

Integrity in politics? Public office as a public trust? Is there hope?

Paper presented to the University of the Third Age, 23 July 2014 by the Hon. Tim Smith Q.C.¹

Origins of the ART

When the group that is now the Accountability Round Table came together in 2006 it was not thinking about integrity in politics or public office as a public trust and was driven more by anger and despair than any hope of success.

The catalyst was a conversation with my sister Anne Mancini that was spoiling a holiday lunch at Anglesea. It concerned the Iraq/Australian Wheat Board affair and whether the principle of ministerial responsibility had ceased to exist if ministers could avoid responsibility on the basis of ignorance. Anne decided that something needed to be done and that she would talk to Race Mathews. He agreed to help, taking the role of chair, and created a non-partisan group of people,² of different political views and a range of experiences who shared the same concern.

First task

The first task undertaken was to prepare a Ministerial Code which included an attempt to define the content of ministerial responsibility. The principal authors were the late Alan Hunt and Prof Ken Coghill, former coalition and ALP presiding officers in the State Parliament at the same time. You will find it on our website if you search for “Be Honest Minister”.

Broadening of focus to the Integrity of our Democracy

This narrow focus did not last long. It quickly became apparent to us that the ministerial responsibility issue could not, and should not, be isolated because of the many different problems adversely affecting its operation, and the accountability generally of our elected governments. They included political funding, lobbying which had become an industry, abuse of the FOI legislation, not to mention the risk of corruption, all challenging the integrity of our system of democratic government and those participating in it.

The ART began making submissions to parliamentary committees and governments and seeking pre-election commitments from the parties seeking office. But we also wanted to encourage our MPs, the media and the community to think and talk about government integrity issues and try to do something about them. This led to two initiatives.

- (a) *Integrity Awards*. We decided to create an award for members of the Commonwealth Parliament who acted with integrity. We considered that this could

¹ Chair Accountability Round Table (www.accountabilityrt.org)

This paper was first presented to the Lyceum Club on 8 April 2014. It was developed further and updated for presentation to the University of the Third Age Hawthorn on 23 July 2014.

² See Appendix 1.

advance the cause. We also thought it was high time that those who did serve us with integrity were publicly acknowledged and publicly thanked. And so the Button Award for ministers and shadow ministers and the Missen Award for all other members of the Parliament came into existence. In setting up the Awards, two major matters had to be addressed:

(i) *Definition of “integrity”*. Generally, we tend to equate integrity with honesty, but it is much more than that. We adopted the proposition³ that Integrity needs to be assessed

“... by reference to the values, purposes and duties for which ... power is entrusted to, or held by, the institutions and individual officeholders concerned. When individuals and institutions act in a manner that is true to these values, purposes and duties, we say they have integrity. Truth and honesty are not synonyms for integrity, but provide fundamental elements”

We applied that definition in addressing the other major issue.

(ii) *Criteria*

They are very similar for both the Button and the Missen Awards.⁴ Probably the key elements have proved to be “demonstrating an outstanding commitment to serving the public interest” and performance in the areas identified.

You will notice the criteria refer, as alternatives, -- honesty, civility, courage and independence. We thought that this was warranted because the integrity of members of Parliament is constantly under challenge because of the adversary practices that have developed and the reality that they are faced with conflicts of interest from the moment of their election many of which are difficult to resolve. There are also accepted conventions in the Westminster system that may require a Minister, for example, to be less than frank.

What are those conflicts of interest? As it happens, this issue was explored in our next major initiative, the Government Integrity Lecture.

(b) *The Government Integrity Lectures.* The Awards were something that might at best attract public attention and discussion to government integrity issues once every three years. What about the other years? One of our members, the Hon Jim Carlton, suggested that we try to rectify that by holding Government Integrity lectures in the years between the Integrity Awards.

³ The definition adopted in the National Integrity Systems Assessment Report, 2005 (p.9), produced by Transparency International and Griffith University,

⁴ See the Missen Award Criteria in Appendix 2

Our first speaker was the Hon Fred Chaney.⁵

He identified some seven potential sources of conflicting interests and obligations that parliamentarians may have to address. I compiled the following list:

Personal

- His or her values, political philosophy and policy views
- Being true to one's family (they have made sacrifices) and supporters (contributors and moral supporters) not to advantage them but to live up to their faith in you.

Political Party

- Being true to one's
 - political party which selected you as a member of Parliament, including maintaining party unity and stability even though the member may disagree with other members on issues at national, state and local levels and within the member's party, and
 - Parliamentary party or caucus that was automatically joined on election.

Electorate

- Obligations to the electorate which voted you in and believes that you represent its interests.

Parliament and accepted conventions

- Obligations to
 - The Parliament itself.
 - Cabinet and the Shadow Cabinet – Solidarity.

I suggest that to these should be added to other major sources of conflict of interest - personal and party political ambitions, particularly the pursuit of power.

He also discussed the question of how a Member of Parliament can resolve the conflicts that will arise particularly those that can arise in determining policy, usually because there is no perfect answer to the problems governments have to address. He said that the member has

⁵ For a copy of his speech go to <http://www.accountabilityrt.org/inaugural-art-lecture-fred-chaney-integrity-parliament-where-does-duty-lie/> ,

“to make necessarily subjective judgements about the best compromise available at the time *to serve the public interest.*”⁶

The progress of the Integrity Awards

The ART has now called for and processed nominations in two Commonwealth Parliaments. Were there any nominations and were there any winners? There were both.

To spread the word about the call for nominations, some media assistance is needed. We had more success in obtaining media coverage in 2010 than in 2013. For that we have to thank the publicity of the Launch of the Awards in 2010 by the Hon Tony Fitzgerald QC, the fact that it coincided with the breaking of the Windsor Hotel story (which are raised issues of ministerial responsibility) and the resulting television coverage of the launch. In 2013, we did not have those advantages.

In 2010, for the 42nd Parliament, we received 25 nominations for 17 candidates (Button and Missen combined). The recipients were Senator the Hon John Faulkner (Button Award) and Petro Georgiou (Missen Award). In 2013 for the 43rd Parliament, we received 18 nominations for 14 candidates for the 2 Awards. The recipients were the Hon Mark Dreyfus QC (Button Award) and the Honourable Judi Moylan and the Honourable Melissa Parke (Missen Award – for their work as backbenchers).

Were the recipients pleased? Very much so. And why not? Members of Parliament have to cope with constant criticism, or the risk of it, and public praise is an extremely rare experience for them. And, as you have seen, the criteria are demanding and the Selection Panel is one whose approval is not easily earned and its members have considerable knowledge, experience and expertise to draw on⁷.

⁶ I suggest that implicit in his analysis is the need for intellectual honesty in assessing the best compromise to serve the public interest? He did not discuss the conflicts of interest that can arise between the pursuit and retention of power and serving the public interest and the challenge that can pose to a person’s intellectual honesty. But his test, I suggest, should assist members of Parliament to address those conflicts, although it is likely to pose a considerable challenge to anyone’s intellectual honesty.

⁷ The Selection Committee for the Integrity Awards for the 43rd Parliament comprised the following; Lyn Allison – former leader of the Democrats, The Hon. Jim Carlton – former federal Liberal Party Minister, The Hon Dr. Ken Coghill – former ALP member of and Speaker of the Victorian Legislative Assembly, Associate Professor, Business and Economics, Monash University, Harry Evans – Former Clerk of the Senate, Professor Charles Sampford – Director, The Institute for Ethics, Governance and Law and Dr David Solomon – Queensland Integrity Commissioner. It was chaired by the Chair of the ART, Hon Tim Smith QC. In the Panel for the 42nd Parliament it also included Professor Emeritus David Yencken AO, - formerly: founding Chair, Australian Collaboration; Head, Centre for Environmental Planning, The University of Melbourne; Secretary for Planning and Environment, Victorian Govt; Chair, Australian Heritage Commission, Australian Govt. He decided to ease back on his commitments in 2013.

If you go to our website,⁸ you will find the published citations for each award and the speeches made by the recipients of the awards and the presenters of the awards -- the former Chief Justices of the High Court, Sir Anthony Mason and Sir Gerard Brennan.

What have been the consequences for the ART?

The first awards brought us to the attention of people in Parliament in Canberra and helped to open doors – a little; to staffers mostly. Meeting with Ministers or Shadow Ministers remains an unfulfilled ambition. My sense is that we are seen as different – and we are so far as that parallel universe is concerned. We are non-partisan, and are not lobbying for personal advantage or benefits or assistance for sections of the community. We are seeking to advance matters of principle relevant to the quality of government which we see as benefiting the whole community.. And we seek to praise them – every three years.

Nonetheless, there have been some other subtle encouraging changes.

