

**Submission
No 102**

**INQUIRY INTO PLANNING PROCESS IN NEWCASTLE
AND THE BROADER HUNTER REGION**

Name: Mr Tony Brown

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NSW Legislative Council Select Committee Inquiry on the planning process in Newcastle and the broader Hunter region¹

Criteria to assessing the Hunter Planning regime

Legislation and other references Guide

Tony Brown

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“Who said democracy was cheap”?²

¹ See Inquiry website for Terms of Reference, critical dates, submission details etc

<http://www.parliament.nsw.gov.au/newcastleplanning>

² <http://www.abc.net.au/stateline/nsw/content/2006/s1595024.htm>

Purpose

The purpose of this submission is to provide the Inquiry, Community members and groups interested in lodging a submission with ready access (resource) to key legislation and other requirements that may help inform their recommendations and submissions respectively.

It also **highlights key promulgated government criteria or checklist by which the community and the Inquiry can appraise the Hunter region planning process.**

The Inquiry's terms of reference are extremely broad "to inquire into and report on aspects of the planning process in Newcastle and the broader Hunter Region".

A natural starting point for the Inquiry and community submissions should not only be what you think is "wrong" with the particular planning projects and associated processes by providing particular examples (evidence), but also linking that "evidence" including circumstantial evidence, with a particular relevant Act, government Code of Conduct/Practice, Policy, State Plan etc.

This guide identifies some of the major Acts and other government documentation relevant to the Inquiry and reproduces key parts including the "Objects" of the Acts. It is not meant to be an exhaustive work. Nor does it constitute legal advice.

The guide also raises important questions for the community and Inquiry to consider (in italics).

Whilst there is usually no legal obligation on government to comply with the (aspirational) "Objects" of an Act, they do however provide important **consistent guideposts** for government, community and industry to stay on the "straight and narrow".

They are therefore worth referencing in your submission to for example, practically illustrate by way of examples or supposition/deduction, that the planning and integrity/probity aspects of a particular project within the terms of reference, may have ran off the rails – perhaps warranting its termination similar to what occurred with a number of coal mining exploration leases and early DAs (Wollongong Council) **contaminated by actual or perceived corrupt activity and undue influence.**

It is also worth noting that this guide includes extracts from the "black letter" law. Equally, and if not of higher importance, are the those immediately less tangible binding concepts of public **"confidence" and "trust"** in the NSW Planning system, government, democracy ("one person - one vote" – "government by the people – for the people") and the rule of law ("we all are equal before the law and no one individual or organisation is above the law"). The ICAC in various publications and decisions has noted the importance of maintaining and restoring public trust and confidence.

In other words, not only should "justice be done", it must "been seen to be done".

The ICAC regularly identifies in its findings "a climate conducive to corruption". This is one form of debilitating "climate" in NSW that won't go away but due entirely to human intervention.

Legislation referred to in this guide

- NSW Constitution
- Environmental Planning and Assessment Act
- Local Government Act
- Transport Administration Act
- Government Sector Employment Act 2013
- ICAC Act
- Public Interest Disclosures Act 1994
- Public Finance and Audit Act 1983

Codes etc

- Public Service Commission Code of Ethics
- Code of Conduct and Ethics – Policy and Guidelines Department of Planning 2011
- Transport NSW Code of Conduct
- Transport for NSW Statement of Business Ethics

Submissions and other References

- NSW 2021 “Restore Accountability to Government”
- Premier’s Memorandum M2012-10 “Open Government”
- ICAC submission to Planning White Paper “Anti-corruption Safeguards

NSW Constitution 1902

Section 5³ of the NSW Constitution, provides the power to “...make laws for the peace, welfare, and **good government** of New South Wales...” (emphasis added)

It is understood that there is little if any joy mounting a legal challenge solely on the basis of any NSW government law not being “good”.

There is however some important specific legislative prescriptions relating to how government and its agencies conduct their activities consistent with the powers prescribed in the NSW Constitution.

These criteria summarised below, may provide the community and Inquiry with tangible benchmarks to evaluate the Hunter’s controversial planning processes and outcomes.

These criteria relate to Corrupt conduct (broadly defined), Criminal laws, Electoral Funding, Government Information and Privacy, Public Interest Disclosures, reporting Maladministration and Serious and substantial waste of public money.

