious policy development going on in most government departments” (p.11).

There is a second way in which democracy can be enhanced to better serve the aggregate the interests of the community – public participation.

Election of representatives to be our trustees for three or four years is a crude form of participation. It is a necessary but not sufficient condition of democracy in modern societies. It leaves members of the community frustrated at inadequate influence over particular policies and actions or on matters emerging between elections.

As shown in Figure 1 (above) there is a spectrum of levels and forms of public participation which can extend and strengthen the. By involving people affected by decisions of the state sector, we can add to the range and depth of information leading to those decisions. There is increasing evidence of the potential of forms of public participation to produce better public policy and better public administration, internationally, in Australian states and territories (less so in Federal government), and in Melbourne. It is particularly valuable for addressing wicked problems (*problems that are difficult or impossible to solve because of incomplete, contradictory, and changing requirements that are often difficult to recognize*). It has been used successfully to address medium to long-term strategies and policy questions.

Use of public participation does require Ministers and their agencies to have the self-confidence to share power and accept that better outcomes could result from additional information and deliberation.

Effective public participation carries the spin-off benefit of better trust in the other sense of that word – confidence that government is acting in the best interests of the community.

There are some specific reforms that could improve governance. In the case of Transport for Melbourne, these reforms mostly apply to Victorian Government. They could include:

- Clear specification of portfolio objectives and performance measures (i.e. evaluation criteria)
 - Recognition of climate change as an existential threat to all mankind, affecting all policies
 - More effective use of parliamentary committees combined with public participation to address longer-term strategic, visionary policies
- Restored public service professional capabilities and resourcing
- Right To Know legislation (“push” model *c.f. freedom of information “pull” model*) requiring default disclosure except where to do so would compromise:
 - privacy of an individual; or
 - public safety; or
 - criminal investigation; or
 - judicial processes; etc.
- Public Interest Disclosure (whistleblower protection) reform
- Strengthen IBAC e.g.
 - 1.The Act now creates a preliminary period when IBAC can only make preliminary inquiries without the powers provided in the legislation. IBAC should be entitled to use these powers from the outset.
 - It is still necessary for IBAC to overcome the hurdles in the Act [i.e. be able to articulate the indictable offence] before becoming entitled to use the statutory powers.
 - The definition of “corruption” is still much too limited.
 - Capacity to have a public hearing unless exceptional circumstances exist (The other 2 prerequisites are acceptable but it is very hard to define “exceptional circumstances” and a court’s response cannot be predicted.)
 - There is no exoneration protocol to enable someone alleged to be corrupt to clear his/her name.
- Reforming political campaign financing including-
 - Regulating donations and spending by candidates, political parties and “third party” campaigners
 - Limiting donations to people on the electoral roll

- Caps on donations (e.g. \$1000 per donor per year, in aggregate to all candidates, political parties and “third party” campaigners)
- Caps on spending by candidates, political parties and “third party” campaigners
- Limiting public funding to reimbursement of campaign expenses up to the current level (\$2.68 per vote)
- Enhancement of the knowledge, skills and attitudes of political candidates and members of parliament (parliamentary functions, ethical conduct, responsibilities and prospective responsibilities)

Reforms like these are going to happen only if governments are persuaded that the reforms are in the public interest and the enlightened self-interest of governing politicians. That persuasive argument may come from within the political parties, as have the Victorian Government’s campaign finance reforms, but it is more likely to be supported with strong advocacy by civil society.

Summary

In summary, there are three key points that I leave with you.

Firstly, good governance must recognise that the nature of relationships between the three social sectors – their individuals and organisations – determine the quality of policy and administration.

Secondly, public policy-makers and administrators are trustees - public officers entrusted with responsibilities to act for the common good. Failure to do so risks prosecution for misconduct in public office.

Thirdly, public participation has the potential for more comprehensive information and superior deliberation leading to better decisions, better infrastructure and better services. That participation includes initiatives by groups like Transport for Melbourne.

Applying these together can address the “key needs” identified by William McDougall and produce improved governance, greater trust in government and improved quality of life.

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