Everyone here will recall Sir Winston Churchill’s famous dictum the subject of democracy – “Democracy is the worst form of government, except for all those other forms of government that have been tried from time to time”.

In Australia we take democracy for granted. Most in this room would never have paused to contemplate an alternative form of means of government in Australia, and probably have never considered that democracy will ever be at risk as the Australian form of government. The truth is that democracy is fragile; those things which make it strong – such as encouraging diversity of thought – can lead to the movements which undermine it. At the end of the Second World War only a handful of countries were subject to a democratic government.

What does this have to do with the subject of my speech? The point which I wish to make derives from those very general considerations – not only is democracy a fragile thing; it is easily manipulated by bad people. Inevitably the electors are placing their trust in individually elected politicians. The system cannot work otherwise. The subject of my discussion is, is to ask a large question – can the current system continue if it is to be based upon trust?

IS THERE REALLY A PROBLEM?

You might recognise that the topicality of the subject upon which I have been asked to speak, derives from a recent inquiry conducted by ICAC here in NSW. You will further appreciate the need for me to be careful in discussing details arising from that matter – if ICAC’s recommendations are accepted then there might be further action taken against some of the principal players, and presently there is an application on behalf of some of those above mentioned in the report – a group of very wealthy coal mining entrepreneurs – which seeks orders setting aside the findings and recommendations made by ICAC. I need to tread carefully.

That is not to say that I cannot tell you the story of two instances where the politicians and the system was shown to be wanting. I can tell you the stories behind the Mt Penny incident and the Doyles Creek incident. I do so as a means of illustrating what I believe to be a problem which can occur anywhere. The fact that it happened in New South Wales means nothing; the fact that it relates to coal mining means even less – these problems could apply anywhere, at any time, and in respect of any aspect of governmental business.

In both cases – Mt Penny and Doyles Creek – there were local and environmental issues at stake which, in a politicians’ rush to decision, were disregarded. With some regret, I am not going to address those matters. The story which I wish to tell is strange enough already.
The Mt Penny incident

My first story comes out of the Bylong Valley – magnificent grazing and cropping country about four and half hours drive north west of Sydney.

It had been known for decades that there was an unexploited coal deposit in the Bylong Valley, but until the recent coal boom there had been insufficient demand to warrant developing it.

In September 2007 a former Minister with responsibility for coal mining, Eddie Obeid, was behind a purchase of a large and substantial property in the Bylong Valley. The property, Cherrydale Park, was located at the foot of a spectacular local geographical feature – Mt Penny.

At the time Mr Obeid purchased the property the relevant mining minister was Ian Macdonald – a close friend and colleague of Mr Obeid’s. In May 2008 Mr Macdonald made a sudden and unexpected demand upon the public servants in his Department – he wanted to know more about coal resources in the area of Mt Penny.

Now, according to Mr Obeid and Mr Macdonald they had not had previous contact over the matter, and this was purely a coincidence.

The coal in the Bylong Valley was a tremendous asset of NSW, and good government required careful consideration to maximise the benefit to the State. The evidence was clear that the Department of Mining’s investigation were incomplete, and the Department told Mr Macdonald that a great deal more work needed to be done before the State could make any rational decision in respect of opening the Bylong Valley for mining.

Despite this, Mr Macdonald pressed on with his desire to create a mining tenement – the grant of an exploration licence. An exploration licence is the first step toward the creation of a mine. The Department prepared a rudimentary map demonstrating a large area in which there was a potential mine containing more than 800 million tonnes of coal. That, of course, is a massive mine, and if it was ever developed would be an important State asset. A mine in this location was even more attractive because most of the coal would have been available on the open cut, and the Bylong Valley is served by a rail line which travels through to the export terminals at Newcastle.

Mr Macdonald then made a series of decisions which are counter-intuitive and counter-productive. Rather than wait and control the development of the whole of the larger asset, he wanted to move swiftly to allocate a much smaller portion of the whole area – a relatively small mine of only 100 million tonnes, which was to be located in the eastern portion of the larger area and centring upon Mt Penny. Again, apparently due to chance, this mine sat squarely on top of Mr Obeid’s family farm.

Meanwhile, the Obeid family and their friends were busily buying two other substantial rural properties which, again by chance, happened to fall directly in the area of the new mining tenement created by Mr Macdonald.

Anyway, the new mining tenement was put out to the market. Well, not really. Against Departmental advice Mr Macdonald insisted that it be a limited form of competitive process which did not include the major mining companies. The State of NSW made a very bad deal. Those who acquired the exploration licence paid a pittance for it – about $1 million, which only reflected the Department of Mining’s expenses in preparing the area. After an additional expenditure of a few million dollars, those who had acquired the exploration licence agreed to on sell it for $500 million. A profit of about $495 million acquired in only a few months. I was never able to see any good basis as to why the people of New South Wales were, in effect, transferring a half billion dollars into the pockets of a small number of already wealthy businessmen.
There was another aspect to this: when the inquiry was shown that these unusual decisions made by Ian Macdonald had the effect of making a massive profit for his mates, the Obeid family – Moses Obeid accepted it might be $75 million, on my calculation it could be as much as $100 million.