For example, on both occasions we extended invitations to attend the Award presentation to all Members of Parliament. Very few responded formally on the first occasion although several attended for the presentation.

One I remember was the Hon. Christopher Pyne. I happened to be at the main entrance to the Committee Room with others when he arrived. He stopped, looked around, said to those standing in the entrance, “I don’t think I belong here” and immediately left. In fairness to Minister Pyne, I should also mention that he recently wrote to the ART thanking us for advising him of the outcome of the latest Awards and referring to the “importance” of the Awards. For the second presentation we received acknowledgements from 41 MPs, the majority apologising for having to be absent. Also on that occasion Russell Broadbent, while presiding as Acting Speaker, informed the House of the recipients of the 43rd Parliament’s Awards describing the Awards as “prestigious”.

How many MPs of Integrity?

Were there only 2 MPS of integrity in the 43rd Parliament and 3 in the 44th Parliaments? No. It was they who the Selection Committee thought demonstrated the most outstanding commitment to the public interest.

All those nominated warranted consideration.⁹ But there are also other members of Parliament who endeavoured to serve the public interest but were not nominated. Unfortunately, the media doesn’t report on behaviour of integrity.

⁸ <http://www.accountabilityrt.org/integrity-awards/>

⁹ To encourage nominations being made, we adopted the policy of treating nominations as confidential. As a result, I am not in a position to give details.

For example, in the Parliamentary Committees much work is done by members who focus on what is in the public interest and try to hold the executive to account. If you read the Award citations on our website¹⁰ you will get some insight into other work that is done. For example, were you aware, of the attempt by the Hon. Judi Moylan and some 30 other members who, in the last Parliament came together to try to develop a non-partisan non-political policy to deal with the refugee issues. If only that could be done to address what Sir Gerard Brennan described in his speech at the recent awards as an “excruciating problem”.

And people are still being chosen and elected to the Parliament who bring a genuine commitment to our Parliamentary democracy.

Consider the new Member for Hotham, Clare O’Neill. On 24 February this year, speaking on asylum seeker policy, she spoke of our parliamentary system of government and the role of the Parliament in holding the executive to account. Speaking on governments governing in secrecy, she said, that the potential consequences are –

“at best, poor decision making; at worst, flagrant, frequent and severe abuses of human rights”.

She delivered a message for us today –

“Our democracy must be protected by all Australians, and that means demanding the truth”¹¹

Is there hope for the Integrity of our Parliamentary Democracy?

We are in a much better position than many countries.

Over the years, our elected representatives have introduced new bodies and regulations to address various threats to the integrity of our Parliamentary Democracies. These are in addition to the traditional Westminster system roles of parliaments and their committees to hold the executive to account, and the Judicial Branch exercising its judicial review jurisdiction over the Executive.

Bodies include Officers of the Parliament such as - Auditors General and Ombudsmen, Integrity Commissioner¹² and anti-corruption bodies. Regulation has included Freedom of Information Acts¹³, regulation of political donations¹⁴ lobbying codes¹⁵ ministerial codes¹⁶ and MP codes¹⁷,

¹⁰ Link - <http://www.accountabilityrt.org/integrity-awards/>

¹¹ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fbb3ef167-e84b-40fc-bff9-814fb0e492d2%2F0176%22>

¹² e.g. Queensland

¹³ benchmarks – Right to Know Acts of Queensland, the ACT

¹⁴ benchmark – New South Wales),

¹⁵ in legislation in Queensland),

¹⁶ benchmark Commonwealth

¹⁷ absent from the Commonwealth but elsewhere

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and Whistleblower Protection¹⁸. As a result, people now talk about a fourth branch of government,¹⁹ the Integrity Branch.

There is still much to be done, however, including both improving and defending what we have.

In recent years there has been progress in strengthening the Integrity system but it has been mixed and, at times, slow. For example, in the last Commonwealth Parliament, we saw

- the creation and funding of the Parliamentary Budget Office to provide independent non-partisan analysis of the budget cycle, fiscal policy and proposals.
- the tortuous, but at the last minute miraculous, introduction federally of an effective whistleblower protection system for the vast majority of the federal public sector
- the failure to introduce a code of conduct for MPS and to implement political funding reforms agreed to by the government, Greens and Independents.

Failures in the States have included

- in the previous Queensland Parliament, the serious weakening of the parliamentary committee system and the role and authority of the Speaker
- in the present parliaments, Victoria's costly and fundamentally flawed attempt to establish our first anti-corruption body and Queensland's amending legislation passed this year which seriously reduced the effectiveness of its anticorruption body – the CMC – and, as a result, its anti-corruption system .

Those examples are evidence, should it be needed, that the battle is never won and never ends and that, to achieve advances, luck can play a big role. – including happening to have the right people in the right place at the right time and/or major scandals which force those, who do not want to do so, to take action in the public interest.

How effective are the Integrity systems?

Looking at the Commonwealth system, notwithstanding the improvements that have been made, the Hon. Malcolm Turnbull painted a bleak picture at the Woodford Festival (in late December 2012) saying that it has never been easier for parliamentarians to lie and that parliamentarians treat us with contempt. He expressly included himself among the parliamentarians²⁰. The

¹⁸ Benchmarks Queensland, ACT, Commonwealth

¹⁹ For a recent discussion see Dr David Solomon's Paper, "The integrity branch – parliament's failure or opportunity"; Paper presented at the Australasian Study of Parliament Group Annual Conference, Perth 2 - 4 October 2013 <http://www.integrity.qld.gov.au/library/document/catalogue/speeches->

²⁰ <http://www.youtube.com/watch?v=VT0tpzMelyI>

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explanation he offered was what he called the 60 second news cycle and the domination of politics over serious policy development.

That may be only part of the explanation. For the success of regulatory integrity systems depends very much on adequate resourcing and on the internal cultures.²¹

Consider the history of resistance to the federal attempts over some 20 years²² to introduce whistleblower protection, and the tortuous progress already mentioned over the last 3 years, largely public sector resistance, resulting in a Bill requiring over 70 amendments to fix it with only a few months of Parliament left in which to repair it and pass it. The ultimate remarkably successful result is a striking example of unplanned events enabling reforms to occur - involving, among other things, a surprise ministerial retirement, a reshuffle and the right person put in charge.

Resistance to transparency and accountability measures and reforms is not new of course. You will recall Tony Blair saying that the biggest mistake he made was to introduce a Freedom of Information System.²³ Sir Humphrey Appleby would agree.

But now the British government is one of the founders and leading members of the international organisation, the Open Government Partnership. David Cameron has been publicly proclaiming that open and accountable government is critical to good government and minimising corruption and, so, critical to economic growth.²⁴

²¹ Consider the FOI reforms secured by Sen Faulkner, as Special Minister of State in the previous Parliament and their implementation. The Australian Information Commissioner has recently expressed concerns about inordinate delays in reviewing rejections of FOI applications and he has been calling for extra resources particularly staffing. He has also raised concerns that agencies could be using delaying tactics. See report and discussion, Pater Timmins, in *Open and Shut Blog* for 14 February 2014; <http://foi-privacy.blogspot.com.au/search?q=delay>

²² http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/laca/whistleblowing/report.htm

²³ <http://www.theguardian.com/politics/2011/sep/20/mixed-results-blairs-dangerous-act>

²⁴ The UK Prime Minister's speech at the OGP summit at the end of last year: <https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013>

See also Speeches by the Minister in Charge, Francis Maude at recent OGP events;

<https://www.gov.uk/government/speeches/francis-maude-welcomes-france-to-the-open-government-partnership>

<https://www.gov.uk/government/speeches/francis-maude-at-an-open-government-partnership-meeting-in-dublin>

I suggest that there is also something that is overlooked and not discussed- a very strong psychological factor at work particularly affecting MPs - what I call the Serengeti Factor. Consider the position of any one elected to government. From the moment of your election you become one of the hunted. The hunters that surround you include the Opposition, the media, lobbyists and those within your party who are unhappy. What do the Serengeti's hunted do? Survival is an overarching concern and they try to minimise the risks they face. They try to avoid anything that may attract the attention of the hunters, or hide or flee if they scent trouble. If, however, they are like the East African buffalo, they will form up and face the hunters and try to protect their most vulnerable members.

Are there other culture issues for the parliamentary branches of government?

What is the culture of the Commonwealth Parliamentary Branch?

One feature of the culture that we have observed in the Parliament is a very strong and focussed "group think" (perhaps fuelled by the Serengeti factor) that there are no political benefits to be gained by strengthening the integrity of our parliamentary democracy and that to do so will only create political problems.²⁵

I suggest that this was a fundamental problem in the last Parliament for the some 6 integrity proposals that the ALP and the Independents and Greens had agreed to pursue at the commencement of that Parliament. But in fairness to them, the lack of action or results for most of those proposals points to another cultural feature that is always present for most members of parliament, including those committed to supporting the integrity of parliaments.

