Submission to the Senate
Finance and Public Administration Reference Committee
Inquiry into Urban Congestion Fund

Summary

A former Victorian Supreme Court Justice has reportedly characterised the administration of and expenditure from the Urban Congestion Fund (UCF) as corruption. It is that, but worse. The report by the Australian National Audit Office, "Administration of Commuter Car Park Projects within the Urban Congestion Fund" (ANAO report), shows that when ministers choose to act unethically and illegally the Australian Public Service becomes a co-conspirator.

The commuter car park program (CCPP) has been managed as corruptly and ineptly as the Australian Public Service (APS) mismanaged the export of live animals, the Online Compliance Intervention (Robodebt) and the Sports Infrastructure Program (Sportsrorts). In each of these instances, the public service chose to ignore illegalities thus abandoning its duty to advise ministers of the law and proper processes: the wishes of ministers trumped good government.

There is hope that these are atypical examples, and that there is no systemic failure in the APS that some characterize as supine or as living in a "promiscuous partisanship". But if such a hope is hopeless, there is nothing easily available that will prevent the service's continuing decline matched by continuing growth in government corruption.

Fund Design

Every chapter in ANAO's report illustrates important failings by ministers and the infrastructure department. But the seed of misfortune for the CCPP commenced with flawed advice that this $660 million component of the $4.8 billion Urban Congestion Fund did not need a competitive process (ANAO report 2.7). The department's advice would have pleased ministers, if this was its intention, but the advice laid the foundation for a broken process. The expressed rationale for this decision, to ensure projects that would otherwise occur would not be funded, is nonsensical. A competitive process could have achieved this objective and the adopted process need not.

The adopted process allowed ministers to select projects based on conversations with "relevant stakeholders". In the main, stakeholders were those whose political connections were shared by ministers. The "distribution of projects selected reflect the geographic and political profile of those given the opportunity to identify candidates for consideration" (ANAO report, Conclusion, paragraph 11).

This ANAO condemnation is consistent with the absence of the infrastructure department from the selection process. In its response to the ANAO report, (Appendix 1), the department observed that the "nature and timing of the project selection …meant that the

Department's role in engagement with stakeholders was limited to the period after the projects were announced".

In hearings before the Senate Rural and Regional Affairs and Transport Committee on 19 July, ANAO presented evidence indicating that the selection relied on work undertaken in the offices of the Prime Minister, Scott Morrison, and of the then cities Minister, Alan Tudge, which canvassed the Coalition members, Coalition candidates, or other Coalition officers such as relevant Coalition senators for, initially, the twenty top marginal seats. This, coupled with an absent department, allowed ministers and their offices to attend to political implications of spending, untrammelled by questions of value for money or, for that matter, legality.

In recent times, Mr Tudge said the projects were selected based on need. This is an assertion without evidence. Certainly, ANAO found no information about the relative needs of alternative projects. Nor could there be such evidence given the "stakeholder conversations" process Mr Tudge and his office adopted. All available evidence shows that the decisive need mentioned by Mr Tudge was the political need of a government facing a general election. What is surprising is that only 77% of projects were in Coalition electorates.

Given that the selection mechanism was so flawed and abused, the infrastructure department's response to the ANAO report is diffident. It did not acknowledge these flaws or abuses. And notwithstanding the department's protestations about the many measures to ensure government accountability, without ANAO's performance audit on CCPP there would have been no accountability.

Project Selection

The Public Governance, Performance and Accountability Act 2013 imposes requirements on ministers when they make spending decisions. These requirements do not apply to most announcements made during the caretaker period before general elections when conventions restrict government decision making. Most of such announcements, often described as election promises, are taken as having been made in the name of the relevant political party, not the government.

While there is agreement that projects to be funded by CCPP were selected without advice from the infrastructure department, there is a dispute about the timing of their selection. If the selection occurred as a government decision, ministers acted unlawfully because they had made decisions without obtaining reasonable assurance that the spending was efficient, effective, economical, and ethical, as required by s71 of the Public Governance, Performance and Accountability Act 2013.

The current minister, Paul Fletcher, asserted that "34 of the CCPP sites were selected as election commitments. …This is because the projects were committed to publicly as part of the election campaign" (Appendix 1, Letter from Mr Fletcher). For many reasons, this argument is derisible. It incorrectly implies that all announcements or re-announcements made during an election campaign must be election promises even if they are clearly pre-

election decisions. More importantly, it ignores all evidence to the contrary, as outlined below.

Inexplicably, perhaps, the infrastructure department agrees with its minister. Its response (Appendix 1) states that "27 commuter carpark sites … were selected on the day before the caretaker period commenced and announced during the election. A further 7 car park projects were also announced during the election". This view is wholly inconsistent with the actions of the infrastructure department after the election. By not seeking Election Commitment Authority (also see below) for the 27 commuter car park sites announced before the caretaker period, the department accepted they were government decisions.

The ANAO had the benefit of Mr Fletcher's and the infrastructure department's evidence when finalising its report, but it chose not to accept them. Instead, ANAO (in Table 3.1) sets out the documents, ministerial letters, and public announcements that supports its claim that only seven sites were election announcements. The remainder were government decisions (except for two projects for which there is no clear source of authority).

Further, ANAO correctly points out that a selection made before the caretaker period commences, even if only one day before, are selections by the government not by coalition parties.

