

Governance and Decision Making in the Public Interest

A Position Paper

by

Roger Taylor Chair Transport for Melbourne
Nick Low Professorial Fellow University of Melbourne
and President Transport for Melbourne
Professor **Michael Buxton**,
RMIT School of Global, Urban and Social Studies
Jackie Fristacky, Councillor City of Yarra
Ken Coghill, Associate Professor,
Department of Management, Monash University

Purpose and objectives

Governance, a critical issue in State transport planning, was the catalyst for a forum held at the Richmond Town Hall on 27th October 2017. This forum was prompted by concerns that poor governance was at the heart of deficient decision making on transport and that unless it was addressed \$billions would continue to be wasted on projects that deliver little value to Melburnians and Victorians. It was recognized that governance failure is not confined to the transport portfolio but extends to many areas with implications for all tiers of government. Transport as a case study provides the opportunity to highlight governance problems in other areas of public administration. The purpose of this paper is to pursue issues of governance dealt with at the forum to encourage broader discussion amongst institutions and civil society with the goal of creating pressure for change.

Executive Summary

How democratic institutions 'govern' defines a society. The activities and processes that governments carry out we call 'governance'. The quality of governance in Australia ultimately determines our quality of life and capacity to deal with growing challenges and in years ahead. This was the theme of the October 2017 forum "Governance and Decision Making in the Public Interest".

The West Gate Tunnel Project as a case study highlighted recent trends in declining standards of governance at the Victorian State level. There is growing concern among analysts however that governance standards are declining more generally in Australia.

The problem is not yet endemic, permanent or widespread but appears at times at all levels of government: too close a relationship between public officials and private corporations, unaddressed conflicts of interest, too little transparency, lazy analysis of problems – grasping at instant solutions imbued with 'optimism bias', manipulated supporting data, enfeebled public scrutiny, and even in examples of outright corruption

both at the political level and within what used to be trusted departments of the public service.

Resulting important questions are: what can be done to improve this situation, by whom and what might be the most appropriate mechanisms to promote change? The starting point however, must be a good understanding of governance. This paper reviews some of the fundamental issues that need to be considered in developing this understanding. These include:

- the origins of our system of Government in Australia especially, the doctrine of separation of powers and the key institutions of governance
- other vital checks on power and how these have changed over recent years
- principles affecting governance and decision-making in the public interest including internationally accepted principles to which Australia is party
- features of better governance.

The paper then explores measures that can be taken to restore governance standards and ways in which this might be achieved. Achieving change is a major task so support from many agencies, civil society as well as political decision makers is required. It is hoped that, at the very least this forum will raise the matter of governance as an agenda item for public discussion and be a step towards the “change process”.

Our governments are not coping well with the need to adapt to challenges evolving in a rapidly changing world. This is becoming increasingly understood by the community. These challenges will not be solved by business as usual but will demand a significant improvement in governance standards and interventions at the highest level.

Introduction

The origins of our system of Government in Australia are based on the doctrine of the separation of powers of the key institutions of governance as 3 separate spheres:

- Legislature or Parliament: of elected representatives making laws
- Executive: implementing and administering laws and policies determined by the Parliament
- Judiciary: independent of these other institutions, adjudicating conflicts over interpretation of laws.

This doctrine is still fundamental to the rule of law in our political system and is designed to provide checks and balances in the exercise of political power. If one of the 3 branches of power exceeds its authority, or acts against the public interest, another can check or restrain that power. In a parliamentary system of government, that accountability is to the parliament in the first instance and is an important part of the checks and balances that constrain the risks of wasteful, unethical or corrupt misuse of political power and public resources.

There are other vital checks on power which include many civil institutions and organisations, a free press, freedom of speech and association, independent academic institutions and think tanks, public inquiries, and assertive citizens, all of which apply to varying degrees to the three tiers of government.

The quality of public administration has, for many years been determined by the establishment of a politically disinterested and permanent public service with core values of integrity, propriety, objectivity, appointment on merit, and transferring expertise from one elected government to the next. This philosophy was strongly influenced by the 1854 Northcote-Trevelyan Report on the organisation of the British civil service with its focus on appointment of civil servants of high capability with promotion on merit. That inquiry and report was a response to growing problems of political patronage and buying appointments into the civil service; the aim of the inquiry being to ensure the administration was not captured by politicians or vested interests.