The NSW Public Service does have a statutory prescription for **Ethical Behaviour** in the **Public Interest** described in the following section. This provides the community with substantive criteria to consider the probity and integrity of planning decisions and the

³ http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1902188/s5.html

actions of those government and council employees and elected officials involved in the decision making process.

Government Sector Employment Act 2013⁴

The following information includes an extract from the NSW Public Service Commission website⁵ and the relevant provisions of the above Act. Some sections have been highlighted as these may be of particular relevance to some critical planning decisions made and associated commentary provided by Public Officials to the media.

“Ethical Framework

The *Government Sector Employment Act 2013* establishes a new legal requirement for all people employed in the government sector - to **act ethically and in the public interest**. Details of the four government sector core values and 18 principles that guide their implementation can be found in Part 2” of the Act: Ethical Framework for the government sector.

The Ethical Framework is listed below. In addition, Sections 25 and 30 of the Act make Department Secretaries and heads of agencies responsible for the ethical conduct and management of their agencies. The Public Service Commission has produced resources to assist all employees to carry out their statutory obligations”.

Government Sector Employment Act 2013

“Part 2 Ethical framework for the government sector

6 Objective of Part⁶

This Part:

- (a) recognises the role of the government sector in preserving the public interest, defending public value and adding professional quality and value to the commitments of the Government of the day, and**
- (b) establishes an ethical framework for a merit-based, apolitical and professional government sector that implements the decisions of the Government of the day.**

7 Government sector core values⁷

The **core values** for the government sector and the principles that guide their **implementation** are as follows:

Integrity

- (a) Consider people **equally without prejudice or favour**.
- (b) Act professionally with honesty, consistency and **impartiality**.
- (c) Take responsibility for situations, showing leadership and courage.
- (d) **Place the public interest over personal interest.**

⁴ http://www.austlii.edu.au/au/legis/nsw/consol_act/gsea2013346/index.html#s5

⁵ <http://www.psc.nsw.gov.au/>

⁶ www.austlii.edu.au/au/legis/nsw/consol_act/gsea2013346/s6.html

⁷ http://www.austlii.edu.au/au/legis/nsw/consol_act/gsea2013346/s7.html

Trust

- (a) Appreciate difference and welcome learning from others.
- (b) Build relationships based on **mutual respect**.
- (c) Uphold the law, institutions of government and **democratic principles**.
- (d) Communicate intentions clearly and **invite teamwork and collaboration**.
- (e) Provide **apolitical and non-partisan advice**.

Service

- (a) Provide services fairly with a focus on customer needs.
- (b) Be flexible, innovative and reliable in service delivery.
- (c) **Engage with the not-for-profit** and business sectors to develop and implement service solutions.
- (d) Focus on quality while maximising service delivery.

Accountability

- (a) Recruit and promote staff on merit.
- (b) Take responsibility for decisions and actions.
- (c) **Provide transparency to enable public scrutiny**.
- (d) Observe standards for safety.
- (e) Be **fiscally responsible** and focus on efficient, effective and prudent use of resources.

8 General provisions

- (1) The Public Service Commissioner has the function of promoting and maintaining the government sector core values.
- (2) There is **no hierarchy among the core values** and each is of equal importance.
- (3) Nothing in this Part gives rise to, or can be taken into account in, any civil cause of action".

Departmental "Codes of Conduct"

Many individual NSW government Departments and agencies have their own Codes of Conduct that incorporate the above overarching Ethical Framework and distinguish between private vested interest and the "public" good. Similar individual Codes exist for Local Government bodies.

These Public Sector Codes provide obligations on employees and others to act with integrity, impartiality, honesty, avoid any conflicts of interest etc.

See for example

- “Code of Conduct and Ethics 2011” for Planning NSW and related entities⁸
- “Transport for NSW Code of Conduct”⁹
- “Transport for NSW Statement of Business Ethics”¹⁰
- “City of Newcastle Code of Conduct”¹¹

Community members and the Inquiry may wish to consider if any of the information obtained or circumstances may suggest any non-compliance with the relevant Codes. Particular attention may be drawn to the deliberate blurring witnessed between private interest and public good.

Application of the NSW Public Sector Ethical framework and individual Department Codes of Conduct and Business Ethics

A common complaint across community groups is the perception of a lack of transparency, impartiality and integrity (inconsistent with the above Ethical statutory requirements and Codes of Conduct) in the way some controversial planning decisions have been derived.