Members are under enormous pressure from the demands of their position and the need to deal with a vast volume of business. Within that business there will always be matters that for the vast majority of them have just as much, if not more, public good (or public detriment) and greater immediacy – whether it be mining taxes, poker machines, regional development, the Murray Darling Basin or the budget. Addressing the integrity of the system ordinarily appears to be given no priority by most and when changes are made to strengthen it, they seem to somehow slip through largely unnoticed unless in response to a major scandal.

Is there something else that is missing in the culture?

What should the culture be?

Notwithstanding the different roles that members of Parliament and the Public Service must serve, I suggest that the culture should be shaped by the same fundamental principle – that we, the people, have entrusted them, directly or indirectly with powers to be exercised in the public interest on our behalf. That obligation must always be given priority over what might be in their

²⁵ See Appendix 3

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personal interest. In short, to go back to Plato,²⁶ the culture should serve the principle that - public office is a public trust.

Lawyers present will be thinking that the relationship I have described sounds like a fiduciary relationship²⁷ - like that between trustee and beneficiary or agent and principal and which the courts enforce. They may also be wondering could it be enforced by the courts?²⁸

I imagine most, if not all of you, will also be thinking - be realistic; if that is an applicable ethical principle it is more often breached than honoured and to try to have it accepted to any extent as an ethical principle by politicians is probably impossible.

But imagine if the principle was accepted, and demanded by the community and sought to be upheld by all holders of public office? The office of a Member of Parliament, for example, would be seen, as it should be, as one of the highest public offices in the land and MPs would be trusted and not be among the least trusted. And consider how different our Parliamentary Democracy would be.

The current status of the public trust principle

Does the principle apply now to MPs and public servants? If so does it apply as an ethical and a legal principle or is it, as some have suggested, merely a “political metaphor”.

I have to confess that I first became aware of the principle in 2009 when I became involved in a workshop “Fiduciary Duty and the Atmospheric Trust” with Prof Coghill from Monash University and Prof Sampford from Griffith University. The Workshop’s aim was to explore the potential for the public trust principle to be invoked to take governments to court if they failed to discharge their fiduciary duty in relation to the environment. The consensus reached was that, while in the USA and Canada that can be done, for a range of reasons, that would not happen in

²⁶ See Cicero, *De officiis*, lib i, cap xxv at <http://harpers.org/blog/2010/05/cicero-the-duties-of-government-officials/>

²⁷ Justice Paul Finn, who has explored and written extensively on these issues since at least the late 1980s defined fiduciary relationships as known to the law in clear and unexceptional terms; “fiduciary relationships generally can be described as ones in which parties are so circumstanced relative to each other for some purpose, as to give one the right reasonably to expect that the other will act in his or her interests or in their joint interests in discharging a purpose and not in his own self- interest”. – see “Public Trust and Fiduciary Relations” 33 in “Fiduciary Duty and the Atmospheric Trust Coghill, Sampford and Smith, 31 at 33 (Ashgate).

²⁸ And private trusts are normally created by a legal instrument such as a deed or will? But the public trust in Australia is also created by an instrument – e.g. at the Commonwealth level, by the Constitution Act. It is a mega trust handling vast sums of money and other property and enforced by the Parliament, the Commonwealth courts and the people of Australia – see paper, Hon Tim Smith QC: paper delivered to Government Integrity Conference for December 2012 - http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-Tim-Public-Office-Public-Trust-2013-FINAL-_5_-_2_.pdf .

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Australia. I was not entirely convinced remembering that not long ago lawyers would have expressed the view that native title would not be recognised by our courts.

May I ask how many of you have any knowledge or awareness of the proposition that public office is a public trust? Could I have an indication? Usually when I asked a group of people that question, there are none or very few.

I did not explore the public trust proposition again until my attention was drawn to a very important speech in 2011 by the present Chief Justice of the High Court, Robert French. In it he discussed the public office public trust principle in some detail.²⁹

He identified two³⁰ cases where the High Court had applied “the idea that public officers occupy a trust like or fiduciary obligation”. In one case, it was held that the breach of the fiduciary obligation had rendered a contract illegal and, in the other case, that it made an agreement a criminal conspiracy. He also commented that “echoes of the concept of fiduciary obligation are to be found in the standards which the law imposes upon the exercise of official power by administrative decision-makers”.³¹ – that is, the common-law jurisdiction of courts to review administrative action. At the same time he described the proposition as a metaphor “straddling the divide between law and ethics”. What was the Chief Justice intending to convey by that description? He may have been attempting to reconcile the legal position and current community perceptions? But why a “divide between law and ethics”?

His metaphor statement raised at least two other questions in my mind:

1. If High Court Judges had, in two cases accepted and applied the proposition that public office is a public trust when resolving questions of law, and so accepted both the proposition and the concepts used in it and applied them in reaching their decisions, , why is that proposition not a principle of law and why is not “public trust” - a legal concept - not a metaphor ; and
2. If it is a principle of law, why should it not be described as underpinning the development of the common law and ethics in this area rather than straddling them?

Why is it not best characterised as a legal principle like the “neighbour principle” which was, and is, the foundation for the development of the law of negligence? Like the “neighbour principle”, the detail of its scope and operation, of course, would be, and is, a matter for development by the courts in accordance with the principles of the common law.

²⁹ Chief Justice Robert French AC, “Public office and Public Trust”, Seventh Annual St Thomas More Forum Lecture, 22 June 2011, <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun11.pdf>

³⁰ *R v Boston* (1923) 33 CLR 386; *Horne v Baker* (1920) 27 CLR494, 501.

³¹ Op cit, p14

These questions caused me to look for other examples of the public trust proposition's recognition, acceptance and operation as a legal principle in areas additional to the three significant areas the Chief Justice had identified. Former Professor and Federal Court Judge, Paul Finn has written extensively on the area. He has identified a number of common law offences relating to public officers which developed on the basis of the principle.³² They include

- official misconduct that involve a breach of powers and duties entrusted to a public officer for the public benefit and in which the officer has abused them or his position,
- wilful neglect of duty,
- wilfully embarking on a course of action which the officer has no legal right to undertake.
- the common law offences of oppression and extortion and civil remedies to recover money paid to authorities when they had no right to exact the payment.

He has also identified areas where the common law has provided remedies for situation where the official has entered into arrangements which are in conflict with his or her official duties. These include the common law offence of bribery. The common law has also developed rules to deal with situations where an official holds incompatible positions and where an official misuses public property.³³

My own searching has revealed, or confirmed, that the principle and the concept of “a public trust” has been recognised in other areas - for example: our Australian Constitution (s116), State legislation which recognises it in establishing anti-corruption bodies (including IBAC) (in particular, in the definitions of conduct that can be investigated), the common law on sentencing, and the common law rules of statutory construction applicable to discretionary statutory powers.³⁴

³² P D Finn, *Public Offences: Some Personal Liabilities*, (1977) 51 ALJ 313, 313-5; Note the “classic formulation of the liability of public officers” – Lord Mansfield in *R v Bambridge* (1780) 22 State Trials 494,501-502

³³ PD Finn, *op. cit.*, 315ff. Note also Second ICAC, *Second Report on Investigation into the Metherell resignation and appointment*, September 1992, p21. Appendix;
<https://bleyzie.files.wordpress.com/2012/02/second-report-on-investigation-into-the-metherell-resignation-and-appointment-1992.pdf>

“The law relating to the public trust, in brief terms, provides that anything whereby an act would give a basis for civil relief between parties, if performed by an official against a citizen, is a common law offence of breaching the public trust, see *R v Bambridge* (1783) 22 State Trials at 155, as discussed in 51 ALJ 313 at 315.” And “where a statute or regulation that prescribes, the behaviour of public servants is breached, unless a civil penalty is prescribed, a common law offence is committed”.

³⁴ See Appendix 4

It also appears to have been recently recognised in criminal proceedings alleging misuse of allowances brought against a Member of the Victorian Parliament, the Member for Frankston. He applied to have those proceedings diverted from the courts into a non-criminal process in which convictions are not recorded. The learned magistrate declined to do that. His reasons are not available but he was reported as having said, in the course of the application hearing, “the issue at stake was not just the money, but the breach of trust by an elected public official”.³⁵

I have also attempted to explore the history and discussion of the “political metaphor” proposition. Time does not permit an exposition. It involves in part the legal and constitutional history of the Victorian and Edwardian eras in the United Kingdom. May I just make a few points.

