

Government Secrecy and Urban Planning – The Forgotten Trust and Reform¹

The Hon Tim Smith QC. 2 Oct 2014

Paper delivered to the University of Melbourne Urban heritage Conference.

http://artinstitute.unimelb.edu.au/events/urban_heritage

<http://www.trustadvocate.org.au/university-of-melbourne-urban-heritage-conference-day-1-wrap-up/>

<http://www.trustadvocate.org.au/urbanheritage2014-day2/>

Introduction

The Accountability Round Table (ART) is a non-partisan group of citizens dedicated to improving standards of accountability, probity, transparency and democratic practice in all governments and parliaments in Australia.²

The challenge - government secrecy.

Government secrecy is a major challenge. Among those employed in the public sector and those we elect to Parliament, there is, and probably always will be, significant support for government secrecy.

- *IBAC*; Consider what happened in Victoria to the strong election commitment of the Coalition to give Victoria its own ICAC. The legislation introduced in this parliamentary term sets a threshold so high that IBAC could not investigate matters like the Obeid matters in NSW.

The Government's proposed amendments fail to rectify that problem and potentially make it worse by introducing a formal distinction between "preliminary investigations" and "investigations".

- *FOI*. Consider also our Freedom of Information system. It came into existence before the major outsourcing of government services and services to government.

With creative use of the exemptions such as the "commercial in confidence" and "cabinet documents", the FOI system has become a system for providing secrecy for government.

We have failed to follow Queensland and adopt its Right to Know legislation which places the onus on government to give access to information unless to do so would be contrary to the public interest.

¹ Paper delivered to the Urban Heritage Conference, University of Melbourne, 2 October 2014 by the Hon Tim Smith QC

² For further information about the ART, its members and activities go to www.accountabilityrt.org.

- *Political Funding.* Consider also our continued reliance on the inadequate Commonwealth legislation to regulate and to bring transparency to political funding and our failure to introduce the NSW reforms, in particular, to significantly improve the transparency of political donations by lowering the disclosure threshold from \$12,500.00 to \$1000, requiring disclosure within 8 weeks of payment instead of within 15 weeks after each election and introducing controls such as the ban on developer donations and caps on donations.

Why Government Secrecy Matters

Government secrecy denies us open and accountable government.

Open and accountable government is critical for good government. It is also critical to the functioning of our parliamentary democracies; for, without it, how can we make an informed judgement when we come to exercise our right to vote every 4 years? And open and accountable government is critical if we are to adequately address the risk of corruption; corruption thrives on secrecy.

In recent times, it has also come to be recognised that open government is critical to domestic and international economic growth. The UK Prime Minister Mr Cameron: speaking at the Open Government Partnership³ Summit 2013, has said⁴

“ the best way to ensure that an economy delivers long-term success, and that success is felt by all of its people, is to have it overseen by political institutions in which everyone can share. Where governments are the servants of the people, not the masters. Where close tabs are kept on the powerful and where the powerful are forced to act in the interests of the whole people, not a narrow clique. That is why the transparency agenda is so important.”

He went on to say –

“So I want to finish by saying this: none of what I’ve outlined today is easy for us politicians. Transparency brings risks – indeed we often find that out here on a day-to-day basis – but it is absolutely critical. Time and again, history has shown us that open governments make for successful nations.”

³ The Open Government Partnership. Some 64 nations have joined it or have applied to do so. So far only one applicant has withdrawn its application – Russia . Australia received an invitation to join from two of the founding members, the USA in August 2011 and later from the UK. It was not until May 2013, however, that Commonwealth government lodged its application to join. The next step is to prepare Australia’s “Direct Action Plan” in consultation with civil society groups. This was to be completed by the end of March of this year. That did not occur. The present government is apparently still considering its position on the application by Australia to join. This is puzzling when similar issues are also on the Agenda of the G20 which Australia is chairing. See further; *“Integrity in politics? Public office as a public trust? Is there hope?”* Hon. Tim Smith Q.C. (p 22 ff): http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-_3_.pdf

⁴ pp 3 and 7 <https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013>

Urban Development and major projects areas – risks of corruption.