The Doyles Creek incident

My second story relates to the Doyles Creek incident. Doyles Creek is a tributary of the Hunter River, in the Hunter Valley and located not far from the small town of Jerrys Plains. The area is renowned for horse breeding, but it has been known for over a hundred years that there are accessible coal deposits in the area.

Depending upon the state of the coal export market, several coal mining entrepreneurs have sought access to the coal near Doyles Creek. There are many reasons why it is a most attractive resource – there are other coal mines in the area, so there is infrastructure in place. The ready access to the coal-burning power stations in the area provides a ready domestic market. Several major mining companies had sought access to the area, but the government had declined those requests.

If Doyles Creek was ever to be opened, then it should have been opened through a competitive process designed to raise a substantial benefit for the State of NSW. Again, Departmental advice and designs were overridden by a Minister, apparently determined to make a hasty decision granting an exploration licence directly to one group of potential investors. The practical effect was the creation of a massive and immediate windfall profit for the investors – some of whom quickly on sold their interest. NSW got nothing.

How did this come about?

The coal boom had exposed a deficit in labour – there were insufficient trained miners. Training miners is complex and costly. Some experts favour the use of a so-called “training mine” – a facility where real world work activities can be better simulated. Although this sounds attractive, many – probably most – experts oppose it, warning of dangers created by this teaching technique. Again, the relevant mining Minister was Ian Macdonald. This time Mr Macdonald was approached by a group of investors apparently motivated by a profound desire to encourage safety in the coal mining industry. Those investors said they were willing to take on this horrible burden – that they would take Doyles Creek and convert into a “training mine”. One of the investors happened to be an old political ally of Mr Macdonald – a former trade union official named John Maitland.

Over a period of time Mr Macdonald became attracted to the training mine proposal; the details were hammered out over a series of lunches and dinners during which Department advice was ignored.

And so Jerrys Plains got a training mine – well, not really: the “training” aspects of the mine seems largely to have been overlooked to date.

The profits for those investors have been substantial – they outlaid $1.5 million. Many have already taken substantial profits, and those profits, as at the end of last year, seemed as though they were in the order of $83 million.

Do we have a problem?

Yes we have a problem.
WHAT IS THE CAUSE OF THE PROBLEM?

It is easy to present a dichotomy here: the problem is almost certain to be the product of the persons with the power to make the decisions or loopholes in the process or a combination of both. As is the case in most of these matters, it is a combination.

The problem with politicians

Please believe me: I believe that most, nearly all of our politicians are honest and that a substantial proportion are good at their job. I further believe that an even larger proportion would be even better at their job if freed from the limits imposed by party politics – the caucuses; the factions; the “spin”.

But I also believe that there is a small number of bad and potentially bad people involved in politics, and that because so much of our system is based upon having faith in our politicians, those bad politicians are able to take advantage of it.

But I don’t want to focus upon bad people – you can find them anywhere, not just in politics. I want to deal with two things, and the first is the way in which the political system can distort power and distort intentions. I want to add – the observations I make apply across the board, to all of the major parties and even to the minor parties.

It is only natural that factions form. Politics is about power, and the power is exercised by collecting the greatest number of votes. Except for a few noble examples, most of the successful politicians in Australia owe some allegiance to a faction or group within their party.

Now hopefully a faction would be built around a political theory or philosophy, and (again, hopefully) the members of those factions would have been attracted to it by their general acceptance of the political theory or philosophy.

But that is not always the case, we have seen vivid examples in NSW of political factions which seem to have grown on the basis of nothing more than a thirst for power, or where there is only a distant or loose contact with a political theory. In New South Wales the dominant factional group known as “The Terrigals” did have a loose connection with the right wing of the Labor Party, but it seems to have had little to do with ideology and a lot to do with controlling the Caucus. In NSW the factional system was so well tuned, that it meant that any faction within the dominant right wing of the Party, could control the whole of the Caucus.

Is there a problem with the bureaucracy?

During the public inquiries I saw the work of the NSW Public Service in respect of each of the Mt Penny incident and the Doyles Creek incident. I was given a glimpse of the working lives of people in a couple of different departments. I saw examples of how the intersection between the political side and the departmental side.

I was left deeply impressed with the skills and dedication of the public servants involved.

In the Department of Mining I saw records which showed careful mapping and monitoring of the State’s mineral resources, compiled over many years and updated as new information came to hand. I saw the way in which development plans were carefully developed, and how the Department looked to maximise the benefits for the people of NSW.
And then I saw how all of this can be crushed with a single blow by a Minister.

Obviously, there can be tension between the political objectives and Departmental plans, and there will be incidences where a government must override public service planning for the purpose of giving full throat to its policy objectives. And if this is done for the right reasons, then it is a good thing.