- The rationale for the “political metaphor” description applied in the UK to holders of public office, is based on the constitutional principle, that was and is debatable, that the UK Parliament is sovereign. That issue does not arise in the Australian Commonwealth parliamentary democracy sovereignty rests with the people not the Parliament.
- As already noted, the principle and associated concepts have been recognised by the courts as part of the common law and applied for many years so that it even if there are areas of activity where “political metaphor” might be arguably apposite, that does not apply to the exclusion of the public trust as a legal principle.³⁶

To sum up, the principle that holders of public office are in a fiduciary relationship with the community is not only an ethical principle. It is also a legal principle. Further, the succinct statement of that proposition in “Public Office is a Public Trust” is an aphorism describing that legal principle as does the phrase, “the neighbour principle” in the law of negligence. They and their key concepts are part of our judge made law - the common law.

The legal position was described by Sir Gerard Brennan in his speech before presenting the Integrity Awards last year.

He said (p3)

“It has long been an established legal principle that a member of Parliament holds “a fiduciary relation towards the public”³⁷ and “undertakes and has imposed upon him a public duty and a public trust”.³⁸ The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The

³⁵ <http://www.heraldsun.com.au/news/law-order/frankston-mp-geoff-shaw-to-fight-deception-charge-after-being-refused-diversion/story-fni0fee2-1226764156713> and <http://www.theage.com.au/victoria/defence-warns-of-dire-consequences-if-mp-geoff-shaw-is-convicted-20131120-2xvy9.html>

³⁶ See Appendix 5

³⁷ (quoting Higgins, J. in *R v Boston* (1923)33 CLR386, 412)

³⁸ (ibid408)

limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee.³⁹

Turning to the question of enforcement, he said (p5):

“True it is that the fiduciary duties of political officers are often impossible to enforce judicially (citing *United Steamship Co of Australia Pty Ltd v King* (1988) 82 CLR 43 at 48); the courts will not invalidate a law of the Parliament for failure to secure the public - interest⁴⁰ – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry “whatever it takes” is not consistent with the performance of fiduciary duty.”

It would be interesting to explore the legal possibilities that flow from such acceptance of the principle. But again time does not permit.⁴¹ But may I mention a recent English decision, upheld on appeal in the House of Lords,⁴² which applied the principle to set aside a policy introduced by a Conservative leader and deputy leader of a Council of selling, under statutory powers, Council homes in marginal wards in an attempt to change the voting demographics in their party’s favour. They were ordered to make good the sum of 31 million pounds plus interest on the sales that had been made at less than market price.⁴³

³⁹ (citing Rich, J in *Horne v Barber* (1920) 27 CLR 494, 501)

⁴⁰ In para 16 of the judgement it is stated:

“16. These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see *Drivers v. Road Carriers* (1982) 1 NZLR 374, at p 390; *Fraser v. State Services Commission* (1984) 1 NZLR 116, at p 121; *Taylor v. New Zealand Poultry Board* (1984) 1 NZLR 394, at p 398), a view which Lord Reid firmly rejected in *Pickin v. British Railways Board* (1974) AC 765, at p 782, is another question which we need not explore.”

⁴¹ See Appendix 6

⁴² *Magill v Porter* (2002) 2 AC 357.

⁴³ The House of Lords held that while the orders had been made to pay 31 million pounds under statutory provisions that applied, they would also have been made at common law because what was involved was a breach of a position of public trust - *Magill v Porter* para. 19 (4)

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All who exercise powers conferred on them by statutes or regulations, be they Ministers of our Commonwealth, State, or Territory Parliaments, or local councillors should note this decision and the reasons in the House of Lords by Lord Bingham in *Magill v Porter*.

“Statutory power conferred for public purposes is conferred as if upon trust not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended It follows from the proposition, that public powers are conferred as if upon trust, that those who exercise powers in a manner inconsistent with the public purpose for which the powers conferred betray that trust and so misconduct themselves”.⁴⁴

But in the case of elected representatives, is it not legitimate for them to have regard to whether their decision will commend itself to their electorate and their party? Lord Bingham also addressed that issue:

“Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the lifeblood of democracy and a potent spur to responsible decision-taking and administration.”

Referring to elected councillors, he commented that they

“do not act improperly or unlawfully if, exercising public powers for a public purpose to which such powers were conferred, they hope that such exercise will earn the gratitude in support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose which the powers conferred but in order to promote the electoral advantage of a political party. “

There will be occasions where the principle will not be easy to apply. But it is a principle that has been part of our common law for a very long time and its application will occur from time to time. In applying the common law, Courts will continue to be very conscious of the importance of the principle of the separation of power and the need to respect it. At the same time, they will not want the law to be seen to be condoning or encouraging clear breaches of public trust by holders of public office.⁴⁵

Before leaving this area and returning to the question of our collective amnesia, may I make another point which is easy to overlook in the modern era, dominated as it is by legislation and regulation, namely, how fundamental the common law is, and remains, in our system of government.

As Sir Owen Dixon famously explained, it was brought to Australia as

⁴⁴ *Magill v Porter* (2002)2AC357(Court of Appeal),497(House of Lords – para (19) discussed in Macknay QC’s paper *Trust in Public Office*” - <http://www.ccc.wa.gov.au/Publications/Reports/Speeches/Trust%20in%20Public%20Office.pdf>

⁴⁵ Cf. *Bunning v Cross* (1978)141 CLR 54 and the common law judicial discretion in criminal trials to exclude evidence obtained in breach of the law.

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“an anterior body of law providing the sources of juristic authority for our institutions when they came into being”,

and

“in the working of our Australian system of government we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates.”⁴⁶

As to decisions from English courts, although no longer binding precedents, they are considered and applied by Australian courts,⁴⁷ and are particularly relevant when shedding light on ancient common law principles and their application - such as the one we are considering.

So let us turn to -

The forgotten trust – the public trust

Why is it that we do not read or hear about the public trust or the public officer fiduciary obligations in the media or in the public political debates of our elected representatives?

There was a time when that was not uncommon and famous people made famous quotable statements.⁴⁸

And sometime between 1903 and 1911, it appears that it was in constant use in the English media at least. So much so that the famous legal historian, F W Maitland (usually cited for the “Political Metaphor” proposition), complained about this use:

“Open an English newspaper, and you will be unlucky if you do not see the word “trustee” applied to the “Crown” or to some high and mighty body. I have just made the experiment, and my lesson for today is, that as the Transvaal has not yet received a representative constitution, the Imperial Parliament is “a trustee for the colony” ”.⁴⁹ The reality is that over the intervening years the principle appears to have been forgotten in politics and in the community. That reality helps to explain the present cultures in the Parliamentary and Executive Branches of our governments. The consequences are potentially very serious.

⁴⁶ Sir Owen Dixon, “The Common Law as an Ultimate Constitutional Foundation”, in *Jesting Pilate*, The Law Book Company (1965), 203, 204

⁴⁷ See the review by Hon Michael Kirby AC CMG in “The old Commonwealth(a) Australia and New Zealand” ; http://www.docstoc.com/docs/164882639/2267-House_of_Lords_Chapter_15_Dec_2008 .

⁴⁸ e.g. 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.” (Benjamin Disraeli—*Vivian Grey*. Bk. VI. Ch. VII) . Jeremy Bentham said ” All government is a trust. Every branch of government is a trust, and immemorially acknowledged to be so.” (<http://www.bartleby.com/78/850.html>)

⁴⁹ F.W.Maitland, “Trust and Corporation” in *Collected Papers* (CUP, Cambridge, 1911) Vol 3, P403 -

May I mention one example of which few are aware. I refer to the Commonwealth Public Service Commissioner's "Policy and Advice document".⁵⁰ This document is intended to give public servants guidance about appropriate behaviour. I refer to the section in it advising them about accepting gifts.

While our public trustees are not forbidden by law to receive gifts, our public trustees should not be encouraged to receive them and they should be reminded in any advice who their stakeholders are and that their paramount concern should be the public interest.

But the Policy and Advice document does the opposite. It encourages the receipt of gifts, identifies the gift givers as the stakeholders not the people and states that the paramount concern is not the public interest but the reputation of the APS. Has the business model been allowed to replace the public trust model for the APS?⁵¹

Fortunately, the public trust principle has not been totally forgotten.