Table B2, footnote (k), shows that the Pre-Election Economic and Fiscal Outlook, published in April 2019 before the caretaker period commenced, included an amount of $389 million for commuter car park upgrades. This amount matches the $389 million for the 27 car park sites for which funding was agreed by ministers in letters of 10 April 2019 referred to in the ANAO report, Table 3.1. Minister Fletcher and the infrastructure department would need to explain how expected spending recorded in the PEFO report was an election promise and not a government decision.

Conclusive evidence is available from the Prime Minister's formal advice in his Election Commitment Authority letter of 5 July 2019 that identified only seven car parks as Coalition election commitments (ANAO report, Table 3.1).

If it is accepted that the government made selections before the caretaker period commenced, there has been a clear failure in process and law because those selections were made by the minister without evidence as required by s71 of the Public Governance, Performance and Accountability Act 2013 (ANAO report, 4.2). That legislation requires a relevant minister to be satisfied "after making reasonable inquiries" that the expenditure is effective, efficient, economical and ethical. In the selected cases decided before the caretaker period commenced there was no evidence and ministers made no reasonable inquiries.

This unlawful use of ministerial powers echoes the illegality of Robodebt and Sportsrorts, and we can expect that there will be, as in those cases, no consequences for responsible ministers. So weakened has ministerial accountability become that the Minister for Finance, Senator Birmingham, when talking about the CCPP can say that voters had their chance in the 2019 election, as if this were the only accountability the government will accept, and as

if a government can do whatever it takes to secure re-election. (The Guardian, Australian Edition, Daniel Hurst, 4 July 2021).

But deciding when the commuter car park selections were made does not solve the Government's problems. Even if the selections were made as election commitments, the Government failed in law and process.

The ANAO report at chapter four sets out a host of administrative errors in the department's assessment process. But the most significant is that this department's automatic response was to recommend to ministers the projects selected by ministers, notwithstanding the absence of merit or value for money. It is thus not surprising that the department did not (and could not) provide sufficient evidence to allow Minister Tudge to meet his obligations under the Public Governance, Performance and Accountability Act 2013.

Some might argue that Mr Tudge was entitled to accept departmental advice that "the proposed expenditure represented a proper use of money" for the purposes of the above Act (ANAO report 4.54). But such departmental advice by itself was insufficient to meet the requirement that the minister make reasonable inquiries, especially when the department provided Mr Tudge with no basis for him to be satisfied.

If, as in this case, the minister wishes personally to make decisions (or to employ ministerial discretion, as the regionalisation minister, Bridget McKenzie, describes it) he or she personally has the responsibility to meet expected standards. In this matter, ministers cannot hide behind departmental advisers.

Some jurisdictions overseas impose criminal penalties on ministers who act negligently in the disbursement of public monies, but there is no legislated penalty in the relevant Australian law. And unlike state ministers, there appears to be no example where a Commonwealth minister faced charges of abuse of office. But the absence of penalties does not mean that the Public Governance, Performance and Accountability Act should be ignored.

Conclusion

Some federal ministers including the Prime Minister, and/or their offices, misused public monies as a tool to buy votes to maintain ministers' positions and powers.

It is no accident that ministerial and ministerial offices' involvement in the Sports Infrastructure Program, as in this CCPP, involved the use of Coalition and marginal seat information to inform the disbursement of public funds.

It is no co-incidence that the Prime Minister's Office was closely involved in the distribution of grants in the Sports infrastructure Program as it was in the proposed spending under the CCPP.

Ministers might claim that they take no personal role in the work of their office, but the resulting malfeasance remains the responsibility of ministers. As the Statement of Standards for Ministerial Staff makes clear, "executive decisions are the preserve of Ministers and not ministerial staff acting in their own right" (point 12). Ministers bear ultimate and full responsibility for their staff.

It might be no co-incidence that essentially the same process used for CCPP decisions was adopted two years earlier by the NSW Premier, Gladys Berejiklian, the Deputy Premier, John Barilaro and the then Minister for Local Government, when they selected projects for Stronger Community Grants before a general election after canvassing Coalition members. One difference is that Ms Berejiklian, unlike Commonwealth ministers, is honest enough to acknowledge she engaged in "pork barrelling". She could have made a fuller confession because acting partially in NSW fulfills the definition of corrupt behaviour.

Unlike NSW, the Commonwealth does not have an Independent Commission Against Corruption before which federal ministers can be brought to account. And there is evidence that the Australian Federal Police and the office of the Commonwealth Director of Public Prosecution show no interest in pursuing suspected fraud or abuse of office crimes where there is the hint of ministers' involvement. Even the Australian Public Service Commission averts its eyes from the problems besetting the APS. Notwithstanding this neglect, the allocation of CCPP resources based on party and personal political goals, thus ignoring or minimising the import of public interest, is corruption, if not abuse of office.

There are options available to the Commonwealth to reduce misuse of public monies. The Prime Minister has shown no appetite for the first, to establish an effective anti-corruption agency. But an integrity commission is not enough, as we can see from NSW experience. The second, and perhaps more important, option is to improve the tenure of heads of departments so that they can better advise ministers, a recommendation of the Thodey Report (Independent Review of the APS, page Recommendation 39c) that was promptly rejected by the Prime Minister, Mr Morrison. Absent other measures, we shall see an unrelenting growth in corruption.

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