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**The ways of the world:**  
Implications of political  
donations for the integrity of  
planning systems

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Practitioner in Residence program  
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## The ways of the world: Implications of political donations for the integrity of the planning system

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# Chapter 1 Introduction and Context

## Money for nothing?

For some years the heavy reliance of both major Australian political parties on developer donations has been known<sup>1</sup>. One developer (Jeff McCloy) memorably told the NSW Independent Commission against Corruption (ICAC, 2014b. p.5328T) he felt like a “walking ATM”. This sentiment was echoed by lobbyist Frank Dunlop, who told the Mahon Tribunal in Ireland that his phone would “walk off the desk” with calls from candidates seeking money as soon as a general election was called (Mahon 2012 p.757).

Both givers and recipients have insisted that nothing is expected and nothing is given in return for these donations, and it has been impossible to disprove this “money for nothing” proposition. Instead it has been suggested that donations are simply a way of “participating in the political process”. This suggestion reflects US Supreme Court jurisprudence, which has elevated donations to the status of “speech” and forbidden US legislatures to act to prevent anything short of “quid pro quo” corruption.

The Australian High Court followed the US Supreme Court part of the way along this path, characterising donations as a form of “political communication”. An attempt to confine donations to voters (as is the case in Canada) was successfully challenged in the High Court by Unions NSW, on the basis that this was an unreasonable imposition on an “implied freedom of political communication”<sup>2</sup>.

A recent challenge by Mr McCloy to the constitutional validity of the pre-existing NSW ban on donations from property developers, and caps on the amount of donations, was however unsuccessful in both respects<sup>3</sup>. The High Court rejected the US Supreme Court’s reasoning that governments may only limit political communication to prevent quid quo pro corruption. It confirmed that the prevention of both corruption *and undue influence* are valid reasons for legislatures to restrict political donations, and that in the final analysis, the Australian constitution must be interpreted to serve the interests of democracy.

This should come as a great relief to Australian citizens. Anti-corruption agencies with strong investigative powers (including the power to undertake covert operations) have uncovered what many suspected was the truth, both here and in Ireland. There is now firm empirical evidence of cases in which donations from the property development sector have in fact had “strings attached”. Something was expected of public officials in return, whether explicitly stated or not, and that something was some form of rezoning or development approval, or an action that cleared the way for these approvals.

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<sup>1</sup> See for example New South Wales Parliament Legislative Council, Select Committee on Electoral and Political Party Funding June 2008, Report no.1, *Electoral and Political Party Funding in New South Wales* p.6

<sup>2</sup> Unions New South Wales and Others v New South Wales [2013] HCA 58

<sup>3</sup> High Court of Australia, *McCloy v State of New South Wales* [2015] HCA 34, 7 October 2015.

Whether or not this behaviour constitutes *corruption* is a question of significance in terms of the possibility of sanctions against individuals. The issue for the integrity of the planning system is not however confined to corruption. It is the broader question of donor *influence* that has been brought into sharp focus by the work of anti-corruption agencies in Australia and elsewhere. Influence is the subject of this research paper, rather than corruption.

Some forms of influence are indeed corrupt by any standard. Other forms of influence are better characterised as “undue influence”; they may fall short of corruption but their potential impact on planning systems is nonetheless significant.

## Research question

The central concern addressed in this paper is whether, and if so, how, political donations pose a risk to the integrity of the planning system. It concerns both the corruption of decision-makers and undue influence over them. Both corruption and undue influence have the potential to distort planning processes and outcomes.

These questions, though explored in the context of planning systems, have much broader implications. Over time, the use of donations to corrupt elected officials or to build influence over them damages the health of our democratic system of government. There are indications that significant damage has already occurred.

The research question addressed in this paper is: *Can planning systems co-exist with a weak political donations regime and retain their integrity? An interrogation and analysis of case studies of donor influence on planning and development approvals in selected jurisdictions.*

## Research gap

The systematic study of corruption and influence-buying in the land development process appears to be rare. As Dodson, Coiacetto and Ellway (2006, p.3) have observed:

*While many theorists address how planning processes can be distorted by political contestation, the criminal or administrative dimension of political contestation is rarely investigated. Despite the scholarly attempts to comprehend the land development process in cities, planning scholars have been deliberately or inadvertently ignorant of questions of corruption. This situation is peculiar given the potential for corruption to occur either grossly or subtly in planning processes...*

*By comparison, the complex and often murky realm of urban politics has received substantial attention from scholars*

Dodson and his colleagues point to the difficulty to date in accessing reliable and relevant evidence of corrupt practice in the land development process. The same has been said of academic study of corruption in general (Berlinski 2009 p.74):

*The term “corruption” compasses such practices as bribery, fraud, embezzlement, kickbacks, cronyism and extortion. These are crimes. Like all crimes, they are difficult to study because those who commit them are not*

*motivated – indeed, are particularly unmotivated – to cooperate with efforts to study them. In the best case, the data are buried; in the worst case, the researchers are buried.*

This paper attempts to narrow a particular part of the research gap identified by Dodson and his colleagues: the use of political donations as a method of securing influence over the land development process.

This paper concludes that influence acquired by the payment of money is inherently undue influence, and that it is immaterial for present purposes whether or not undue influence crosses another line and is properly regarded as corrupt. Monetary influence on elected representatives is one or the other; both damage the integrity of the planning system, and in time erode faith in the democratic system.

On the basis of this conclusion, this paper considers how best to protect and enhance the real and perceived integrity of the planning system, and by extension, the proper working of the democratic system.

## Evidence base

Empirical evidence on corruption and undue influence is becoming more available as anti-corruption agencies and special-purpose Tribunals are established in places with similar political systems and planning systems, and publish investigation reports and transcripts of their proceedings. Political donations surface repeatedly in these documents. These official reports and transcripts function as case studies, which add considerably to the research published in scholarly journals.

There is a great deal of academic inquiry into the effects of political donations by legal academics, especially in the United States (Burke 1997, Cialdini 2009 p.28). Political scientists have considered the question from a different perspective, that of democratic theory and practice.

Evidence of the reality of influence also comes from the field of psychology. A donation, like any gift, tends to activate the very human urge to *reciprocate* (Cialdini 2009, Chapter 2). This dynamic readily skews the judgement of any human being, but as chapter 6 of this paper discusses, recipients may not be consciously aware that this is so.

This paper draws on material from all these fields, but particularly from case studies. The research task for this project entailed reviewing published reports of investigations into possible corrupt activities associated with development decisions, including decisions concerning enabling infrastructure, and isolating those in which donations played a part.

## Summary

Persistent concerns about donations influencing elected officials are met with retorts that donations “support democracy” and donors expect and receive nothing in return. The issue is often, though by no means exclusively, raised in connection with planning decisions.



Some influences that are hypothesised to distort the urban decision-making process (like political contestation and what is often called “nimby”<sup>4</sup> influence) are much studied. Corrupt influence is less studied, and has been difficult to study due to the lack of hard evidence. The same is true of monetary influence that does not necessarily meet the relevant standard of “corruption”.

Both corruption and undue influence can distort planning processes and outcomes. Over time, the use of donations to corrupt elected officials or to build influence over them also damages the health of our democratic system of government.

With the increasing availability of published material from anti-corruption bodies it is now possible to remedy this lack of study. Doing so provides the basis for the development of effective measures to protect the integrity of planning systems.

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<sup>4</sup> “Not in my back yard”

## Chapter 2 Scope

### Political donations

The scope of this paper is limited by its focus on the use of *political donations* to attain influence over planning decisions.

Unelected public officials are of course not offered inducements in the form of political donations. It follows that this paper focuses on elected representatives rather than on unelected public officials, including planners.

There are other methods of seeking undue influence over planning decisions. The most obvious and least subtle method is bribery, the targets of which may be either elected or unelected. Bribery is well understood to be corrupt and there is little debate about how it works and the consequences it has<sup>5</sup>.

This focus on elected officials does not mean I am judging the incidence of corruption to be higher among elected officials, although that might be true of undue influence. True figures are impossible to obtain.

### The planning system

The term “the planning system” is most often used in the NSW context to refer to the legislative framework established by the *Environmental Planning and Assessment Act 1979* (“EPA Act”), and statutory planning instruments made under that Act (LEPs, SEPPs, and DCPs). This constitutes the enabling framework for what most people trained as “planners” (also known as “land use planners or “urban planners”) do in their day-to-day work. There are broadly parallel systems in existence across the English-speaking world.

Urban and regional development and change do not rest solely on the statutory planning system. Many other decisions enable, or restrict, land use development and change. These include infrastructure provision, immigration intake, industry policy, interest rates, and foreign investment rules.

In this paper I am focusing on the statutory planning system and some of the enabling infrastructure decisions that are inextricably linked to urban development (such as transport, and water and sewerage provision).

Some other systems concerning urban infrastructure and land use will be referred to in this paper, but others (like waste removal and liquor licensing) are more operational in nature and outside its scope.

### Case studies

The use of political donations to buy influence over planning decisions and related enabling decisions has featured in numerous official investigations. These include

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<sup>5</sup> See National Institute of Law Enforcement and Criminal Justice (1979). *Corruption in land use and building regulation: program for the study of corruption in local government*. [Washington, D.C.]. This 1970s research details many examples including a scheme whereby New York building inspectors delayed and “lost” applications if not paid a bribe.

six investigations by the NSW Independent Commission Against Corruption (ICAC) since 1990, with several more instances under scrutiny in a current inquiry (Operation Spicer); and four investigations by the Corruption and Crime Commission of Western Australia (CCC) in 2008 and 2009. They also include a series of investigations conducted by the Mahon Tribunal in Ireland.

### *The Mahon Tribunal*

Described in one press article as “the mother of all Tribunals” (Clifford 2013), the Tribunal of Inquiry into Certain Planning Matters and Payments (the “Mahon Tribunal”) ran from 1997 to 2008 in Ireland, and made its final report in March 2012<sup>6</sup>. It was initially referred to as “the Flood Tribunal” (for its first Chairman).

The Mahon Tribunal’s final report (2012, p.2) records the background to its creation:

*1.08 In the late 1980’s and early 1990’s Dublin County Council rezoned thousands of acres of land, repeatedly against the advice of the professional planners. There was a widespread belief that many of these rezoning decisions had been bought by developers and that some public officials, including local councillors, were for sale.*

*1.09 Matters came to a head in 1995, when Mr Colm Mac Eochaidh, a barrister<sup>7</sup>, and Mr Michael Smith, the then Chairman of An Taisce<sup>8</sup>, placed an anonymous advertisement in the Irish Times..., offering a reward of IR£10,000 for information on land rezoning corruption that would lead to a conviction.*

Among the responses was an allegation by James Gogarty that he had been present at a meeting during which the then Minister for Industry and Commerce, Ray Burke, received IR£80,000 from property developers in return for his support and his influence over others in rezoning land in North Dublin (Mahon 2012, p.2).

Details of this allegation emerged in the newspapers and sparked the establishment of the Tribunal on 4 November 1997. Days later Mr Burke resigned from his position as Minister for Foreign Affairs (Mahon 2012, p.2).

Mr Burke admitted that he had accepted IR£30,000 as a political donation at a meeting with Mr Gogarty (Mahon 2002, p.5), but who else was there, who handed the money over, on whose authority, and why, remain contested to this day and may never be resolved<sup>9</sup>.

By the time of its final report in 2012, the Mahon Tribunal had found 14 separate rezonings that had been influenced by corrupt, improper or inappropriate payments in the form (or guise) of political donations. The Tribunal made adverse findings against public officials from George Redmond, Dublin’s Assistant City and County Manager, right up to the Prime Minister, Bertie Ahern.

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<sup>6</sup> One chapter was withheld from publication for legal reasons until July 2013.

<sup>7</sup> Now a judge of the Irish High Court

<sup>8</sup> The National Trust for Ireland

<sup>9</sup> Findings made against Mr Burke and several developers based on Mr Gogarty’s evidence were withdrawn after a court challenge to the use of statements redacted to remove what the Tribunal saw as irrelevant material; lawyers had not had the opportunity to cross-examine Mr Gogarty on the redacted material. Mr Gogarty died in 2005.

<http://www.planningtribunal.ie/asp/Sumpapers.asp?ObjectID=310&Mode=0&RecordID=451>

### *Data gap*

The case studies referred to in this paper were chosen because they combine three features: political donations, planning decisions, and donor influence. They are drawn from NSW, WA and Ireland, all advanced democracies with similar planning systems. They were chosen as illustrations, without any claim as to what proportion of the total number of applications that have passed through elected hands they represent.

The likely rejoinder is that many thousands of applications lodged by donors are processed without any evidence of corruption or undue influence. The implication is that there is no problem or that it is not significant enough to warrant much attention. Exactly what number, or percentage, would satisfy this objection is an interesting question to which there is no answer.

In any event, actual numbers and percentages will never be known.

Unlike crime statistics, which are based on reported crime, prosecution statistics and supplementary surveys, corruption statistics are unobtainable. Corrupt arrangements aim to ensure that the victims remain unaware that they have something to report.

Nor are there any available statistics on donor influence short of corruption – undue influence. The possibility that donations can establish undue influence may not even be acknowledged. Recipients bristle at any suggestion that donations influence decisions, proclaiming in an injured tone that they “can’t be bought”. Once in a while a donor admits to the purchase of access to politicians with the expectation of influencing decisions, but for the most part, donors stick to the script and profess an altruistic desire to “support democracy” or “participate in the political process” (de Lollo 2015).

### Summary

The scope of this paper is confined to the risks political donations pose to the integrity of the planning system. This necessarily means that primary focus will be on the actions of elected officials rather than non-elected officials.

The term “planning system” as used in this paper refers to the statutory planning system and some of the enabling infrastructure decisions that are inextricably linked to urban development (such as transport, and water and sewerage provision).

The paper draws on case studies drawn from NSW, Western Australia, and Ireland (the Mahon Tribunal). It is impossible to say whether such cases are rare, occasional, or common and such inquiries are bound to lead to a dead end.

Corrupt behaviour is most unlikely to be reported and concealment is the norm, while the influence of donors is rarely admitted and may not even be consciously recognised. Actual numbers and percentages will never be known.

## Chapter 3 Key concepts

### Relationship between legitimacy and integrity

This paper concerns the integrity of planning systems, not the legitimacy of planning systems.

Legitimacy and integrity are not the same thing, although they often go together. Legitimacy concerns the justification for creating and maintaining the system in the first place. Integrity concerns the ability of the system to produce decisions that serve the public interest.

A system that is known or strongly suspected to lack integrity will also lack legitimacy. A planning system that some regard as lacking legitimacy, however, does not necessarily lack integrity.

### Legitimacy

The legitimacy of planning systems is sometimes attacked for reasons that have nothing to do with the integrity of the system or anyone working within it, and everything to do with its regulatory character.

There are different conceptions of the *nature of the planning system* – I come down on the side of those (like Lord and Tewdwr-Jones (2014); Mant (2006) and Dawkins (1996)) who argue this is a regulatory system – the pointy end is a decision about what an individual can and cannot do on or with a particular area of land. Planning schemes and strategic plans provide the criteria for that decision. They may seek to do other things as well, particularly to guide investment decisions, but this does not change their essential nature.

Regulatory activity invariably seeks positive outcomes, like clean water, sturdy buildings, sober drivers, financial stability and liveable urban environments. From the regulator's perspective the positive outcome sought dominates; from the applicant's perspective the constraint dominates, even if the basic aim is understood and accepted.

However positive the outcome sought, the act of limiting the right of landowners to do as they wish with their land is inherently a regulatory act; it is a form of market intervention. Whether and how governments should intervene in markets is bound to be a matter of contention.

### *The neoliberal project*

Klosterman (1985) suggests that the “great debate” of the 1930's and 1940's between proponents of government planning and defenders of free markets and laissez -faire has never really ended. Klosterman's observation (at p.2) is as true now as it was in 1985:

*Contemporary arguments for abandoning planning, reducing regulation, and restricting the size of government are generally accompanied by calls for increased reliance on private entrepreneurship and the competitive forces of the market. That is, it is often argued, government regulation and planning are unnecessary and often harmful because they stifle entrepreneurial*

*initiative, impede innovation, and impose unnecessary financial and administrative burdens on the economy.*

Challenges to the legitimacy of the planning system have intensified in the neoliberal era in which we still live (Lord and Tewdwr-Jones 2014). A recent example is the nomination of planning and zoning rules as one of three priority areas for review, in a review of competition policy in Australia (Harper et al 2015). The Harper Report argues (at p.44) that:

*Planning systems by their nature create barriers to entry, diversification or expansion, including through limiting the number, size, operating model and mix of businesses. This can reduce the responsiveness of suppliers to the needs of consumers.*

A 2015 article in the Economist (p.9) complains that:

*London has strict rules preventing new structures blocking certain views of St Paul's Cathedral. Google's plans to build housing on its Mountain View campus in Silicon Valley are being resisted on the ground that residents might keep pets, which could harm the local owl population. Nimbyish residents of low-density districts can exploit planning rules on everything from light levels to parking spaces to block plans for construction.*

The Economist sees an association between planning controls and higher house prices, arguing 'many households are priced out of more vibrant places. It is no coincidence that the home-ownership rate in the metropolitan area of downtrodden Detroit, at 71%, is well above the 55% in booming San Francisco.' The article contains the claim that:

*... lifting all the barriers to urban growth in America could raise the country's GDP by between 6.5% and 13.5%, or by about \$1trillion- 2trillion. It is hard to think of many other policies that would yield anything like that.*

### ***Begging to differ***

On the other hand, the diagnoses and the prescriptions of neoliberal ideology are not universally accepted. There is strong public support for the regulation of development, for a variety of social, environmental, amenity and financial reasons. The fierce reaction to proposed changes to the EPA Act in 2013, widely perceived as an attempt to loosen control over development, demonstrates this countervailing force.

An attempt to add to the changes made to the NSW biodiversity offset scheme late in 2014 '*the opportunity to reduce the value of the required offset if a project's social or economic benefit is deemed significant enough*' was also fiercely opposed and eventually abandoned (Nicholls 2014a) by the NSW State government.

Opinions will differ on whether or not it is appropriate to insist that planning regulations should work in the interests of "consumers". Some might see themselves as citizens living in a society, not consumers living in a marketplace. Different perspectives and ideologies will produce different views of what constitutes "the public interest".

So, while the Economist might have a problem with planning controls protecting views of St Paul's Cathedral, Londoners and visitors might well regard views of Wren's masterpiece as, literally, priceless. The Economist (2015, p.9) itself anticipates (and rejects) the retort: '*give economists their way, and they would quickly pave over Central Park*'.

### ***Events, experience, and values***

Popular and government enthusiasm for free markets and for the regulation of development waxes and wanes, and is strongly influenced by events and lived experience, as well as by underlying values.

The history of planning began in a laissez faire era, in tandem with the public health movement. It sprang from concern about the wretched living conditions of many city dwellers, famously chronicled by Charles Dickens and captured photographically by Jacob A Riis in "How the Other Half Lives", in the late 19<sup>th</sup> century. Klosterman (1985, p.9) observes that:

*The planning profession originated at the turn of the [20<sup>th</sup>] century in response to the widespread dissatisfaction with the results of existing market and political processes reflected in the physical squalor and political corruption of the emerging industrial city*

By the mid 20<sup>th</sup> century, planning had moved on, to "make no little plans"<sup>10</sup>. Concern about the squalid living conditions of the inner-urban poor was supplanted in Australia by dissatisfaction with the lack of services like water and sewerage in urban fringe developments.

Later concerns included the protection of the environment: air quality, water quality, biodiversity, natural features such as headlands and escarpments, and the ecological health of sensitive wetlands and bushland. Employment prospects are a perennial concern, and they become particularly potent in times of economic restructuring and high unemployment.

When natural catastrophe strikes, the focus of government and citizens reliably shifts, and restrictions on development on flood prone or bushfire prone land make their way to the top of the agenda (e.g. Keys, 2015). Between catastrophes, memories dim and sentiment often moves the other way.

### ***Working assumption***

This paper does not try to answer these philosophical, political, and empirical questions about the legitimacy of the planning system. I need to acknowledge that they exist, but this paper is about something else entirely.

I am going to make the assumption that a planning system that regulates development and land use will still be with us, in some form, for the foreseeable future. The immediate challenge is to protect its integrity.

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<sup>10</sup> The famous Chicago architect/planner Daniel Burnham is often quoted as saying, "Make no little plans. They have no magic to stir men's blood and probably will not themselves be realized"; but there is some debate about whether these were his actual words [http://articles.chicagotribune.com/1992-01-01/news/9201010041\\_1\\_sentences-chicago-architects](http://articles.chicagotribune.com/1992-01-01/news/9201010041_1_sentences-chicago-architects)

## Integrity

My starting point is the proposition that a sure way to destroy the legitimacy of *any* planning system is to enable some applicants to obtain more favourable treatment than they would otherwise receive, by making a payment to the right person or in the right quarters. A system that can be subverted in this way is in danger of losing its integrity, and along with it, its legitimacy.

If a political donor gains *any* advantage over other applicants, the integrity of the system is damaged.

At some point, the functioning of the system of democracy itself is undermined. Just how many cases it takes to reach that point is an important question. Unfortunately it cannot be answered until that point has been passed – until the last straw has broken the camel's back.

The question is, can the planning system be subverted in this way? If it *has been*, then clearly it *can*.

## Corruption

Various definitions of corruption can be found in social science and political science literature. According to Della Porta and Vannucci (1997, p.231), corruption has been characterised as a form of behaviour that deviates from: the public interest (citing A. A. Rogow and H. D. Lasswell (1974)); legal norms (citing J. S. Nye (1967)); or some other publicly sanctioned moral standards or norms (citing L. Berg, H. Hahn and J.R. Schmidhauser (1976)).

Della Porta and Vannucci (1997, p.231) observe that early conceptions of what they term *political* corruption differ from modern ones:

*The term corruption has assumed different connotations in different historical periods. In a classic conception, political corruption was conceived as the degeneration of the political system in general: for Machiavelli, it was the destruction of citizens' virtues; for Montesquieu, the transformation of a good political order into an evil one; for Rousseau, the inevitable consequence of the very struggle for power.*

*Later on, political corruption started to be considered as a pathology rather than a general disease and as a particular type of individual behaviour rather than a systemic disease.*

The second, more modern conception of political corruption is the one most relevant to this paper. The threat to the integrity of the planning *system* posed by political donations lies in the actions of *individuals*. In ordinary conversation, these individuals might often be labelled "corrupt". Legally however this might not be so; that will depend on definitions and court interpretations.