The Report influenced the setting up of Australia's State and Federal public services each with a strong central Public Service Board (PSB) responsible for standards of recruitment and the quality, integrity and independence of the public service. The PSBs (Victoria 1883; Commonwealth 1902) set merit standards for entry and promotion, common pay and conditions, and controlled establishment numbers in government departments.

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.

Recent Developments

The creation of the Accountability Round Table (ART) arose out of concern that governments (Executive Government – ministers led by the premier or prime minister) – were not effectively held to account for the discharge of ministerial responsibility, for decisions made and for actions to ensure better use of resources, better infrastructure and better services and so on.

Australia is now one of 75 national government members of the Open Government Partnership (OGP). There are threshold membership conditions such as freedom of information laws but each member must commit to a Declaration that includes four principles:

1. Increase the availability of information about governmental activities;
2. Support civic participation;
3. Implement the highest standards of professional integrity throughout administrations;
4. Increase access to new technologies for openness and accountability (Coghill, 2017).

The first principle is consistent with the need for investment of taxpayers' funds with full transparency and accountability. However, it is not just about accountability. One of the founders of OGP, quoting Daron Acemoglu and James Robinson (Acemoglu & Robinson, 2012) argued "that open political institutions are critical to whether nations succeed or fail".

The second principle is about doing things very differently than is common in Australia. It is about taking the public, especially people affected by prospective decisions on resource allocation or other policy and actively involving them to assist in decision making processes. This involves engagement techniques along the public participation spectrum ranging from merely informing; consulting; collaborating; involving; to empowering (Victorian Auditor General's Office (VAGO), 2015).

An example is provided in the Yarra City Council Plan which provides that "Transparency, performance and community participation drive the way we operate". Elsewhere, councils and governments have found that civic engagement can lead to better decision-making, especially for "wicked" problems. In Australia's case, civic engagement has led to establishment of the Open Government Forum. This is a body with equal numbers of senior public service and civil society nominees charged with developing reform commitments that advance open government and overseeing implementation of those commitments over two-year cycles (Coghill 2017).

The third principle highlights the importance of corruption control or integrity commissions, to back up codes of conduct and statutory provisions in every jurisdiction. In the Melbourne "city-state", the independent broad-based anti-corruption commission (IBAC) was set up in 2012 to deal with areas of State and local government, with equivalent bodies now 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 before it affecting a member of the Victorian Parliament. There is no Federal body with equivalent comprehensive powers. But it is important to remember that reducing the risk and the reality of corruption is a constant, never-ending task (Coghill 2017).

The fourth principle (***Increase access to new technologies for openness and accountability***) needs little explanation (Coghill 2017).

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 (Coghill 2017).

Changing Philosophies and Institutional Factors

1. Abolition of Key Public Institutions

The approach to the organisation of public services changed with the abolition of the Commonwealth Public Service Board (PSB) by Hawke in 1987 and the Victorian PSB by Kennett in 1993. The new philosophy for the public sector in the 1980's was to assume characteristics of the private sector in the way services were provided and managed, staff were recruited, and their terms of employment and remuneration. These philosophies have reduced checks and balances in the administration. Of particular concern is the loss of strong independent Public Service Boards whose role was to ensure standards of service were delivered in the public interest by providing professional independent advice without fear or favour.

Many independent public institutions set up to plan and deliver services such as the MMBW, SECV and others were also abolished. These bodies had maintained specialist expertise, delivered infrastructure and services irrespective of political cycles, and operated as part of the checks and balances of power. The loss or degradation of these public institutions with essential public sector skills, expertise and corporate memory has undermined capacity to deliver or oversee delivery of many government services.

2. Amalgamations into large mega-departments and changes in strategic focus.

Political pressures including a 24/7 news cycle, short term appointments and focus on procurement and technology have contributed to a loss of strategic thinking and longer term planning in the public interest. For example, even though the obligation to develop long and medium-term integrated transport planning is mandated in the Victorian Transport Integration Act 2010, governments have failed to deliver this.

3. Capture by sectional interests

Policy and public investment capture has always been a feature of Australian governance. It was evident from the earliest days of convict settlement when Governor Phillip used it to maintain control and power within the colony by awarding land grants to soldiers and convicts in return for "good behaviour"¹. Some were rewarded more than others at the discretion of the Governor. And the practice of preferment continues today. It has become a feature of almost all areas of governance, but its extent and pervasiveness has increased substantially over recent decades and has a major impact on the distribution of wealth and income in this country². The implications are profound. It is a systemic problem that needs to be addressed at the highest level.