In addition to the people I have already mentioned⁵² former High Court Chief Justice Gleeson applied the principle to the Judicial Branch of government in a speech delivered in 2000 entitled "Judicial Legitimacy"⁵³, Roger Macknay QC, former Commissioner of CCC of WA discussed and confirmed it in a paper in 2012 "Trust in Public Office"⁵⁴ and Dr David Solomon, the former Queensland Integrity Commissioner, has considered and applied it in a recent paper

⁵⁰ <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>

⁵¹ See Appendix 7 for more details

⁵² French C J –see also most recently the Paul Finn, "Public trust and fiduciary relations' in "Fiduciary Duty and the Atmospheric Trust Coghill, Sampford and Smith, 31 at 33 (Ashgate). Also, PD Finn "Public Officers: Some Personal Liabilities" 1977 ALJ 313; "The Forgotten Trust":the People and the State" in Malcolm Cope (ed.) Equity – Issues and Trends, CH 6 p.131 (Federation Press); "A Sovereign People, A Public Trust" in PD Finn (ed.) Essays on Law and Government, p1; P.D.Finn "Integrity in Government" (1992)3 Public Law Review, 243;

⁵³ "Judicial power, which involves the capacity to administer criminal justice, and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath",

and later

"the characterisation of the High Court as an agent of the Australian people, entrusted with the responsibility of ensuring observation of the Federal compact, signifies that fiduciary capacity in which it exercises its power" - Murray Gleeson, Judicial Legitimacy (2000) -
http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_aba_conf.htm

⁵⁴ <http://www.ccc.wa.gov.au/Publications/Reports/Speeches/Trust%20in%20Public%20Office.pdf>

entitled “Nepotism, patronage and the Public trust”.⁵⁵ Also the public office - public trust principle was referred to and relied upon by the authors of the reports recommending the establishment of anti-corruption bodies – for example, in Tasmania⁵⁶ and Western Australia.⁵⁷

At the same time, I cannot recall hearing it as part of the language let alone the focus of the political debate or commentary. But might that be changing? On 18 March 2014, in question time, the Prime Minister said concerning Sen. Sinodinos and MPs generally.

“It is important to maintain the highest possible standards in our public life. I want to stress to the House and to the Australian community that people should be in public life to serve our country and not themselves.”⁵⁸

I note he said they “Should serve “not – “are under a fiduciary duty to serve”.⁵⁹ But we should also bear in mind that the Statement of Ministerial Standards originally of the Rudd Government, and now of the Abbott Government, states, as one of the guiding principles recognised by the Standards, the principle “public office is a public trust”.⁶⁰

Might the Prime Minister be seeking to revive and apply views of 19th century giants like Disraeli and Bentham? It is possible. He has shown a tendency to find inspiration in the past. Let us hope that he follows up such statements with more actions of substance. He could do that with the Open Government Partnership.⁶¹

But it needs to be borne in mind that there does not appear to have been any change from the shift in the political debate from the rationalism of the 80s and 90s to the populism from the late

⁵⁵ In that paper, he quoted Professor Finn’s expression of the Fiduciary principle – “The institutions in government, the officers and agencies of government exist for the people, to serve the interests of the people and, as such, are accountable to the people”⁵⁵ p5

⁵⁶ “Public Office is a Public Trust”, Joint Select Committee Ethical Conduct Final Report 2009 http://www.integrity.tas.gov.au/data/assets/pdf_file/0020/189110/Public_Office_is_Public_Trust_report.pdf and WA Inc Report (Kennedy, J, Sir Ronald Wilson, and Hon. Peter Brinsden Q.C ;

⁵⁷ [http://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/EB7A73F79B8C4FCA482569850012E10E/\\$file/report2.pdf](http://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/EB7A73F79B8C4FCA482569850012E10E/$file/report2.pdf)

⁵⁸ Re 18 March 2014 statement, see Hansard <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F349fbf1e-3729-43d8-af42-e282d6de779b%2F0069;query=Id%3A%22chamber%2Fhansardr%2F349fbf1e-3729-43d8-af42-e282d6de779b%2F0000%22>

⁵⁹ Note Wyatt Roy MP; <http://www.openaustralia.org/debates/?id=2013-06-18.70.2> ; “We need a government that is guided by the discipline that governments do not have any money of their own, just the people's money held in trust.”

⁶⁰ http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf , para 1.2

⁶¹ Discussed below

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1990s onwards that the Hon Lindsay Tanner identified in his lecture⁶² and the Hon Malcolm Turnbull discussed in his Woodford Festival speech.

This tends to point to a lack of awareness but one cannot exclude a continuing conscious or unconscious abandonment by our elected representatives, and the public sector generally, of the principle that public office is a public trust.

Why has this situation developed?

I suggest that the major reason has been the community's loss of knowledge of the principle, a loss that has existed for several generations. And this loss of knowledge extends to the public trustees themselves. How did that come about? Is it because it has not been dealt with in schools and universities for several generations?

In addition, for any MPs who give priority to the polls, and “doing whatever it takes” to gain power or retain it, the principle, if known to any of them, would be seen as an inconvenient proposition that has been forgotten and could be ignored.. But why the public service? – has the introduction of the business model to public administration and the lack of security of tenure had an impact?

And is our disengagement from politics a cause as well as an effect?

Much has been said about the community's disengagement from our democracy. In his *Integrity in Government* lecture of 2012, the Hon. Lindsay Tanner described “most politically engaged people” as being “passive, content to express their frustrations to those around them without ever doing anything about it” with the result that “countless Australians who have the interest and knowledge to enable them to do so choose to remain inert.”⁶³

I suggest that it is more than passivity. I suggest that a vast number of us are in rejection mode because of our anger and disillusionment caused by the current state of government integrity and the contempt shown to us, and each other, by our elected representatives coupled with a sense of powerlessness because there is no apparent basis for, or way of, changing things.

And it also must be recognised that a vast number of us are fully occupied coping with the demands of our lives.

How can we be encouraged and enabled to become engaged?

Addressing the problems

I suggest that a major part of the answer is raising awareness of the fundamental principle that public office is a public trust.

⁶² <http://www.accountabilityrt.org/integrity-lectures/>

⁶³ *ibid* p 6

We need it to be part of the secondary and tertiary syllabuses wherever it is relevant to the subjects and courses being taught whether they be philosophy, law, history, politics, government, journalism or ethics.

It would mean that over time, an increasing number of those involved in the discussion in the community, and the media, and political and government worlds, of government performance, would be alive to the principle and its application and, when relevant, have an important principle to bring into that discussion.

We would also understand that we are right in our sense of being treated with contempt when our elected public trustees lie to us or break promises (particularly without an attempt at explanation) and withhold information from us and that we have not only the right but the obligation to consider an appropriate response. A consequence may be that instead of two or three percent of voters withdrawing their support from an elected government, as occurred for the last ALP government and has occurred for the present government when they were perceived to have broken promises, more voters may be likely to decide to withdraw their support.

But it should also bring home to us that while our public trustees, be they members of parliament, public servants or judges, carry responsibilities (albeit each different) to act where the fiduciary duty has been broken, we, as the beneficiaries who entrusted them with the power to act, directly or indirectly on our behalves, have the ultimate responsibility to try to ensure the fiduciary obligations are honoured by our public trustees.

Can the revival of the principle help to restore integrity to our parliamentary democracy?

Two propositions must be true:

- the principle cannot play a role if it isn't present in people's consciousness;
- we should not hope for Nirvana to arrive immediately or that the battle will ever be completely won. We are seeking to have the principle applied by people pursuing power, or seeking to hold on to it, and there will always be those among them who believe the rules do not apply to them or that their ends will warrant the use of any means.

But I suggest that revival of the principle could be a game changer if only because it would restore an obvious and powerful critical element into our consciousness and that of the public trustees and into the public debate.

Let me try to give that a context.

Three years ago, Queensland, notwithstanding the serious weakness in its government integrity system of the absence of an Upper House of Review, had arguably the best government integrity system in the country. But in the last months of the previous government, the ALP and Coalition passed legislation placing the control of Parliamentary committees, and the Parliament, formally

in the control of the Executive Branch and seriously reducing the role and authority of the Speaker. Protests were raised but they were ignored and treated by most as just another political issue.

The public office-public trust principle was not mentioned and did not appear to be in people's consciousness as an issue to be considered. If it had been in their consciousness would it not have been seen by at least some of the parliamentarians, people entrusted by the Queensland community with the power to both legislate and hold the executive to account on their behalf, that what was being proposed was an abdication of the Parliament's power to do so, a power they held as public trustees and one vital to the public interest? Might not the result have been different?

More recently, with that amnesia having continued, the new government has further weakened the Queensland integrity system by amending the law to seriously reduce the effectiveness of its anti-corruption body, the then CMC, to protect the integrity of their government system. If the public office - public trust principle was part of community and political knowledge and discussion, would this have been contemplated let alone carried out?

When those holding public office are unaware of the fiduciary nature and responsibilities of their position, it is only to be expected that they, including those of integrity, will not consider them and so inevitably fail to bring their fiduciary obligation to put the public interest first into their consideration when they are making their decisions.