There are overlaps with the concepts of patronage and clientelism, as noted by the High Court in its recent decision in *McCloy*<sup>11</sup> (p. 14 para.36):

*There are different kinds of corruption. A candidate for office may be tempted to bargain with a wealthy donor to exercise his or her power in office for the benefit of the donor in return for financial assistance with the election campaign. This kind of corruption has been described<sup>12</sup> as "quid pro quo" corruption.*

*Another, more subtle, kind of corruption concerns "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."<sup>13</sup> This kind of corruption is described as "clientelism". It arises from an office-holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest. The particular concern is that reliance by political candidates on private patronage may, over time, become so necessary as to sap the vitality, as well as the integrity, of the political branches of government.*

Where there is a corruption commission there will be a statutory definition of the term. These differ according to the jurisdiction, but they embody democratic expectations that the conduct of public officials will be "honest and impartial" and reflect the "public trust" placed in them. These expectations are explored in Chapter 6. In general, there is no single crime of corruption as such, but a variety of possible offences<sup>14</sup>.

### ***Public office, private gain***

The elements common to most definitions of corruption (in the sphere of government) are public office, and private gain. Accordingly, Collins and O'Shea (2000, p.2) suggest a working definition: "*the abuse of public office for private gain*", which I will adopt in this paper. Private gain includes gain accruing to the friends, relatives, and business associates of office holders. The use of public office to deliver private gain to donors can also, in some circumstances, constitute corruption.

There are some layers to the question of what constitutes corruption that need to be addressed at this point.

### ***Explicit bargains, tacit understandings***

One area in which understandings of corruption can differ concerns the necessity for an explicit exchange of money or some other benefit for a particular decision. This is often termed "quid pro quo" corruption, suggesting there can also be corruption without an identifiable quid pro quo.

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<sup>11</sup> High Court of Australia, *McCloy v State of New South Wales* [2015] HCA 34, 7 October 2015

<sup>12</sup> Citation: *Buckley v Valeo* 424 US 1 at 26-27 (1976); *McCutcheon v Federal Election Commission* 188 L Ed 2d 468 at 485, 495-498 (2014).

<sup>13</sup> Citation: *McConnell v Federal Election Commission* 540 US 93 at 153 (2003).

<sup>14</sup> For a detailed review of the Australian situation see Lenny Roth, NSW Parliamentary Research Service, September 2013 e-brief 11/2013

Thomas Burke (1997) identifies what he calls three competing *standards* for corruption in US cases – quid pro quo, monetary influence, and distortion. These standards are used not to determine whether particular conduct is corrupt, but whether the legislature is permitted to do anything to prevent it.

#### Quid pro quo standard

Burke (1997, p.131) describes the quid pro quo standard as follows:

*The quid pro quo standard is simply that it is corrupt for an officeholder to take money in exchange for some action. The money may be a bribe for personal use or a campaign contribution. The deal is explicit, with both sides acknowledging that a trade is being made.*

Burke (1997) and others are fiercely critical of the inclusion of the idea that an explicit quid pro quo is a necessary element of corruption. Issacharoff (2010, p.127) for example points out that the quid pro quo approach cannot deal with clientelism:

*At its simplest, clientelism is a patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged access to public goods. The concept differs in emphasis from quid pro quo corruption. The traditional account of corruption assumes that the harm is the private benefit obtained by the politician. While the concept of quid pro quo corruption is ample enough to include almost any benefit obtained, the focus of clientelism is not the enrichment of an individual politician but continued officeholding on the condition that "party politicians distribute public jobs or special favors in exchange for electoral support."*

The quid pro quo approach was restated by Chief Justice Roberts in the recent, and controversial, case *McCutcheon et al v FEC* (2014, pp.1-2):

*The right to participate in democracy through political contributions is protected by the first amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption [but]... Any regulation must ...target what we have called 'quid pro quo' corruption or its appearance... That Latin phrase captures the notion of a direct exchange of an official act for money.*

This standard also means that such actions as “calling in a favour” some time after a donation is made, to advance a proposal not necessarily in existence at the time, are unlikely to qualify as corrupt. As Thompson (2005, p.1046) implies, this is a perverse outcome:

*Connections that are proximate and explicit, elements that are required to show bribery, are not necessarily any more corrupt than connections that are indirect and implicit.*

Thompson’s point is well illustrated in one of the cases covered by the Mahon Tribunal in Ireland. Some of the benefits enjoyed by Dublin Councillors who supported the “Quarryvale” shopping centre rezoning accrued during the construction phase, long after the land had been rezoned. Councillor McGrath was engaged to provide “Security Services and Small Plant Hire”; Councillor O’Halloran

provided “Canteen Services”; and Councillor Tyndall provided “Insurance Services”. The site’s developer, Owen O’Callaghan, claimed (Mahon 2012 p.1022) that he was just “*employing local people*”.

The quid pro quo standard tends to equate corruption with bribery. Bribery (the classic “hidden transaction”) must surely be a *type* of corruption though, not a synonym for corruption. The concept of corruption would otherwise be redundant, or close to it, as bribery is a crime in every jurisdiction founded on English law and in most other places.

#### Monetary influence standard

According to Burke (1997):

*The monetary influence standard is broader. Here the root idea is that it is corrupt for officeholders to perform their public duties with monetary considerations in mind. The influence of money is corrupting under this standard **even if no explicit deal is made** (emphasis added).*

Burke regards the monetary influence standard as the most appropriate standard, and this is a sound suggestion. Payments to public officials, especially secret payments, strongly suggest corrupt motive – that is not usually questioned, except in the case of political donations.

The only argument against this standard seems to be the worrying suggestion that the payment of money to elected officials without an *explicit* trade is part of “everyday politics”, and that the status quo should not be disturbed. Burke (1997, p.137) notes that in *McCormick v. United States*<sup>15</sup>, the Supreme Court reversed a bribery conviction because the jury had been instructed that no quid pro quo was necessary to make a campaign contribution illegal:

*The Court concluded that to allow a conviction without evidence of an explicit trade would cast a shadow over everyday politics and make all legislators vulnerable to prosecution...*

Queensland takes a different view of “everyday politics”. Former Queensland Minister Gordon Nuttall served six years of a 14-year jail term (Rawlins 2011) for official corruption and perjury, without an explicit quid pro quo being identified. He had received almost \$360,000 over three years from prominent Queensland businessmen, Ken Talbot and Harold Shand, and \$152,700 from businessman and close friend, Brendan McKennarney<sup>16</sup>.

The Mahon Tribunal appears to have applied a “monetary influence” standard in its findings against Ray Burke, who was the Minister for the Environment from October 1980 to June 1981, and again from March 1982 until December 1982. Mr Burke was also Chairman of Dublin County Council between 1985 and 1987.

In its second Interim Report in 2002 the Tribunal found that Mr Burke operated offshore accounts<sup>17</sup> into which property developers Tom Brennan and Joseph

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<sup>15</sup> 500 U.S.257, 271-74(1991)

<sup>16</sup> <http://www.abc.net.au/news/2009-07-15/nuttall-found-guilty-of-corruption/1354284>

<sup>17</sup> One was in a false name.

McGowan had separately or together lodged sums totalling £100,000 between December 1982 and April 1985 (Mahon [Flood] 2002 p. 19). All three men insisted that the payments were political donations.

The precise reason for the payments never became clear, but the Tribunal concluded (Mahon 2012 p.34) that they were corrupt payments made “*with the intention of securing some, as yet unidentified, benefit*”.

#### Distortion standard

The third standard of corruption identified by Burke (1997, p.131) from US case law is the distortion standard. The ideal behind this standard in his view is that:

*... the decisions of officeholders should closely reflect the views of the public.*

Burke’s “distortion standard” is reminiscent of the principle of *political equality* and serves much the same purpose. The protection of political equality is not, however, seen by the current US Supreme Court as a legitimate reason to regulate political donations. Chief Justice Roberts in *McCutcheon et al v FEC* (2014, p.18) states:

*No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field’ or to ‘level electoral opportunities’ or to ‘equalize the financial resources of candidates ... Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to quid quo pro corruption. Nor does the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties.*

According to Burke (1997, p.143), Bruce Cain (1995, p.112) regards it as a mistake to include distortion of the political process as a type of corruption:

*By littering the intellectual landscape with irrelevant issues, moralist/idealists obstruct the path to a full, open discussion of the public’s views about the proper distribution of power and influence.*

This argument has some force. Cain (unlike the current US Supreme Court) appears to accept that the distribution of influence matters. The question of distortion of the political system is however more relevant to undue influence than to corruption. Corruption is a strong term, and when used to refer to an individual (not a system) it is usually reserved for conduct meriting serious consequences for that individual. The official sanctions available range from disciplinary action (such as a period of suspension) to prosecution for a criminal offence.

Attempts to adopt wider definitions of “corruption” are arguably the US way of trying to capture undue influence while remaining within the US constitution as interpreted by its current Supreme Court. The exercise is unnecessary in Australia because our High Court recognises political equality as “the great underlying principle” of the Australian Constitution, and allows the legislature to pass laws designed to prevent undue influence as well as corruption, provided certain tests are met – see Chapter 9.

## Undue influence

Joo-Cheong Tham (2010, p.4) classifies corruption involving a quid pro quo as 'corruption through graft'. He distinguishes this (at p.5) from 'corruption through undue influence':

*In contrast with corruption through graft, corruption through undue influence does not require explicit bargains or that a specific act result from the receipt of funds.*

Tham thus subsumes the concept of undue influence within the concept of corruption, using what Burke would call the monetary influence standard.

In this paper, though, I prefer to treat corruption and undue influence as two separate, though intertwined, concepts. The High Court (*Unions NSW* and *McCloy*), the EPA Act (s.147), and the *Election Funding, Expenditure and Donations Act 1981* NSW (s.4A(c)) all use the phrase "corruption and undue influence". Justice Gageler in *McCloy* states (p.57):

*Undue influence has different meanings in different contexts. Influence is a matter of degree; whether or not influence is undue is a matter of judgment; and judgment is a matter of perspective. The perspective here is the effect on the integrity of government.*

The primary issue for this paper is whether donations give the donor *influence* over an elected official who in turn can influence the outcomes of the planning system. For present purposes, it does not matter whether that influence is undue, or crosses a line beyond which lies "corruption".

### **"Due influence"**

Not all influence on elected officials is "undue influence". The term connotes a form of influence that is not legitimate in a particular context, in this case, the operation of a planning system. It tends to invite consideration of what constitutes "due influence" (a suitable synonym might be "legitimate influence").

It might be readily agreed that forms of "due influence" on elected officials would include listening to reasoned argument and heeding empirical evidence from their departments or from respected agencies such as the CSIRO or university research centres. Beyond that there would be less agreement. Two areas warranting discussion are influence exerted by electors, and influence exerted by vested interests and lobbyists.

### **Electors**

The influence of electors on politicians is often disparaged – as Dodson and his colleagues (2006) remark, the allegedly "distorting" effects of political contestation on the planning process is much studied. The usual pejorative is "nimbyism".

The contrary view is that there is nothing untoward about elected officials responding to public opinion in general and to the opinions of their electors in particular. There is much more to representing constituents than polling them, certainly, but critiques asserting that politicians act wrongly if they act "politically" could on this view be regarded as technocratic and undemocratic.

The influence of electors is clear in the evidence given to the Mahon Tribunal by a councillor who was found to have improperly (though not corruptly) taken payments in the form of political donations from Frank Dunlop, a lobbyist acting for property developer Owen O'Callaghan.

Mr Dunlop had counted Councillor McGennis's support for the "Quarryvale" development as "definite". When the rezoning proposal came before the Dublin County Council in May 1991 Councillor McGennis voted in favour of it; but when a second vote was required 18 months later, she did not vote as Mr Dunlop had anticipated. Her reason for this 'u-turn' was what she described (Mahon 2012 p. 991) as *'the explosion that occurred in Blanchardstown'*:

*It was non-ending from the day of the Local Elections. All of the way through there were pickets outside the Council offices, there were mail shots, there were people coming to the clinics, there were public meetings and it was just impossible to get the message through that a vote for Quarryvale wasn't a vote against Blanchardstown.... So where I believed, and I still believe, that [sic] in the merit of Quarryvale, I'm afraid that the reality was that ... it would have been political suicide for me to vote for that.*

The electors might not have been the only influence. It transpired that Councillor McGennis had also taken a IR£5,000 donation from the owner of the rival shopping centre site at Blanchardstown, less than 2 miles away (Mahon 2012, p.988).

Although it found many councillors to have behaved in ways that were variously corrupt, improper or inappropriate, the Mahon Tribunal did not regard bowing to the wishes of the electorate as any of those things.

Whatever the rights and wrongs of voter influence on elected representatives, I do not include it as "undue influence" in the sense in which the term is used in this paper. There is a world of difference between the statements: "*Reconsider your plan to allow 20-storey towers in my suburb, and you have my vote*"; and "*I want to build 20-storey towers in low-rise suburbs but I am having a bit of trouble getting my plans through; oh, and by the way, I am keen to make a donation to your party.*"

### ***Vested interests and lobbyists***

It could be argued that influence by or on behalf of vested interests (entities with something to gain or lose from a decision) automatically constitutes "undue influence". The involvement of lobbyists is a particular concern. Some people revile lobbyists, and see their influence as inherently illegitimate.

On the other hand, it can be argued, I think correctly, that the mounting of a cogent argument to influence decision makers, by any sector of society, is a beneficial feature of democracy. Even on this view, though, there must be a qualification. The claimed benefits disappear if the argument is bolstered by a donation; this includes securing a superior level of access for vested interests and lobbyists to make their argument. "Outsiders" may have little or no chance to challenge the quality of the analysis or the accuracy of the information presented behind closed doors.

### **Drawing lines**

The Mahon Tribunal grappled with the question of how to draw the line between

payments that should be regarded as corrupt, those that should be classed as improper or inappropriate, and legitimate donations.

The approach taken by the Tribunal is encapsulated in a passage from its final report. The Tribunal found (Mahon 2012, p.828) that the developer Owen O'Callaghan had provided his lobbyist Frank Dunlop with large amounts of cash (IR£80,000 in 1991 and IR£73,500 in 1992) and that most of this money was paid to councillors to ensure their support for the rezoning of land at "Quarryvale":

*1.17 ... The Tribunal considered that such payments were always corrupt from the perspective of Mr Dunlop and Mr O'Callaghan, and were often (although not always), corrupt from the perspective of the recipients.*

Having considered an enormous amount of evidence, the Mahon Tribunal (p.1133) developed a set of principles relating to payments to local councillors, covering both givers and recipients. These principles are summarised below.

The Tribunal applied the same principles to: payments by or from agents (such as lobbyists like Frank Dunlop); monetary equivalents and other forms of favour; and payments to candidates for election.

#### **Donors**

In the eyes of the Mahon Tribunal it was "probably corrupt" for a developer/landowner to pay money to an elected councillor, where:

- (a) the developer/landowner was, or was likely to be, or to become, the subject of a decision by the County Council in which the councillor was an elected public representative;
- (b) the councillor would be entitled to exercise the right to vote, or to otherwise act, in relation to such a decision.

Depending on the circumstances, however, the payment might alternatively be classed as "improper" or "inappropriate". The Tribunal's concept of improper or inappropriate payments corresponds with the concept of "undue influence".

Donors often argued that payments could not be corrupt because they did not change the recipient's actions, but this claim was either rejected or made no difference to the Tribunal's overall view of them:

*1.58 The Tribunal did not consider it necessary that the recipient was actually influenced by the payment or even aware of the payer's intention to influence him or her for the payment to be corrupt on the part of the payer.*

#### **Recipients**

The principles applied by the Mahon Tribunal in the case of the recipients of donations were:

- a) It is corrupt to solicit or accept money from a developer/landowner, specifically in return for exercising his/her vote (or for undertaking any other act open to him/her to take in his/her role as a councillor);

- b) It is corrupt for a councillor to exercise his/her vote in the expectation of a payment of money;
- c) It is inappropriate, improper or corrupt to solicit or accept money from a developer/landowner, where it is known, believed, expected or suspected that land in which they have an interest is (or is likely) to be the subject of a rezoning/planning decision, in respect of which the councillor has any role.

In addition to being inappropriate, improper or corrupt (depending on the circumstances), the Tribunal concluded that soliciting or accepting a donation in the above circumstances:

- a) compromises the councillor's disinterested performance of his/her duties as a councillor; and
- b) constitutes an abuse of a councillor's public office.

As in the case of donors, the Tribunal did not regard it as necessary that recipients could be shown to have actually changed their vote, to justify a corruption finding. The Tribunal did not however make findings of corruption against recipients unless they were aware that a donation was intended to influence them, and it accepted that *'this level of conscious awareness by councillors in receipt of payments was not always present'*.

#### **National politicians**

The Tribunal did not set out a separate set of principles in relation to payments made to politicians at the national level, such as the IR£25,000 given by developer Owen O'Callaghan to Liam Lawlor TD<sup>18</sup> during the November 1992 election campaign. It made a number of findings broadly consistent with the application of the same principles it applied to the local level.

It was unable to ascertain whether or not some of the hundreds of thousands of pounds acquired by Bertie Ahern, for which he had no sensible explanation<sup>19</sup>, came from Owen O'Callaghan (Mahon 2012 p.2481). Mr Dunlop admitted he had paid IR£25,000 to someone at Powers Hotel near Ireland's Parliament House in September 1993, but his memory uncharacteristically failed him, and he could not tell the Tribunal the name of the recipient (Mahon 2012, p.773).

#### Points on a continuum

Corruption and undue influence are best thought of as sitting at different points on a continuum; with legitimate influence at one end, corruption at the other, and undue influence somewhere between the two.

The point at which influence on a public official becomes "undue influence" is hard to pinpoint, but that point has certainly been passed if money, including a political donation, has been paid to a person with influence over a decision affecting the

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<sup>18</sup> Member of the Irish Parliament - equivalent of MP

<sup>19</sup> The Tribunal found his tale of a "digout" by friends and strangers concerned that he did not own his own house utterly unconvincing; noting that the owner of the house he lived in had written a will leaving it to Mr Ahern.



donor. It has also been passed if a donor pays an intermediary to gain preferential access to decision makers. In the *McCloy* case Justice Gageler (p.63 para. 183) states:

*183 The legitimacy of the elimination of undue influence, understood in the sense of unequal access to government based on money, was expressly accepted by all members of the Court in Unions NSW.*

This position aligns with that taken by the Attorney-General for the State of Victoria (2015, p.5) in the *McCloy* case; and explicitly accepted by Justice Nettle in his judgment (paragraph 226, p.75):

*226 As was submitted on behalf of the Attorney-General for Victoria, any instance of public decision-making affecting a person's interests which is influenced by that person making a substantial political donation to the decision-maker or his or her party or group may be regarded as an unduly influenced decision.*

The work of psychologists such as Cialdini (2009) provides strong evidence that such instances will inevitably be the norm, not the exception. Decision-makers are likely to be influenced by donations, whether they consciously realise it or not. That influence is systematic, predictable, and all too human. Recipients who honestly see donations as “money for nothing” are deluding themselves.

## Summary

Some key concepts used in this paper are: integrity, legitimacy, corruption, and undue influence.

The legitimacy of planning systems concerns the justification for their existence and their reach. This is often contested on grounds best described as political or philosophical, but this contestation is not the subject of this paper.

This paper concerns the *integrity* of planning systems. Whether it attempts to achieve much or little, any planning system that lacks integrity lacks legitimacy, and cannot long be sustained.

The term “corruption” is used in this paper to refer to “the abuse of public office for private gain”, following the approach of Collins and O’Shea (2000). Corruption and undue influence are best thought of as sitting at different points on a continuum; with legitimate influence at one end, corruption at the other, and undue influence somewhere between the two.

The point of crossover does not matter for the purposes of this paper, because both corruption and undue influence have the potential to undermine the integrity of planning systems, and to erode confidence in the democratic system.

It is similarly unnecessary to try to discern the exact point where legitimate influence ends and undue influence begins. It has certainly been passed if money, in the form of a donation or otherwise, is paid to a person who can make or influence a decision

affecting the donor. It has also been passed if a donation secures access to such a person. *Purchased influence is undue influence at best, corruption at worst.*



Land release at Leppington NSW 2015  
Source: the author

## Chapter 4: Pressure points in planning systems

### Pressure points

There is much more to a functioning democracy than elections. Issacharoff (2010, p.126) argues that there should be less focus on elections, and more on decision-making by those who attain political office. His reasoning is that this is where donor influence is more likely to occur.

Political donations can impact on one or more key decisions affecting land use outcomes. Each is a potential pressure point that can be targeted by those seeking to use donations as a means of corrupting decision-makers, or obtaining undue influence over them.

### Legislation

Planning systems rest on a legislative base – in NSW, the *Environmental Planning and Assessment Act 1979* (“EPA Act”). Other Australian planning systems and the Irish system are of similar typology, even though the details vary.

Similar to Australian planning systems, the Irish planning system has three main functions: making (and varying) development plans; granting planning permission; and planning enforcement.<sup>20</sup>

In this paper I have not attempted to identify any instances of donor influence on the content of planning legislation. The drafting and passage of legislation are, however, possible pressure points. The Mahon Tribunal noted that the return for a donation may take any number of forms (Mahon 2012 p.2611):

*At one extreme, the recipient may reward the donor with lucrative government contracts or **even introduce legislation** and/or policies favourable to the donor’s interests (emphasis added).*

### Zoning instruments

The EPA Act enables the Minister administering the Act to make zoning instruments (collectively called “environmental planning instruments”).

The local council often proposes the rezoning of land, but it is the Minister who is responsible for making local environmental plans, which contain zoning and development controls. State environmental planning policies are made by the Governor on the recommendation of the Minister and they may make provision for any matter that, in the Minister's opinion, is of State or regional environmental planning significance.

The Irish version of a zoning instrument is the Development Plan (Mahon 2012 p.18).

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<sup>20</sup> Ireland’s planning system is currently consolidated in the Planning and Development Acts 2000 – 2011. At the time of the rezonings investigated by the Mahon Tribunal it was governed by the Local Government (Planning and Development) Act 1963. See Mahon (2012), p. 18.

At the time of interest to the Mahon Tribunal, a development plan had to be reviewed at least once every five years for the purposes of either making a new development plan or varying the existing plan. As one witness told the Tribunal (Mahon 2013 p.21), this provided a 'window of opportunity in the event of one seeking a rezoning of one's lands'.

Zoning instruments and supporting rules and orders (such as a Ministerial order "calling in" a development application) are forms of delegated legislation. As a quasi-legislative activity with significant policy content, zoning has traditionally been the preserve of elected officials. The granting or refusal of an individual development application is however an administrative function often delegated to, or reserved for, unelected officials or bodies.

Over the years zoning arguably ceased to be a strategic policy exercise in NSW, and became overwhelmingly focused on "spot rezoning" or project-specific zonings. The term "rezoning application" became common and the distinction between quasi-legislative and administrative functions was muddled in NSW by the 1990s. The traditional characterisation is still reflected in Irish planning law. Functions of Local Authorities were (and are) separated into reserved (political policy) and executive (management) functions (Mahon 2012, p.18).

#### ***A debased currency***

Zoning decisions were at issue in many of the case studies examined for the purposes of this paper. In Western Australia, the strategic use of donations by lobbyists Brian Burke and Julian Grill most often concerned proposals to rezone land<sup>21</sup>.