But this creates a weakness in the system. The Minister has the final say, so it does not matter whether the Department is right – the Department is subservient to the Minister.

If decision making was transparent, there is nothing wrong with this. For example, if a Minister acknowledged that his or her decision was contrary to the advice of the Department, but was based upon a particular policy, this would be appropriate.

But that is not what happens in practice. A Minister can override a Departmental result, but then direct the Department to provide such information which would tend to support the Minister’s decision – in effect, to re-write history. Even worse, a Minister can overrule the Department, but then delegate the decision back to the Department – so it looks as though the decision originated in the Department. In the public inquiry into the Mt Penny incident this extraordinary evidence was given by the relevant Minister, Ian Macdonald:

Q. Why didn’t you take the decision to re-open instead of delegating it to the Department?
A. I was concerned about potential public criticism.

... 

Q. Well I’m interested particular at the moment in the re-opening. Why is it that you did not want your name on that decision?
A. I wanted to be out of the whole process.
Q. Why?
A. Well as, as I said because at the end of it there inevitably was going to be attacks on, on those particular ELs.
Q. ... Do you think that it is proper when it comes to a difficult decision where there might be criticism from one quarter or another to delegate the decision to the Department so you can avoid the criticism?
A. I don’t think it’s improper but it’s certainly in, in my experience has occurred.
Q. I’m not asking you whether it has occurred I’m asking you whether you think that is something that you could stand up and justify to your constituency?
A. I, I think that - I’d say yes.

... 

Q. Do you think it is fair to require persons such as Mr Mullard, Mr Coutts and Dr Sheldrake to take decisions that will attract public criticism so you could escape it even though you were the one who directed them to take the decisions?
A. I haven’t answer to that, Mr Commissioner.

... 

Q. So you can conceal your personal activity so the public, the electors do not know what you are doing and they think, that is the electors, think that what’s happening is being done by the Department and you the politician don’t have to take responsibility for it?
A. Well, at times that can occur - - - in the political process.
Q. Do you think that that is appropriate?
A. I don’t think it’s inappropriate.
Q. I am asking you about you the Minister requiring your Department to take the criticism, the public criticism for decisions that you in fact have directed them to take?
A. Well, I think that occurs occasionally.

Q. Do you think that it is their duty to accept that criticism?---

A. I’m not sure.

Q. When, when the criticism is being made of them for actions which they oppose?---

A. Well, I, I, I would just say it’s situational, Mr Commissioner.

This demonstrates how easily the situation is manipulated – a Minister makes a decision contrary to the Departmental advice, but disguises it by delegating the decision making back to the Department itself. The public servants get the criticism; the Minister skates free.

Are there problems with the process?

Yes – there are plenty of problems with the process.

Following its inquiries into the Mt Penny incident and the Doyles Creek incident, ICAC published an anti-corruption report. For those persons with a particular interest in this area of preventing corruption, the report is essential reading.

At the cost of oversimplification, I wish to suggest that ICAC’s investigation and recommendations in the result were solidly based in the recognition that an individual Minister wielded too much power. ICAC described in some detail the rather complicated systems put in place so that the relevant public servants could assess the long term merits of opening an area and the best way of doing so, but inevitably, and irrespective of the Departmental position, the issue was one which was able to be controlled or manipulated by the Minister.

So, for example, the Department’s highly technical and sophisticated planning could be swept aside. Even worse, the selection of the process under which a particular investor is selected to be given the licence can be set aside, and replaced with a direct allocation made by the Minister. By these means, a Minister can make a decision which could cost the people of NSW literally tens of millions of dollars.

And even worse, the Minister can dress up each of these decisions as though they were the decisions of the Department itself.

WHAT SHOULD WE DO?

There is no point propagating empty slogans; there is no point calling for “greater transparency in governmental decision making”. Recent evidence, not limited to NSW, would suggest that Australian governments are immune to such calls. It is better to recognise the inevitable – we can no longer deal with this matter reposing so much trust in the hands of single politicians; there need to be safeguards against ministerial abuse.

POSTSCRIPT

At the commencement I referred to an observation Churchill made about democracy. There was a context to that observation: it was made not so long after Churchill had been voted from power in July 1945 – at a time when victory in the Second World War was inevitable and within grasp. Some have suggested the British voters were a tad ungrateful, but Churchill, of course, accepted the result
– he is said to have responded to the news by remarking “They have a perfect right to kick me out. That is democracy”.  
There is a sequel: shortly afterwards, King George VI offered Churchill an appointment to the highest of the chivalric orders – appointment to the Order of the Garter – but Churchill refused, commenting “Why should I accept the Order of the Garter, when the British people have just given me the Order of the Boot?”.  
That observation contains a lot of robust common sense in respect of a functional democracy. Politicians should never forget that the electors have the final say, and when trust collapses – and this can apply to a political party as much as it can to an individual politician – then we should treasure our opportunity to reward those involved with the Order of the Boot.