But with the restoration of the community's knowledge of the legal principle and its application restored, those holding public office will no longer have the freedom given by that present lack of knowledge whenever they are making decisions affecting the community.⁶⁴

Restoring the Principle

For optimum results, the principle will need to be taken up by us, the people, including the old and new media, as well as our representatives and made an element of the political debate.

As ever, persistence of a high order will also be needed. Fortunately there are able and knowledgeable people and organisations that have been, and will continue to be, persistent.⁶⁵

⁶⁴ For example, public servants handling FOI requests are more likely to see their role as that of people entrusted by, and for us, with the information they are considering and that it is held by them on our behalf, not their behalf, and so be helped to deal with the conflict of interest situation they are in by putting the public interest ahead of their perceived own, departmental or internal government interests. Note P. D. Finn also makes the point that the principle "expresses what should be an inescapable consequence of sovereignty and trusteeship: accountability to the people is required of all who hold office or employment in, or who exercise public power in, our government system" – "A Sovereign People: A Public Trust" in P.D. Finn, *Essays on Law and Government, Vol.1 Principles and Values* (1995), pp30-32.

⁶⁵ Including, for example, members of Transparency International, and the ART and Peter Timmins who publishes his research and the information he gathers on FOI and privacy issues on his blog "Open and

And we must remember there are people of ability, persistence and integrity in government and that our community is still producing idealist and there are outstanding people exploring these issues in universities and adding their voices.

And it has never been easier for civil society groups to get together, exchange information and mobilise themselves thanks to the Internet and email. In addition, thanks to the internet and its search engines it has never been easier to access the information needed to inform submissions and campaigns including reports of Ombudsmen, Commissions, Committees, and Hansard, newspapers and journals.⁶⁶

Is there any Help in Sight?

As it happens, Australia is a participant in three international agreements and organisations within which civil society and governments, including the Australian Government, are expected to work together to strengthen the Integrity of governments around the world. Particular objectives include addressing the risks of corruption and advancing the cause of open and accountable government domestically and internationally.

They also require that civil society be involved in the process and they provide for reviews of each national members' performance.

I am referring to our membership of the United Nations Convention Against Corruption (UNCAC), the G20 and our application to join the Open Government Partnership, an application formally made by the Australian government in May last year.

These have great potential. How have they progressed?

- **UNCAC.** Over the last 2 years, work had advanced on the National Anti-Corruption Plan (NAP) required of Australia under the Convention in the last Parliament. The ART had participated in the initial civil society discussion as had TI and other people and organisations. But the NAP is yet to be finalised. The previous government's draft was recently leaked to the media.⁶⁷ The present government has criticized it.
- **G20.** Australia is currently chairing the G20 and hosting its meeting in Australia in November this year. The government and G20 have been consulting with Transparency International and others in the civil society C20 group in the revision of the 2013-14 G20

Shut" and members of a newly created OGP Network that he has helped to bring together. Re the OGP see further below.

⁶⁶ The ART has been able to research and make submissions to inquiries into a wide range of government integrity issues. A result has been the building up a body of material discussing government integrity issues, problems and solutions which we place on our website. We hope that will be a useful resource for the community.

⁶⁷ <http://www.smh.com.au/federal-politics/political-news/david-ipp-calls-for-federal-corruption-watchdog-20140622-3amd6.html>

anti-corruption plan for the November meeting. One of its major objectives is to instill values of “transparency, accountability and integrity into the way that governments and the private sector function.”⁶⁸

- **Open Government Partnership.** Australia received an invitation to join from the USA in August 2011 and later from the UK Government. It was not until May 2013, however, that the then recently appointed Attorney-General, Mark Dreyfus QC, lodged Australia’s application to join. The next step in that process is to file with the Open Government Partnership our “Direct Action Plan”. That process involves government consultation with civil society groups and was to be carried out by the end of March of this year. That has not occurred. The Finance Minister, not the Attorney-General, now has the primary responsibility – which reflects, we hope, the view powerfully put by the UK PM of the importance to economic growth domestically and around the world of open and accountable government and action to address corruption risks.⁶⁹ An informal Civil Society Network has already come into existence thanks to the internet and particularly Peter Timmins (“Open and Shut”⁷⁰).

The present Government’s public statements under recent Parliamentary committee questioning are that it is still considering its position on the application by Australia to join.

In relation to the OGP, the Government has had a number of reasons to act and to expedite matters.

It needed to move quickly to minimise the international embarrassment for Australia of having failed to meet the timetable, particularly when regard is had to its current role in the G20 and the objectives the OGP shares with the G20. The failure to do so became public knowledge in early May when Ministers of member countries of the OGP meet in Bali.

The failure should also be seen as an issue by the government because it is inconsistent with the Government’s stated determination to honour its election commitments – the 2 relevant ones being more transparency in government and economic growth in Australia aided particularly by economic growth in Asia and around the rest of the world, that growth being held back by corruption which in turn thrives on a lack of transparency of government⁷¹.

⁶⁸ G20 Anti-Corruption Working Group Progress Report 2013. P 3
<http://www.mofa.go.jp/files/000014208.pdf>

⁶⁹ See Mr Cameron’s speech at the OGP summit at the end of last year.
<https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013> .

⁷⁰ See - <http://foi-privacy.blogspot.com.au/>

⁷¹ See “Our Plan”, section 21 and 1 respectively - <http://www.liberal.org.au/real-solutions>

Conclusions

Despite the ongoing obstacles, delays and disappointments there is hope for the integrity of our system of Parliamentary democracy.

But we, the people of Australia, will need to help start the revival of the public trust principle with the aim that all, but particularly our elected representatives and public servants and agencies, will understand and accept that their *fundamental and over-riding obligation* is that they put *the public interest first*.

So how do we do go about that?

What about you and yours? Have you been trying to do something? Are you wanting to do something? Have you considered joining a political party? Forming a party? Joining civil society groups on this or more specific issues?

Ultimately, it is up to us

Let us not forget the words of the Member for Hotham –

“Our democracy must be protected by all Australians”

APPENDICES

Appendix 1 – Present Executive Members of the ART

Lyn Allison, former Senator and former Leader of the Australian Democrats.

Carmel Benjamin AM, founder and former Executive Director of the Victorian Court Information and Welfare Network Inc. Former Chairperson of the Victorian Women's Prison Council, and consultant to the Law Reform Commission and to the Public Advocate.

The Hon Jim Carlton AO, former Federal Minister for Health (Fraser Government), former Secretary General of Australian Red Cross.

The Hon Stephen Charles QC, former Judge of the Court of Appeal, Supreme Court of Victoria, Lecturer Melbourne University Law School Master's Course on the Law of Royal Commissions and other Public Inquiries.

The Hon Dr Ken Coghill, former Speaker (Legislative Assembly, Victoria) (Cain & Kirner Governments), Associate Professor, Faculty of Business and Economics, Monash University.

Harry Evans, former Clerk of the Senate, Parliament of Australia.

Barry Everingham, Melbourne based author, broadcaster and journalist.

The Hon Alan Goldberg AO QC, former Justice of the Federal Court of Australia, former President of Victorian Council of Civil Liberties, former President of the Australian Competition Tribunal.

Bruce Grant, Author, High Commissioner to India and Ambassador to Nepal (1973-1976), Chairman, Australia-Indonesia Institute 1988-1991.

Dr Genevieve Grant, Faculty of Law, Monash University.

The Hon David Harper AM QC, former Judge of the Court of Appeal, Supreme Court of Victoria, former President of the Graduate Union, University of Melbourne (1997-1999) and of VACRO (1995-2012) and, since 2001, President of the International Humanitarian Law Committee of the Australian Red Cross (Victoria).

Prue Innes, former *Age* Journalist, Member of the Australian Press Council.

The Hon Dr Barry Jones AC, FAA FAHA FTSE FASSA FACE, former Federal Minister for Science and Technology, former Minister for Science, Customs and Small Business (Hawke Government), former Victorian Labor Member of Parliament (in opposition during the Hamer

Government). Member, Executive Board of UNESCO Paris 1991-95. Visiting Fellow, Trinity College, Cambridge 2000-01. Author.

Adjunct Professor Colleen Lewis, National Centre for Australian Studies, Faculty of Arts, Monash University.

Anne Mancini, Author, Secondary School and CAE Teacher.

The Hon Dr Race Mathews, former Federal Member for Casey (Whitlam Government), former Victorian Minister for Community Services (Cain Government), former Victorian Minister for Police and Emergency Services and Minister for the Arts (Cain Government).

Professor Barbara Norman, Foundation Chair of Urban & Regional Planning and Director of Canberra Urban & Regional Futures (CURF), University of Canberra.