The Mahon Tribunal's investigations were heavily focused on the review of the 1983 Dublin County Development Plan, which commenced in 1987, and the making of the 1998 Dún Laoghaire-Rathdown County Development Plan. The Tribunal concluded that "*large tracts of land were ultimately rezoned because of the making and receipt of corrupt payments rather than in the interests of proper land use and development*" (Mahon 2012, p.4).

The Tribunal's report (p.4) notes that in May 1993 the then Minister for the Environment, Michael Smith TD, described zoning in Dublin as '*a debased currency*'<sup>22</sup>. It also records a delicious irony. Mr Smith's speech provoked a deputation of indignant councillors, including Councillors Colm McGrath, G.V. Wright, and Cyril Gallagher. All three had accepted corrupt payments in return for their support for rezonings.

#### ***Overrides***

Both the NSW and Irish planning systems contain override provisions that enable consent authorities to approve development that contravenes the applicable development controls. This kind of provision provides an alternative to project-specific rezonings, or altering the base controls for everyone.

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<sup>21</sup> Corruption and Crime Commission Western Australia ("CCC") 2008b (Whitby); 2009a (Smith's Beach); 2009b (Wanneroo)

<sup>22</sup> The speech was delivered at the Irish Planning Institute's 1993 Awards Ceremony. Two years later Michael Smith (not to be confused with the Minister Michael Smith TD) and Colm Mac Eochaidh placed the newspaper advertisement that led to the establishment of the Mahon Tribunal.

The NSW override provision was originally put in place through State Environmental Planning Policy number 1 (SEPP1). It is gradually being supplanted by the mandatory inclusion of a standard provision to the same effect in individual planning instruments<sup>23</sup>.

SEPP1 was the method by which certain developments were corruptly approved in Wollongong (ICAC 2008 p.80) and Rockdale (ICAC 2007 p.64), as shown in investigations by the ICAC in NSW.

In Ireland, the Manager of the local authority cannot normally grant permission for development in material contravention of the Development Plan approved by the elected councillors.

It is however possible for councillors to direct the Manager to grant planning permission, by a resolution passed by no less than three quarters of the total number of the Councillors of the Council or Corporation. A notice of intention to propose a motion to give such a direction must be signed by a minimum number of councillors, and public consultation is required (Mahon 2012, p.20).

This procedure is known as the “material contravention” path. It is the subject of several cases of corrupt, inappropriate and improper donations documented by the Mahon Tribunal.

#### ***Ministerial “Call-in” powers***

As well as being the ultimate decision-maker in relation to zoning, the Minister may have a range of decision-making powers under planning legislation. Under the EPA Act in NSW, the Minister determines applications for approval of State significant development.

Section 147 of the EPA Act implicitly recognises a number of Ministerial decisions as pressure points, by imposing special requirements to disclose donations at the time of the application, and moving responsibility for decisions from the Minister to a Planning Assessment Commission. Four out of five of these decisions are capable of changing or overriding the established zoning of land, and/or moving a decision from the local level to the State level. They are forms of “project specific” or “spot” rezonings.

Special provisions also apply to local councillors dealing with matters affecting donors, under the Model Code of Conduct for NSW local government officials<sup>24</sup>.

#### Consents, refusals and conditions

The point at which an individual applies for a consent authorising action to be taken is an obvious pressure point, recognised as such by its inclusion in s.147 of the EPA Act. The outcome, under the NSW system and under similar systems like the Irish system, can be “no”, or a conditional or unconditional “yes”.

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<sup>23</sup> Standard Instrument (Principal Local Environmental Plan) clauses 1.9, 4.6; <http://www.legislation.nsw.gov.au/maintop/view/inforce/epi+155a+2006+cd+0+N>. The standard instrument is prescribed by the [Standard Instrument \(Local Environmental Plans\) Order 2006](#).

<sup>24</sup> Model Code of Conduct for Local Councils in NSW, March 2013, Department of Premier and Cabinet, <https://www.olg.nsw.gov.au/strengthening-local-government/conduct-and-governance/model-code-of-conduct>

In order to determine what the outcome should be there is a process of assessment against stipulated criteria. Ideally these can be easily found in legislation and in zoning instruments, but historically the criteria actually used have sometimes been located in less accessible codes, policies and guidelines. When this is so, detecting suspicious variations from what would be a normal, expected outcome becomes more difficult.

## High value

The case studies suggest that rezoning and the exercise of “override” powers are particularly vulnerable points in the planning system. The reason is not hard to discern. The Mahon Tribunal (2012, p.2547) considered that:

*... planning and development are areas which are particularly likely to give rise to corruption because of the financial opportunities which can be created by the rezoning or development of land and because of the fact that land is a finite resource.*

Land with the requisite zoning (and the services to support that zoning) is also finite. It was evident that if a shopping centre at Quarryvale could be approved before a shopping centre proposed nearby by another landowner, it would at the very least have an advantage in securing high-profile anchor tenants (Mahon 2012, p.129 paragraph 2.03).

The Mahon Tribunal (2012, p.369) noted that a valuation of the Quarryvale site in May 1991 estimated that in the event that the lands were rezoned, their value was IR£12m, and that in the event of planning permission being obtained for the lands, their open market value would rise to IR£20m.

The amount paid to assemble the Quarryvale site by the original proponent, Tom Gilmartin, is not clear from the Tribunal’s report, but it appears to be in the order of IR£9m (Mahon 2012, p.179, p.210, p.345, p.365). This was IR£2.36M more than it might have been, had Mr Gilmartin yielded to a demand by parliamentarian and councillor Liam Lawlor for IR£100,000 for himself and IR£100,000 for Dublin’s Assistant City and County Manager George Redmond (Mahon 2012 p.179).

The value of securing more than the established controls specify can also be extremely high. The ICAC report on the Rockdale case for example shows that each floor permitted above the four ostensibly allowed (using SEPP1) was worth enough to support a payment of \$70,000 to corrupt aldermen (ICAC 2007 p.64).

## Enabling infrastructure

The availability of certain kinds of infrastructure is typically a precondition of the rezoning of rural and semi-rural land for urban development in Australia. Water supply, road access and sewerage connections are now considered essential services, without which development may not proceed.

Members of the Government (the Prime Minister and Ministers or Premier and Ministers) collectively determine expenditure categories and priorities. Infrastructure providers plan and mostly follow a predetermined schedule, reflected in budget

allocations. Contributions towards the cost of infrastructure provision are routinely expected of landowners both in Australia and in Ireland.

Decisions about where and when enabling infrastructure is to be provided, and the contributions required, are pressure points in planning systems.

The Mahon Tribunal's Third Interim Report (2002, p.4) dealt with George Redmond's acceptance of payment for giving advice to a landowner, and significantly lower service charges being levied on that landowner by Dublin County Council.

The ICAC investigation of planning decisions in Wollongong found that a council officer accepted a watch worth \$10,000 to ensure an application by a developer for a reduction in developer contributions was approved (ICAC 2008, p.9).

## Property divestment

Governments are significant landholders, and from time to time they divest themselves of parcels of land. Divestment can be by public tender, and there may be a clear set of planning controls in place to govern subsequent development of the land. Subsequent variations to, or departures from, these controls have considerable influence on development yield and hence on land value.

There may be (as in NSW) scope for a party to make an "unsolicited proposal" to acquire and develop a parcel of public land without competing with other parties. Notionally there has to be something "unique" about a proposal to justify such an approach. The judgement about whether this is or is not the case rests with a Minister, as do decisions about the planning controls to be applied.

This kind of power constitutes a pressure point in planning systems (and in property divestment systems). Divestment decisions can be misused to divert funds potentially available to the public into private hands.

Tom Gilmartin for example was on track to purchase part of the Quarryvale site from Dublin County Council by private treaty for IR£2.74M. When he refused Liam Lawlor's demand for money, that agreement unraveled. Mr Gilmartin was obliged to compete in a tender process, which resulted in him paying IR£5.1M for the land instead (Mahon 2012 p.179).

## Development incentives

A particular pressure point at the national level in Ireland at the time considered by the Mahon Tribunal was the system by which the national Government could grant development schemes "designated area status"<sup>25</sup>. According to Williams (2006, p.6) the original package of incentives under the *Urban Renewal Act 1986* included a mix of taxation allowances, taxation reductions and rent allowances.

The developers at the centre of the Mahon Tribunal's inquiries frequently sought to have the government exercise this power. An indication of the value involved appears in an internal bank memorandum written in January 1990, concerning the Quarryvale site (Mahon 2012, p.230):

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<sup>25</sup> The scheme is being phased out, with no new applications accepted since 2008.

*46.22 ... Designation of the site would generally enhance the value of the site and would make it very attractive for development with purchasers/lessors of units obtaining the same tax incentives as the Custom House Docks and Tallaght designated areas.*

Another development incentive in Ireland was the creation of a single purpose development agency, like the Customs House Docks Development Authority (CHDD), which carried with it “enterprise zoning”. Development certified by such an Authority as consistent with its Planning Scheme (approved by the Minister for the Environment) was removed from the usual planning process and did not require any further planning permission (Mahon 2012 p.228).

On numerous occasions throughout 1989 and 1990 Tom Gilmartin discussed tax designation and/or enterprise zoning status for two sites (Bachelor’s Walk and Quarryvale), with the Minister for the Environment, Pádraig Flynn (Mahon 2012 p.225). There was no written record of any of these discussions, which were often “on a one-to-one basis” (Mahon 2012 p.229). At one meeting, in June 1989, Mr Gilmartin gave Mr Flynn a donation of IR£50,000, intended for the Minister’s party (Fianna Fáil).

In September 1993 Owen O’Callaghan, the developer who took over the Quarryvale development from Mr Gilmartin, received a letter from the Fianna Fáil Party, seeking a contribution of IR£100,000 (Mahon 2012, p.721). The letter was signed by Prime Minister Albert Reynolds, and Bertie Ahern (then Minister for Finance). He had paid the first of three instalments when he met Mr Ahern on 24 March 1994 and raised his concerns about the prospect that the competing site at Blanchardstown might obtain tax designation (Mahon 2012 p.2475). He was given an assurance that Blanchardstown would not be designated.

Another witness testified that Mr O’Callaghan had complained to him of paying Mr Ahern for tax designation for a different development entirely, the “Golden Island” shopping centre in Athlone, and not getting the designation until the night before Fianna Fáil left Government in December 1994 (Mahon 2012, p.1279).

Councillors were also active in lobbying the national government to use its tax designation powers to the benefit of their donors. Councillors O’Halloran, McGrath, Ridge, Tyndall and Brady wrote to the Minister for Finance, Bertie Ahern, seeking tax designation for Quarryvale (Mahon 2012, p.1052). Councillor McGennis meanwhile lobbied for the owner of the opposing Blanchardstown development (Mahon 2012, p.987).

## Summary

Planning systems and related systems enable elected and unelected officials to make a wide range of decisions affecting the way land is used and developed. Relevant decisions include: zoning decisions; decision-making on individual proposals; infrastructure decisions; decisions about the divestment of public land; and development incentive decisions.

The case studies examined for the purposes of this paper demonstrate that each of these decisions constitutes a potential pressure point that can be targeted by those



seeking corrupt or undue influence over decision-makers. Not surprisingly, points at which particularly high value decisions are made, such as rezoning and overrides of established controls, are particularly vulnerable.

## Chapter 5: The damage done

Corrupt and undue influence over planning decisions delivers windfall profits to some landowners at the expense of others, and diverts public resources that should be available for public purposes to the benefit of private interests. That is of course the primary aim of the perpetrators.

The damage does not however stop there. It extends to the urban landscape and to planning systems. Over time, confidence in the democratic system itself can be eroded.

### The urban landscape

Dodson et al (2006, p.2) discuss the theoretical possibility that corrupt decisions will have no discernible impact on the urban landscape. They suggest that if corruption does not make a difference to urban outcomes then 'the legitimacy of the planning system would be placed in substantial doubt. Why bother with the pantomime of land use regulation if it made no substantive difference?'<sup>26</sup>.

The Irish case studies show that corruption (and undue influence) did indeed make a difference to the location, density, and type of urban development in and around Dublin in the period in question. Ireland has been forced to demolish isolated and uncompleted "ghost estates" built in the rush of speculative development from 1995 to 2005 (Flynn 2012). Some will be returned to farmland.

This bears out what geographer Peter John Perry predicted, when he addressed the question Dodson and his colleagues would ask many years later (Perry 1994, p.291):

*For such are the geographies of almost everywhere: the rationale of corruption is after all to make a difference; the bribe is paid to ensure that things are made or located differently from what the law or even a narrow view of the market intended. Corruption acts alongside or within a matrix of other legitimate forces to shape our geographies and we ignore it our intellectual peril.*

If the planning system loses the ability to direct development to appropriate locations, at the right time, with the necessary services in place, this has physical and financial consequences for cities and regions; and for the people who live in them.

### Public confidence in planning systems

Public confidence in planning systems requires a high level of confidence in their integrity. This can be said of all regulatory systems. If reasonable people lack confidence in the integrity of the planning system, there can be flow-on implications for confidence in elected representatives and the democratic system itself.

There is however an additional factor in the case of planning systems. Public participation and consultation processes are central to modern planning systems,

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<sup>26</sup> Dodson Coiacetto and Ellway at p.2

and when functioning well they establish reasonable expectations for both communities and industry. They take time and energy on the part of all the participants, and are worthwhile only if there is a reasonable level of confidence that future decisions will advance the agreed (or at least understood) outcomes.

Corrupt and undue influence can neuter these processes. If something else actually happens “on the ground”, public confidence in the planning system is sapped, even if the underlying cause never comes to light.

### Collateral damage to democracy

Orr suggests that advanced democracies like Australia no longer face the historical problem of “crude vote buying”, which he describes (2006, p.291) as *the promising or giving of value in the form of money, employment or treats in return for a promise of a vote*”. They face a different challenge (2003, p.6):

*... the more modern concern is not with politicians buying votes. Quite the reverse: the real problem in the 20th century has been with businesses and sectional groups buying influence over politicians.*

Whether or not it passes the threshold that would warrant a corruption finding, influence buying falls far short of the legitimate expectations of citizens and erodes trust in the democratic system.

Three important and legitimate expectations of citizens in democracies are explored below: the rule of law, political equality, and decisions made in the public interest.

#### ***The rule of law***

The “rule of law” is a touchstone of democratic political systems. The ICAC (2012, p.8) observes:

*A core belief in our society is that the law should not be arbitrary; the law should be certain, general and equal in its operation. Sir Ninian Stephen, former governor general of Australia, identified this as the last of four principles of the rule of law. Legal certainty arises from the regular, open and predictable application of the rule of law according to these principles and, so, delivers confidence to society.*

Allen (1999, p.221) comments:

*The idea of regularity and impartiality in the administration of the law, whatever its content, is clearly a central feature, if not the entire subject-matter, of any satisfactory theory of the rule of law.*

If decisions can be influenced by the payment of money in any form, regularity and impartiality in the administration of the law are lost; the rule of law has been violated.

#### ***Political equality***

A functioning democracy requires, at a bare minimum, fair elections. But the citizens of Canada and Australia expect more than a technically fair election. They expect political equality, a principle which Joo-Cheong Tham (2010, p.9) says ‘*lies at the heart of democracy*’. Tham quotes political philosopher John Rawls, who has argued that political freedoms must have ‘*fair value*’, which requires that:

*... citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class.*

Indeed, undue influence can be regarded as the converse of political equality. The majority judgment of the High Court (2015, p.11 para.28) states:

*... guaranteeing the ability of a few to make large political donations in order to secure access to those in power would seem to be antithetical to the great underlying principle to which Professor Harrison Moore referred.*

In their judgments in the recent *McCloy* case<sup>27</sup>, members of the High Court stated that the '*great and underlying principle*' of the Australian Constitution is that '*the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power*' (*McCloy* majority judgment p.11 para.27, Justice Gordon p.103 para. 318; and Justice Nettle at p.73 para.219).

The Attorney-General of Victoria, in his submissions to the High Court in *McCloy* (2015, paragraphs 24 and 25) pointed to the Canadian case *Harper v Canada (Attorney-General)*, which affirmed '*the egalitarian model of elections adopted by Parliament as an essential component of our democratic society*'. The majority in that case observed:

*... the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power.*

A passage from Justice Nettle's judgment in *McCloy* (p.73 para. 217) highlights the way in which political donations can undermine political equality by skewing the attention of elected representatives towards the interests of donors:

*Political sovereignty further necessitates that those who govern take account of the interests of all those whom they govern and not just the few of them who have the means of buying political influence.*

There is recent UK research suggesting donations can also have a direct impact on who attains political office, undermining political equality in a different way. The researchers (Mell et al 2015, p.25) provide evidence that "big donors" are disproportionately likely to be nominated for elevation to the House of Lords.

Mell and his colleagues say that while this does not prove causation, the odds of this being pure coincidence '*are roughly the same as those of entering Britain's National Lottery five consecutive times, and winning the jackpot on each occasion*'.

Complete political equality may not be achievable, but that does not diminish its importance. If elected members become more attuned to the interests of donors than to those of non-donors, or donors can stake a claim for a seat in Parliament, the principle of political equality is violated. The further away from this expectation a

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<sup>27</sup> High Court of Australia, *McCloy v State of New South Wales* [2015] HCA 34, 7 October 2015.

society moves, the less its citizens can be expected to retain confidence in its democracy.

### ***The public interest***

There are many issues and debates surrounding the concept of the “public interest”, and some are discussed below. What becomes clear from that discussion is that in a properly functioning democracy elected officials are expected to act in the public interest (as they genuinely see it), notwithstanding that they may favour very different courses of action to achieve very different conceptions of the public interest. Justice Nettle (p.75 para. 225) in McCloy noted:

*As Mason CJ said in ACTV, "the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people". They must exercise their public powers solely in the public interest and upon the merits of any particular proposal, not in their private interest.*

Favouring the interests of donors runs counter to any reasonable conception of the public interest.

The ICAC (2014a, p.53) made this point in a recent report:

*... Edward Obeid Sr, in this situation, although exercising his position as an MP, was no longer acting properly and honestly as a representative of the people. Rather, he was serving the Circular Quay lessees in meeting their expectations as a consequence of, and in consideration for, their substantial donation to the ALP. Accordingly, it must be accepted and the Commission so finds, that a breach of public trust thereby occurred.*

### ***Madisonian and Westminster systems***

Legislating is the core role of every Member of Parliament. The first point at which the impact of donations might be seen is in patterns of voting in parliament that serve political donors.

In the Madisonian conception of democracy, the US ideal, legislators are expected to discern the public interest by *deliberating*. Burke (1997, p.140) notes that reasoned debate on the floor of Congress is meant to influence the way legislators cast their vote. While he accepts that no single conception of the public interest will necessarily emerge from deliberation (due to the plurality of societal values and interests), Burke (1997, p.142) does not see this as fatal to the Madisonian ideal:

*... If people are completely immune to persuasion, then of course deliberation is futile. But as long as debate is capable of moving people, then the fact of pluralism is quite compatible with deliberative theory.*

In the Westminster system, with voting along party lines, the Madisonian ideal of deliberation is not much in evidence on the floor of Parliament. Debate in the Westminster system seeks more to persuade the public of the wisdom of a position thrashed out outside Parliament, than to win votes on the floor of the Parliament. Parliamentary Committees are somewhat closer to the Madisonian ideal.

### **Parliamentary standards of conduct**

Parliaments have exclusive jurisdiction over conduct within Parliament and conduct associated with Parliamentary duties; they are self-regulating. The extent to which parliamentary privilege protects parliamentarians even from prosecution for breaking the law of the land has been the subject of some debate (Griffith 2014).

Westminster system Parliaments rely heavily on codes of conduct, backed up by registers of gifts and interests, to maintain standards. Although the wording differs, all emphasise the public interest. The preamble to the *Code of Conduct for Members of NSW Parliament* (2011) for example states:

*Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.*

The preamble is not an operative provision, and the Code allows Members to accept “*political contributions in accordance with part 6 of the Election Funding Act 1981*” (no doubt to avoid overlapping the electoral law). All the same, favouritism towards donors cannot be reconciled with these sentiments.

Incongruously, it is considered acceptable for NSW parliamentarians to provide “a service involving the use of the Member’s parliamentary position”<sup>28</sup>, i.e. acting as paid political consultants and lobbyists, provided they refrain from doing so within the confines of Parliament and its committees<sup>29</sup>. The Mahon Tribunal (2012, p. 2515) considered the “professional and consultancy” services offered by Liam Lawlor TD<sup>30</sup> an abuse of his role as an elected public representative:

*In the period of the late 1980’s and the 1990’s, Mr Lawlor provided services and advice to landowners/developers (including to Mr Dunlop as their agent) in his capacity as an elected politician, for personal gain. In effect, Mr Lawlor, while an elected public representative, conducted a personal business in the course of which he corruptly sold his expertise, knowledge and influence as a councillor and as a TD for personal financial reward.*

In *McCloy*, Justice Gageler (paragraph 167) cites *R v Boston*, a case dating from the 1920s in which the Chief Justice of the High Court made a statement of principle no less applicable in 2015:

*Payment of money to a member of Parliament to induce him to persuade or influence or put pressure on a Minister to carry out a particular transaction tends to the public mischief in many ways, irrespective of whether the pressure is to be exercised by conduct inside or outside Parliament. It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve.*

It may be that parliamentarians expect less of themselves and their colleagues than does the average citizen, which cannot be good for their public standing.

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<sup>28</sup> Defined so as to include “*lobbying the Government or other Members on a matter of concern to the person to whom the service is provided*”.

<sup>29</sup> Clause 7A of the *Constitution (Disclosures by Members) Regulation 1983*

<sup>30</sup> Member of the Irish Parliament. Mr Lawlor was a councillor until 1991 and a TD until 2002.

### Ministerial standards of conduct

The next point at which the impact of donations might be felt is in the decisions of those parliamentarians who form the government; in Australia, the Prime Minister or Premier, and Ministers.

Ministers in NSW are bound by a Ministerial Code of Conduct, in addition to their obligations as parliamentarians. It says (clause 6):

*A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.*<sup>31</sup>

Unlike other parliamentarians NSW Ministers are expected to devote all of their time to their duties (clause 3), and not to undertake secondary employment such as moonlighting as lobbyists and political consultants<sup>32</sup>.

Favouritism towards donors is plainly inconsistent with the duties of a Minister under the Code. Of course, it can always be said (Richardson, 2014) that by happy co-incidence the interests of donors and the public interest are one and the same:

*In recent times, there are many examples of donors being less likely to get favourable treatment from politicians. So many pollies are terrified to be seen doing favours for donors even if the “favour” is the right decision.*

The problem with this viewpoint is that no one on the outside can ever know whether the favour (such as an appointment to one of the boards and entities within a Minister’s portfolio) was indeed the “right” decision.

