

PUBLIC OFFICE -- PUBLIC TRUST: the "Forgotten" Principle?¹

"Public office is a public trust"? Until three years ago, I had been unaware of that proposition. How many people are familiar with that proposition? I have found very few. Is it studied? I am yet to identify a tertiary course in which it is. Does it matter?

I suggest that, for at least four important reasons, it does matter.

First, it encapsulates the true nature and purpose of public office. As the Hon Paul Finn has said²

".. Much the most fundamental of fiduciary relations in our society is that which exists between the community ... and the state and its agencies that serve the community"

What is a fiduciary relationship? To paraphrase Finn,³ in general in fiduciary relationships, the party with the fiduciary obligation is expected to act in the interests of the other party or in their joint interests. The party with the fiduciary obligation should not act in his or her self-interest when discharging a purpose.

What are the obligations of the fiduciary? The fundamental obligation is to put "their principals' interests ahead of their own ... The duty demands a denial of self interest."⁴

The private trust is a classic fiduciary relationship⁵. Such relationships are also to be found in the public sphere.

¹ Paper presented by the Hon Tim Smith. Q.C., Adjunct Professor Monash University, at the Integrity in Government Futures Conference, University of Melbourne, 4 December 2012

² Hon. Paul Finn, "Public trust and fiduciary relations' in "Fiduciary Duty and the Atmospheric, Coghill, Sampford and Smith, 31,, referring to his argument in "The Forgotten Trust": The people and the State", in Malcolm Code (Ed), Integrity issues and Trusts, Federation Press"

³ op. cit, 31 at 33

⁴ , Dr Sarah Worthington, *Equity* (Oxford University Press, 2003) at 121; cited Chief Justice Robert French AC, "Public office and public Trust", Seven Annual St Thomas More Forum Lecture, 22 June 2011, p. 8

⁵ What is a trust? His Honour has written,

"..... a trust can be described as a relationship to property in which a person has that property vested in him or her to be held and/or use in some way for the benefit of another person or persons or for a purpose recognised by law. The trustee characteristically will have powers conferred by the terms of the trust to exercise in the interests of those persons (beneficiaries) or for that purpose". Op.cit., 35

Secondly, the proposition also matters because, by the use of the term “public trust”, it also encapsulates the fundamental and ultimate obligation of those who hold office in any branch of government ⁶-to serve the best interests of the people.

Thirdly, the term “public Trust” encapsulates -the critical ethical foundation of the obligations of such officeholders and on which measures to strengthen the integrity of our system of government should be based.

Fourthly and perhaps most significantly, it also matters profoundly because, where it is forgotten or overlooked, those holding public office are unlikely to bring their fiduciary obligations into consideration when they are making their decisions. This is particularly important for our elected representatives who, from the moment of their election to office, have to perform their duties in a situation of many potential conflicts of interest.⁷

For the Public Service, overlooking the proposition can be just as significant. How else can one explain the advice on gifts and benefits in Sect 4.12, of the Commonwealth Public Service Commissioner’s “Policy and Advice” document ⁱⁱ – a document intended to give public servants guidance about appropriate conduct in accordance with the APS Values⁸.

Among other things, this document identifies two important matters -- the Australian Public Service (APS) “stakeholders” and what should be their “paramount concerns”.

- *The stakeholders.* They are not the people of Australia. They are the people that the APS deals with who offer APS personnel gifts, entertainment and hospitality. The primary

⁶ The members of parliament elected by the people, the executive branch and the judicial branch . Their essential obligation is to serve the people.

⁷ AT the ART’s inaugural Government Integrity Lecture in 2011, Integrity in Parliament- Where does Duty lie? (www.accountabilityrt.org) the Honourable Fred Chaney AO, identified a number including being true to one's own political values and philosophy, living up to the faith of those who have supported you, being true to one's political party including maintaining unity and stability within the Parliamentary party and across the national, state and local levels of the party, loyalty to the Parliamentary party caucus, serving the electorate which voted for you and believes that you represent its interests, duties to the Parliament, and, if a member of Cabinet or shadow Cabinet, Cabinet solidarity.