Compounding these concerns is the web of connections and personnel interchangeability between various government and private organisations that have seemingly collaborated to promote some of the current controversial projects subject to the Parliamentary inquiry. Part of this “promotion” has included criticism of community objections.

Whilst there is no prima facie problem with such interchangeability, it does increase the risk of actual or perceived lack of impartiality and impediments to the provision of ongoing **“apolitical and non-partisan advice”**.

It should not be forgotten that some of the biggest promoters (and potential personal beneficiaries) of some of the controversial projects have admitted to the ICAC of making or receiving unlawful and potentially corrupt political donations.

A real question for the Inquiry is to what extent has the NSW Public Sector Ethical Framework and careful delineation between “private and/or personal interest” and “public good”, been able to effectively protect public sector employees (allowed them to continue to act with “integrity” and “impartiality” in deriving “merit” based decisions) and quarantine them from the “undue influence”.

This is so obviously intimately attached to the form, nature and sheer extent of these undeclared political “donations” and basic dishonesty exposed by the ICAC from a wide array of powerful and diverse businesses sources in Newcastle and elsewhere who have an actual or perceived interest in the controversial projects.

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<http://www.planning.nsw.gov.au/Portals/0/GIPPA/Code%20of%20Conduct%20and%20Ethics%20signed%20by%20DG%2019%20May%202011.PDF>

⁹ <http://www.transport.nsw.gov.au/sites/default/files/b2b/aboutus/code-of-conduct.pdf>

¹⁰ <http://www.transport.nsw.gov.au/sites/default/files/b2b/aboutus/statement-business-ethics.pdf>

¹¹ http://www.newcastle.nsw.gov.au/council/elected_council/code_of_conduct

A perusal¹² of the ICAC Operation Spicer transcripts¹³ and some associated exhibits¹⁴ reveal very disturbing examples of potential ingrained and systemic corruption and electoral funding irregularities that does impact upon the probity and integrity of the controversial projects and planning regimes under consideration by the Inquiry.

The following links provide a sample of comments and details of some of the public sector organisations. Some groups may be interested in comparing the media statements by public officials with the above Ethical Framework obligations for the public sector.

It may also prove very useful for the Inquiry to map the history and connections between the public and private sector organisations' individuals.

It would also be invaluable to identify/map the land owners and financial interests of the property surrounding the Newcastle rail corridor in dispute to ascertain whether any of the same parties have made donations to political parties and candidates or, have a personal financial interest.

The community and Inquiry may observe from a chronology of media announcements the uncanny ability of the former Newcastle Lord Mayor McCloy to predict/foreshadow (clairvoyance) the outcomes of controversial planning decisions. Some examples include his foresight to complain about Newcastle's obsession with aesthetical matters such as view corridors and the Cathedral before the promulgated decision to substantially increase building heights and the government preferred route of the light rail down Hunter St.

The community and Inquiry may also note the member for Swansea's later reported testimony about the influence of the former Lord Mayor and the description of him as "god-like in our part of the world"¹⁵. They may note the ICAC exhibit suggesting Mr Edwards be leant upon to support one developer and the brief reference involving Mr Owen and assistance for the liquor industry.

The community and Inquiry may also be interested in identifying the key players of the Newcastle Alliance and the group of business people calling itself "6.5" implicated by the ICAC in electoral funding problems, to ascertain if they individually had any pecuniary/property interest in any of the controversial projects including closing of the rail corridor, re-routing the proposed tram down the middle of Hunter St and the spot rezoning of the CBD.

<http://mobile.abc.net.au/news/2014-09-08/hunter-development-corp-urges-newcastle-not-to-let-distractions/5726378?pfm=sm&source=rss>

<http://www.theherald.com.au/story/2610127/opinion-nile-has-got-it-wrong-on-newcastle-rail/?cs=308>

and

<http://www.hunterinfrastructure.nsw.gov.au/TheBoard.aspx>

<http://www.theherald.com.au/story/2209942/property-council-backs-hunter-street-route-for-light-rail/>

<http://www.theherald.com.au/story/1600135/mccloy-lays-out-own-rail-plan/>

<http://www.theherald.com.au/story/1990452/rail-must-run-down-hunter-street-mccloy/>

¹² <http://www.theherald.com.au/story/2470793/icac-august-2014-archive-operation-spicer/>

¹³ <http://www.theherald.com.au/story/2468714/icac-read-the-full-transcripts/?cs=305>

¹⁴ <http://www.icac.nsw.gov.au/images/Spicer%20PI%202/Exhibit%20Z1.pdf>

¹⁵ <http://www.theherald.com.au/story/2535689/garry-edwards-accused-of-lying/>

NSW State Plan 2021¹⁶

The above four pillars of the NSW Public Sector Ethical Framework are

- **Integrity**
- **Trust**
- **Service**
- **Accountability**

These core elements are incorporated into the NSW State Plan 2021. In particular, one section of the Plan is devoted to restoring accountability and the other essential attributes mentioned above.