Burke (1997, p.137)) quotes, with approval, Dennis F. Thompson’s suggestion that:

*Because ‘citizens cannot easily collect the evidence they need to judge the motives of politicians in particular circumstances’, representatives ‘must avoid acting under conditions that give rise to a reasonable belief of wrongdoing.’*

Burke (1997,p.137) also notes Thompson’s view that when representatives fail this standard ‘they do not merely appear to do wrong, they do wrong’.

### **Conflict of interest**

Central to the expectation that public officials act in the public interest is the concept of conflict of interest. Public officials are expected to make decisions impartially, in the sense that they must not stand to gain or lose personally from a decision they make or can influence. If they do, they are said to have a conflict of interest. One recognised form of conflict of interest arises from indebtedness.

The interests of family, friends and business associates are regarded as creating a conflict of interest for a public official if the relationship is sufficiently close<sup>33</sup>.

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<sup>31</sup> Clause 6

<sup>32</sup> They may continue their involvement in a limited range of personal and family businesses, including farming.

<sup>33</sup> Definitions vary. See for example NSW Ministerial Code of Conduct clause 7

In a recent report the New South Wales ICAC refers to a statement by Chief Justice Gleeson in *Greiner v Independent Commission Against Corruption* [1992] 28 NSWLR 125 at 145: “*the law refuses to countenance decision-making with a personal interest in the outcome*” (ICAC 2014, p.57)<sup>34</sup>.

The Mahon Tribunal made numerous findings that the acceptance of donations by councillors was ‘improper’ or ‘inappropriate’ as they ‘*compromised the required disinterested performance*’ of their obligations as elected councillors (see for example Mahon 2012, p.841 and p.941, where such findings are made against Councillors Liam Cosgrave and Tony Fox). “Disinterested” is of course a synonym for “impartial”.

The Corruption and Crime Commission in Western Australia (“CCC”) explicitly refers to conflict of interest in its 2008 report concerning the Mayor of Cockburn (CCC 2008a, pp.6-8). Failing to declare that the developer of the “Port Coogee” project paid some of his electoral expenses, and failing to declare an “interest affecting impartiality” when votes relating to the development came before the council:

*...constituted conduct that could adversely affect the honest or impartial performance of his [Mr Lee’s] functions as Mayor of the City of Cockburn because it assisted in concealing the degree of a potential conflict of interest.*

The inverse relationship between impartiality and conflict of interest is not confined to local government; it applies equally at higher levels of government.

### Policy positions

Legislators are expected and entitled to be policymakers and to give effect to philosophical and political positions. This is not a lack of impartiality in the sense relevant to conflicts of interest. Within limits, it is perfectly in order to legislate to reflect a policy position that advances the interests of one *broad* section of society over those of another.

Legislators can, for example, amend planning legislation to focus on the protection of agricultural land or to facilitate mining developments. In practice this advances the interests of one broad group over those of the other. They can amend the legislation to deliberately weaken or conversely to strengthen its focus on environmental concerns. They can incorporate in the legislation more or fewer procedures mandating public participation in the making of planning instruments.

They can be called to account for these decisions (“policy” or “political” decisions) at the ballot box; that is the stuff of democracy.

There is a qualification to be made in the case of decisions made by Ministers on individual cases. Such decisions are common in planning systems, and they are administrative decisions. Philosophical and political views are irrelevant considerations at this point, even for elected representatives.

Judicial review avenues are available to provide redress for decisions that breach administrative law principles. A decision can be found to be beyond power, *ultra vires*, without any necessary intimation that it was not “impartial”, let alone corrupt. If the irrelevant consideration a Minister takes into account is the payment of a

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<sup>34</sup> ICAC 2014, *op. cit.* p.15. Cited at p.57



donation, though, something more serious than a technical breach of administrative law principles is at issue.

### Falling short of expectations

Elected officials sometimes fall short of the legitimate expectations of citizens. This does not, of course, mean that they are corrupt. It is entirely possible that such a failure results from a lack of understanding, commitment or competence; hardly ideal, but not a case of wrongdoing.

If, on the other hand, money has been received in the form of donations or otherwise, failure to meet the legitimate expectations of citizens could be the outcome of corruption or undue influence.

### Losing faith in democracy

The Mahon Tribunal (2012, p.1) was anxious about the prospect that its exposure of “both endemic and systemic” corruption in the Irish planning system might weaken public trust in Ireland’s democracy:

*... the Tribunal firmly believes that the vast majority of public officials perform their functions with the utmost integrity.*

*Those who believe that those in the public sphere are corrupt do a great disservice to these individuals. In addition, they may inadvertently contribute to corruption by both dissuading those of high integrity from entering public office and simultaneously contributing to lower standards on the part of those in public office, on the basis of a mistaken assumption that ‘everyone is doing it.’*

The Tribunal’s advice may be correct, but some erosion of trust in elected representatives and even in democracy itself inevitably accompanies the exposure of corruption and undue influence.

Failing to investigate and hoping a state of blissful ignorance will restore trust, however misplaced, is neither defensible nor realistic. As the Mahon Tribunal noted (2012, p.2612), citing the US case *Nixon v Shrink Missouri PAC* (2000):

*Leave the perception of propriety unanswered and the cynical assumption that large donors call the tune could jeopardise the willingness of voters to take part in democratic governance.<sup>35</sup>*

The former Premier of Victoria, John Cain, warned in 2006 that donations are ‘potentially undermining our democracy’ (Cain, 2006). The validity of this view is increasingly recognised. Kelly and Sawyer (2010, p.2) note:

*The International Institute for Democracy and Electoral Assistance (IDEA), the auspicing body for the Democratic Audit of Australia, regards party finance as one of the key issues for the future of democracy. The combination of the escalating costs of campaigning, shrinking party membership and deepening*

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<sup>35</sup> In countries where voting is not compulsory, this means low voter turnout, and even worse skewing of the democratic system towards vested interests (like the NRA).

*public mistrust about the role of money in politics contributes to loss of confidence in democratic institutions.*

Confidence in the democratic system can be tracked and as Kelly and Sawyer (2010, p.6) have noted, citing work by McAllister and Clark (2007), it has been tracking downwards in Australia for some years:

*The 2007 Australian Election Study showed that 69 per cent of voters believe that big businesses—the kind of organisations who make the most substantial donations to political parties—have too much power. This sentiment has increased from 51 per cent in 1987. In addition, in 2007, 38 per cent of voters believed that government is run for the benefit of a few big interests, and not for all interests. These figures indicate the influence (either real or perceived) that large political donations can have on the health of Australian democracy.*

More recent results covering the period to 2013 are a little better; whether or not stronger action in NSW and the ACT since 2009 has had an impact is an interesting question. Confidence levels are however still low (McAllister and Cameron 2014, p.48, p.53).

## Summary

Corruption or undue influence in planning systems has damaging consequences beyond the obvious delivery of windfall gain to some landowners at the expense of others, and the diversion of public resources to the benefit of private interests.

If a planning system loses the ability to direct development to appropriate locations, at the right time, with the necessary services in place, this has physical and financial consequences for urban areas, and for the people who live in them.

Corruption and undue influence on planning decisions sap public confidence in the integrity of planning systems, just as they sap confidence in any regulatory system. In addition, the public consultation processes that are central to modern planning systems can be neutered. This has the same effect, even if the underlying cause never comes to light.

Whether or not it passes the threshold that would warrant a corruption finding, the use of donations to secure influence over decision makers (influence buying) falls far short of the legitimate expectations of citizens and erodes trust in the democratic system. Three legitimate expectations of citizens in a democracy are relevant in this context: the rule of law, political equality, and decision-making in the public interest.

Elected representatives may pursue different policies embodying very different conceptions of what is in the public interest. Favouring the interests of donors however runs counter to any reasonable conception of the public interest. Whatever else they expect of their elected representatives, citizens do not expect their decisions to be influenced by the payment of donations. Nor do they expect the time and attention of their representatives to be skewed towards the interests of political donors.

There is evidence of an erosion of trust in Australia's democratic system since the

1980s, and the role donations are playing in this erosion of trust is increasingly recognised.



A 'ghost estate' in Ireland

Source: <http://www.valerianex.com/index.php/ghost-estates/>  
Accessed 2 March 2016

## Chapter 6: The psychology of influence

### The psychology of influence

Studies of decision-making and psychology have examined the factors that can lead to *systematic bias*. Foremost in the field of the psychology of influence is Robert Cialdini. Cialdini's theory of influence is based on the principles of reciprocity, commitment and consistency, social proof, authority, liking, and scarcity.

All but the last of these principles are clearly evident in the case studies examined for the purposes of this paper. They accurately describe the interactions between donors, party officials and power brokers, decision-makers and officials.

#### *Reciprocity*

The norm of reciprocation – the rule that obliges us to repay others for what we have received from them – is one of the strongest and most pervasive social forces in all human cultures (Cialdini and Goldstein 2004 p.599).

Human beings cannot help feeling impelled to return a “favour”; and they are inclined to expect others to do the same. There is a striking similarity in the evidence given by Wollongong developer Frank Vellar (ICAC 2008, p.97) and that of Irish developer Owen O’Callaghan:

*... Mr Vellar specifically denied that he was asked for “a bribe” or “for what [he] thought might be a bribe”, but he immediately qualified or contradicted those denials by stating that ... when he asked for the Councillors’ support they said “you know, you might have to do other things” and requested a “political donation”, saying words to the effect of “when our campaign comes up, don’t forget about us”*

Half a world away, Mr O’Callaghan (Mahon 2012, p.528) said of his lobbyist’s payments to Dublin councillors:

*He would have made promises to help people of course at that particular time to help them in the Local Elections. That would be very normal if he asked somebody to support Quarryvale it’s quite possible that the Councillor would say back to him yes I will, and I am going to do it, but I want you to look after me as well when the Election comes up etc, etc.’*

Cialdini (2009, p.27) directly addresses reciprocity and political donations:

*... [W]e can see the recognised strength of the reciprocity rule in the desire of corporations and individuals to provide judicial<sup>36</sup> and legislative officials with gifts and favors. Even with legitimate political contributions, the stockpiling of obligations often underlies the stated purpose of supporting a favorite candidate. One look at the lists of companies and organizations that contribute to the campaigns of **both** major candidates in important elections gives evidence of such motives.*

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<sup>36</sup> Judicial positions in the US are frequently elected positions

*A skeptic, requiring direct evidence of the quid pro quo expected by political contributors, might look to the remarkably bald-faced admission by businessman Roger Tamraz at congressional hearings on campaign finance reform. When asked if he received a good return on his contribution of \$300,000, he smiled and replied: ' I think next time, I'll give \$600,000'.*

In the High Court's recent decision in *McCloy* Justice Gageler explicitly refers to the issue (High Court 2015, p.60 para.175):

*... the basic human tendency towards reciprocity means that payments all too readily tend to result in favours. Whether the causal sequence is that of payment for favours or that of favours for payment, the corrupting influence on the system of government is little different.*

#### Unconscious bias

Recipients of gifts are sometimes genuinely unaware that they have been influenced, and may resent the mere suggestion. This has been well documented in research into the effects of gifts to physicians by pharmaceutical companies. Miller (2007, p.1150) reports that:

*When Jason Dana, Ph.D., an assistant professor of social psychology at the University of Pennsylvania in Philadelphia, lectures to doctors about their interactions with drug representatives, the question he always gets is, "How dare you question my integrity? I can't be bought."*

*In survey after survey, most physicians say they don't think the food, gifts, and payments they accept from drug representatives make them more likely to prescribe a company's new drugs. ....*

There is an extensive body of research to the contrary. Cialdini (2009, p.27) cites for example a study concerning the safety of a class of drugs for heart disease, which found:

*100 percent of the scientists who found and published results supportive of the drugs had received prior support (free trips, research funding, or employment) from the pharmaceutical companies; but only 37 percent of those critical of the drugs had received any such prior support (Stelfox, Chua, O'Rourke, & Detsky, 1998).*

Miller (2007, p.1150) points out that such findings have nothing to do with the integrity of recipients, and everything to do with natural human behaviour:

*The problem is not unethical behavior but rather an unconscious, self-serving bias that distorts the judgments of doctors and anybody else who is offered a gift, he said. Experiments show that most people are unaware that they constantly use this bias and have little control over it. So when physicians say they don't think gifts influence them, they may well be telling the truth as they see it.*

Cialdini (2009, p.27) points out that political donors and recipients are inclined to say the same thing as the physicians in Miller's example:

*For the most part, the givers and takers join forces to dismiss the idea that campaign contributions, free trips, and Super Bowl tickets would bias the opinions of 'sober, conscientious government officials'. As the head of one lobbying organization insisted, there is no cause for concern because 'These [government officials] are smart, mature, sophisticated men and women at the top of their professions, disposed by training to be discerning, critical, and alert' (Barker, 1998). One of my own state representatives left no room for doubt when describing his accountability to gift-givers, 'It gets them what it gets everybody else, nothing' (Foster, 1991).*

His response is unequivocal:

*Excuse me if I, as a scientist, laugh. Sober, conscientious scientists know better. One reason they know better is that these 'smart, mature, sophisticated men and women at the top of their [scientific] professions' have found themselves to be as susceptible as anyone else to the process.*

A lack of awareness might diminish the personal culpability of the recipient, but it does not diminish the problem of what is colloquially called "currying favour". It arguably *increases* the threat, because recipients can be off guard. From there it is a short and possibly unconscious step to favouring the interests of donors.

Moreover, a gift does not have to be particularly large to influence the recipient. The CCC (2007, p.81), for instance, concluded in the Smith's Beach case in Western Australia that it would be "naïve" to believe that a \$5000 donation would not have some influence on parliamentarian Norm Marlborough. It saw Mr Marlborough's attendance at a meeting of the Department of Conservation and Land Management about the Smith's Beach proposal as otherwise "inexplicable". He was at the time not a Minister, and his electorate was a long way from Smith's Beach.

### **Social proof**

A key observation was made in one of the earliest investigation reports of the NSW Independent Commission Against Corruption, which found multiple instances of corrupt behaviour related to development on the North Coast of NSW (ICAC 1990, p.653):

*If money is offered to a Minister or a Member of Parliament for himself or herself, it will be seen as a bribe, and none but the dishonest would accept it. On the evidence before this Inquiry, it seems that if money is offered, or paid, to a political party or an election campaign fund, it is likely to be seen as a necessity, and few, if any, would refuse it".*

A passage from Cialdini (2009, p.99) would suggest that the explanation for this behaviour does not lie solely in the perceived "necessity" of donations. It also reflects the operation of the principle of "social proof", which Cialdini describes as follows:

*This principle states that we determine what is correct by finding out what other people think is correct (Lun et al, 2007). The principle applies especially*

*to the way we decide what constitutes correct behaviour. We view a behavior as correct in a given situation to the degree that we see others performing it.*

Cialdini (2009, p.99) notes that while the social proof principle normally works quite well as a 'convenient shortcut for determining the way to behave' it also 'makes one who uses the shortcut vulnerable to the attacks of profiteers who lie in wait along its path'.

The implication is that current or aspiring elected officials are likely to give little thought to the acceptance of donations from parties affected by their decisions, if others are already doing the same thing. In more common phraseology, the behaviour will become "normalised".

The practice of accepting, and commonly requesting, political donations from lobbyists and developers with matters actually or imminently before them had clearly become normalised in Ireland in the period of concern to the Mahon Tribunal. Mr Dunlop's evidence revealed a widespread understanding among developers and councillors in the Dublin area that what he poetically called "*the ways of the world*" included the payment of money to councillors.

These payments were usually in the form of political donations, though some were more blunt about it. Mr Dunlop testified (Mahon 2012 p.1053) that one Dublin County councillor (John O'Halloran) had approached him during the course of the review of the Development Plan and:

*...complained is the word I have used, that he was getting nothing and others were coining it.*

The lack of any serious thought process is shown in a response by a Dublin Councillor who had received a IR£2,000 cash payment from Mr Dunlop some three months after he voted in favour of a material contravention of the local Development Plan to permit a development called "Citywest". He admitted (Mahon 2012, p.880) that at the time it had '*crossed his mind that the money might have come from a party connected to the Citywest venture*' but when asked if that gave him pause for thought he replied:

*9.14 ... 'at the time when I got the envelope I didn't know what was in it, I knew afterwards, there is no point in saying different. But let's put it this way, if it was a donation for my election as Mr. Dunlop said, to help me in my election, well I had no problem with that. It was an election donation and that was for me campaign and that was that. That's the way I looked at it'.*

Councillor Rabbitte gave the matter some thought and his party returned a donation from Mr Dunlop (Mahon 2012 p.1766), but this was a rare response.

### ***Commitment and Consistency***

If people commit, orally or in writing, to an idea or goal, they are likely to honour their commitment (Cialdini 2009, p.53), even if the original incentive or motivation is removed.

*Psychologists have long understood the power of the consistency principle to direct human action. Prominent early theorists such as Leon Festinger*

*(1957), Fritz Heider (1946) and Theodore Newcomb (1953) viewed the desire for consistency as a central motivator of behavior. Is this tendency to be consistent really strong enough to compel us to do what we ordinarily would not want to do? There is no question about it. The drive to be (and look) consistent constitutes a highly potent weapon of social influence, often causing us to act in ways that are clearly contrary to our own best interest.*

The strength of the consistency principle is part of the reason the purchase of “closed door” access to Ministers with donations is so problematic. If Ministers make commitments, having heard just one view, subsequent exposure to other points of view is statistically likely to have less effect. As Cialdini puts it (2009, p.52), ‘we all fool ourselves from time to time in order to keep our thoughts and beliefs consistent with what we have already done or decided’.

Clearly it is difficult to admit to oneself, let alone to the public, having made a decision too soon on too little information. Public participation in planning decisions can thus be neutered, as can environmental impact assessment.

### **Authority**

People tend to obey authority figures, even if they are asked to do unethical things. Cialdini cites incidents such as the famous Milgram experiments in the early 1960s and the My Lai massacre in Vietnam (Cialdini 2007, p.208, p.289).

Cialdini and Goldstein (2004, p.596) note that this norm can result in subordinates having ‘little regard for potential deleterious ethical consequences’ (although the effect varies depending on pre-existing personality traits):

*Personnel managers, for instance, may discriminate based on race when instructed to do so by an authority figure (Brief et al), particularly those who are high in Right-Wing Authoritarianism*

Within every political party there are recognised authority figures. These authority figures frequently occupy positions that give them responsibility for fundraising, as well as power over the trajectory of a political career - wherein lies a potential problem. The potential problem is alluded to in an intriguing passage from Benson (2010, p.47):

*Bitar’s response to issues and crisis had been the same since the election: the solution was to sack people. The first Minister he had wanted sacked was Planning Minister Frank Sartor ... lemma thought it was because Sartor was refusing to meet with developers.*

Tom Gilmartin’s instincts took him first to two Ministers (Bertie Ahern and Pádraig Flynn) and then to the Head Office of Fianna Fáil to seek redress when he faced demands for money from parliamentarian Liam Lawlor (also a Dublin councillor until 1991)<sup>37</sup>, and from Councillor Hanrahan<sup>38</sup>. Mr Gilmartin reported being asked for donations at all three ports of call.

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<sup>37</sup> When refused cash, Mr Lawlor demanded an equity stake in the Quarryvale project instead.

<sup>38</sup> Councillor Hanrahan wanted IR£100,000 in return for his support for the Quarryvale rezoning.



He reluctantly gave the Minister for the Environment, Pádraig Flynn a cheque for IR£50,000 intended for Fianna Fáil (Mahon 2012 p.235). According to a Bank of Ireland Manager, Mr Sheeran, in whom Mr Gilmartin confided shortly after making the payment (Mahon 2012, p.234):

*His primary object in making a donation to Fianna Fáil was to try and ensure that the people that were putting obstacles in his way for whatever reason, because they weren't being paid money or were looking for money, would be admonished or disciplined or eliminated by the Fianna Fáil party.*

### Liking

People are more easily persuaded by people they like. Deliberate ingratiation (flattery, hospitality, invitations to corporate boxes, beach houses and ski lodges) is a way in which people can induce others to like them, as well as summoning up the instinct to reciprocate. According to Cialdini and Goldstein (2004, p.599):

*Impression management through ingratiation is another means by which individuals utilize the liking principle for maximal influence. ...Investigators have found that targets of ingratiation tend to view the ingratiation more positively than do onlookers (Gordon 1996)... Once the target has uncritically accepted the ingratiation's intentions as wholly good-natured, greater affinity for the adulator follows and leads to increased compliance.*

Frank Dunlop hosted a lunch group called the '2x4 club', which included himself, Owen O'Callaghan, the 'Fine Gael Ladies' (Councillors Ann Devitt, Mary Elliott, Therese Ridge and Olivia Mitchell), and, on occasion Councillor Liam T Cosgrave. Councillor Elliott was asked whether Mr O'Callaghan's Quarryvale development had been discussed at these gatherings (Mahon 2012 p.887):

*We would have discussed it but I know there wouldn't have been any representation, asking for votes or anything like that at it, I suppose it would have been discussed alright.*

Mr Dunlop and his client Owen O'Callaghan also spent a lot of money supporting causes dear to the hearts of the councillors they targeted. Mr Dunlop for instance spent £7,300 in November 1993 on a grab-bag of Christmas gifts for councillors ('Hampers, bottles of whiskey, wine, whatever'), race nights, golfing events and good causes like the "Old folks/Ladies club" (Mahon 2012 p.560). The Neilstown Golf Club benefited separately from a donation of IR£2,460, given at the behest of Councillor John O'Halloran (Mahon 2012, p.558).

### Summary

There has been a great deal of study of the ways in which people influence other people, in the field of psychology (Cialdini 2007, 2009). There are some well-established principles of human behaviour that provide useful insights into the effects of political donations on recipients.

Whether they realise it or not, the recipients of donations are likely to be influenced by political donations. The giving of gifts is well established as a source of

systematic bias in decision-making, as it elicits the very human behavioural response of “reciprocity”.

The principle of “social proof” is also relevant - people are inclined to decide what is right on the basis of what they see around them; this can lead to what is usually referred to as the “normalisation” of unethical or otherwise undesirable behaviour. People can also be dominated by authority figures, even against their own interests and stated principles.

Finally, the giving of donations can be part of a deliberate strategy of ingratiation, which over time makes recipients more likely to think well of the donor, and more likely to comply with their requests.

## Chapter 7: The reality of donor influence

### Influence buying

Concern about influence buying rests on the proposition that it is objectionable for influence over elected officials to be traded for money, in the form of political donations or otherwise. If that proposition is accepted, the best-case scenario is that purchased influence is *undue influence*.

Donors and recipients both sense this, and strenuously deny the reality of influence. Picking up on US constitutional cases, donors assert that they make donations altruistically, to “support democracy”; and “democracy isn’t cheap<sup>39</sup>”.

Recipients meanwhile assert that they are unaffected by donations and make the decisions they would have made anyway (“money for nothing”).