4. Fiscal imbalances

The balance of power in Australia is undermined by fiscal imbalances between tiers of Government. State income taxation was ceded to the Federal Government in 1942 during World War II, and the Commonwealth now assumes 80% of tax revenues and redistributes a diminishing share of the overall tax take to State Governments leaving them with 14% of total tax revenue to provide

¹ Page 10 Game of Mates by Murray and Frijters 2017

² ibid

transport infrastructure, housing and other State services for the people. Federal redistribution to Local Government has reduced from 1.5% to 0.55% currently. Infrastructure funding, grants and GST distributions are applied selectively and politically between peoples in States.

This imbalance also occurs within States. For example major investment priorities tend to favour the capital city and central business districts (often for political reasons) at the expense of many suburbs in the metropolitan area particularly growth areas or country shires that suffer from inadequate services and infrastructure.

5. Poorly targeted and financed infrastructure investment

Government policy, particularly at state and federal levels is now focused to a large extent on mega infrastructure projects – typically financed from proceeds of asset sales (such as the Port of Melbourne) and through public private partnerships (PPP's). These are often designed to make the project appear cheaper than it really is, rather than using working capital or borrowings at competitive market rates. Mega projects have a poor track record. They often fail to address systemic problems that require a range of actions (many of which may have nothing to do with infrastructure) and tend to be developed in an ad-hoc manner without reference to a proper plan. Their value to the broader community can be (and often is) further compromised if financing costs are unnecessarily high. This is typical of Public Private Partnerships (PPP's), or projects which are rushed for political reasons with insufficient time allocated to proper community consultation, project evaluation and planning processes, or when projects are developed for the wrong reason ie to suit political objectives or other parties which have a vested interest in the project process or its outcomes.

The West Gate Tunnel project reflects all these concerns but has now become a template for more major projects such as the North East Link. The full details of commercial arrangements associated with such projects typically lack transparency and are generally not released to the public on the grounds of "commercial in confidence".

Steps towards better governance

The very purpose of 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 (Coghill 2017).

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 (Coghill 2017).

Breaches of this common law can lead to prosecution for misconduct in public office. This law has been rarely invoked until recent times in cases such as Obeid's conviction and imprisonment in NSW (Coghill 2017). Litigation in US courts is seeking to extend application in rulings that through government's affirmative actions, cause climate change, and in the process violated the youngest generation's constitutional rights to life, liberty, and property, as well as failing to protect essential public trust resources (Our Children's Trust, 2017). In terms of better governance, 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 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. Tingle 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). But governance problems are not confined to policy advice and strategic planning; they apply to all aspects of government administration.

There is a second way in which democracy can be enhanced to better serve the aggregate interests of the community – through public participation. Election of representatives to be our trustees for three or four years is a crude form of participation. It is an essential 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 (Coghill 2017).

There is a spectrum of levels and forms of public participation which can extend and strengthen the process of governance. By involving people affected by decisions of the state, it is possible to add to the range and depth of information leading to those decisions. There is increasing evidence internationally of the potential of public participation to produce better public policy and better public administration. The extent to which this can be effective in a practical sense will depend on the way it is carried out and the political climate in which it exists recognizing that there are many barriers to participation that need to be overcome and that it is also a process that can be abused. Outcomes will depend on the extent to which participants are informed or prepared to collaborate to arrive at a solution or the extent to which the result becomes a political exercise manipulated to achieve the result politicians want and have already decided (Coghill 2017).

The West Gate Tunnel for Melbourne is such an example. This project was initiated in secret by the Victorian State Government in collaboration with its proponent Transurban and officers from Vic Roads instructed to work with Transurban to develop the project. When finally announced the community was given little time to respond to the vast array of documentation prepared for it. It was a *fait accompli* from the outset, despite compelling evidence that the project was heavily flawed and could not be justified from any perspective – social, economic, environmental. The business case did not stack up: traffic modelling was flawed, the project was an ad-hoc response, not part of any longer term transport plan for Melbourne and conflicted with other government planning proposals.

The key beneficiary of the project is Transurban, with high costs to the citizens of Victoria. Despite compelling evidence presented by numerous expert witnesses and the broader community the Government remains determined to implement this project. It is also using it now as a template for ramming through other mega projects such as the North East Link.

Community consultation in this situation has been a sham and an opportunity for the government to use it for political spin and propaganda. The only recourse left for the community in this situation is to seek legal or other means to delay or stop the project by initiating a public campaign of protest and use their vote at the ballot box at the next election. But this action will not change a political system that is now initiating ill-conceived projects that deliver little value by default in the first place.