If we look at the last 30 years, I suggest a recurring issue at State level has been corrupt conduct in the development and major projects areas identified by the Fitzgerald Inquiry in Queensland and the WA Inc inquiry, and the investigations by anti-corruption bodies subsequently established there and in NSW. In those jurisdictions, and elsewhere, the lessons learnt remain valid; in particular that

- Given secrecy, corruption will thrive and
- there will always be people who will pursue their objectives corruptly.⁵

Over the last 30 years we have also dramatically increased the opportunities and temptations to corrupt in this and other areas by an ongoing program of privatisation and outsourcing of government services and services to government including the expert advice needed for major projects and urban planning generally. As a result many more people and large businesses are now financially dependent on securing contracts with governments.

There has also been the development of a lobbying industry and movement between elected office and, on retirement, employment in lobbying.

The so-called arms race for money for election campaigns has also put pressure on the political parties to seek large donations and to accept them from those seeking decisions of benefit to them from government. It also appears to have been a factor in the development of the fundraising practice of political parties charging for access to Ministers, Shadow Ministers and MPs. This provides opportunities for people to further their influence. The ART has raised questions about the legality of that practice in submissions to Commonwealth and Victorian parliamentary committees.⁶ Those concerns do not appear to have been addressed.

Correct me if I am wrong, but there appears to me to have been a significant lack of government openness in the urban planning and major projects area under this and the preceding government.

A feature of media reports of major infrastructure projects, major planning permit applications and decisions, particularly those involving intervention by the Planning Ministers has been the lack of detailed information that should be readily available from governments and Ministers about the planning objectives, matters they had taken into account, their resolution of the complex pros and cons that exist in all such decisions, even the terms of the contracts signed – whether it be a desalination plant, choices between road or rail, the East-west link or urban development policies or

⁵ See generally, Hon Tim Smith Q.C., *Corruption, The abuse of entrusted power in Australia*, The Australian Collaboration, <http://www.australiancollaboration.com.au/pdf/Essays/Corruption.pdf> .

⁶ <http://www.accountabilityrt.org/art-submission-to-the-2011-joint-standing-committee-on-electoral-matters-inquiry-into-the-funding-of-political-parties-and-election-campaigns/> and <http://www.accountabilityrt.org/wp-content/uploads/2014/09/2011-JCEM-submission-re-2010-elections-FINAL- 2 .pdf>

the height to be permitted for particular buildings. Apparently, the statutory right of the Minister to intervene does not carry with it the obligation to give reasons for the decisions subsequently made.

The lack of information is also a result of the so-called 24 hr news cycle and the fact that it has become more and more difficult for the Fourth Estate to perform its critical role because of the decline in its resources. But governments have also played their part.

Government secrecy techniques

Governments have developed media units with the ability and expertise to control the supply of information about government to the community.⁷ And then there is spin.

Looking at the Commonwealth Parliament (in late December 2012), the Hon. Malcolm Turnbull went further and painted a bleak picture at the Woodford Festival saying that it has never been easier for parliamentarians to lie and that parliamentarians treat us with contempt. He expressly included himself among the parliamentarians⁸. The explanation he offered was what he called the 60 second news cycle and the domination of politics over serious policy development.

Is “spin” a form of lying? It can be subtle and sophisticated. Consider a recent example of the Victorian Planning Minister commenting on the issue of whether Victoria should follow the NSW lead and ban political donations from developers. The Age reported that, when interviewed on the ABC, he was “firm in saying it was not needed”.⁹

What he said was a very skilled short reply expressing a firm position and supporting it by “setting up windmills” which he then purported to knock down.

(a) "I am not sure why you would criminalise one section of the business community over another. If you are going to criminalise one part of the business community, I fail to see why on earth you wouldn't do it for other parts."¹⁰

(b) While praising the measures in place in New South Wales, which he said were working, He was reported as saying that “it was crucial Victoria did not follow that state's lead”, because “no [planning] decision here is made with any level of patronage attached to it; they will only be based on merit”.¹¹

⁷ Op Cit , 47

⁸ <http://www.youtube.com/watch?v=VT0tpzMelyI>

⁹ Press report - <http://www.theage.com.au/victoria/donations-by-developers-should-not-be-banned-in-victoria-says-planning-minister-matthew-guy-20140902-10bl55.html#ixzz3Ec7WN8PH>

¹⁰ Analysis: the reason advanced is based on a false premise that prohibiting developers making donations is criminalising developers when it does no more than seek to address the reality of the high risk of corruption by some flowing from secrecy, opportunities now provided, the potential profits at stake and the reality that long experience around Australia has shown that the risk is real.