Evidence to the contrary is mounting. The public statements of some donors, fundraisers and politicians offer some illuminating insights into the reality of modern political fundraising and the influence buying that has come to define it.

### Mind-reading

The Mahon Tribunal in Ireland tussled repeatedly with witnesses claiming that payments to elected officials were “legitimate political donations”, and found many were nothing of the kind.

In the Quarryvale case for example, of 15 payments the Mahon Tribunal found to have been accepted corruptly by elected councillors, 13 were defended as legitimate political donations. Of 21 payments the Tribunal found were accepted improperly or inappropriately, 13 were defended as legitimate political donations<sup>40</sup>.

If a donation is made in order to influence its recipient, this is not likely to be publicly admitted. Owen O’Callaghan cannily responded to the suggestion that IR£80,000 was paid for votes supportive of his Quarryvale development at a particular council meeting (Mahon 2012,p.533):

*Well that would be very, very wrong. And to do that you would have to get to read my mind. I don’t know [how] you actually take that out of it.’*

As it happened, Mr O’Callaghan’s lobbyist Frank Dunlop was prepared to admit that influencing decisions was exactly what he had in mind in making donations to councillors, using cash provided by his client.

### **Say no more**

Discussions that might lead to corruption findings are invariably conducted in private, and the parties to them can agree that they “never happened”. Mr Dunlop

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<sup>39</sup> ABC NSW Stateline, 20 February 2004

<sup>40</sup> Payments to Councillor Ardagh and to Councillor O’Halloran are excluded because the number of such payments could not be established by the Tribunal. In the case of Councillor Ardagh all such payments were said to be political donations, and so the proportion would be unaffected.

testified for example (Mahon 2012 p.893) that in the course of the inquiry he had received calls from one of the councillors he had paid:

*... I did confirm for him that he received £2,000 from me in 1991. He said that was OK because it was for the Local Elections. I intimated to him that that was not so and his reply was that **there would be no problem because both of us would agree that it was legitimate**. I reminded him that he had to say whatever he believed and I would be telling the Tribunal what I knew. (Emphasis added).*

It is also possible for understandings to be reached without being explicitly discussed among participants. In another exchange with the Tribunal's counsel, concerning his discussions with his clients (Mahon 2012, p.1685), Mr Dunlop said:

*.... these are meetings that take place with intelligent, reasonable, honourable people who know what business is about, who have been dealing in the construction industry for the best part of 30 years and it does not require, on any given occasion, for somebody to say 'I want you to pay X, Y and Z'. The culture of the meeting, the atmosphere of the meeting, the circumstances of the meeting, to any reasonable, outside, objective person would indicate that the context was that the ways of the world would apply.*

### ***Plausible deniability***

It can easily be claimed that a donation simply reflects philosophical alignment, with no untoward motivation on either side. Establishing the counter-factual of what an elected representative would have done in the absence of a political donation is no easy matter.

There is copious material on the voting patterns of members of the US Congress in relation to the interests of donors. Cialdini (2009, p.28) notes that:

*Associated Press reporters who looked at U.S. Congressional Representatives receiving the most special-interest-group money on six key issues during the 2002 campaign cycle found these Representatives to be over seven times more likely to vote in favor of the group that had contributed the most money to their campaigns. As a result, these groups got the win 83 percent of the time (Salant, 2003)<sup>41</sup>.*

Burke (1997, p.139) however acknowledges that establishing causation is a difficult exercise, noting that early studies had suggested that '*contributions seem to go to representatives already inclined-by ideology or constituency- to support the contributor*'. He sensibly cautions though that voting on the floor of Congress is not a reliable indicator of donor influence, saying '*floor voting is only the tip of the iceberg of legislative activity*'.

Many Councillors told the Mahon Tribunal that they were philosophically "pro development" or "pro jobs" and would have voted the way they did with or without a donation from the applicant. Councillor Greene for example (Mahon 2012, p.1579) denied that he requested a political donation in return for his vote and said that he "*agreed to support the project if it brought jobs and prosperity to the Dublin West area*".

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<sup>41</sup> Cialdini 2009 p.28

Denials of this kind are always perfectly plausible. Philosophical and political views naturally influence elected representatives, as do the views of the constituents to whom they are ultimately accountable. This is unremarkable in a democratic system. As Thompson (2005, p.1042) notes, elected representatives typically act on *mixed* motives.

In the case of the rezoning of land owned by the development company Monarch the Tribunal found (2012, p.1579) that numerous payments had been made (as political donations) but that:

*The extent to which such payments did in fact induce councillors to consider the rezoning applications (and related motions) in a manner which would or might benefit the Cherrywood lands was impossible to determine in most instances.*

On the other hand, while councillors could and did claim that their support was not dependent on the payment of a donation, the reverse clearly did not apply. When it was suggested to Mr Dunlop that Councillor Ridge was “vehemently supportive” of the Quarryvale rezoning, and her support did not need to be secured with money, he responded (Mahon 2012 p.1077):

*Well let me put it this way for you for convenience and expedition. She certainly wouldn't have got the support if she had not been a supporter of Quarryvale.*

## Modern political fundraising

Orr (2007, p.73) has described Australian electoral politics as ‘*decidedly British in its flavor*’ for much of the 20<sup>th</sup> century, dominated by parties with ‘*mass bases of paying, rulebound members*’:

*Campaigns were short and relatively homely affairs centred on a dignified launch of an election manifesto, with candidate expenditure reined in by legislative limits set at modest levels.*

Orr associates a dramatic change in political fundraising with the advent of the television and then information ages, which ‘*brought with them powerful elements of mass politicking, U.S. style*’, including ‘*parties dominated by careerists and guided by professional consultants, especially market researchers*’.

Over time, political fundraising became focused on “high net worth” individuals, and offers of access to decision-makers in exchange for donations became standard practice. This changed the mechanics of democracy.

Members of parties became increasingly irrelevant as they were no longer a major source of funding, and numbers dwindled<sup>42</sup>. There is a respectable argument that the first caused the second. This dynamic poses an existential threat to political parties like the Australian Labor Party.

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<sup>42</sup> A recent UK case, *Cruddas v Calvert, Blake and Times Newspapers Ltd* says at paragraph 10 that ‘approximately four million people belonged to political parties’ in the 1960s and by 2010 that number had dropped to about 420,000;  
<http://www.bailii.org/ew/cases/EWCA/Civ/2015/171.html>

### *High net worth strategy*

Political fundraisers, following the lead of charity fundraisers, routinely target “high net worth” individuals and corporations. There are clusters of such individuals in a small group of industries, including the property development industry<sup>43</sup>.

The observable result in NSW was that the single largest source of political donations was the development industry, prior to the prohibition of donations from that source in 2009. The next biggest sources of political donations in NSW aside from unions at the time were the liquor and gambling industries (which became prohibited donors in NSW in 2010) (Klan 2015).

With its finances in what Bertie Ahern called ‘*a bit of a state*’ (Mahon 2012, p.257) Fianna Fáil in Ireland pursued the same strategy. In September 1993 Fianna Fáil sought contributions of IR£100,000 each from approximately ten high net worth individuals (Mahon 2012, p.721). As noted earlier, the developer of the Quarryvale site, Owen O’Callaghan, was one of those individuals.

### *Galah events*

The influence of fundraising gimmicks borrowed from the charity sector is also evident in the political sphere. Concepts like bidding for a dinner with an admired sports star or celebrity, harmless in that context, have been transplanted in the political fundraising sphere, without thought to the fundamental difference in context. Jess Garland (2015b) observed in March 2015 that in the UK:

*The Conservatives’ election fundraising gala last month offered up auction prizes that included shoe shopping with the Home Secretary and a chicken dinner at home with the Chief Whip.*

Cialdini (2009) would predict that allowing a slice of your time to be the “prize” at a fundraiser will come to seem the norm to a Minister who regularly sees colleagues participating in such unedifying spectacles.

### *Flogging access*

Political fundraisers do not deny that donations can buy access to decision-makers. On the contrary, they offer it, in black and white.

Political commentator Graham Richardson, formerly an ALP official, politician, and lobbyist, described this fundraising method in May 2014 (Richardson 2014):

*The concept of paying for access is not new. I wore it as a badge of honour when I was raising serious money for Labor. For those who were prepared to kick in the big bucks, I had the standard phrase: you will be **guaranteed access to the ministers who will make decisions that affect you**, but you will never be guaranteed a favourable outcome.*

*The concept was, by and large, an accepted method of fundraising for three or four decades (emphasis added).*

### Join the club

Parties with conservative leanings pioneered the creation of fundraising entities

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<sup>43</sup> See BRW Rich List in The Australian Financial Review Magazine July 2014

styled as exclusive clubs, the members of which enjoy private opportunities to spend time with powerful politicians. Bartlett (1999, p.224) records:

*..., the [Conservative] Party – through the Millennium Club – has engaged in what Lord MacAlpine (a past party treasurer) described [in a BBC Program] as “flogging access”. The “club” is reported as organized by Marcus Fox<sup>44</sup> and as having close ties with John Major prior to the 1997 election. It reputedly offered members (subscription £2,500) privileged and private access to the highest ministerial levels.*

Another early example is TACA, a fundraising organisation created in Ireland in 1966 to fund Fianna Fáil<sup>45</sup>. Investigative journalist Frank Connolly (2010, p.23) has observed that the membership of TACA was dominated by the property and construction sectors. When its existence became public knowledge in 1967 there was such disquiet that the entity was disbanded in 1969.

Recently one of many Australian versions of this kind of entity, the “North Sydney Forum” (NSF), has been in the news<sup>46</sup>. Newspaper reporting of its operations, and the “tweets” and posters associated with the reports, led to a defamation claim by the former federal Treasurer, Joe Hockey, in the Federal Court of Australia.

In his 2015 judgment in the case (Hockey v. Fairfax paragraph 339), Justice White made findings summarising the nature and operations of the NSF, including:

*... membership of the NSF costs \$5,500 per year for individuals, \$11,000 per year for corporate and business membership, and \$22,000 per year for membership as a private patron; membership of the NSF is promoted and sold on the basis that it is an opportunity to obtain access to Mr Hockey in his capacity as the Treasurer of Australia ...*

Justice White concluded that the access to Mr Hockey provided by the NSF was ‘quite different from the occasional access obtained by an ordinary member of the CWA, Rotary, a member of a Chamber of Commerce and Industry, or for that matter the person in the street’<sup>47</sup>:

*348 ... membership of the NSF gives members the expectation and benefit of coming into contact with Mr Hockey regularly, on occasions when the numbers of other persons present are likely to be modest, on occasions when matters of policy will be the subject of dialogue, on occasions when they will have an opportunity for detailed discussion with Mr Hockey, when by reason of regularity or frequency of their contact, they will have the opportunity to develop some continuing rapport with him,*

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<sup>44</sup> Former Conservative Member for Shipley; as Vice-President of the Conservative Party under Margaret Thatcher he was responsible for candidate pre-selection, earning the nickname “the Shipley Strangler”.

<http://www.theguardian.com/news/2002/mar/19/guardianobituaries.conservatives>

For details of the UK Conservative Party’s current donor “groups” or “clubs” see UK Court of Appeal Judgment in *Cruddas v Calvert, Blake and Times Newspapers Ltd.* (paragraph 25)

<http://www.bailii.org/ew/cases/EWCA/Civ/2015/171.html>

<sup>45</sup> TACA is an Irish word for 'support' or 'help' (from the word 'tacaiocht').

<http://www.politics.ie/forum/fianna-fail/165649-fianna-fail-taca.html>

<sup>46</sup> Others are the Wentworth Forum, the Millennium Forum, the Higgins 200 Club and the Free Enterprise Foundation. See *Hockey v Fairfax* at paragraph 340.

<sup>47</sup> *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652 at para 349

*and in circumstances in which it would be reasonable for the member to assume that Mr Hockey, knowing that the member has paid a substantial fee, will give close attention to their comments.*

### **Second thoughts**

In a candid interview with journalist Paul Barry in 2011, the creator of the Millennium Forum and the Wentworth Forum, Michael Yabsley<sup>48</sup>, confessed to having felt “somewhat queasy” about the whole process for some years, and said it ‘*fails the smell test*’. He said:

*We’re not selling soap powder here, we’re not selling pet food, we’re not advertising a service that is just another commercial service offering. This actually goes to a fundamental question about the integrity of government and the way it is perceived, and that is why I think there should be a separate discussion in relation to political fundraising and the funding of elections, and I find myself ironically having after all of this arrived at what might be described as a very left of centre view from a right of centre person<sup>49</sup>.*

Mr Yabsley advocated a move to the Canadian system of prohibiting all corporate donations. He also advocated a cap on personal donations (in the order of “\$500, \$1000, perhaps \$2000”). Former federal opposition leader John Hewson (2015) has suggested donation caps of about \$1000 a year.

### **Intermediaries**

Intermediaries are often used both to solicit donations and to persuade recipients to some point of view or course of action. Sometimes the same person does both.

### **Lobbyists**

Intermediaries may be paid lobbyists, and they may use donations to advance the interests of their clients. This was shown to be a tactic used by lobbyists Barry Cassell and Roger Munro to improve the prospects for land developments on the north coast of NSW in the 1980s (ICAC 1990). The same tactic is at the heart of the Dublin rezonings investigated by the Mahon Tribunal.

In the UK Cruddas case<sup>50</sup>, the transcript of a meeting between the then Treasurer of the Conservative Party, two journalists posing as potential donors and their lobbyist (Court of Appeal 2015, paragraph 65) records one of the journalists saying that the lobbyist had ‘*come up with a load of brilliant ideas*’:

*‘One of them was that we could think about making a donation erm and that that would be a good way of getting ourselves noticed, erm’.*

### **Party officials and powerbrokers**

Party officials may act as intermediaries on the other side; the donations made by Barry Cassell and Roger Munro were given to the party head office rather than

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<sup>48</sup> Michael Yabsley website <http://www.michaelyabsley.com/michaelyabsley.htm>.

<sup>49</sup> <http://www.thepowerindex.com.au/political-fixers/paul-barry-talks-political-donations-with-michael-yabsley>

<sup>50</sup> UK Court of Appeal Judgment in Cruddas v Calvert, Blake and Times Newspapers Ltd, <http://www.bailii.org/ew/cases/EWCA/Civ/2015/171.html>



directly to the decision-makers at local level. In the worst of all possible worlds, lobbyists occupy formal positions within political parties.

Powerful factional figures with influence over other Members, even those ostensibly higher in the pecking order, are also potential intermediaries.

### *All of the above*

This dynamic reached its high (or perhaps low) point in Western Australia where a former Premier, Brian Burke, and his Ministerial colleague Julian Grill took up lobbying after their departure from Parliament. Mr Burke remained an influential party powerbroker in Western Australia.

Indeed it seems that one of the ways to become a highly successful lobbyist has been to demonstrate your prowess at bringing in donations for the people you intend to lobby.

For example, as part of his lobbying for a client seeking an increase in the permitted density of dwellings in a proposed subdivision, Brian Burke telephoned the State Member for Wanneroo, for whom he had organised a fundraising event. She offered to “speak to some people for him” (CCC 2009b p.189). When the proposal to “upcode” his client’s land came before council it was unanimously approved.

In another WA case (Whitby) Brian Burke and Julian Grill wanted a particular public servant, Gary Stokes, promoted, as he was amenable to a rezoning request opposed by his Department. Mr Grill was close to the Minister in charge of the Department, Mr Bowler, and had run his campaigns in 2001 and 2005 (CCC 2008b, p.45, p.67). In a conversation with Mr Grill, Mr Burke said of Mr Stokes (CCC 2008b, p.24):

*One of the big things is to convince Bowler that he’ll be our bloke there and get Bowler to promote him.*

The CCC was satisfied that Mr Burke and Mr Grill duly attempted to influence Minister Bowler to remove the head of the Department and appoint Mr Stokes (CCC 2008b, p.50). The Commission was also satisfied that Mr Stokes believed the lobbyists were able to influence Mr Bowler to advance his career, and that this was his motivation for helping them in the way he did (CCC 2008b, p.xi).

### Access and influence

The “standard phrase” that the donor is not *guaranteed* a positive result suffices only as an argument that the donation is not a case of quid pro quo corruption, which may well be the case most of the time. But while political fundraisers try to reassure the public that donations “only” buy access, the possibility that they also buy *influence* over decision makers is often studiously ignored.

In the recent High Court decision in *McCloy* (2015)<sup>51</sup> Justice Gageler p.57 noted:

*The influence which comes with the preferential access to government resulting from the making of political donations does not necessarily equate*

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<sup>51</sup> High Court of Australia, *McCloy v State of New South Wales* [2015] HCA 34, 7 October 2015.

*to corruption. But the line between a payment which increases access to an elected official and a payment which influences the official conduct of an elected official is not always easy to discern.*

In an article in 2006 a former Premier of Victoria, John Cain, asked: "...why do institutions and individuals donate?" His answer (Cain, 2006) was:

*All of them want access and, some would say, favours... Donors want the parties (and so, governments) to be beholden to them and to be preferred over their business competitors. It is a neat, cosy arrangement. It grows more blatant.*

*The parties in Australia now openly call for donations that provide access at rates of \$10,000 to the Prime Minister or premier. It costs less to get to see a Minister (emphasis added).*

### **Speaking freely**

Some donors are now on the record clearly linking donations with access, and access with an expectation of influence. Curtis (2010) has reported on the evidence given to an inquiry into party funding by the UK Committee on Standards in Public Life by major political donor Stuart Wheeler:

*Obviously a party is going to take more notice of somebody who might give them lots of money than somebody who won't, but that would be the same in any walk of life. If you were minded to give quite a bit of money to a charity, you would expect them to give more notice of you than they would to somebody who gave them £5.*

*... If someone minds enough about policy to be willing to give them an awful lot of money then he or she is probably worth listening to.*

Former Clubs NSW chief executive Mark Fitzgibbon is reported to have said that political donations bought the lobby group government access, which it used to influence policy (Klan 2009):

*'There was absolutely the view that supporting fundraising helped our ability to influence people', Mr Fitzgibbon said.*

Mr Fitzgibbon was also of the view that "you could easily make the case for banning political donations".

Since Mr Fitzgibbon's departure, Clubs NSW has officially changed its ways; its spokeswoman is reported to have said that in 2013 and 2014 sizable donations were made to the Menzies 200 Club, a Liberal Party fundraising entity, for 'no particular purpose' (Nicholls and Millar 2015).

### **A very particular purpose**

Frank Dunlop made it clear to the Mahon Tribunal that he was not in the habit of making donations for no particular purpose. When asked whether the rezoning of land at "Quarryvale" had been discussed in the course of his payment of IR£1,000 to Councillor Cyril Gallagher (Mahon 2012, p.903) he replied:

14.07 ... *'I cannot say definitively that I did or did not, but the only point I make to*

*you is that this is not a list of names that I drew up and stuck a pin in them and said that's the person I am going to give a thousand pounds to. I gave 1000 pounds to Cyril Gallagher for his, in the context of the local elections for the support that he had stated that he would give to Quarryvale, that was my demeanour at that particular time.'*

The last word on the subject surely comes from lawyers for former Newcastle Mayor Jeff McCloy (a person of interest in a current ICAC inquiry, "Operation Spicer"), whose High Court challenge to donation caps and the prohibition of developer donations in NSW recently failed. The plaintiffs' submissions unapologetically acknowledge the connection between making a donation, securing access to politicians, and gaining political influence.

Justice Gageler (p.64) noted that the plaintiffs were arguing that the ban on developer donations discriminated against them on this basis:

*How can it be reasonably necessary for the elimination of preferential access to government, they ask, to deny corporate property developers and their close associates the same degree of access to candidates and political parties that comes with the making of a political donation available to everyone else?*

The majority judgment (French CJ Kiefel J Bell J Keane J) paraphrased the argument put to the Court as follows (p.10):

*... they submit that donors are entitled to "build and assert political power"... Political influence may be acquired by many means, they say, and paying money to a political party or an elected member is but one.*

The only conclusion that can sensibly be drawn from these statements is that providing access to decision makers in return for donations is influence peddling.

### ***Being heard***

The plaintiff's submissions in *McCloy* (p.13) claim in relation to the NSW cap on donations: '*There is no basis to infer that the making of even a very large donation necessarily entails any kind of quid pro quo. Having political influence does not mean purchasing specific outcomes; it only entails an increased chance of being heard*'.

The value of "being heard" should not be underestimated, especially in planning, which purports to value open consultation processes. There is a real possibility that decision makers will make commitments on the strength of untested information and arguments presented behind closed doors. Other voices are muted or blocked out.

In NSW, the evidence presented at the Operation Spicer public inquiry includes an email sent to two NSW parliamentarians, Tim Owen and Andrew Cornwell, by Mr Owen's 2011 campaign manager, Hugh Thomson (ICAC 2014, Exhibit Z1, p.74). Mr Thomson, the Contracts Manager for a civil construction firm, sent the email a day after a press report that Swansea MP Garry Edwards was opposing a plan by development and construction group Buildev for a marina and tourist development on Crown land fronting Swansea Channel. The email reads:

*Not sure if you guys feel up to reminding Garry who paid for the lion's share of his campaign. Picking a fight with Buldev is not a smart move, particularly if he hasn't engaged with them privately.*

Political scientists will recognise this scenario from a seminal paper written by Bachrach and Baratz in 1962<sup>52</sup>; by the time there is any public discussion of a proposal, the choices available may have been narrowed to “acceptable” options behind the scenes.

### The “naughty list”

If donations buy access and influence, the obverse of the dynamic should also hold true; an article by Graham Richardson (2014) suggests that it does:

*Bob Hawke and Neville Wran were very, very good at raising a dollar. As prime minister, Hawke would host a dinner for the Sydney Jewish community at Kirribilli House. The big names attended and they remembered to bring their cheque books. It was not uncommon to raise \$700,000 to \$800,000 at these dinners. And that was in the 80s.*

*Towards the end of his reign, Wran asked Hawke to host one of these dinners for him. The same big names turned up for the NSW premier and wrote out their contributions. When I told Neville the next day how much each had given, he was particularly concerned at a \$10,000 donation from one very wealthy individual.*

*... Leaving out the “fs” and the “cs”, I was instructed to return the cheque and inform this unfortunate soul what part of his body he could roughly shove the offending instrument. When I did so, another nought was added to the original amount. It may have lacked subtlety, but it worked...*

*Fundraising has become a major task for officials. Whether it is in the job description or not, fundraising almost dominates the modern party office. There are schemes to milk the truly committed, encourage the unconvinced, and to make sure those who don't kick in are on a naughty list.*

*All political parties will deny that last point because they have to. Those denials don't alter the facts. Many business figures believe they have little choice but to donate because they fear discrimination.*

The behaviour described above may be perfectly acceptable in a parallel universe created by powerful party officials about 30 or 40 years ago. But outside that universe it is not viewed with such equanimity.