This is not an isolated case of government malfeasance. Other examples can be found in many areas of government activity – property planning and development, public infrastructure more generally, superannuation, mining, banking, education, health, medicine and others.³

Specific suggestions for improvement

Whilst there is no single solution to poor governance standards or malfeasance, many actions can be taken in response. In the short or immediate term, the only options are to apply political pressure by protesting/campaigning against poorly conceived or improper actions and vote accordingly at election time. Other options include enforcing political integrity through anti-corruption commissions and banning parliamentarians from holding private sector positions for five years after leaving office. Also required is back up from other members of civil society, media and relevant institutions to keep the “bastards” honest.

For the longer term, action is required to restore the kinds of institutional checks and balances that have been lost over recent decades. Key is to restore the capacity of government departments to provide expert high quality independent advice without fear or favour, to be able to plan and administer the delivery of services they are ultimately responsible for, and to provide the necessary support mechanisms. Many actions will be required to achieve administrations with such capacity and will need a fundamental change in the political mindset. Politicians who seek to control administrations without heeding fundamental principles of checks and balances of power are not expected to tackle this without substantial pressure for change. This pressure must come from civil society and advocacy groups. Institutions that have been set up to administer the law and its compliance by governments and other bodies can be persuasive because of their moral or professional standing. Institutions set up to act as checks on legal compliance by governments can also be used to challenge decision making which contravenes proper processes.

More fundamental changes will ultimately be required to the mindset of politicians themselves with respect to their responsibilities under the public trust principle in common law. This applies to members of the Executive – ministers – their staff and public servants, and others empowered to act in accordance with the law. As noted above the public trust principle needs to be supported by organisations such as IBAC that oversee and monitor governance compliance at every level. This principle needs to be accompanied by an understanding that politicians and their advisors are not experts as far as policy and administrative expertise is concerned. Their role is to listen and act on

³ Ibid

the best advice and to distinguish high quality independent advice (that should be provided in the first instance by the relevant department) from that proffered by parties with a sectional or vested interest. It is also recommended that funding for projects using PPP's be abolished.

The public trust principle is enshrined in the Victorian Local government Act requiring Councils to act in the best interests of the community as a whole. Whilst the principle is more readily applied in local government where there is greater community engagement of civil society in contributing to and challenging decision making there are also breaches of public trust and the need for greater accountability. Further examination may be necessary of some local government structures, and whether governance would be better facilitated by more extensive civic engagement or by broader democratically elected metropolitan governments (like the London Government Authority and Mayor for London).

As noted above, it is unlikely that politicians more concerned with power than the public interest will initiate such changes on their own. Whilst a persuasive argument for change may ultimately have to come from within the political parties, it is likely that governments at all levels will need external pressure to change. Pressure for change must come from civil society and other politically independent institutions. But this will also require a more engaged community that understands the public trust principle, has higher expectations of our political leaders and government institutions and is prepared to challenge and where necessary apply legal remedies in instances of poor or corrupt government performance whenever it occurs.

It seems that without action and pressure from a politically engaged civil society, there will be little prospect of change in any of the scenarios above. Civil society needs to find ways of making such change happen. Vital is the dissemination of information to assist broader communities to develop an understanding of what is really going on and the real costs to society and the economy of current ad-hoc political decision making serving sectional interests not the broader public interest. Successful community action responses are demanding. They require many engaged community members with the interest and capacity to maintain the intensity of community action that is required for sustained campaigns of this sort over a long time. Ultimately success may depend on the extent to which independent institutions can be enjoined to support, take over and maintain pressure for change.

Summary and Where to From Here

Understanding that our standards of governance are weak and declining, and the implications of this for all society and broadcasting this as a subject for community concern and discussion at open forums is the starting point for reform. Once this is understood, the challenge is to mobilise sufficient support and pressure to make reform happen. The purpose of the public forum in October 2017 and this paper is to reinforce the need to address governance problems and to support organisations that have similar concerns. The initial focus may be on Victorian State Government transport policy and projects, and their link with land use planning and development. Both fields can be used as case studies for campaigns in other areas.