Des Pearson AO, former Auditor-General of Western Australia (1991-206) and Victoria (2001-2012). Presently Non-Executive Director and Advisor on Governance, Accountability and Performance Reporting, Melbourne Health. Life Member and Fellow of CPA Australia; Life Member and Fellow of the Australian Institute of Management; National and Victorian Fellow of the Institute of Public Administration Australia; Fellow of the Institute of Chartered Accountants Australia; and Fellow, International Society of Engineering Asset Management.

The Hon Kevin Rozzoli AM, former Speaker (Legislative Assembly, NSW) (Greiner & Fahey Governments), Honorary Research Associate in the Department of Government at the University of Sydney, formerly National President, The Australasian Study of Parliament Group.

Professor Charles Sampford, (DPhil, Oxon), Foundation Dean of the Griffith Law School, Director, IEGL, The Institute for Ethics, Governance and Law (a joint initiative of the United Nations University, Griffith, QUT, ANU, Center for Asian Integrity in Manila and OP Jindal Global University, Delhi) President, International Institute for Public Ethics.

Angela Smith, former Senior Social Worker in the area of Adoption and Permanent Care of children.

The Hon Tim Smith QC, former Supreme Court Judge and former Commissioner of the ALRC and VLRC, ~~presently Adjunct Professor, Monash University.~~

Dr Julia Thornton, Research Associate, Social Science: School of Global Studies, Social Science and Planning, RMIT University.

Professor Emeritus David Yencken AO, formerly: founding Chair, Australian Collaboration; Head, Centre for Environmental Planning, The University of Melbourne; Secretary for Planning

and Environment, Victorian Government; Chair, Australian Heritage Commission, Australian Government.

Professor Spencer Zifcak, Allan Myers Chair in Law, Australian Catholic University, Director of the Institute of Legal Studies, Australian Catholic University; Barrister and Solicitor, Supreme Court of Victoria.

Appendix 2 - Missen Award Criteria

The award winner's behaviour should be exemplary and reflect the best traditions of political service to the community.

The award winner will, in the relevant period, have demonstrated an outstanding commitment to the public interest in the performance of his or her role with Honesty, Civility Independence and/or Political Courage, in one or more of the following areas:

- Supporting the principles and practice of transparent and accountable government
- Contributing effectively and constructively to parliamentary debate, committee deliberations and/or policy development in a way that promotes and/or supports good parliamentary practice and the institution of parliament.
- Pursuing a change in government policy or practice whether generally or in response to a constituency issue or injustice.
- Protecting peoples' political and civil rights

The Button Award criteria are very similar⁷²

⁷² <http://www.accountabilityrt.org/integrity-awards/>

Appendix 3. “Group think”

While there were no doubt many pressures, issues and added difficulties during that hard fought 43rd Parliament, it is difficult to exclude the “group think” mentioned as a significant factor that prevailed over consideration of the public interest in strengthening the integrity system. The agreement between ALP, the independents and the Greens had presented a real opportunity to the government and, properly handled, had the potential to demonstrate a strong commitment to the Integrity of the government system and, could have helped it recover some of the community’s trust that had been withdrawn from it.

There were some 6 government Integrity matters listed for attention. Only 2 of the matters listed, the Parliamentary Budget Office (driven by Senator Faulkner) and the Whistleblower Act were implemented, the latter having been allowed to remain within the bureaucracy and develop into a Bill that was contrary to the ALP government’s stated adoption of the 2009 Parliamentary Committee Report to the extent that it effectively discouraged whistleblowers and gave no adequate protection. Early in 2013, there was a reshuffle of Cabinet and The Hon Mark Dreyfus QC assumed responsibility for the Bill managing to turn the Bill around (with more than 70 amendments) in a few months and secure its passage in the last week of the 43rd Parliament.

As to the other matters, they included the agreement to establish effective Codes of Conduct to guide our MPs. This was first diverted from the original joint committee approach agreed to between the ALP, Greens and Independents at the start of the Parliament to a two committee approach, one in each House, and then allowed to slip, along with the proposal to establish a Parliamentary Integrity Commissioner. The preparation of legislation for that proposal was put off pending the completion of the Codes on the basis that it involved Executive action and should await the outcome of the decisions on the Codes by the members of the Parliament. Also not implemented was the agreement to immediately pass legislation to make reforms to the regulation of political donations, including a disclosure threshold of \$1000.00, and improving the timeliness and frequency of donation disclosure.

Appendix 4-Recognition and acceptance of the public trust principle and its concepts

A. The Australian Constitution s116 –

116. Commonwealth not to legislate in respect of religion

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.*

(B) Australian Parliaments ;

The State legislation setting up the anti- corruption bodies of Queensland (CMC Act s 14(b) (ii), NSW (ICAC Act s 8(1) (c)), WA (CCC Act s 4(d)(iii) and Victoria (IBAC ACT s 4(c) includes in the critical list of the types of misconduct they can investigate the breach of “public trust”.

© ***Recognition and application by the courts in applying the common law, the law developed by the courts.*** In addition to the 2 civil law and 1 criminal law (crime of conspiracy) examples given by Chief Justice French and the examples identified by PD Finn referred to in the main text, the offence of misconduct in public office was recently considered in Victoria and the relevance of the public trust element to the elements of the offence confirmed in *R v Quach* [2010] VSCA 106;

<http://www.austlii.edu.au/au/cases/vic/VSCA/2010/106.html>.

Also <https://www.cps.gov.uk/legal/1-to-o/misconduct-in-public-office/>

(D) Sentencing law :

Under sentencing law, where holders of public office break the law in the course of using their powers, the fact that their office was a public trust aggravates the gravity of the offence and increases the importance of the sentence addressing specific and general deterrence. As a result, the sentence will be significantly higher than would be the case if it was not a breach of the public trust. To take a high profile matter, consider the case involving a Minister in the Commonwealth Parliament, *R v.Theophanous* (Sentence 11June 2002). Reference should be made in particular to the following extracts from Judge Crossley’s reasons for sentence.

“It is vital to our democracy that the people of Australia have trust in the honesty and integrity of those they entrust with the task of governing this country and making laws in respect of the Australian community. That you have breached that high trust is an aggravating factor of very considerable significance indeed”.

And later

“I must also take into account the principle of deterrence, both special deterrence and general deterrence which, given the breach of the trust of the people of Australia and the dangers inherent in the corruption of our democratic institutions, is of paramount importance in cases of this type. “

The Court of Appeal upheld the sentences on the counts in respect of which the convictions were allowed to stand, accepting his Honour’s reason without comment or qualification.⁷³

(E) Criminal proceedings – procedures.

The case of the present member for Frankston, Mr Shaw, may also provide an example. He applied to have the charges diverted into a non-criminal process which would have resulted in no conviction. In the course of discussions, His Honour identified as a relevant consideration the fact that the allegations made, if proved, involved a breach of his public trust rendering the matter too serious to be so diverted.

(F) Statutory Construction.

The important common law rule of statutory construction of discretionary powers that are conferred on people and agencies by statute without express limits, that they are “conferred as it were upon trusts”⁷⁴ and are to be interpreted to require the exercise of them in the public interest to promote and not to defeat or frustrate the object of the legislation – Craies on Legislation 10th ed 71 and ff;

⁷³ R v Theophanous [2003]VSCA 78). Also see Judicial College of Victoria, Sentencing Manual 9.9.2.3 ;Other Public Officials and cases there cited and Bagaric and Edney, Australian Sentencing, 450.10400; 1-51002.

⁷⁴ Citing *R v Secretary of State for the Environment, Transport and the Regions and another. Ex parte Spathe Holme Ltd* , [2001]1 All ER 884,893 (overturned in House of Lords on other grounds – (2001) 2AC 349) and see passages referred to above in *Magill v Porter* (2002) 2AC 357.

Appendix 5. What is the origin of the “political metaphor” analysis?

It arose in circumstances very different to those operating now in Australia.

It appears to have originated with Victorian jurists like Maitland and Dicey. Finn refers to them both in the following passage commenting that –

“The very idea that the parliament itself could be a trustee was dismissed as a “political metaphor””⁷⁵.

He continued,

“That idea, moreover, conflicted with the acceptance given to parliamentary sovereignty itself”⁷⁶

There appears to have been a major debate at that time in England about the sovereignty of Parliament with eminent jurists like Austin arguing that sovereignty lay with the people. The metaphor description, if accepted, reflected and supported the view that the Parliament was sovereign and, as a result, that the trust was not one which any court could enforce against the Parliament and it was only a moral trust.