These responses provided more issues than answers. Were the responses framed deliberately to avoid the issues and the concerns at which the banning of developer donations is aimed? Why was that course taken? Might it be that he was aware that there is a real risk of corruption and no answer to the case for excluding developers? Or is it possible that past planning decisions had been influenced by donations or that there are other reasons for strongly resisting the proposal? In the modern media interview, there is not enough time for in-depth interviews.

How have we got into this situation?

There have been a number of forces at work including the pursuit of power and its retention. But I suggest there is a fundamental reason, one that has been overlooked.

We, and too many of our elected representatives, have forgotten, or are unaware of, a longstanding ethical and legal obligation – that Public office is a Public trust.

We entrust our elected representatives with the power to decide what will best serve our public interest. That power carries with it the fiduciary obligation to serve us, and in doing so, to give priority to the public interest over their personal interests. This is the long forgotten ethical principle articulated by Plato and the legal principle recognised by the common law.

I suggest our collective amnesia is a major factor that helps to explain the current situation; for, if you, as a member of parliament, are unaware of the principle, it is not something that you can, or will, take into account in making decisions and, as a result,

- your thinking will more likely focus on political considerations, and
- in your dealings with the people, you will be less likely to treat them with respect and honesty.

Confession and Question

I was unaware of this principle until 5 years ago. Is anyone here familiar with the legal and ethical principle that people who hold public office are public trustees?¹² How did you become familiar with it?

¹¹ Analysis: Again the reason proceeds on a false premise – that the problem sought to be addressed is the patronage of developers. The Oxford dictionary identifies several meanings, the relevant one being – “The power to control appointments to office or the right to privileges.”¹¹ No-one is suggesting that there is “patronage”. The concern is about donations being given to influence decisions and the risk of them succeeding. It should also be noted that he did not refer to the past and the last sentence refers to future decisions and is silent about, and so avoids, the issue as to the basis of past decisions.

¹² Approximately 10% of the audience responded in the affirmative.

The content of the principle

Let me quote the statements of principle given by the former Chief Justice of the High Court, Sir Gerard Brennan, in his speech before presenting the ART Integrity Awards last year.¹³

He said

“It has long been an established legal principle that a member of Parliament holds “a fiduciary relation towards the public”¹⁴ and “undertakes and has imposed upon him a public duty and a public trust”.¹⁵ 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 trustee.¹⁶

Turning to the question of enforcement, he said:

“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 - interest)¹⁷ – 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.”

¹³ For speech, go to <http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/>, and quoted passages at pp3 and 5.

¹⁴ (quoting Higgins, J. in *R v Boston* (1923)33 CLR386, 412)

¹⁵ (ibid408)

¹⁶ citing Rich,J in *Horne v Barber*(1920)27CLR494,501

¹⁷ 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.”

Recognition of the legal Principle and its application

Where has the legal principle been recognised?¹⁸ Acting in breach of the public trust has been recognised in the High Court as rendering a contract illegal and resulting in an agreement being a criminal conspiracy. The legal concept of a position of public trust is recognised, for example, in s 116 of the Australian Constitution. Conduct in breach of it is mentioned in Australian Statutes establishing anti-corruption bodies (including the IBAC legislation) in the lists of the types of conduct they may investigate. A number of common law offences have been based on the principle including misconduct in public office.

The common law rules for sentencing those convicted of criminal offences require the principle to be taken into account. In particular, if the conduct in issue was also in breach of the public trust principle, that fact will aggravate the seriousness of the crime and make the issues of specific and general deterrence of greater significance. As a result, a heavier penalty will be required than would otherwise be the case.

Of particular relevance in the urban planning area is recognition of the principle in the common law rules for the interpretation of discretionary statutory powers¹⁹. Where such powers are conferred on people and agencies by statute, the courts have held that they are “conferred as it were upon trusts” and are to be interpreted to require that they be exercised in the public interest to promote and not defeat or frustrate the object of the legislation.

Application of the principle in Urban Planning?

I submit that this rule would apply to the broad discretionary statutory powers given to the Planning Minister to intervene and issue planning permits and would be relevant in any legal challenge to the validity of the exercise of those powers.²⁰

A puzzling example of the exercise of those powers is the new phenomenon of “Flipping” in which recipients of permits from the Minister, or a purchaser from them, seek fresh permits from the Minister adding to the height of the proposed development or for a change of use.²¹ For example, in relation to 108 South Bank, the first application secured a permit for a 47 level building.