The community and the Inquiry should consider whether the extent of likely corruption and undue influence already exposed by the ICAC in the region in conjunction with what transpires from the Inquiry's investigation, is consistent with the following extract of the State Plan?

“Essential to our strong democracy, personal choice and freedom are public institutions and administration that people trust.

Government exists only to serve the individuals, families and communities who delegate – in limited ways to government – the responsibility to conduct certain functions on their behalf.

Government doesn't have all the answers, and will stimulate a more diverse public sector economy to improve choice, transparent benchmarking and quality. Citizens can expect the public service, **as the protector of public interest and defender of public value, to put the public interest front and centre in public services and functions.**

Citizens, elected representatives and public servants all need the confidence of clear expectations about the limits of government's role, the performance, standards and results that public officials deliver, and **appropriate separation between political roles and professional public servants.**

Building trust demands honesty, transparency and clear accountability across the civil domain....

Strengthening the powers of the Independent Commission Against Corruption and the NSW Ombudsman, **making more government information easily available**, enabling citizens to **critique government services**, and finding more ways to **involve people** in government decision making (including in our planning system), will require government to continuously improve its own performance...¹⁷ (emphasis added)

¹⁶ <http://www.2021.nsw.gov.au/>

¹⁷ <http://www.nsw.gov.au/sites/default/files/initiatives/Restore-Accountability-to-Government.pdf>

Corruption and Undue Influence

The ICAC Act¹⁸ and related documentation

“2A Principal objects of Act

The principal objects of this Act are:

(a) to promote the integrity and accountability of public administration by constituting an Independent [Commission](#) Against Corruption as an independent and accountable body:

(i) to [investigate](#), expose and prevent corruption involving or affecting public authorities and [public officials](#), and ...”

Section 8 of the Act defines “corrupt conduct”¹⁹ but this is qualified by further sections of the Act. It should be noted that there is a **positive obligation**²⁰ on public sector employees to report suspected corrupt conduct.

The Audit Office provides the following brief summary of “**corrupt conduct**”.

“...The definition used in the Act is intentionally broad - corrupt conduct is defined to include the dishonest or partial exercise of official functions by a public official. Conduct by a person who is not a public official, when it adversely affects the **impartial or honest exercise of official functions by a public official**, also comes within the definition.

Corrupt conduct can take many forms, ie taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples”²¹.

The ICAC February 2012 Report “Anti-Corruption Safeguards and the NSW Planning system”²² provides the community and the Inquiry with some excellent [reference points or criteria](#) to assess the **probity and integrity** of the controversial projects.

The report notes “...Improving on the **transparency, accountability and openness** in the NSW planning system would do much to reinstate confidence in the governance of planning in NSW”.

It “identified six **key anti-corruption safeguards** to help minimise corruption in the NSW planning system. The safeguards include providing **certainty, balancing competing public interests, ensuring transparency, reducing complexity, meaningful community participation and consultation**, and expanding the scope of third party merit appeals”

¹⁸ http://www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/

¹⁹ http://www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/s8.html

²⁰ http://www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/s11.html

²¹ <http://www.audit.nsw.gov.au/About-Us/Complaints-and-Feedback/External-Public-Interest-Disclosures-Policy>

²² <http://www.icac.nsw.gov.au/media-centre/media-releases/article/4023>

“3. Ensuring transparency

Transparency is an important tool in **combating corruption** and providing public **accountability** for planning decisions.

A transparent planning system ensures the public has meaningful information about decision-making processes as well as being informed about the basis for decisions...

5. Meaningful community participation and consultation

Meaningful community participation in planning decisions is essential to **ensuring public confidence in the integrity of the system**. Community involvement in planning outcomes includes the public exhibition of planning instruments and development proposals as well as planning authorities giving **adequate weight** to submissions received as part of this process”²³.