The Australian situation⁷⁷ is very different. The Commonwealth has a written constitution that specifies and limits the legislative and executive capacity of the parliamentary and executive branches and there is a substantial history of the High Court performing its role of determining whether they were acting within power or not.⁷⁸ Further, while enacted by the English Parliament, its source was the Australian people. That was the political reality. The Constitution itself contains a Preamble that states

“Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established”

and the Constitution gives the people the power to amend the Constitution. Initially the British Parliament retained the power to legislate for Australia but this was removed by the Australia

⁷⁵ P D Finn . “A sovereign People, a public Trust” in *Essays on Law and Government*” 1995 (ed. Finn) at p 11-12 citing F.W. Maitland, *Collected Papers*, CUP, Cambridge, 1911, 403”

⁷⁶ Ibid, citing AV Dicey , *The Law of the Constitution* (10 Ed., McMillan and Co, London 1960, 75 – 76)

⁷⁷ See detailed analysis of the history and issues in Finn, op cit. pp2-9.

⁷⁸ Note cases where the courts have heard and decided cases involving the powers and privileges of Parliaments – e.g. *Egan v Chadwick* and *Willis v Chadwick*. A detailed analysis is available of the High Court decisions in *Egan v Willis* and *Egan v Chadwick*: *Responsible Government and Parliamentary Privilege*, Research Paper 12 1999-2000 Christos Mantziaris, Law and Bills Digest Group, 14 December 1999

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP12

Acts 1986. Subsequently, in the 1980's and 1990s, it was acknowledged in the High Court that "sovereign power resides with the people"⁷⁹

The public trust principle does not appear to have featured to any great extent in recent litigation. This is a reflection of the long standing and ever growing trend to specific legislation and, with it the development of administrative law. But its recognition as a legal principle stands. So Maitland and Dicey, if asked today to consider the Australian position, might well agree that, in Australia, there is a legal principle that a fiduciary relationship does exist between the people and the government.

This conclusion is in fact supported by what Maitland wrote in the course of discussing the "metaphor". After describing press reports which referred to the Imperial Parliament being described as a the trustee of the colony of Transvaal because it had no constitution, he stated⁸⁰

"There is a metaphor here. Those who speak thus would admit that the trust was not one which any court could enforce and might say it was only a "moral trust".

But he immediately continued:

" But I fancy that to a student of *Staatswissenschaft* [political science] legal metaphors should be of great interest, especially when they have become the commonplace of political debate. Nor is it easy to say where a metaphor begins. When a Statute declared that the *Herrschaft* [control of power] which the East India Company had acquired in India was held in trust for the Crown of Great Britain that was no idle proposition but the settlement of a great dispute." (ibid)

I suggest that Maitland there was saying that it is not clear where the boundaries of this suggested political metaphor lie, in particular where it "begins" or ends and where the law or legal principle begins or ends in this area. In that statement he also appears to concede that the

⁷⁹ *Australian Capital Television Pty Ltd v Cth* (No 2) (1992) 177CLR 106 at 137, Mason CJ; see also Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 – " the powers of the government belong to and are derived from ..the people"; note also prior to the 1986 legislation Deane J in *University of Wollongong v Metwally* (1984) 158 CLR447 – said that " the Australian Federation is a union of the people" and that it is from "the people" that the "artificial entities called the Commonwealth and States derive their authority "

See also from the National Anti-corruption Plan Discussion Paper published by the A-G's Department in March 2012, 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. "

⁸⁰ Ibid.

metaphor analysis, whatever its coverage, does not cover the whole of the field covered by the legal principle. that public office is a public trust.

I suggest that therein also lies the explanation for the distinction that has been drawn and the justification for the legal aphorism – “public office is a public trust”. Plainly, the scope for enforcement by the courts of the private trust and of the public trust is different and for the legal community, the concept of a trust tends to be associated with private arrangements involving property. That does not mean, however, that each fiduciary position should not be categorized as a “trust” for legal purposes. Positions of public trust also include arrangements involving property. The addition of the word “public” to “trust” for holders of public office enables the differences in scope and manner of enforcement to be recognized. If it is thought that to be called a “trust” there needs to be a legal instruments creating the fiduciary relationship that is called a public trust, the primary legal instrument for the Commonwealth public trust is the Commonwealth Constitution Act.⁸¹

In Australia, to treat it as a political metaphor would be inaccurate. A “metaphor”, according to the Shorter Oxford Dictionary, is a “figure of speech in which a name or descriptive term is transferred to some term to which it is not properly applicable”. If no legal obligations or consequences flowed from breaches of the public office fiduciary duty, the description might be accurate. But the public office - public trust proposition is a legal principle involving legal concepts and consequences that are part of the law of this country and the descriptive term “public trust” is properly applicable because of the fiduciary nature of a public office and distinguishes it from the other type of trust, the private trust.

The legal position was summed up by Sir Gerard Brennan’s analysis in his speech before presenting the Integrity Awards last year.

He said (p3)

“It has long been an established legal principle that a member of Parliament holds “a fiduciary relation towards the public”⁸² and “undertakes and has imposed upon him a public duty and a public trust”⁸³. The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee⁸⁴.”

Turning to the question of enforcement, he said (p5):

⁸¹ http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-Tim-Public-Offic-Public-Trust-2013-FINAL-_5_-2_.pdf

⁸² quoting Higgins, J. in *R v Boston* (1923)33 CLR 386, 412)

⁸³ *ibid*408

⁸⁴ citing Rich,J in *Horne v Barber*(1920)27CLR494,501) ”.

“True it is that the fiduciary duties of political officers are often impossible to enforce judicially (citing *United Steamship Co of Australia Pty Ltd v King* (1988) 82 CLR 43 at 48)⁸⁵; the courts will not invalidate a law of the Parliament for failure to secure the public - interest) – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry “whatever it takes” is not consistent with the performance of fiduciary duty.”

⁸⁵ In para 16 of the judgement it is stated:

These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see *Drivers v. Road Carriers* (1982) 1 NZLR 374, at p 390; *Fraser v. State Services Commission* (1984) 1 NZLR 116, at p 121; *Taylor v. New Zealand Poultry Board* (1984) 1 NZLR 394, at p 398), a view which Lord Reid firmly rejected in *Pickin v. British Railways Board* (1974) AC 765, at p 782, is another question which we need not explore.

Appendix 6 - In what circumstances might our courts extend the operation of this legal principle?

Paul Finn has commented;

“What I have tried..... to indicate is that in our principles of interpretation, in our grounds of judicial review and in the standards of fair play and fair dealing we expect of the State itself, we have the tools to achieve a deal of what has been achieved elsewhere in the common law world by direct resort to the notions of trusteeship and fiduciary responsibility. Moreover, these tools are ones which are consistent with our legal history, and methodology. They do not involve the judicial usurpation of the decision-making powers of Parliament or the Executive which is a recognized hazard of the public trust/fiduciary obligations ideas. Rather they impose on those institutions a level of accountability to the public by requiring a more open acceptance by them of responsibility for the consequences of their decisions.

All that remains to be done – and it is a large “all” – is that the courts breathe further life into those principles by acknowledging that there are emerging public interest and values which warrant protection from legislative or executive encroachment and which should be protected in the same way that we now protect fundamental rights and interests.”⁸⁶

⁸⁶(see PD Finn “Public Trust and Fiduciary Obligations” in “Fiduciary duty and the Atmospheric Trust”, Coghill, Sampford, Smith, (Ashgate), 31, 39.

Appendix 7 - Gift advice and the power of Gifts

Section 4.12, of the Commonwealth Public Service Commissioner's "Policy and Advice document"⁸⁷ is intended to give public servants guidance about appropriate behaviour.

It identifies the Australian Public Service (APS) stakeholders and what should be the paramount concerns of members of the APS.

The stakeholders 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 relationship identified is that between the organisation making the offer and the agency, not the agency and the people⁸⁸ of Australia.

The paramount concern expressly identified when accepting gifts is the reputation of the APS - and not the interests of the people of Australia. "When deciding whether to accept a gift or benefit, the reputation of the APS is paramount"

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.

How has this happened?

Has the business model been allowed to replace the public trust model for the APS? Has a lack of security in employment had an impact? As to the dangerous effect of small gifts see the Study "You Owe Me"⁸⁹

⁸⁷ <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>

⁸⁸ A word search of the Guidelines found the word "people" once - in the following passage – "When developing policies about accepting gifts and benefits, agencies should clarify in what circumstances accepting a gift or benefit may be appropriate, taking into account the agency's functions and objectives, the roles of employees within the agency and the types of relationships employees may have with organisations and *people* who may offer gifts or benefits;"

⁸⁹ Malmemendier and Schmidt; <http://www.nber.org/papers/w18543> - reported the Age <http://www.theage.com.au/comment/the-smaller-the-gift-the-larger-the-fallout-20140418-zqv7.html#ixzz2zzMeY07G>