⁸ <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>

<http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice/gifts-and-benefits>

relationship identified is that between the organisations making the offers and the agency .

- *The paramount concern when accepting gifts.* It is the reputation of the APS . The interests of the people of Australia are not mentioned.⁹

Comments are made in the text such as –

"at times, particularly for senior employees, acceptance of offers of entertainment or hospitality can provide valuable opportunities for networking with stakeholders."

and

- "attendance at significant events can provide senior public servants with opportunities to make important business connections that will be of considerable benefit to their agencies".¹⁰

Has the Public Trust model for the APS been supplanted by the Business model or some other model ? How has this happened?

What are the implications for our elected representatives? Criticisms made of the conduct of our Federal representatives in the 43rd Parliament, may suggest that part of that problem is that they too have forgotten the public office public trust proposition?

Looking at the elected arms of the Executive branch in the Commonwealth and Victorian governments, an explanation for the slow, painful and tortuous path taken in both jurisdictions in developing an overarching anticorruption body is that the public office – public trust proposition has been forgotten. But, if it has been forgotten, we all share the responsibility

⁹ The advice even permits public servants to receive fees for activities that form part of their regular duties provided they hand them over; "Generally, it is expected that APS employees will not accept outside payment for activities considered part of their normal duties. If an employee is offered a fee to speak at a work-related conference, it may be accepted providing the agency receives the benefit, not the individual." (Google- "Australian Public Service Commissioner Advice and Gifts" . <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice/gifts-and-benefits>

¹⁰ <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/aps-values-and-code-of-conduct-in-practice/gifts-and-benefits>

Public Office – Public Trust; signs of revival

The concept of public office holders being fiduciaries has an ancient history going back to Plato.

According to Cicero

Those who propose to take charge of the affairs of government should not fail to remember two of Plato's rules: first, to keep the good of the people so clearly in view that regardless of their own interests they will make their every action conform to that; second, to care for the welfare of the whole body politic and not in serving the interests of some one party to betray the rest. For the administration of the government, like the office of a trustee must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted.¹¹

There was a time when the proposition was widely accepted and stated. Most quotations come from people who had significant influence in the development of democracy in the 18th and 19th centuries, thereby adding to the utilitarian arguments the reality that public office is formally conferred by the people. For example, Disraeli said ~~that~~—

“all power is a trust; that we are accountable for its exercise; that from the people and for the people all springs, and all must exist.”¹²

In the 1920s, two Australian High Court decisions relying on the proposition that public office is a public trust were reported. In *Horne v Barber*¹³, it was held that a commission agreement between a member of the Victorian parliament and a land agent under which the member of parliament was to lobby for a land agent was illegal and therefore void because it breached the member's fundamental obligations. Justice Rich referred expressly to the trust principle. In *R v Boston*¹⁴, the High Court upheld a conviction of a Member of Parliament in New South Wales on a charge of conspiracy concerning the acquisition of land from government. It relied upon cases which rested on "violation of a public trust". As Justice Higgins commented in that case

¹¹ —Marcus Tullius Cicero, *De officiis*, (85) XXV; i http://www.constitution.org/rom/de_officiis.htm. Note the word “tutela” is used in the Latin text. Its usual meaning appears to be “guardianship” not “trust” but in this translation the latter is used. The significance, however, lies in the fact that the propositions concern a fiduciary relationship and duties that flow from that relationship.

¹² Benjamin Disraeli, 1st Earl of Beaconsfield, *Vivian Grey* (bk. VI, ch. VII)

¹³ (1920) 27CL R 494

¹⁴ (1923) 30 3CLR 386

"he is a member of parliament holding a fiduciary relation towards the public, and that is enough"¹⁵

It should also be noted that it is accepted that the "*public office is a public trust*" proposition has supplied the ethical foundation for the development of our administrative law both in the courts and in parliaments.¹⁶

Since 2007, the concept of the public trust has been accepted and relied upon in the Commonwealth government's Standards of Ministerial Ethics.¹⁷ It is also found in the definitions of corrupt conduct in legislation establishing anticorruption bodies,¹⁸ including the Victorian legislation, as a description of corrupt conduct.