*The community and Inquiry may well ask how have the controversial projects under consideration reasonably satisfy the above highlighted criteria recommended by the ICAC in early 2012 to prevent **actual and perceived** corruption and undue influence?*

“Climate conducive to corruption”

The above expression or variations of the same is regularly used by the ICAC.

The community and the Inquiry may similarly wish to consider whether there exists in the region a planning and political regime that has contributed to a climate of corruption.

This following section provides some background to what constitutes “corruption”.

In his 2 February 2013 SMH article²⁴, Linton Besser observed

“In 1989, a network of graft and patronage had allowed corrupt politicians to solicit bribes and political donations from property developers. In 2012, a very similar network is alleged to have extracted millions of dollars not from small-time builders, but from some of the wealthiest and most successful mining executives in the country. Counsel assisting ICAC told the public last November that while greed was a perennial motive in such affairs, so too was power. **“Circles of influence develop, a favour is done, it requires reciprocation,”** Geoffrey Watson, SC, said. “That happened here.”

Quentin Dempster from the ABC has used the proverb “he who pays the piper calls the tune”²⁵.

What we have witnessed in Newcastle is a clear orchestrated media campaign by the Hunter Business Chamber, Property Council, Newcastle Alliance, the former mayor and member for Newcastle to collectively promote the cessation of the heavy rail, the light rail alternative

²³ http://www.icac.nsw.gov.au/component/docman/doc_download/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012

²⁴ <http://www.smh.com.au/nsw/all-in-the-name-of-power-and-fortune-20130201-2dpzx.html#ixzz3FyuA1P8d>

²⁵ <http://www.abc.net.au/stateline/nsw/content/2006/s2113274.htm>

down Hunter St and, the spot rezoning and the erection of the high towers exceeding that in the 2012 LEP.

These above private groups^{26 27} and, public officials and representative^{28 29} have by sheer coincidence, equally been vociferous in their criticism of the community members and groups opposing the above controversial projects but supporting the need for sensible and responsible urban growth in Newcastle consistent with the whole community's expectations.

This in itself may not represent corrupt conduct.

However, the overlay of the admissions to the ICAC as to the nature, form and extent of prohibited and undeclared political donations, and the obfuscation and loss of memory of some of the politicians and business representatives giving evidence in the ICAC's Operation Spicer inquiry, creates the perfect storm of "circles of influence", "favours" and "reciprocation" (sooner or later).

The ICAC has previously acknowledged the high risks of corrupt conduct in the planning system. Land use, zoning and spot rezoning and mining exploration leases have the real potential to deliver windfall gains to developers and land speculators.

May be in has been no coincidence that many buildings along Hunter St (particularly the northern side adjacent to the rail corridor) have remained vacant for considerable time in anticipation of closure of the rail corridor? *Again, an examination of the financial interests in these properties and any political donations may prove illuminating?*

This risk factor appears common to both the rail truncation and Newcastle spot rezoning decisions. In managing such obvious risks, one would reasonably expect a greater incentive for a government, departments, agencies heads such HDC, Hunter Infrastructure etc, or councils to be meticulous in promoting and ensuring transparency, objectivity, impartiality, merit and avoiding substantial waste of public resources. This especially applies to very costly controversial projects generating significant division within the community and business.

The ICAC has considered the issue of "resource allocation"³⁰. See the following ICAC extract.

"Resource allocation

Governments provide services and other resources for a range of public policy purposes. It is a fundamental principle of public administration that these resources are delivered to those who are

²⁶ <http://www.theherald.com.au/story/2371104/opinion-no-need-to-fear-light-rail/>

²⁷ <http://www.theherald.com.au/story/2523587/opinion-city-renewal-must-continue-despite-icac/?cs=308>

²⁸ <http://mobile.abc.net.au/news/2014-09-08/hunter-development-corp-urges-newcastle-not-to-let-distractions/5726378?pfm=sm&source=rss>

²⁹ <http://www.theherald.com.au/story/2610127/opinion-nile-has-got-it-wrong-on-newcastle-rail/?cs=308>

³⁰ <http://www.icac.nsw.gov.au/preventing-corruption/knowning-your-risks/resource-allocation/4901>

entitled to them on the **basis of merit and equity** and **not for extraneous, irrelevant or improper reasons**.