Donatella della Porta and Alberto Vannucci, writing in the Italian context in 1997, saw political donations as one of the resources available to corruptors (their term) seeking influence over official decisions. On the other hand, they note that donors may be subject to unwelcome pressure (della Porta and Vannucci 1997, p.241):

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<sup>52</sup> Bachrach, Peter and Baratz, Morton S. 1962 *Two Faces of Power*, American Political Science Review volume 56 Issue 4 December 1962 at p.948

*... Some Milanese politicians convicted for corruption ... in certain cases went so far as to compel the firm [Icomec] to subsidise private offices, election campaigns and periodicals’.*

### ***Making the Mafia look like monks***

Irish born but UK based developer Tom Gilmartin plainly found himself on the “naughty list” in Ireland, when he tried to develop a site called “Bachelor’s Walk” in Dublin (as a joint venture with Arlington Properties) and a site called “Quarryvale” on its outskirts. Mr Gilmartin came close to financial ruin after a series of unhappy encounters with Irish parliamentarians and councillors, seeking both donations and outright bribes.

Early in 1989 parliamentarian Liam Lawlor organised a meeting for Mr Gilmartin with Taoiseach (Prime Minister) Charles Haughey at Parliament House. Several Ministers, including Pádraig Flynn and Ray Burke, also attended (Mahon 2012, p.167).

Just outside the meeting room Mr Gilmartin was approached by a man who told him to deposit IR£5m into a bank account in the Isle of Man ‘*in return for the assistance that Mr Gilmartin was going to receive in relation to his Bachelor’s Walk and Quarryvale projects’*. Mr Gilmartin told the Tribunal he refused this demand:

*... I turned to him and I told him ‘You people make the so and so Mafia look like monks’. I said, ‘You’re not serious are you?’, and I walked away.*

The reaction of the unidentified man was to tell Mr Gilmartin he could ‘*wind up in the Liffey for that statement’* (Mahon 2012, p.168).

A Bank of Ireland Manager, Mr Sheeran, was asked at a Tribunal hearing (Mahon 2012, p.175) what Mr Gilmartin gave him to believe he would get for his IR£5m:

*I think he was told what he wouldn’t get if he didn’t pay it... That he wouldn’t get planning for Quarryvale, it would go nowhere.*

When it seemed that Quarryvale was indeed “going nowhere”, Mr Gilmartin paid IR£50,000 to Pádraig Flynn for his Party, Fianna Fáil, ‘*out of desperation’* (Mahon 2012, p.243). The Tribunal accepted that there was an ‘*element of duress or coercion’* but considered the payment nonetheless ‘*misconceived and entirely inappropriate’* (Mahon 2012, p.247).

Mr Gilmartin did not wind up in the Liffey. He remained on the “naughty list” though – his IR£50,000 cheque found its way into the personal bank account of the Minister and his wife instead of to Fianna Fáil.

Mr Gilmartin’s joint venture partners in the Bachelor’s Walk project joined him on the naughty list, despite paying almost IR£75,000 in “consultancy fees” (IR£3,500 a month) to Liam Lawlor. Executives of the company (Arlington) believed they would otherwise face a ‘lack of support’ for the project by the government and the authorities in Dublin (Mahon 2012, p.2455).

Mr Gilmartin’s counsel asked Mr Dudley of Arlington if ‘*the warmth of the welcome somewhat dimmed’* after he went to a fundraising event in London in November 1989 and refused a request by Mr Flynn for a donation ‘*for the boys’*. Mr Dudley’s

dry response was: ‘Dimmed, I would not use. Terminated would probably be better’ (Mahon 2012, p. 277).

### *Impeccable timing*

During 1993 Owen O’Callaghan met several times with then Taoiseach Albert Reynolds, and his lobbyist Frank Dunlop met with Bertie Ahern, who was at the time Minister for Finance. They lobbied for government funding (between IR£3m and IR£5m per annum) for the redevelopment of the “Neilstown” site as a stadium. Both had a financial interest in the project.

It was while this lobbying was underway that Mr Reynolds and Mr Ahern wrote to Mr O’Callaghan, seeking a donation of IR£100,000 to the Fianna Fáil Party (Mahon 2012, p.2481).

Mr O’Callaghan obliged, despite the payment taking his company Riga’s overdraft from almost IR£18,000 to almost IR£100,000. He paid in three tranches, beginning with a cheque for IR£10,000 paid during or after a private fundraising dinner in Cork on 11 March 1994. Mr Reynolds was the special guest at the fundraiser; he flew there and back by helicopter (Mahon 2012 p.2481).

Less than two weeks later, Mr O’Callaghan met with Bertie Ahern. The Tribunal found that (Mahon 2012, p.2481):

*... the issues for discussion between Mr O’Callaghan and Mr Ahern on 24 March 1994 were Mr O’Callaghan’s stadium project, and his request for state funding for the project (by way of National Lottery funding and/or tax designation) as well as Mr O’Callaghan’s concern that the Blanchardstown Town Centre site might be favoured with tax designation status.*

Shortly after the meeting Mr O’Callaghan made a further IR£10,000 donation to Fianna Fáil, followed in June 1994 by the final tranche of IR£80,000 (Mahon 2012 p.2481).

The Tribunal did not find the total IR£100,000 payment to the Fianna Fáil Party by Mr O’Callaghan corrupt on his part; it considered him to have been under pressure in making it. It did however consider (Mahon 2012, p.730) that:

*... the concept whereby senior Ministers, together with a former Government Minister and EU Commissioner<sup>53</sup> closely associated with that party, would actively engage in (what amounted to in reality) pressurising a businessman, then involved in lobbying the Government to support a commercial project, to pay a substantial sum of money to that political party, was entirely inappropriate and an abuse of political power and Government authority.*

## Summary

The standard response to concerns about political donations is that donations don’t influence; that donors are just “supporting democracy” or “participating in the political process”. These explanations are becoming increasingly threadbare.

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<sup>53</sup> Ray McSharry

Political fundraisers plainly and explicitly offer access to important decision-makers in exchange for donations. Some major donors are on record saying donations give them influence, not just access, and that this is what they expect. It follows that selling access to politicians is a form of influence peddling.

The converse applies, or is feared to apply, to non-donors and to those whose donations are comparatively modest. They may fear they will find themselves on a “naughty list”, and be disadvantaged in their dealings with government, if they do not donate generously to political parties.

Tom Gilmartin’s experience in Ireland, and a startling tale from an Australian lobbyist and political fundraiser, suggest such fears might not be groundless.

## Chapter 8 Directions for change

“Legitimate” political donations, and the rest

The difficulties inherent in establishing the motives of individuals make suspicions that donations have influenced particular decisions hard to verify, and equally hard to dispel. This has major implications for devising and implementing measures to protect the integrity of planning systems.

### Disappointing outcomes

In Ireland, the Mahon Tribunal’s findings of corruption were numerous, but successful prosecutions have been thin on the ground. This has been widely seen as a failure of the Tribunal to achieve much, despite its length and considerable expense (Mac Eochaidh 2012).

Only Mr Dunlop has to date served time for corruption. Ray Burke and Liam Lawlor did spend time in jail, but for tax offences and contempt of the Tribunal respectively (O’Connell 2013). Mr Lawlor died in a car crash in Russia before any further charges could be laid against him.

Criticisms based on a perceived lack of prosecutions have also been levelled at the NSW ICAC, as is well canvassed by McClintock (2005, pp.38 – 40), by the NSW Parliament (Committee on the Independent Commission of Inquiry 2014), and by Gleeson and McClintock (2015).

There have been practical problems arising from the fact that responsibility for prosecutions sits with the DPP, not the ICAC, to which there are practical solutions (Ipp, 2014). More fundamentally, though, it is not appropriate to judge the success of anti-corruption agencies solely, or even primarily, in terms of criminal prosecutions.

### **Measures of success**

As the submission of the NSW Director of Public Prosecutions to a recent Parliamentary Inquiry on the subject notes (Babb, 2014):

*Royal Commissions and anti-corruption bodies like ICAC have a very particular primary role in our society, that is, to expose the truth. As a society governed by the rule of law, including the right to silence, it has always been recognised that the price of truth is almost always a guarantee that compelled evidence cannot be used in subsequent criminal prosecutions.*

*In reality, where no admissible evidence exists in relation to a hidden crime, the truth may be the only thing that can be brought to light.*

Successful prosecutions for corruption offences are more common than may be generally realised (ICAC 2014b), but they will inevitably be fewer than findings of corruption. Other possible outcomes can however also be of lasting value; such as the removal of corrupt individuals from positions of power, changes to systems that have been corruptly manipulated, and law reform.



### **Law reform**

When called on recently to decide the fate of a significant NSW reform, caps on donations and a ban on donations from property developers, the High Court referred to a number of ICAC investigation and corruption prevention reports (see *McCloy*, Justice Gordon p.113, footnote 426). The constitutional validity of both measures was confirmed.

In the case of the ICAC's 1990 report, the prosecution of a development company executive for bribing two State Ministers with donations to their respective political parties was unsuccessful<sup>54</sup>, but the words of its author Adrian Roden QC were still ringing in the ears of the High Court 25 years later. Justice Gageler quoted Mr Roden extensively in his judgment in *McCloy* (High Court 2015, pp. 19, 58-61 para.173). Furthermore, he noted (at p.62) that Justice Allen had said in the Court of Criminal Law's decision:

*... Assume having made the payment to the campaign funds of the politician, accepted by the politician as being a wholly proper contribution from a political supporter with no strings attached, the person who made the payment thereafter approaches the politician and says: 'I made this contribution to your campaign funds, I now need this favour. It is irregular but don't you think you owe it to me?' Is that a bribe by the person soliciting the favour? Again the answer must be 'No'. The payment when made implied no condition that if it were accepted the recipient would act improperly in the future in the payer's favour."*

Like Justice Allen in 1994, Justice Gageler (*McCloy* p.62 para.180) indicated that this situation (still) calls for law reform.

In Ireland, the Mahon Tribunal similarly drew attention to the inadequacies of Irish law in relation to official corruption. The *Criminal Justice (Corruption) Bill* now in its final stages in Ireland gives effect to some of the Tribunal's recommendations, and to several international agreements relating to corruption<sup>55</sup>. It includes a presumption of corruption in the case of undeclared donations, exceeding allowable limits, by a donor who had or has an interest in the recipient "*doing any act or making any omission in relation to his or her office, employment, position or business*"<sup>56</sup>.

### **The really big guns**

Meanwhile, Ireland's Criminal Assets Bureau has clawed back millions of euros from corrupt individuals and tenaciously continues to do so. In NSW the *Criminal Assets Recovery Act 1990* allows for the same form of redress. If all else fails, the levying of hefty tax bills and prosecution for tax evasion is an outcome that should not be sniffed at. It was, after all, tax offences that finally brought down the seemingly untouchable American gangster Al Capone.

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<sup>54</sup> R v Glynn (1994) 33 NSWLR 139 at 145

<sup>55</sup> Council of Europe Criminal Law Convention on Corruption, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and United Nations Convention Against Corruption

<sup>56</sup> [http://www.justice.ie/en/JELR/Pages/Criminal%20Justice\\_%28Corruption%29\\_Bill](http://www.justice.ie/en/JELR/Pages/Criminal%20Justice_%28Corruption%29_Bill)

## The criminal law perspective

Approaching the subject of donor influence from a criminal law perspective has another drawback. It tends to elicit a defensive response to perceived personal insult, and recourse to a central principle of criminal law: “innocent until proven guilty”. The central issue, influence, falls by the wayside. US case law is replete with this distracting line of thinking (see Chapter 9).

The notion that a donation that is not a crime is not a problem is deeply flawed. It expects nothing more of elected representatives than that they stay on the right side of the criminal law, particularly that relating to bribery. This falls a long way short of legitimate democratic expectations: the rule of law; decisions made in the public interest; and political equality.

## The conflict of interest perspective

The conflict of interest perspective provides a sound analytical framework for thinking about donations and influence. That perspective is evident in many of the case studies considered in this paper.

The Corruption and Crime Commission of Western Australia used the conflict of interest rationale in relation to political donations to the Mayor of Cockburn by the developer of the Port Coogee project (CCC 2008a). The Mahon Tribunal’s findings similarly rest heavily on its conclusion that donations compromised the ability of recipients to deal with matters affecting donors in the disinterested manner required of them (see Chapter 5).

There is an inescapable logic in the proposition that donations create a conflict of interest for any recipient with influence over decisions that affect the donor. In the case of an industry that is both lucrative and regulated, like property development, such decisions are made daily at all levels of government.

The chief advantage of taking a conflict of interest perspective is that it is capable of dealing with undue influence as well as corruption. It does not suggest personal culpability where that is not warranted (although sometimes, of course, it is). There is no basis for wounded feelings such as those expressed in the plaintiffs’ submissions to the High Court in the *McCloy* case, which (at p.11) portrayed the NSW ban on donations from property developers as:

*...an attempt to prevent socially undesirable persons from being seen to contaminate political parties and candidates with their influence.*

Prohibiting political parties from accepting donations from certain sources on the basis of conflict of interest has nothing to do with punishing anyone for unproven crimes or presumed moral failings. Such restrictions are preventative and protective, not punitive.

The conflict of interest perspective also has the practical advantage of sidestepping the impossible task of unlocking the inner workings of people’s minds to discern their motives.

## The disclosure approach

As noted in Chapter 7, former Premier of Victoria, John Cain (2006), believes that “donors want access and, some would say, favours”. Mr Cain also observed that selling access to decision-makers in exchange for donations ‘grows more blatant’ and that:

*We seem to have accepted this situation provided that the donation, the giver and receiver are known; that is, that disclosure is the key.*

As Mr Cain intimates, the efficacy of the disclosure approach is more often assumed than examined. It is nonetheless frequently put forward as the solution to any concerns about political donations, as it was in the plaintiffs’ submissions to the High Court in *McCloy* (p.17 para. 106):

*Indeed, one is compelled to ask why anything more is needed than public disclosure of donations and other dealings. It is by now axiomatic that the light of publicity is the surest scourge of potential corruption.*

The philosophy behind the disclosure approach is that “sunlight is the best disinfectant”<sup>57</sup>, a quote taken from the work of American jurist Louis D. Brandeis (1913,1914.). Tham (2010, p.58) rightly calls this mantra “a snappy, but overstated case”.

The disclosure approach assumes that parties and candidates will curb their enthusiasm for donations that might cause them embarrassment when disclosed, and lose them votes next time around.

Greater public disclosure since the 1980’s served a very useful purpose; it exposed the fact that Australia’s political parties had become reliant on donations from the property industry, with the liquor and gambling industry not far behind (Klan 2009). Transparency had revealed a potentially large problem, but of itself could do nothing to correct it.

The assumption that redress could come via the ballot box turned out to be heroic. It did not take into account the possibility that competing parties would embark on the same kinds of fundraising schemes, targeting the same “high net worth” individuals and industries. Nor did it take into account the utter shamelessness of some donors and some recipients.

### **Exemptions**

Disclosure regimes have another potential weakness; they routinely exempt donations below a specified threshold, ostensibly to allow for minor contributions considered incapable of influence. Some thresholds are however so high that they undermine the disclosure regime, as Kelly and Sawer note (2010, p. 6):

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<sup>57</sup> Louis D Brandeis, 1914, *Other People’s Money – and how bankers use it* published by Frederick Stokes NY, p.96; the chapter “*What publicity can do*” appeared first as an article in a 1913 Harper’s Weekly article. The actual words are: “*Sunlight is said to be the best of disinfectants; electric light the most efficient policeman*”.

*As the ACT Electoral Commissioner noted in his evidence before the Committee, the fact that a party can receive over half a million dollars of income from undisclosed sources is a serious affront to transparency.*

Things are much worse at the Federal level and in Queensland (which now uses the Federal threshold): the current disclosure limit is \$13,000 (Schott et al 2014 Working Paper 1, p.11; figure updated). Such a high figure is seriously at odds with the existence of a disclosure regime.

## First principles

While disclosure is the usual starting point of statutory and non-statutory regimes designed to deal with conflicts of interest, it is an unsuitable finishing point when dealing with political donations from industries with much to gain or lose from government decisions.

It is not usually seen as sufficient for significant conflicts of interest to be dealt with simply by declaring them. A NSW provision that does have that effect (*Local Government Act 1993 NSW s.451 (4)*) was introduced in 2012, but having created a loophole big enough to drive a Ferrari and several Lamborghinis through, it is set to be repealed (Nicholls 2015).

A donations regime that goes no further than requiring the disclosure of donations is a weak political donations system. The higher the disclosure threshold, the weaker the system.

### *Changing decision makers*

As noted in a previous chapter, there are some provisions relating to donations in legislation other than the electoral law. The logic of these provisions is to treat the receipt of a donation as creating a conflict of interest for decision-makers. In NSW the EPA Act s.147 and the Model Code of Conduct for NSW local government officials (2013)<sup>58</sup> contain such provisions.

In the former case, decisions that would otherwise be made by the Minister for Planning are instead referred to the Planning Assessment Commission.

In the latter case the conflict of interest rationale is explicit; all donations are stated to be a possible source of conflict of interest. If a donation exceeds the declarable threshold (currently \$1000) conflict of interest is implicitly presumed. Councillors must either remove the source of conflict (which could only mean returning the donation); or absent themselves from, and take no part in, any debate or voting on the issue<sup>59</sup>.

These provisions apply to ordinary, occasional applicants rather than entities engaged in the business of property development. Donations from property developers were prohibited in 2009 in NSW.

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<sup>58</sup> Department of Premier and Cabinet, 2013, Model Code of Conduct for Local Councils in NSW, March 2013, <https://www.olg.nsw.gov.au/strengthening-local-government/conduct-and-governance/model-code-of-conduct>

<sup>59</sup> These are the same options that apply to a pecuniary (financial) interest, under section 451(2) of the *Local Government Act 1993*.

Changing the decision maker is a comparatively weak form of protection in that it applies only at the last stage of decision-making. If the field has already been tilted by donor influence on legislative or policy decisions, the final decision may be a foregone conclusion. For example, removing social or environmental impact from a list of relevant considerations might be sufficient to determine the outcome of an application.

There are other drawbacks to dealing with conflict of interest by removing the decision-maker from the decision (though that is certainly better than leaving them there). The most obvious drawback arises if Ministers appoint the alternative decision-makers.

### ***Root cause reform***

Avoiding the creation of such conflicts of interest is the preferable course. Fundamentally, there is no good reason elected officials should be put in a position of such deep conflict of interest in the first place.

The majority in the *McCloy* decision (*French CJ Kiefel J Bell J Keane J* at p.14 para.36)) considered the reliance of an office-holder on the support of a wealthy patron an instance of clientelism. They agreed with the conclusion reached in the US case *McConnell v. FEC* (2003):

*... unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.*<sup>60</sup>

A prohibition on developer donations can deal with the important de facto planning decisions taken by Ministers outside the *Environmental Planning and Assessment Act NSW 1979* and comparable legislative instruments. The very valuable tax designation power was a striking example in Ireland. The “unsolicited proposals” route in NSW is another.

## Flexibility and consultation

Planning systems purport to value public consultation, or even “participation”, and invariably incorporate a variety of provisions to that end.

There are two main points at which these provisions apply: the making of planning instruments (decisions concerning the content of planning controls); and development proposals (decisions about their application). Both points are pressure points in planning systems and can be targets for corrupt or undue influence (see Chapter 4).

Proposed amendments to the EPA Act in 2013 had the stated intention of putting the emphasis on the first of these points, described as the “front end” of the planning process<sup>61</sup>. The logic of this approach was that once an inclusive, sophisticated and meaningful debate about the outcomes sought from a planning instrument had been conducted, the parties could reasonably be expected to abide

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<sup>60</sup> Citation: *McConnell v Federal Election Commission* 540 US 93 at 153 (2003).

<sup>61</sup> NSW Government April 2013 “A new planning system for NSW: White Paper” p.50

by the results. Debate need not be re-opened every time a particular proposal came forward. Technology now can be used to make early consultation genuinely effective.

This sensible enough approach was not however followed through in an unbiased way. Applicants (and only applicants) were *not* expected to abide by the results of this consultative policy development (White Paper p.149). Yet another method of “spot” rezoning was to be created, adding a pressure point to the planning system and repeatedly reopening the process of consultation. All that “front-end participation” could create was a floor, never a ceiling.

Attempts to delegitimise objections to this bias as “nimbyism” and sweep them aside were fiercely resisted, and ultimately the legislation was shelved.

To a lesser extent this approach already exists in the EPA Act, in that if certain “non-discretionary” standards are met, the characteristics to which they relate cannot form the grounds of refusal of a proposal (s.79C (2)). On the other hand, if these “non-discretionary” standards are not met, refusal does not similarly follow; a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the “non-discretionary” development standard (s.79C (3)).

### *Ends and means*

The desirability of “flexibility” in the planning system has been a powerful notion in planning practice since the 1980s (Kelly and Smith 2008, p.87). Many planners might be inclined to argue that “negotiated outcomes” are a necessary and desirable thing. I have previously argued (Walton, 1997) that this is so up to a point; that point being when *ends*, rather than the *means* to an end, are open to negotiation.

Flexibility of means (such as the use of performance standards) is both fair and wise, but if ends decided (indeed, negotiated at length) in an open and inclusive process can be negotiated away behind closed doors, confidence in the planning system will erode.

There may for instance be several different ways to ensure that a building does not generate wind speeds at ground level higher than a stated level. A “negotiated outcome” concerning the method to be adopted is very different from trading off a comfortable pedestrian environment at ground level (embodied in measurable standards) for some other end entirely.

In time, the legitimacy of the planning system can be damaged by perceived unpredictability as well as by suspected, or proven, corrupt or undue influence on the negotiators<sup>62</sup>. Planners, having responded to exhortations to be more “flexible”, can find themselves derided for being “inconsistent” or for “planning on the run” (Stone, p.35), if not worse.

Even without the heavy emphasis on public consultation in planning systems, marked disparities between plans and physical reality tend to reduce confidence in their integrity. There are many possible reasons plans and reality might diverge, and while some are benign, two are not – corruption and undue influence.

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<sup>62</sup> Walton, J. 1997 “In praise of certainty” Australian Planner, 34:1, pp.12-15

## Summary

Benign explanations such as “supporting democracy” and “participating in the political process” lack credibility, but hard evidence of donor influence on particular decisions is difficult to find.

If the distinction between a legitimate donation and an illegitimate one rests on the intention of the donor, and the counter-factual of what the recipient would have done without it, telling one from the other from the outside is fiendishly difficult. Suspicions that donations have influenced particular decisions are hard to verify, and equally hard to dispel.

This essentially criminal law perspective can lead to public frustration and disappointment at the apparent lack of consequences for those engaged in influence peddling, and even for individuals found to have given or received corrupt payments in the form of donations. It is too narrow a perspective from which to consider donor influence on planning decisions.