Public office is a public trust – metaphor or principle?

The proposition has been recently referred to by the former Chief Justice Gleeson. and by the former Justice Michael Kirby, of the High Court. They have, however, as the Hon Paul Finn has commented, expressly or implicitly ~~treat~~ treated it as a "political metaphor" stating a "moral or political obligation", one that cannot be enforced by the courts.¹⁹ So too has Chief Justice French.²⁰

The characterisation of the proposition as a "metaphor" is perhaps understandable when it is viewed from a legal perspective. But to characterise it in that way significantly diminishes the proposition, together with its force and value, as a clear and succinct statement of the true nature of public office and its obligations. It also contributes to the likelihood of the proposition being forgotten and ignored.

¹⁵ At 412

¹⁶ Chief Justice Robert French AC, "Public office and public Trust", Seven Annual St Thomas More Forum Lecture, 22 June 2011, 12 and following

¹⁷ Note also the sections in the Code on Honesty and the obligation to correct misleading information.

¹⁸ A "breach of public trust" included in the definitions of corrupt conduct in Commission against Corruption Act 1988 (NSW)ss 8 (10) (c), 12; A broad-based Anti-corruption Commission Amendment (Investigators Functions) Bill 2011 s4 ("3A Corrupt conduct (1) For the purposes of this Act, corrupt conduct means conduct ----- (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust;"

¹⁹ Hon Paul Finn, Public trust and fiduciary relations in "*Fiduciary Duty and the atmospheric Trust*" Coghill, Sampford and Smith, 31, at 34

²⁰ Op.cit, at pages 8 and 12.

It is submitted, however, that it is not appropriate to characterise the proposition as a metaphor. The Shorter Oxford Dictionary defines a "metaphor" as a "figure of speech in which a name or descriptive term is transferred to some object to which it is not properly applicable."

The word "trust" is a term used in Australian law to describe a particular form of fiduciary relationship - the private trust. But one may question whether, simply because this public trust has not been subject to enforcement by Australian courts, except to a limited extent, the term trust is not properly applicable in its own right. The relationship between the people and those in public office, be they judges, public servants or members of parliament and ministers, is a fiduciary relationship. For that reason, the word "trust" is properly applicable to it. The distinction between it and the "trust" relationship that is recognised and enforced by Australian courts is that it is a public trust not a private trust. Each expression acknowledges the true nature and purpose of each type of trust. The propositions are not metaphors.

It is also submitted that the description of the alleged metaphor as "political" is not appropriate because the proposition is much more than a political proposition. Reference has already been made to breach of public trust being relied upon by members of the High Court to find a contract illegal and to find that the conduct of a member of parliament constituted a criminal conspiracy. Breach of public trust also appears to be still accepted as the key element in the common law offences of bribery²¹ and misconduct in public office.²² It is also accepted that the "public office is a public trust" analysis has supplied the ethical foundation for the development of our administrative law both in the courts and in parliaments²³ - a critical area of law that renders the actions of government reviewable by the judicial branch of government.

May it not fairly be said that the proposition public office as a public trust has been and is in Australia a legal proposition recognised as part of the Australian common law and an ethical principle upon which a very significant body of Australian common law is based? In the latter sense, it has played the same role in our legal system as "the neighbour principle" did in the development of the common law of negligence. It is very much part of the common law of Australia.

²¹ Gerard Carney, "Law and Ethics" Ch 8

²² Colin Nicholls QC, Tim Daniel, Martin Polaine & John Hatchard, Corruption and misuse of public office, Oxford :OUP, 2006 . pp 65 -90

²³ Chief Justice Robert French AC, "Public office and public Trust", Seven Annual St Thomas More Forum Lecture, 22 June 2011, 14 and following

But the analysis can and should be taken further. Private trusts are set up by legal instruments which set out expressly or by implication the structure and terms, the trustees (and provide for their appointment) and their responsibilities. They will also typically hold assets and income on behalf of the beneficiaries. There are also ways to enforce them. To what extent do our democratic systems of government mirror the private trust in such matters?