Many public sector agencies control or manage public resources for allocation to applicants or clients based on the clients' individual needs, demographic characteristics or other predetermined criteria. Examples of these resources include public housing, child care or school places and disability services. The process of **allocating these resources is susceptible to corruption** when demand for them exceeds supply. Corruption risks may be exacerbated when the applicants for these resources are particularly vulnerable or dependent.

The **improper allocation of public resources can constitute corrupt conduct** as defined by the *Independent Commission Against Corruption Act 1988*".

A key criterion for the community and the Inquiry to consider is "have the controversial planning decisions been solely determined on the basis of merit"?

If so, the community and the Inquiry would undoubtedly appreciate the full disclosure and independent examination of the cost benefit analysis (and similar business cases) relied upon by the NSW government supporting both the termination of the heavy rail and the alternative light rail proposal including the preferred route down the middle of Hunter St.

They would also be interested in detecting any examples of "bias" in the project evaluation/consideration process, whether for example

- *All reasonable alternative options have been fairly considered with the same degree of scrutiny and alacrity*
- *Consideration was given to non-meritorious issues such political donations, business connections etc*
- *Any assumptions underpinning the preferred proposal have been scrupulously tested and could withstand any external independent analysis by an agreed independent expert*
- *Those public officials with any declared conflicts of interest remained quarantined from all decision making processes associated with the two controversial projects and refrained from public comment (including criticism of community objections)*

A secondary question would be determining whether the authors of such business reports prepared for government had any actual or perceived conflicts of interest?

Consideration of "Corrupt Conduct"

The following information is extracted from the ICAC Report³¹ into corruption in Wollongong Council involving the planning system. The footnote references in the ICAC Report (Part 2) have been excluded. Emphasis has been added

The community may wish to bring to the Inquiry's attention any evidence or reasonable suspicious of alleged corrupt conduct. The following ICAC information may assist you in this respect but it does not represent an exhaustive examination of the meaning of "corruption".

³¹ http://www.icac.nsw.gov.au/component/docman/doc_download/820-report-on-an-investigation-into-corruption-allegations-affecting-wollongong-city-council-part-2-operation-atlas-28-may-2008. See p40ff

“Appendix 2: Relevant criminal offences (p43)

“Corruptly (p48)

No offence is committed under s.249B unless the defendant, in giving or receiving etc. a benefit, did so “corruptly”. Some guiding principles in relation to this element are as follows:

- In the present context the word “corruptly” means acting “with some wrongful intention” or “purposely doing an act which the law forbids as tending to corrupt”.
- It is the intention or belief of the person receiving etc. in the case of s.249B(1), or giving etc. in the case of s.249B(2), at the time of the receiving or giving etc. that is relevant in determining whether the act was done by the person “corruptly”.
- A benefit will be “corruptly” given or offered if it was done so with the intention of influencing the agent in relation to the affairs of his or her principal and “corruptly” received if the agent “believed” that it was given with such an intention, **even if the agent never intended to be and never was influenced.**
- Where the agent is a public official, a benefit will be “corruptly” received if the agent “believed” that the giver intended it as a reward for something the agent had previously done in the performance of his or her official functions, such as making a decision favourable to the giver, even if the agent had not done that thing or had acted properly when he or she did that thing.
- A benefit will be “corruptly” given or offered if it is **intended as a general “goodwill payment” or “sweetener” to encourage future acts of favouritism**, without it having been given or offered as a quid pro quo for a specifically identified favour at the time it was given or offered, and will be **“corruptly” received if the recipient believes it was offered or given for a such a purpose even if he or she did not intend to be influenced by it.**
- The fact that the giver or recipient etc. **may not have known that it was illegal to give or receive the benefit in the relevant circumstances is no excuse.”**

Proof (p49)

In R v. Allen, Gleeson CJ endorsed the following approach for ascertaining whether a person **acted corruptly in relation to the provision of a gift to a public official:**

The existence of a corrupt intent is something to be inferred from the facts of each particular case, and must depend upon many circumstances, involving, for example, **the time and the place**; the position respectively of the giver and the recipient; whether the gift is of a moderate or an **immoderate amount**; and whether it is given openly **or secretly, underhandedly or clandestinely.**

In that case, which involved a statutory offence corresponding to s.249B, both the giver and recipient of payments were held to have acted corruptly and convicted even though the giver **“never asked [the recipient] to act in any way contrary to his duty, and never**

mentioned any improper request that might be made in the future". In affirming the convictions, Gleeson CJ made the following statement:

[T]he gravamen of the offence ... is the making or offering of a payment with an intent **to incline a person in public office to disregard his duty**. The occasion for the disregard of duty **need not have arisen at the time of the offence, and it need never arise**. Nor is it necessary that the particular kind of contemplated breach of duty be specified at the time of the payment or inducement. Of course, the absence of any such specification may be of powerful evidentiary significance on the issue as to whether there exists a corrupt intent, but that is a separate matter.