When considering how best to address the potential for donations to lead to *undue influence* as well as corruption, the more appropriate perspective is that of conflict of interest. From this perspective it is the objective circumstances surrounding the making of a donation that count. There is no need for the fraught task of unlocking the inner workings of people’s minds to discern their motives.

Changing the decision maker is a possible response, but this may not ensure an unbiased decision if prior legislative or policy decisions have already tilted the playing field in favour of a political donor.

Fundamentally, there is no good reason elected officials should be put in a position of deep conflict of interest in the first place. Equally, there is no justification for placing anyone at the potential mercy of political fundraisers wielding a “naughty list” of insufficiently generous donors, who have reason to fear discrimination *against* them (see Chapter 7).

From the conflict of interest perspective it is also crystal clear that Tham (2010, p.58) is correct to describe the mantra ‘*sunlight is the best disinfectant*’ as ‘*a snappy, but overstated case*’. Something more than disclosure is required when dealing with political donations from industries with much to gain or lose from government decisions.

The desirability of “flexibility” in the planning system can also be overstated. Planning systems purport to value public consultation. There is nothing unfair or unwise about a “negotiated outcome” concerning the means by which an end developed in an open and inclusive consultation is to be reached. The same cannot necessarily be said of negotiations in which the end itself can be traded off, behind closed doors, for some other end entirely.

In time, the legitimacy of the planning system can be damaged by perceived unpredictability as well as by suspected, or proven, corrupt or undue influence on the negotiators<sup>63</sup>.

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<sup>63</sup> Walton, J. 1997 “In praise of certainty” *Australian Planner*, 34:1, pp.12-15





## Chapter 9 High Court headwinds

Public disclosure of donations by recipients, and more recently by donors as well, is a staple of modern Australian electoral law, and the validity of this approach has not been in question. The failure to do much else in most places to address the problem of donor influence stems in part from an apprehension of constitutional difficulties.

More robust measures have indeed had to run the gauntlet of challenges to their constitutional validity. The High Court's recent decision in *McCloy*<sup>64</sup> confirms however that fears of a constitutional barricade to reform akin to that erected by the current US Supreme Court can be laid to rest in Australia. In sharp contrast to the current situation in the US, political equality matters in Australian constitutional law.

### Genesis and development of Australian approach to electoral finance

Graeme Orr (2003) has traced the development of the Australian federal approach to political donations law up to the end of 2002, and concludes (p.5):

*Prior to the 1980s, the Australian approach to electoral finance was, by default, largely laissez faire. Apart from some residual laws from the Victorian era, the statutory schemes and attitudes were British, indeed common lawyerly, in their outlook. It was a case of trusting – or rather hoping – that political decency would prevail.*

Since the 1980s there has been a growing realisation that controls on donations are essential to the integrity of government.

One or more of the following approaches can be seen in Australia and in other countries: caps on expenditure; disclosure; public funding; caps on donations; and prohibitions on some sources of political funding. A comparative paper prepared for the NSW Panel of Experts on Election Funding and Donations Disclosure (Schott Report 2014b) provides a snapshot of the similarities and differences.

The disclosure approach was generally relied on at State level until 2009, when a period of more muscular action began in NSW. The first step was to remove certain sources of campaign funds (entities with a particular dependence on government approvals) rather than simply exposing them to public view.

Still more muscular was an attempt by the O'Farrell government in 2012 to follow Canada's lead, and prohibit donations from any body or person other than a person on the State, Commonwealth or local government electoral rolls<sup>65</sup>. This measure fell foul of an "implied freedom of political communication" in the High Court of Australia.

#### **Expenditure limits**

The first limitations on political donations in Australia came in the form of caps on candidate expenditure. Orr (2003, p.6) describes the 19th century system as "fatally flawed", in that the expenditure limit was imposed only on the promotion of

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<sup>64</sup> Jeffrey Raymond McCloy and Ors v State of New South Wales and Anor, High Court of Australia no S211 of 2014.

<sup>65</sup> Invalidated s.96D, EFED Act NSW (the section as it existed prior to the invalidated amendment remains in force.)

individual candidatures. Mass media campaigns run by central campaign offices escaped the net.

Expenditure limits were widely regarded as defunct, until Tasmania's Supreme Court took its State's limits seriously in 1979 and declared a poll void due to excess expenditure by several members. Orr (2003, p.6) records that '*The political caste across Australia was thrown into apoplexy*', and within a year, federal expenditure limits had been repealed. In 1985, Tasmania's expenditure limits were watered down, but they still apply to upper house elections.

Caps on electoral communication expenditure were put in place in NSW in 2010<sup>66</sup>, and they also apply in the Australian Capital Territory (see Schott et al 2014b Appendix A). They were introduced in Queensland in 2011 but repealed in 2014 by the Newman government (Schott et al 2014b, p.3).

Expenditure limits exist in Canada (Kelly and Sawyer 2010, p.2), and in the UK (Garland 2015 p.9). The UK's longstanding ban on electoral broadcasting also serves to limit the scale of electoral expenditure, but this was ruled out as an option for Australia by the High Court in 1992 in the "ACTV" case<sup>67</sup>.

### ***Disclosure and public funding***

Disclosure of donations accompanied the early caps on candidate expenditure in Australia. The idea re-surfaced in the 1980s, starting in New South Wales in 1981, spreading to the federal level in 1983<sup>68</sup>, to Queensland and the ACT in 1992 and to Victoria in 2002 (Orr 2003).

These newer disclosure requirements were typically accompanied by some degree of public funding. Public funding is currently available at federal level and in the ACT, NSW, Queensland, Victoria and Western Australia.

### ***Caps on Donations***

In NSW donors have since 2010 been limited in the amount of donations they can make in any financial year, but only in relation to State elections and elected members of the NSW Parliament<sup>69</sup>. Limits apply to donations to registered parties (\$5000); candidates (\$2000); elected members (\$2000); unregistered parties (\$2000); a group of candidates (\$5000); or third party campaigners (\$2000).

The NSW cap on donations survived a recent High Court challenge by, as did the NSW ban on donations from property developers<sup>70</sup>.

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<sup>66</sup> *Election Funding and Disclosures Amendment Act 1981* Part 6 Division 2A, s.95F.

<sup>67</sup> *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106.

<sup>68</sup> [Part XX of the Commonwealth Electoral Act 1918 \(Cth\)](#) ('CEA'); first applied at 1984 Federal election

<sup>69</sup> *Election Funding and Disclosures Amendment Act 1981* Part 6 Division 2A, s.95A, inserted by *Election Funding and Disclosures Amendment Act 2010* (NSW). See Election Funding, Expenditure and Disclosures (Adjustable Amounts) Notice (NSW), No 2011-597. Unlike the remainder of Part 6, Div 2A only applies in relation to State elections and elected members of the NSW Parliament (s 95AA; cf s 83(1)). Cf Local Government Act 1993 (NSW) ss 328A-328B.

<sup>70</sup> High Court of Australia, *McCloy v State of New South Wales* [2015] HCA 34, 7 October 2015.

Victoria imposes a \$50,000 cap on political donations from casino and gambling licensees and related entities (Schott et al 2014b). Canadian law limits donations to relatively small amounts - \$1000 adjusted for inflation.

### ***Prohibited donors***

Restrictions on *who* can donate are not uncommon, and have a long lineage.

#### Foreign donors

The Schott report says the prohibition of donations from foreign individuals and corporations is common (Schott et al 2014a, p.4). Such prohibitions exist in Australia<sup>71</sup> and in the UK. Foreign donations are ruled out in Canada (at the federal level and in provinces such as Quebec and Manitoba) by provisions that allow donations only from citizens and permanent residents (Kelly and Sawyer 2010, p.2).

#### Corporations and Government contractors

Donations from corporations generally and from government contractors in particular have historically been seen in the US as problematic. According to Issaccharoff (2010, p.139) '*the Tillman Act has prohibited corporate contributions to candidates for federal office since 1907*'. Furthermore, he says:

*Beginning with a 1940 amendment to the Hatch Act, all federal government contractors were prohibited from 'making any ... contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use,' during the period of contract negotiation or performance.*

In 2012 NSW introduced legislation similar to that in place in Canada. Corporations of all kinds – including trade unions - were forbidden to donate. At the same time the aggregation of the donations of parties and “affiliated entities” (including, and perhaps especially, unions) was introduced for the purposes of donation caps<sup>72</sup>.

Both provisions<sup>73</sup> were invalidated by the High Court in December 2013, on the basis that they imposed an impermissible burden on an “implied freedom of political communication”<sup>74</sup>. The ACT had introduced a similar provision but repealed it on the basis that it was similarly vulnerable (Schott et al 2014b, p.3).

#### Industries highly dependent on government decisions

Since 2009 property developers have been “prohibited donors” in NSW (*Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW) (“EFED Act”). Donations from other groups highly dependent on government decisions - tobacco, liquor and gambling industry entities - were similarly prohibited in 2010 (EFED Act ss. 96GAA-96GB).

Unlike the broad ban on corporate donors enacted in 2012, the targeted prohibition on developer donations survived a challenge to its constitutional validity in 2015.

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<sup>71</sup>See e.g. EFED Act NSW s.96D

<sup>72</sup> Invalidated s. 95G(6); See Twomey 2012 p.1

<sup>73</sup> *Election Funding, Expenditure and Disclosures Amendment Act 2012* (NSW) (s96D), s95G(6)).

<sup>74</sup> *Unions New South Wales and Others v New South Wales* [2013] HCA 58

The High Court considered it reasonably appropriate and adapted to the legitimate purpose of preventing corruption and undue influence. Orr (2015) considers the parallel prohibitions on donations from other industries similarly dependent on government decisions likely to be safe as well.

### Implied freedom of political communication

The High Court of Australia sees communication with and between voters as essential to the proper operation of the system of representative government established by the Australian Constitution. For that reason it implies a restriction on the capacity of governments to pass legislation limiting (“burdening”) political communication. This is known as the “implied freedom of political communication”, established by the High Court in the *ACTV* case in 1992, and developed in a line of subsequent cases (Twomey 2012).

Following the US along the path of seeing donations as either “speech” or “speechy enough” as to warrant constitutional protection (Issaccharoff 2010 p.119) would be a troubling development. It is untenable, in the face of extensive empirical evidence of donations to both sides, and concealment of political donations, to maintain that they constitute “political communication” with voters. If donors’ money is speaking to anyone, it isn’t voters.

Despite a superficial resemblance, the “implied right of political communication” in Australia is however very different from the personal right to “freedom of speech” the US Supreme Court regards as relevant to the making of donations.

#### *Talking money*

As Twomey (2012, p.645) observes, the US Supreme Court regards the making of a political donation as a direct form of political communication, on the basis that:

*... a donation tends to indicate that the donor supports the political party and wishes to aid it in winning or retaining government.*

Twomey (2012, p.646) notes that this view has been the subject of much criticism by US commentators such as J Skelley Wright (1976), and Issaccharoff, Karlan and Pildes (2012)<sup>75</sup>. As Richard White (2013, p.1033), commenting on the 2010 US Supreme Court case *Citizens United*, has put it:

*... the decision is ultimately about the trade-offs between political “speech” and the corruption of democratic politics. And it is quite possible that Citizens United is only the first step in a trajectory of money, transmuted into “speech”, trumping restraints on corruption.*

The recent decision of the High Court in *McCloy* resoundingly rejected the approach taken by the US Supreme Court. Justice Gordon’s view (p.110) was that ‘making a donation communicates no content to electors’:

*... The act of donating is private ... If any particular message is to be*

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<sup>75</sup> J Skelley Wright, ‘Politics and the Constitution: Is Money Speech?’ (1976) 85 Yale Law Journal 1001; S Issaccharoff, P Karlan and R Pildes, *The Law of Democracy*, (Foundation Press, 4th ed., 2012) 347–8.

*communicated by the donor, it would need to be expressed by words separate from, and in addition to, the donation. The public disclosure requirements in the Act do not alter that conclusion.*

Justice Gageler was also of the view that the ‘*mere fact of making a political donation communicates nothing*’ (p.54), and he added:

*As New South Wales rightly points out, making a political donation does not even necessarily communicate support for the recipient's policies. It is not unheard of for donors to donate to more than one party.*

#### Both sides of the fence

If donations express support for the policies of a party or candidate, why donate to their opponent too? The usual benign explanation is mentioned by Justice Gordon in *McCloy* (p.110), along with a less benign possibility:

*The donation may be made to support the political process generally (donors may donate to more than one party), to garner influence, to support the recipient's policies or for other reasons.*

Twomey (2012,p.646) suggests that donations to both sides are more likely to indicate that the donor wants to obtain influence with whoever wins the election. A statement by political commentator Graham Richardson, a former ALP official, Minister and lobbyist (2014), suggests Twomey’s hardheaded assessment is correct:

*I always got clients to donate to both sides. It seemed to me that, no matter how entrenched one side seemed to be at any given moment, given the cyclical nature of politics you could bet your bottom dollar that it would not last forever. My advice was to be able to transition from the red team to the blue team as seamlessly as possible.*

#### Careful, they might hear you

The most telling evidence against the notion that political donations are a form of communication with voters is the effort many donors have put in to *avoid* signalling to voters their financial support of a candidate or party. The measures used in the case studies examined for the purposes of this paper were often elaborate, and sometimes preposterous.

In the case of the “Port Coogee” development in Western Australia, for example, the Corruption and Crime Commission (“CCC”) found that the Premier-turned-lobbyist Brian Burke had emailed his client Australand, reminding it to ensure the Mayor it was assisting financially was fully “protected” (CCC 2008, p.166):

*When asked what the Mayor would need protection from, Mr Burke said he wasn’t sure. When asked whether Mr Burke was trying to ensure that the public wouldn’t make any connection between Australand and the fundraising being done for Mr Lee, Mr Burke said:*

*‘That’s what it looks like, but I – I don’t recall the – the email so I don’t know.’*

## Watering the grassroots

The strategy Brian Burke developed for his client in the Port Coogee case included bankrolling a seemingly grassroots lobby group “Port Coogee Now”(“PCN”), and using it as a “veil” to conceal the true source of donations (CCC 2008. p.33).

Mr Burke was not happy when he became aware that the public relations firm used by PCN and paid for by Australand (Riley Mathewson) had sent an invitation under the banner “PCN” to Cockburn’s Deputy Mayor, a member of the Mayor’s team, containing the (accurate) words ‘*We have organised a fundraising luncheon to assist your campaign*’.

He hastened to instruct his clients on the finer points of political fundraising (CCC 2008, p.47):

*It is really unwise to be saying in emails of invitations etc things that are not accurate. The intention of the luncheon is to raise funds that PCN can then use as it sees fit. It may see fit to support candidate/s at the election, it may not.*

*In completing the required return after the election, a candidate is required to state “honestly” where any support in excess of \$199 (cash or kind) came from. In this case, the declaration will simply say support came from a community group PCN.*

His clients, however, knew this was a fiction, and told the Corruption and Crime Commission so. Mr Owens, of Riley Mathewson, said that Mr Burke’s response ‘*didn’t make much sense to him*’ (CCC 2008, p.49).

The CCC (2008, p.34) noted the similarity between the “Port Coogee Now” (PCN) arrangement and Mr Burke’s subsequent proposal to use the “Independents Action Group” as a vehicle to channel funds from the proponent of a development at Smiths Beach<sup>76</sup> to Busselton Shire Council candidates.

## Muddying the money trail

In Ireland, Frank Dunlop preferred to use cash, provided by his clients. The Mahon Tribunal (2012, p. 933) found, for instance, that over the course of May/June 1991, Owen O’Callaghan provided Mr Dunlop with IR£80,000, the primary purpose of which was for distribution to councillors standing in the 1991 Local Election. It noted (2012, p.2341) that:

*In the course of his testimony in the Quarryvale Module, Mr Dunlop advised that, on occasions, he had cash sums ranging between IR£25,000 and IR£100,000 in his briefcase.*

The money outlaid was accounted for in company records as “expenses” of the development project, and all concerned were at pains *not* to tell the voters about Mr O’Callaghan’s financial support of his favoured candidates for public office.

## ***Amassing political power through donations***

The plaintiffs in *McCloy* urged the High Court to decide that the implied freedom of political communication comes in the form of the right to use donations to “*build*

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<sup>76</sup> See Corruption and Crime Commission WA 2009 *Report on Investigation of Alleged Public Sector Misconduct linked to the Smith’s Beach Development at Yallingup*

and assert political power" (High Court 2015, p.10 para. 25). Accordingly, the plaintiffs argued NSW could not deny them 'a political means to succeed in their business endeavours' by capping donations and prohibiting developer donations (plaintiffs' submissions p.11).

The High Court gave short shrift to the argument; Justice Gordon (p.103) said:

*Indeed, a right of an individual to "build and assert" political power would be, and is, contrary to the "great underlying principle" of the Constitution that the rights of individuals are secured by ensuring that each individual has an equal share in political power*<sup>77</sup>.

## Burdens on freedom of political communication

Laws that impose "burdens" on political communication are not inherently unconstitutional. The test established by the High Court is whether the burden is reasonably appropriate and adapted to a legitimate end, and compatible with the system of democratic government established by the Australian constitution (Twomey 2012, p.646).

### **A practical matter**

The High Court in *Unions NSW* decided (p.14 para. 38) that the prohibition on all corporate donations (invalidated s.92D) limited the freedom of political communication. This was not because it interfered with a right of free speech or political expression; it was because it imposed what Justice Gageler (High Court 2015, p.45 para.133) described as 'a practical restriction on political communication':

*That section effects a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds. The public funding provided by the EFED Act is not equivalent to the amount which may be paid by way of electoral communication expenditure under the Act. It is not suggested that a party or candidate is likely to spend less than the maximum allowed. The party or the candidate will therefore need to fund the gap. It follows that the freedom is effectively burdened*<sup>78</sup>.

In *McCloy* the same conclusion was reached, as summarised by Justice Gordon (p.110 para.347) in relation to the prohibition on donations from property developers:

*Section 96GA restricts the funds available to political parties and candidates to meet the costs of political communication.*

This paper argues that sustaining political parties is not the actual motivation of big corporate donors; at the most, it is a by-product of the building of influence. It is

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<sup>77</sup> This quote by Justice Gordon is taken from Harrison Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 329

<sup>78</sup> *Unions New South Wales and Others v New South Wales* [2013] HCA 38  
<http://eresources.hcourt.gov.au/showCase/2013/HCA/58>

undeniable though that in the absence of sufficient public funding, donations are important to the financing of political candidates and parties.

## Legitimate ends

The High Court has recognised that the practical benefit of donor support is accompanied by a real risk that parties can become financially dependent on donors who do have other motivations. The Attorney General of Victoria in his submissions in *McCloy*<sup>79</sup> (paragraph 15) quotes a compelling statement by Justice Brennan in the *ACTV* case:

*[T]he salutary effect of freedom of political discussion on performance in public office can be neutralized by covert influences, particularly by the obligations which flow from financial dependence. The financial dependence of a political party on those whose interests can be served by the favours of government could cynically turn public debate into a cloak for bartering away the public interest.*

Justice Nettle quotes the same passage in his decision in *McCloy* (at p.75 para.224). The majority judgment in *McCloy*<sup>80</sup> as well as the individual judgments of Justice Gageler and Justice Nettle (p.75 para.224) noted the relevance of the concepts of “clientelism” and “patronage” to the case before them. In rejecting the US approach in *McCloy*, Justice Gageler (p.62) said:

*The legitimate end of limiting campaign financing here surely extends to the elimination of what has there been labelled "clientelism".*

The High Court’s decision in *Unions NSW* (2013, paragraph 138) and its recent decision in *McCloy* (2015) confirmed that the prevention of corruption or undue influence is a legitimate end that can justify legislative imposition on the implied freedom of political communication in Australia.<sup>81</sup> The Court resoundingly rejected the recent approach of the US Supreme Court in *McCloy*; Justice Gageler stated (p.62 para.181):

*There is no place within the system of representative and responsible government as it has developed in Australia for the notion, recently reiterated by a narrow majority of the Supreme Court of the United States, that the legitimate end of limiting campaign financing is the elimination of "quid pro quo corruption".*

The preservation of political equality (the converse of undue influence) was specifically raised in *McCloy*; the Commonwealth Attorney-General argued that the permissible ends for electoral finance regulation include:

*...minimising the distortion of the political process - at the level of both election by the people and representation of the people in Parliament - in favour of those who can afford to make larger political donations (a level*

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<sup>79</sup> *McCloy v State of New South Wales*, High Court case no S211 of 2014, Submissions filed by A-G for the State of Victoria 10 March 2015.

<sup>80</sup> Chief Justice French, Justices Kiefel, Bell and Keane

<sup>81</sup> *Unions New South Wales and Others v New South Wales* [2013] HCA 58 at [138]



*playing field end*)<sup>82</sup>

In endorsing the prevention of both corruption and undue influence as legitimate ends the Court in *McCloy* gave effect to the principle of political equality; the majority judgment says (p.14 para.35):

*The plaintiffs submit that gaining access through political donations to exert persuasion is not undue influence. This mirrors what was said by Kennedy J, writing the opinion of the Court in Citizens United v Federal Election Commission, that "[i]ngratiation and access ... are not corruption." In practice, however, the line between them and corruption may not be so bright.*

Justice Gageler (p.54 para.164) summarised the plaintiffs' principal argument as being that caps on donations and prohibition of developer donations restricted political communication by '*removing the preferential access to candidates and political parties which would otherwise come to those who have the capacity and incentive to make large political donations*'. He continued:

*... The argument is as perceptive as it is brazen. It goes to the heart of the mischief to which the provisions are directed.*

Justice Gageler concluded (p.63 para.184):

*...the elimination of preferential access to government which results from the making of political donations is a legitimate legislative objective. More than that, the elimination of that form of influence on government is properly characterised as a compelling legislative objective.*

## Appropriate means

The High Court majority<sup>83</sup> in *Unions NSW* could not discern a "rational connection" between the NSW prohibition of donations from all corporate bodies, including non-profit corporations, and the legitimate end of prevention of corruption and undue influence. It thus failed the requirement that a burden on the "implied freedom of political communication" must be "reasonably appropriate and adapted" to serving a legitimate end.

In *McCloy* however the High Court could see the rational connection between caps on donations and the prohibition on developer donations, and the legitimate end of preventing corruption or undue influence. The nature of the planning system, and the nature of the industry, were both recognised as factors establishing the rational connection. The decision also refers specifically to empirical evidence that planning and development is in fact, not just in theory, an area of elevated risk.