Can our systems of democratic government themselves be described as public trusts?

Do our systems of democratic government have all the elements that are typically found in those trusts that the law recognises?

Let us look at the Commonwealth government. It can properly be said that the people are the source of the fiduciary's power.²⁴ We entrust those elected with the power of office, together with those appointed to the public service and agencies, to make decisions which will affect all our lives in major ways. In the period for which they are elected we are vulnerable to the decisions that they make.

It is necessary to look more closely at its elements.

1. The establishment of the Commonwealth Public Trust?

It was established by the people over 100 years ago by the formulation of a Constitution,²⁵ adopted by the people at referenda and passed into law in accordance with the law applicable at the time by the United Kingdom Parliament.

2. The essential structure and terms?

²⁴ "The powers of government belonged to, and are derived from, the governed, that is to say, the people of the Commonwealth. The repositories of government power under the Constitution hold them as representatives of the people under a relationship, between representatives and represented, which is a continuing one." Per Deane and Toohey JJ, *Nationwide News Proprietary Ltd v Wills* (1992) 177CLR, 122.

See also from the National Anti-corruption Plan Discussion paper chapter 3 "Australia has a strong federal and democratic system of 'representative government'—that is, government by representatives of the people who are chosen by the people. This fundamental principle is enshrined in the Australian Constitution and, together with independent and impartial courts and non-partisan public services, provides a strong foundation upon which anti-corruption measures can be built.

Respect for the rule of law, accountability and having the highest ethical standards are the foundations of any democracy and provide the grounding for a society that is resilient to corruption. Indeed, the Australian public rightly expects high standards of behaviour and a high level of performance from their government, public institutions and the business sector.

²⁵ One section, s 116, appears to be the only section in the Constitution in which the words "public trust" appear. It provides: "116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." While office and public trust are in that context expressed as alternatives, it needs to be remembered that there may be some public offices the duties of which may not place the office holder in a fiduciary position and the section is attempting to exhaustively cover all public office.

The structure and terms are set out in the Constitution and constitutional conventions - not all matters are directly addressed in the Constitution. It also provides a process for its own amendment-, a process dependent on the approval of any amendment by the people.

3. The trustees

They comprise the three branches of government identified in the Constitution– the Parliament (with its two very different houses and members), the Executive and the Judicature. Only the Parliament’s members are elected and the Constitution spells out in some detail how that is to be done.

4. Assets and income?

The Executive branch of the Trustee holds massive assets and receives a massive income from and on behalf of the people to be used for the common good. The Budget net worth estimate for 2012 -- 13 is \$248.6 billion.²⁶ The Budget estimate for 2012-13 of government revenue was \$376.1 billion and expenditure, \$366.3 billion.²⁷

5. Responsibilities

The Trustee has very significant and wide ranging responsibilities, far greater than any private trustee. At the federal level, it has not only the responsibility for maintaining civil order and the justice system, managing the economy, organising infrastructure, education and health services, preserving the environment and managing the exploitation of the people's resources. It also has a responsibility to manage our international relations and organise the defence of us and our territory.

6. Enforcement

With a typical private trust, the beneficiaries can go to court to have their fiduciary relationship enforced according to law. The public trust fiduciary relationship is not one enforced solely by the courts applying the law. It has its own internal and external enforcement mechanisms:

(a) *Those applied by members of the trustee body;*

²⁶ 2012-13 Budget Paper No 1, Statement 7,

²⁷ to a

(i) The Parliament and its Members.

They have the critical role of

- providing the elected Executive to direct the unelected Public Service and
- holding the whole Executive branch to account;

(j) The Judicature.

The Judicial Branch has the power and responsibility to rule on the validity of the actions and processes followed by the other branches of government, and itself, applying, principally rules of the Australian common law developed from the ethical principle that public office is a public trust.²⁸

(b) The People

Under the terms of the Trust Instrument, the Constitution, the people have the right to vote, in the ordinary course, every three years on who should represent them in the House of Representatives and the Senate and so who will be entrusted with power over them until the next election.