Additional Legislative criteria to apply to the controversial projects

In addition to the above Ethical and Integrity/Probity based criteria, the community and Inquiry can also utilise the additional criteria contained in the **Public Interest Disclosures Act 1994**³² designed in part to afford public officials (not the general community) limited protection for making a disclosure of **"Serious and substantial waste"** (Audit Office), **"Maladministration"** (Ombudsman), **"Corrupt conduct"** (ICAC) and other specified grounds to the appropriate designated public authority.

The community and Inquiry may wish to consider whether the material and circumstances available and discovered by the Inquiry may give rise to a reasonable apprehension that the planning processes under consideration may or has given rise to "serious and substantial waste" and/or "maladministration" in addition the previously discussed "corrupt conduct".

The Audit Office provides the following brief descriptions³³ to these potential causes of action (emphasis added):-

"Serious and substantial waste

Serious and substantial waste refers to the **uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources**.

In addressing any complaint of serious and substantial waste the Audit Office will have regard to the **nature, scale and materiality of the waste**.

The following delineation may be of assistance to public officials and/or public authority.

Waste can take many forms, for example:

- misappropriation or misuse of public property
- the purchase of unnecessary or inappropriate goods and services

³² http://www.austlii.edu.au/au/legis/nsw/consol_act/pida1994313/

³³ <http://www.audit.nsw.gov.au/About-Us/Complaints-and-Feedback/External-Public-Interest-Disclosures-Policy>

- too many personnel being employed in a particular area, incurring costs which might otherwise have been avoided
- personnel being remunerated for skills that they do not have, but are required to have under the terms or conditions of their employment
- programs not achieving their objectives and therefore the costs being clearly not effective and not efficient.

Maladministration

'Maladministration' is defined in the Act as conduct that involves action or inaction of a serious nature that is:

- contrary to law
- unreasonable, unjust, oppressive or improperly discriminatory
- **based wholly or partly on improper motives**".

A number of community and other commentators have expressed concerns with not only the decision making process, but the likely total costs of the truncation of the rail and the additional public cost and inconvenience of an allegedly inferior replacement service.

To assist the Inquiry, it is important to link such allegations and supporting/corroborating evidence with some inconsistency/contradiction with an underpinning law, government policy, memorandum, plan, directive etc.

Premier's Memorandum M2012-10 "Open Government"³⁴

Whilst the above "Active" Memorandum relates to the government's Information and Communications Technology strategy, it provides the following unequivocal statement:-

"The NSW Government is committed to the open government principles of transparency, participation, collaboration and innovation".

The community and Inquiry would be concerned if the above rhetoric did not match the reality in respect of the planning processes in the Hunter region under examination. It would be unreasonable for any government to apply the above commitment to only selective aspects of government.

The challenge confronting the Inquiry and the public benefit arising from the Inquiry would be to identify the reasons for any deviation and recommend mechanisms to ensure their systematic rectification and elimination not only from the projects under examination, but the whole broader planning, administration and governance process in NSW.

Consideration of the "Objectives" of legislation

An important consideration for the community and the Inquiry is whether the actions and outcomes disclosed by the Inquiry are consistent with the "Objectives" of various Acts and the underpinning general legal principle the "public interest"?

³⁴ <http://arp.nsw.gov.au/m2012-10-open-government>

As mentioned previously, it is not normal to base a legal challenge simply on the basis that a government decision is not allegedly consistent with an objective of a relevant Act. However, the objectives provide significant guideposts in the decision making process and any inconsistencies do raise serious integrity/probity and ethical issues.

Environmental Planning and Assessment Act 1979³⁵

“5 Objects

The objects of this Act are:

(a) to encourage:

(i) the proper management, [development](#) and conservation of natural and artificial resources, including agricultural [land](#), natural [areas](#), forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better [environment](#),

(ii) the promotion and co-ordination of the orderly and economic use and [development](#) of [land](#),

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of [land](#) for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the [environment](#), including the protection and conservation of native animals and plants, including [threatened species](#), [populations](#) and ecological communities, and their [habitats](#), and

(vii) [ecologically sustainable development](#), and

(viii) the provision and maintenance of [affordable housing](#), and

(b) to promote the sharing of the responsibility for [environmental](#) planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in [environmental](#) planning and assessment”.