Generating pressure for change will be the challenge. But there is an increasing imperative for this. There are many situations in which the implications of poor governance are manifest and getting

worse. It is clear that our governments collectively are not coping with the need to adapt to the changing world. If they cannot address challenges that face us now we will have little chance of coping with bigger challenges that are evolving now and in the future. Community participation must be the catalyst for change, to blow the whistle and stop inappropriate government policies and projects. Required also are high level skills and expertise of revitalized government institutions that understand policy complexities so they are able to assess how to provide better social, economic and environmental outcomes in the public interest. Ultimately good governance with strong and open political institutions will be critical in determining whether our nation succeeds or fails.

Acknowledgements

The authors have quoted extensively from presentations made by Hon Dr Ken Coghill, Cr Jackie Fristacky and William McDougall at the Transport for Melbourne Governance Forum held at the Richmond Town Hall on 27th October 2017 titled "Governance and Decision Making in the Public Interest".

References

- Acemoglu, D., & Robinson, J. (2012). *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*: Crown Business.
- Cameron, D. PM speech at Open Government Partnership 2013. Retrieved from <https://www.gov.uk/government/topical-events/open-governmentpartnership-summit-2013>
- Coghill, K. (2017). *Governance of the Melbourne city-state*. Paper presented at the Transport for Melbourne: Governance and Decision-making in the Public Interest, Richmond Town Hall.
- French Robert (22 June 2011), Seventh annual St Thomas More Lecture *Public Office and Public Trust*.
- Governance Institute of Australia (2016) Governance Principles for Boards of Public Sector Entities in Australia
- Our Children's Trust. (2017). Juliana v. U.S. Climate Lawsuit. Retrieved from <https://www.ourchildrenstrust.org/us/federal-lawsuit/>
- Saward, M. (1996). Democracy and Competing Values. *Government and Opposition*, 31(4), 467-486.
- Tingle, L. (2015). Political Amnesia. How we Forgot to Govern. Quarterly Essay (Vol. 60, pp. 1-86). Carlton, Victoria, Australia: Black Inc.
- Victorian Auditor General's Office (VAGO). (2015). *Public Participation in Government Decision-making: Better practice guide*. Retrieved from <https://www.audit.vic.gov.au/sites/default/files/20150130-Public-Participation-BPG.pdf>
- Yarra City. (2017). Community Engagement Summary Report. Yarra 2021: Help Shape the Next Four Years. Retrieved from https://s3-ap-southeast-2.amazonaws.com/ehq-production-australia/ad14f5128d009154abc50d32c8835a4dc15a367e/documents/attachments/000/052/844/original/Council_Plan_EngagementSummaryReport_March2017.pdf?1490231600
- Warhurst, John (2017) We need a royal commission into the corruption and decay of Australian politics SMH: <http://www.smh.com.au/comment/we-need-a-royal-commission-into-the-corruption-and-decay-of-australian-politics-20170613-qwqi5u.html>

Selected reading on the WestGateTunnel Project

West Gate Tunnel: Another Case of Tunnel Vision: Ian Woodcock, Sophie Sturup, John Stone, Nathan Pittman, Crystal Legacy, Jago Dodson, Melbourne University RMIT University Centre for Urban Research, December 2017

Submissions to Senate Economics Committee Toll Roads Inquiry: [http://www.aph.gov.au/Parliamentary Business/Committees/Senate/Economics/TollRoads/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TollRoads/Submissions) (submission number 37).

Public hearings for Senate Economics Committee Toll Roads Inquiry: [http://www.aph.gov.au/Parliamentary Business/Committees/Senate/Economics/TollRoads/Public Hearings](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TollRoads/Public_Hearings) (transcript of William McDougall's interview starts on page 7 of the Melbourne hearings).

Victorian Government market led proposals guidance: <http://www.dtf.vic.gov.au/Infrastructure-Delivery/Market-led-proposals>

Australian Transport Assessment and Planning Guidelines: <https://atap.gov.au>

Victorian Auditor-General's report into East West Link: <https://www.audit.vic.gov.au/report/east-west-link-project>

Millar, Royce & Ben Schneiders (2017) Transurban: the making of a monster. *The Age*: <http://www.theage.com.au/victoria/transurban-the-making-of-a-monster-20160512-gotjim9.html>

(Note) There are many more articles relating to Transurban and the West Gate Tunnel. This project has also been extensively reported by *The Age* – articles can be sourced by Google.

Environment Effects statement (EES) Panel Hearings – in particular submissions prepared by the Victorian Transport Action Group (VTAG), Melbourne City Council, Inner Melbourne Planning Alliance (IMPA), Transport for Melbourne.