This Commonwealth public trust is a complex mega trust. It is a remarkable creation. At the time it was created it was unique. Of course it is not one the courts can fully administer. -Ultimate responsibility falls to the people as they periodically choose the elected members of the Body of Trustees.

Applying this analysis to our democratic government systems, they are created and structured in such a way that an overwhelming majority of public office holders are properly and accurately described as holding offices of public trust and each democratic system of government created is fairly and accurately described as "a public trust". This is not a metaphor but an accurate and succinct description of the fundamental nature and purpose of such systems of government and the relationship which exists between the prospective arms of government and the people in the communities they

²⁸ Chief Justice French, AC, 7th Annual St Thomas Moore Lecture" delivered 22 June 2011 Canberra, particularly, 14

are supposed to serve and the ethical obligations placed on them as holders of public office.

Can acceptance of the public office - public trust principle make a difference?

To consider that question it is necessary to look at recent experiences where the principle has clear relevance and a significant role to play - for example, the recent experiences in the Commonwealth and Victoria in anti-corruption reforms needed for their government integrity systems. In both instances members of the public service and the elected arms of government have been inevitably placed in a conflict of interest position between their personal interests and their fiduciary obligations when making decisions about whether to strengthen their community's government integrity system and how to do it. Inevitably, such strengthening would expose themselves to potentially greater scrutiny which they may feel would not be in their personal interests. This conflict of interest situation cannot be avoided by the parliamentary decision-makers.

In both jurisdictions, progress has been slow and tortuous and marked by resistance from those holding public office. It is difficult to avoid the conclusion that the resistance reflects personal concerns about being exposed to greater scrutiny if integrity systems are strengthened.

In Victoria, the legislative process has ended in failure. There the consideration of the critical issues and the decision making process occurred with the most minimal public consultation and involved through the critical stages of the process only public service and parliamentary decision-makers, people who would be the subject of scrutiny by the system they were creating. In the Commonwealth, the process has been different and could result in a positive outcome for the Commonwealth Integrity System. The Commonwealth exercise has been conducted as part of Australia's UNCAC, OECD and G 20 international obligations with associated external scrutiny, and the requirement flowing from those commitments of public consultation with the people of Australia.

Might the results have been different in Victoria, for example, if the "*public office is a public trust*" principle had been remembered and was at the forefront of the minds of those making the decisions? Perhaps not for all, but, contrary to the prevailing cynical view, there are people of integrity in the Public Service and Parliament, people who, provided they were aware of the principle, would consider the need to put their own personal interests and concerns to one side in favour of the public interest.

We need to acknowledge the degree of difficulty of the task presented to those entrusted with power to make such decisions that involve deciding between competing and conflicting interests, as decision making at the highest level often does.

Would an ethical guideline for all elected and appointed public officials and holders of public office giving effect to the “public office is a public trust” principle have helped? Such a guideline might provide as follows:

“Consistent with our fiduciary obligations as holders of public office, which include maintaining and, strengthening the integrity of government, we are obliged to support, implement ... reforms where

- *the integrity system of which we are trustees is at risk of corruption, and*
- *the proposed reforms are likely to help to address or reduce those risks.*

In making such a judgement, it is not relevant or permissible to consider our own personal benefit or advantage, or any other improper private interest” ?

Such a guideline could well have assisted in that situation but much more is needed. .

Restoring the forgotten principle -- public office is a public trust.

There is widespread concern about integrity in government in Australia. This is warranted having regard to the changes that have occurred In the last 30 years that have increased the risks to that integrity including commercialization of the provision of services by and for government, increased government control of information, the politicisation of the public service, the ever increasing arms race for private political funding and the methods employed and the development of the lobbying industry and the use of success fees

There is an urgent need to secure the re-establishment in our society of the forgotten principle that public office is a public trust. The challenge we all share is how is this to be done?