“79C Evaluation

(1) Matters for consideration-general In determining a [development application](#), a [consent authority](#) is to take into consideration such of the following matters as are of relevance to the [development](#) the subject of the [development application](#):

(a) the provisions of:

(i) any [environmental planning instrument](#), and

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the [consent authority](#) (unless the [Director-General](#) has notified the [consent authority](#) that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any [development control plan](#), and

(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and

³⁵ http://www.austlii.edu.au/au/legis/nsw/consol_act/epaaa1979389/s5.html

(iv) the [regulations](#) (to the extent that they prescribe matters for the purposes of this paragraph), and

(v) any coastal zone management plan (within the meaning of the [Coastal Protection Act 1979](#)),

that apply to the [land](#) to which the [development application](#) relates,

(b) the likely impacts of that [development](#), including [environmental](#) impacts on both the natural and built [environments](#), and social and economic impacts in the locality,

(c) the suitability of the site for the [development](#),

(d) any submissions made in accordance with this Act or the [regulations](#),

(e) the public interest”.

TRANSPORT ADMINISTRATION ACT 1988 - SECT 2A³⁶

Objects of Act

2A Objects of Act

The objects of this Act with respect to the administration of the [transport services](#) provided to the people of New South Wales include the following:

(a) **to provide an efficient and [accountable](#) framework for the [governance](#) of the delivery of [transport services](#),**

(b) to promote the integration of the [transport system](#),

(c) to enable effective planning and delivery of [transport infrastructure](#) and services,

(d) to facilitate the mobilisation and prioritisation of key resources across the transport sector,

(e) to co-ordinate the activities of those engaged in the delivery of [transport services](#),

(f) to maintain independent regulatory arrangements for securing the safety of [transport services](#).

LOCAL GOVERNMENT ACT 1993 - SECT 7³⁷

What are the purposes of this Act?

7 What are the purposes of this Act?

The purposes of this Act are as follows:

(a) to provide the legal framework for an **effective, efficient, environmentally responsible and open system** of local government in New South Wales,

(b) to regulate the relationships between the people and bodies comprising the system of local government in New South Wales,

(c) to **encourage and assist the effective participation of local communities in the affairs of local government,**

(d) to give councils:

- the ability to provide goods, services and facilities, and to carry out activities, appropriate to the current and future needs of local communities and of the wider public

³⁶ http://www.austlii.edu.au/au/legis/nsw/consol_act/taa1988305/s2a.html

³⁷ http://www.austlii.edu.au/au/legis/nsw/consol_act/lga1993182/s7.html

- the responsibility for administering some regulatory systems under this Act
- a role in the management, improvement and development of the resources of their areas,

(e) to require councils, councillors and council employees to have regard to the **principles of ecologically sustainable development** in carrying out their responsibilities.

See also Section 8 “**Council Charter**”³⁸ of the Act for additional key objectives of Local Government.

Role of a Councillor³⁹

“232 What is the role of a councillor?”

(1) The role of a councillor is, as a member of the governing body of the council:

- to provide a civic leadership role in guiding the development of the community strategic plan for the area and to be responsible for monitoring the implementation of the council’s delivery program
- to direct and control the affairs of the council in accordance with this Act
- to participate in the optimum allocation of the council’s resources for the benefit of the area
- to play a key role in the creation and review of the council’s policies and objectives and criteria relating to the exercise of the council’s regulatory functions
- to review the performance of the council and its delivery of services, and the delivery program and revenue policies of the council.

(2) The role of a councillor is, as an elected person:

- **to represent the interests of the residents and ratepayers**
- **to provide leadership and guidance to the community**
- **to facilitate communication between the community and the council”.**

Key question confronting the community and the Inquiry - has Newcastle and other regional Councillors fully and properly discharged their above highlighted statutory obligations in an objective, impartial and transparent fashion with respect to all the relevant controversial projects and planning processes raised throughout the Inquiry?

³⁸ http://www.austlii.edu.au/au/legis/nsw/consol_act/lga1993182/s8.html

³⁹ http://www.austlii.edu.au/au/legis/nsw/consol_act/lga1993182/s232.html