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<sup>82</sup> *McCloy v State of New South Wales*, High Court case no S211 of 2014; Annotated submissions of the Attorney-General of the Commonwealth of Australia (intervening) at para. 46.2

<sup>83</sup> Chief Justice French, Justices Hayne, Crennan, Kiefel and Bell

Justice Gordon (p.112 para.354) noted:

*...The value of land is peculiarly tied to governmental decisions relating to such matters as zoning and whether or not particular development applications are approved. These governmental decisions often involve State and local government officers in an individualised, discretionary decision-making process.*

Justice Gageler (p.65 paras.193-194) stated:

*What it is that relevantly differentiates corporate property developers from the mainstream of political donors is the nature of the business in which they are engaged. By definition, it is a profit-making business which is dependent on the exercise of statutory discretions by public officials. It is the nature of their business that gives corporate property developers a particular incentive to exploit such avenues of influence as are available to them, irrespective of how limited those avenues of influence might be.*

*The problem is not merely theoretical. The unfortunate experience in New South Wales has been one of exploitation of influence leading too readily to the corruption of official conduct.*

## Compatibility with system of representative government

Both caps on donations and the ban on developer donations in NSW easily passed the final hurdle; compatibility with Australia's system of representative government. The majority found (p.33 para.93) that:

*These are provisions which support and enhance equality of access to government, and the system of representative government which the freedom protects. The restriction on the freedom is more than balanced by the benefits sought to be achieved.*

## Summary

Political donations have a degree of constitutional protection in Australia. Some limitations (in the absence of full public funding) have been held to "burden" an "implied freedom of political communication." This is subtly but critically different from the US Supreme Court's conception of donations as a form of "speech", communicating to voters the donor's support for the policies of the recipient.

The notion that donations are a form of communication with voters is untenable in light of the practice of making donations to both sides of politics, and evidence of active concealment of donations from voters. It has been specifically considered and rejected by the High Court of Australia, which recognises that donations communicate nothing to voters.

To the extent that Australian legislatures are constrained in restricting donations, it is not because of a personal right protected by the Constitution. The reason is practical: in the absence of full public funding, donations give parties and candidates the financial means to communicate *their* messages to voters.

Donations do serve this purpose under our current system, but that does not establish that this is why they are made. Still less does it establish that the interests of democracy are well served by allowing political parties to become dependent on donations from industries heavily reliant on government decisions, such as the development industry.

Fortunately for Australians, the “*great underlying principle*” of the Australian Constitution is that ‘*the rights of individuals are secured by ensuring that each individual has an equal share in political power*’. That is, political equality, the converse of undue influence, matters in Australia’s constitutional law.

Provisions that are reasonably appropriate and adapted to serving a legitimate end are not unconstitutional; and the prevention of both corruption and undue influence are legitimate ends. In its decision in *McCloy* (2015) the High Court stood with, not against, much-needed donations law reform.

# Chapter 10 Conclusions

## Introduction

The research question addressed in this paper is: *Can planning systems co-exist with a weak political donations regime and retain their integrity?*

The conclusion reached in this paper is that they cannot. The reasons are set out below, along with a discussion of options for addressing the issue.

## The problem is influence

Influence on elected representatives lies on a continuum ranging from legitimate, to undue, to corrupt. Maintaining the integrity of the planning system requires attention to undue influence, not just to behaviour that is clearly corrupt, and sometimes criminal (such as bribery).

There is extensive empirical evidence that political donations can be, and have been, used to acquire corrupt or undue influence over elected representatives, including those responsible for planning decisions. This evidence is backed up by research in the field of psychology, and by the public statements of some donors and recipients, most recently by the submissions for the plaintiffs in the *McCloy* case in the High Court.

Political donations are ideal for “currying favour”, a shorthand term for harnessing the instinct to reciprocate and ingratiating yourself with someone before making some request of them. No explicit bargain is required. A condition of internalised “indebtedness” and eagerness to please simply follows successful candidates and parties into office.

Modern political fundraisers have taken the easy path of seeking big donations from a small group of “high net worth” individuals clustered in a few industries, notably the property development industry. To make matters worse, they have taken to “flogging access” to key decision makers; a form of influence peddling. Along the way, they have lost sight of the legitimate expectations of citizens in a functioning democracy: the rule of law, political equality, and decisions made in the public interest.

## Planning systems are particularly vulnerable

The decisions made under planning systems and related systems are of high value. There is discretion in the making of planning rules, and often a degree of “flexibility” in applying them<sup>84</sup>. These characteristics make planning systems particularly likely to be the target of attempts to corrupt or unduly influence decision-makers. It is important to address the vulnerabilities created within the planning system itself, as threats to its integrity do not stem only from donor influence. The most important area of reform to address donor influence however lies *outside* the planning system itself, in the electoral law. In the long run it is unlikely that any regulatory system can

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<sup>84</sup> See <http://www.legislation.nsw.gov.au/maintop/view/inforce/epi+155a+2006+cd+0+N> for current provisions in NSW

withstand the kind of pressure generated by the purchase of political influence by those it is supposed to regulate.

### Complacency is unwise

There are no reliable statistics indicating the prevalence of corruption and undue influence. There never will be. What is now clear though is that corruption and undue influence can become normalised, as captured in evidence given to the Mahon Tribunal by lobbyist Frank Dunlop, concerning the rezoning of land at Ballycullen in Ireland (Mahon 2012, p.1666):

*Mr Dunlop stated that Mr Jones had said to him that he was 'fed up giving money to political parties' and that he had acquiesced when Mr Dunlop had stated that 'the ways of the world would have to apply' ...*

More explicitly, his client (Mr Jones) had indicated that he was aware that 'there was no hope for land such as his to be rezoned' if councillors were not paid (Mahon 2012 p.2455).

Overall, the Mahon Tribunal painted a bleak picture of the period it examined, from the late 1980s to the late 1990s (2012, p.1):

*Throughout that period, corruption in Irish political life was both endemic and systemic. It affected every level of Government from some holders of top ministerial offices to some local councillors and its existence was widely known and widely tolerated. Although that corruption was occasionally the subject of investigation or adverse comment, those involved operated with a justified sense of impunity and invincibility. There was little appetite on the part of the State's political or investigative authorities to take the steps necessary to combat it effectively or to sanction those involved.*

A complacent approach to the influence that donations can buy risks the gradual development of a very serious problem, as it did in Ireland.

### Collateral damage to democracy can result

In the long run the proper functioning of the democratic system is threatened by failure to deal adequately with the elevated risks attached to donations from the development industry.

The former Premier who introduced the NSW prohibition on contributions from the development industry recalled in his valedictory speech in the NSW Parliament (Rees 2014, p. 2441):

*In November 2009 at the New South Wales Labor State Conference I sought and was unanimously granted the power to select my own Cabinet. I also announced that we would no longer be taking donations from property developers and that I wanted New South Wales to move as far as possible to public funding of elections. The public had had a gutful and, frankly, so had I. Public confidence in decision-making was low, our political standing even more so, and the culture of our party was in a state of decay.*

*I knew there would be no going back having made that announcement. I knew that the forces of darkness would come after me, but it was a calculated risk. The critical part of the calculation was that even if I did not survive<sup>85</sup> we would have started the ball rolling on much-needed reform.*

## Donations do more to undermine democracy than to support it

The US Supreme Court proposition that donors are in “direct communication” with voters, signalling their support for particular policies, is easily debunked. There is too much evidence of donations to competing sides and concealment of donations from voters for this to be remotely plausible. The High Court does not give it credence.

The alternative claim that donors are “supporting democracy” by funding communication the parties otherwise could not afford is also dubious. The evidence strongly suggests this is not the reason donations are made by development interests and industries similarly dependent on government decisions. Sustaining political parties might be a by-product with some attractions, but it comes at a high price if parties become dependent on donors with much to gain or lose from government decisions.

Public statements by some donors (including the plaintiffs in *McCloy*), say they expect donations to give them influence, as former Victorian Premier John Cain warned in 2006.

The only countervailing argument that needs to be addressed is pragmatic: how can political parties and candidates be funded, if not by large donations from property developers, liquor and gambling interests?

## The conflict of interest perspective is useful

The notion that a donation that is not a crime is not a problem is deeply flawed. In order to restore public trust that the public interest is at the heart of planning decisions, the criminal justice perspective is too narrow. The conflict of interest perspective is more useful.

Elected representatives are placed in a position of serious conflict of interest if they or their parties become reliant on donations from industries highly dependent on government decisions. A steady flow of donations is best secured by paying close attention to the interests and requests of donors.

Decision-makers may be genuinely unaware that their ability to act impartially in the public interest, as the citizens in a democracy are entitled to expect, has been compromised. This possible lack of insight strengthens rather than weakens the case for action.

Political donation regimes need to decisively address the conflict of interest created by donations from the development industry, to lessen the risk of corruption and undue influence.

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<sup>85</sup> He didn't. Within days Mr Rees was relieved of his role as Premier.

Canada confines donations to individuals on the electoral roll. Since there are many industries apart from the development industry dependent on government decisions, and government contracts, this comprehensive approach has much to recommend it<sup>86</sup>. Indeed, it would satisfy the plaintiffs' submissions in *McCloy* (p.11) suggesting that property developers are not in a different category from others, such as trade unions, banks, lawyers, accountants, financial advisers, real estate agents, media proprietors, supermarket chains, or pharmaceutical companies:

*In each case, their advancement of their own interests through participation in the political process is perceived by some part of the community as pernicious.*

As the plaintiffs were well aware, the NSW government had concluded that a more comprehensive approach was indeed the best course, but it had already been overruled by the High Court in *Unions NSW*.

### ***Mind the gap***

For the moment, the targeted prohibition of donations from sources carrying the highest risk, including the property industry, is the next best alternative to the more comprehensive Canadian approach.

If accompanied by greater public funding, and reasonable expenditure limits, a variant of the Canadian approach remains a feasible option for Australia, and it could be revisited in the future. This is because the size of the funding gap allowed by expenditure limits, and the availability of other sources of funding sufficient to “fund the gap”, are both relevant to whether the implied freedom of political communication is “burdened” or not. If there is no gap, there is no burden, and this is a threshold question for any High Court determination.

### Transparency is not enough

Improved disclosure regimes in Australia since the 1980s served a very useful purpose by revealing the unhealthy dependence of political parties on funding from the property development industry, followed closely by the liquor and gambling industries. They could not however solve the problem they revealed.

A donations regime that goes no further than requiring the disclosure of donations is a weak political donations system. The higher the disclosure threshold, the weaker the system.

Changing the decision maker can be an appropriate response, but this leaves open the possibility that prior legislative or policy decisions have already tilted the playing field in favour of a political donor. The better course is to take money out of the equation.

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<sup>86</sup> A key concern about the North Sydney Forum for instance is the presence of financial advice interests, which are regulated at the Federal level. Donations from the tobacco industry are a perennial concern.

## Intermediaries need attention

The central role played by intermediaries is unmistakable. Lobbyists involved in securing and disbursing political donations, in tandem with lobbying decision-makers, feature in investigations in Ireland and in Australia. The practice received dishonourable mention in an early ICAC report (ICAC 1990), as is noted by High Court Justice Gageler in his judgment in *McCloy* (p.58 para.173).

The prospects of both elected officials and candidates depend to a greater or lesser degree on the goodwill of a party head office dominated by the task of fundraising. The presence of lobbyists in official positions within political parties heightens the potential problem inherent in this situation.

Measures intended to address the use of donations to influence decisions need to be alert to the possible role of intermediaries.

## Planners under pressure

Donor influence on elected decision-makers is not a mere side issue for planners. Corrupt or undue influence on elected decision makers impedes the achievement of the objectives of the planning system (be they modest or ambitious). The standing of professional planners can only suffer if the work they do is undermined in this way.

Moreover, pressure to make particular decisions or to provide certain recommendations can make the position of planners difficult if not untenable. Senior Executive Service contracts allow for their termination at any time “for any or no reason”.

A snapshot of what this can mean in practice appears in the CCC’s finding that lobbyists (and fundraisers) Brian Burke and Julian Grill sought to influence a Minister to remove a Departmental head and appoint instead an individual who had been helpful to them (CCC 2008 p.50; see Chapter 9).

Part of the reason planners can find themselves under such pressure is the inclusion of excessive “flexibility” in the planning system; namely the ability to give consent to proposals that do not meet the ends of planning controls (as opposed to proposals that meet the desired ends in alternative ways).

## Technocratic ambitions

Attachment to the idea of “flexibility” in planning is sometimes coupled with the suggestion that the key to integrity in the planning system is removing politicians from it.

Limiting the involvement of elected officials in determining individual applications is consistent with the administrative nature of such decisions (see Chapter 4).

On the other hand, the “front end” of planning involves important policy decisions – political decisions. The question of democratic principle arises. Whether views of St Paul’s Cathedral, or sunlight on the Hyde Park pool of reflection, should be



protected so that future generations can enjoy them too is quintessentially a democratic question, not a technical or professional one.

Apart from that, corruption and undue influence in the planning system is not necessarily connected with political donations and does not necessarily involve elected officials. And since corruption is not, as a matter of fact, confined to elected representatives, removing them from planning decisions is not a panacea.

Too much discretion in the hands of any official, elected or unelected, is open to abuse and manipulation. This should not be overlooked.

## Summary

The conclusion reached in this paper is that planning systems cannot co-exist with a weak political donations regime and retain their integrity.

Influence on elected representatives lies on a continuum ranging from legitimate, to undue, to corrupt. Maintaining the integrity of the planning system requires attention to undue influence, not just to behaviour that is clearly corrupt, and sometimes criminal (such as bribery).

There is a demonstrably heightened risk of corruption and undue influence inherent in planning systems, and political donations are the source of much of this risk in the case of elected officials.

The decisions made under planning systems and related systems are of high value. There is discretion in the making of planning rules, and often a degree of “flexibility” in applying them<sup>87</sup>. These characteristics make planning systems particularly likely to be the target of attempts to corrupt or unduly influence decision-makers.

Donations from development interests (sometimes via intermediaries) create a serious conflict of interest for elected decision makers. Political donation regimes need to decisively address the conflict of interest created by donations from the development industry, to lessen the risk of corruption and undue influence. Simply declaring them is not sufficient at any level of government.

A donations regime that goes no further than requiring the disclosure of donations is a weak political donations system. The higher the disclosure threshold, the weaker the system.

There can be negative impacts on the democratic system if planning systems lose their integrity. Even advanced democracies have developed a trust problem, and political donations from property developers and industries similarly dependent on government decisions are contributing to it.

There can be negative impacts on the democratic system if planning systems lose their integrity. Even advanced democracies have developed a trust problem, and political donations from property developers and industries similarly dependent on government decisions are contributing to it.

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<sup>87</sup> See <http://www.legislation.nsw.gov.au/maintop/view/inforce/epi+155a+2006+cd+0+N> for current provisions in NSW

There is reason to review planning systems and practice to remove avoidable vulnerabilities to corruption or undue influence. Confining the scope for overriding planning controls to means rather than ends would assist. This approach to the idea of “flexibility” in planning would value and build on the open participation processes built into modern planning systems, reinforcing confidence in these processes and in the planning system.

In the long run however it is unlikely that any regulatory system, however well crafted, can withstand the kind of pressure generated by the purchase of political influence by those it is supposed to regulate. The key area of reform in tackling donor influence consequently lies *outside* the planning system itself, in the electoral law. The most sensible course is to take money out of the equation.

## Chapter 11 Recommendations

The conclusion that planning systems cannot co-exist with a weak political donations regime and retain their integrity calls for a strong political donations regime, measures to reduce the susceptibility of planning systems, or a combination of both.

The following recommendations are a combination of both approaches, based on the conclusions in the previous chapter.

**Recommendation 1:** Prohibit political donations from the property development industry, at all levels of government.

**Recommendation 2:** Prohibit political donations from political lobbyists, and bar lobbyists from official positions in political parties.

**Recommendation 3:** Introduce a presumption of corruption along the lines of that contained in the Irish *Criminal Justice (Corruption) Bill*: covering undeclared donations, exceeding allowable limits, by a donor who had or has an interest in the recipient “*doing any act or making any omission in relation to his or her office, employment, position or business*”<sup>88</sup>.

**Recommendation 4:** Confine override provisions in planning systems to the variation of means, rather than ends. In NSW, this entails removing clause 4.6 (3) (b) from the Standard Instrument and requiring applicants to demonstrate consistency with objectives, in line with the assessment required by clause 4.6 (4) (ii).

**Recommendation 5:** Developing and drafting clear and robust objectives that function well when tested by override provisions should form part of the training of every planner.

### Recommendation 1: Prohibit development industry donations

Donations from the development industry place decision-makers in a position of deep conflict of interest, and heighten the risk of corruption or undue influence on planning decisions. Declaring them is a grossly inadequate response.

To protect the integrity of planning systems, such donations should not be permitted. Fears of constitutional impediment can now be laid to rest; the NSW ban on developer donations recently survived a challenge in the Australian High Court<sup>89</sup>.

Prohibiting developer donations in recognition of the conflict of interest they create carries no pejorative inferences about developers as people, and it is not a ‘sweeping condemnation of the whole property development sector as being inherently inclined to corruption by way of political donations’ (McCloy, plaintiff’s submissions p.13).

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<sup>88</sup> [http://www.justice.ie/en/JELR/Pages/Criminal%20Justice\\_%28Corruption%29\\_Bill](http://www.justice.ie/en/JELR/Pages/Criminal%20Justice_%28Corruption%29_Bill)

<sup>89</sup> High Court of Australia, *McCloy v State of New South Wales* [2015] HCA 34, 7 October 2015

If it is clear that donations from the development industry cannot be accepted, it is no longer necessary to distinguish between “legitimate donations” and the rest on the basis of the motives of individuals. Objective circumstances will dictate whether or not a donation is legitimate.

It is of course true that the characteristics justifying the prohibition of developer donations can be found in other industries. The appropriate response is to extend prohibitions to other industries, as has been done in NSW, not to leave the problem unaddressed in the planning context.

### ***Compliance questions are not insoluble***

Some will point out the obvious – that not everyone will comply with stronger laws restricting donations. This is of course perfectly true, just as it is true that not all donations that should be declared are in fact declared

It is equally true that every law, including laws prohibiting theft, fraud, extortion and worse, will be broken. No one puts that fact forward as an argument for legalising any of these anti-social behaviours.

On occasions it is true that a lack of public support makes disobedience so widespread and enforcement so difficult that there is no point to a piece of legislation (the prohibition of alcohol in the US in the 1930s being the classic example). We are not dealing here with such a case. There is strong public support for donation law reform.

The practical issues surrounding compliance need to be addressed, of course, but the fact that complete success is never likely is not a good argument for preserving an unsatisfactory status quo. Most donors and recipients will in time adapt to a new reality, provided the new reality includes an expectation that breaches are likely to be detected, and serious consequences will follow.

## Recommendation 2: Add lobbyists to list of prohibited donors and bar them from official positions in political parties

Political lobbying is an industry highly dependent on government decisions, even without success fees (banned in NSW under the *Lobbying of Government Officials Act 2011*<sup>90</sup>). In addition, the potential for lobbyists to include the use of political donations as a key part of their lobbying strategy has been well demonstrated.

The ban on political donations from the development industry and like industries should be extended to lobbyists.

The NSW (*Lobbying of Government Officials Act 2011*) provides that third-party lobbyists (and the individuals they engage to undertake the lobbying for them) must “keep separate from their lobbying activities any personal activity or involvement on behalf of a political party” (*NSW Lobbyists Code of Conduct 2014 clause 13*)<sup>91</sup>.

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<sup>90</sup> Section 15

<sup>91</sup> The code is contained in, and prescribed by, the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014*.

Party officials had earlier been banned from lobbying the federal government (as paid lobbyists): then Prime Minister Tony Abbott is reported as saying: ‘*you can either be a powerbroker or a lobbyist, but you can’t be both*’ (Nicholls 2013).

These measures are a good way to reduce closed-door donor influence and to protect the integrity of government. The planning system, as a particularly vulnerable system, will derive particular benefit from them.

### Recommendation 3: Presumption of corruption

The difficulties associated with prosecutions for corruption offences are notorious and have led to dissatisfaction with the outcomes of corruption inquiries. The *Criminal Justice (Corruption) Bill* now in its final stages in Ireland gives effect to some of the Mahon Tribunal’s recommendations to address this problem, and to several international agreements relating to corruption<sup>92</sup>.

It includes a presumption of corruption in the case of undeclared donations, exceeding allowable limits, by a donor who had or has an interest in the recipient “*doing any act or making any omission in relation to his or her office, employment, position or business*”<sup>93</sup>. The presumption can be rebutted by evidence supplied by the donor or recipient.

A provision to the same effect would greatly improve outcomes in Australia. In the case of prohibited donors, of course, the allowable limit is zero.

### Recommendation 4: Confine override provisions in planning systems to the variation of means, rather than ends

The extent of discretion available in planning systems is one of the factors that make it a vulnerable system. In particular, “override” provisions introduced to provide “flexibility” in planning systems have featured in proven cases of corruption (see Chapter 4).

Limiting the extent of the discretion available so that it is hard to achieve the desired result without a high risk of detection would reduce the vulnerability of planning systems. It would also serve to strengthen the likelihood of compliance with laws prohibiting political donations from the development industry; in effect, there is less to buy or to sell.

There is a way to give sufficient latitude to decision-makers to deliver positive outcomes without needless risk to the integrity of the planning system. This entails limiting flexibility in the system to means, not ends.

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<sup>92</sup> Council of Europe Criminal Law Convention on Corruption, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and United Nations Convention Against Corruption

<sup>93</sup> [http://www.justice.ie/en/JELR/Pages/Criminal%20Justice\\_%28Corruption%29\\_Bill](http://www.justice.ie/en/JELR/Pages/Criminal%20Justice_%28Corruption%29_Bill)

To some extent the important distinction between means and ends is now made in mandatory override provisions included in new planning instruments in NSW<sup>94</sup>, in a way that was not the case in 1997. There is scope for improvement.

The Standard Instrument prescribed under the EPA Act (clause 4.6(3)) requires the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

This is not directed at demonstrating that the objectives of the proposed standard will be met by the proposal in an alternative way. It does not mesh with the consideration required of the consent authority by clause 4.6 (4) (ii); which is (among other things) that:

- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.<sup>95</sup>*

Removing Clause 4.6 (3) (b) from the Standard Instrument and replacing it with a requirement that applicants demonstrate consistency with the objectives of the particular standard, and of the zone in which the development would be located, would tighten the focus on the necessity to advance the objectives established at the “front end” in an open process.

### Recommendation 5: Include drafting of robust objectives in planning education

Used poorly, override provisions defeat the purposes of the public consultation processes integral to planning systems and undermine faith in the planning system. A lot hinges on the way in which objectives are drafted. The desired ends need to be clear and the achievement of those ends needs to be capable of objective verification. The opportunities to obtain a different result by corruption or undue influence, with little risk of detection, are then lessened.

Developing and drafting clear and robust objectives that function well when tested by override provisions should form part of the training of every planner.

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<sup>94</sup> Standard Instrument (Principal Local Environmental Plan) clauses 1.9, 4.6; <http://www.legislation.nsw.gov.au/maintop/view/inforce/epi+155a+2006+cd+0+N>. The standard instrument is prescribed by the [Standard Instrument \(Local Environmental Plans\) Order 2006](#). These provisions will gradually supplant SEPP1.

<sup>95</sup> Clause 4(a)(ii)

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