¹⁸ See *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. <http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-3.pdf> Appendix 4.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ See media reports <http://www.theage.com.au/victoria/developers-flipping-projects-for-huge-profits-20140901-10b3a8.html> and <http://www.theage.com.au/victoria/melbourne-city-council-bends-sacrosanct-rule-to-allow-tower-over-the-yarra-20140910-10f4e1.html#ixzz3EcYVsGeb>

The owner had purchased it in 2008 for \$14.2 M and sold it with that permit for \$42.2 M. The new owner is now seeking a permit for an 80 level building, close to doubling its height.

More information would be needed to know how the statutory power might be applied in that situation and what will be the relevant considerations bearing in mind the power is to be exercised in the public interest to promote and not defeat or frustrate the objects of the legislation. For example, would it be relevant to consider whether the market development of “flipping” is advancing the aims of the legislation. More specifically, what criteria would best serve those aims in deciding whether, and if so how, to consider an application to replace a previous permit with one for a much higher building?

The relative secrecy in which the “flipping” appears to occur, and the potential significant profits that can be made, add to the real risk of corruption. But, on the information presently available in the media about the matters, IBAC could not start an investigation.

Application to discretionary statutory powers- An English example

A seemingly more straightforward situation is that the subject of a relatively recent English decision, upheld on appeal in the House of Lords,²² which applied the public trust 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.²³

In the House of Lords, Lord Bingham said.

“Statutory power conferred for public purposes is conferred as it were 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”.²⁴

But in the case of elected representatives, is it 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:

²² Magill v Porter (2002) 2 AC 357.

²³ 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)

²⁴ 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>

“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 and 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.²⁵

The role of the Common Law.

Before leaving this area and turning to the question of addressing our collective amnesia, may I briefly refer to the fundamental role of the common law in our system of government.

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

“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.”²⁶

As to decisions of English courts, although no longer binding precedents, they are considered and applied by Australian courts,²⁷ and are particularly relevant when shedding light on ancient common law principles and their application - such as the one we are considering.

²⁵ 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.

²⁶ Sir Owen Dixon, “The Common Law as an Ultimate Constitutional Foundation”, in Jesting Pilate, The Law Book Company (1965), 203, 204

Reform - What can Victorians do to strengthen our government integrity system?

As to the immediate future, we can ask those seeking our vote in our forthcoming State election to commit to restoring open and accountable government. To that end, the ART has written to the Coalition, the ALP and the Greens seeking the following commitments:

1. *IBAC*. The IBAC legislation be amended to

- give IBAC the same ability as NSW's ICAC to investigate corruption and
- to deal with the uncertainties and problems created in the handling of "protected disclosures" identified by the IBAC Commissioner and the Ombudsman.

2. *Political Funding*. The State of Victoria lacking appropriate legal controls to prevent private funding of political parties leading to anti-democratic, if not corrupt, outcomes, an Inquiry be held into the political funding in Victoria of Parties, Members of Parliament and Candidates by the Joint Electoral Matters Committee.

3. *FOI*. Victoria's freedom of information legislation be repealed and replaced by adopting the Queensland Solomon Report and the Right to Information legislation in place in Queensland and Tasmania.²⁸

What other action is needed to

- secure these commitments,
- ensure due observance of the changes made and
- preserve the reforms in the future?

I suggest that they include changing the Public Trustees' culture to one that accepts and supports the public trust principle

To achieve those objectives it will be necessary to make the public trust principle a public issue through the old and new media. This election provides the opportunity for the public office public trust principle to be put back into the day to day discussion and commentary on politics and government. Where better to start than the urban planning area?

But while acting to end the present amnesia in the community steps need to be taken to try to ensure that it won't happen again.

²⁷ 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 .

²⁸ For more details see <http://www.accountabilityrt.org/art-seeks-accountability-committments-prior-to-victorian-state-elections>

To address both objectives, the subject of the public trust legal and ethical principle, its history and content, will need to be restored to secondary and tertiary studies, wherever it is relevant , including, for example, the study of ethics, government, law, philosophy, politics, urban planning, architecture and related fields. I suggest that we need our Universities to take the lead on this.

On whom does the responsibility rest? The short answer is everyone; including the public trustees (the public service, including the private sector providing public services for or to the public sector, Parliamentarians and the Parliament, the Judiciary), we, the beneficiaries, and the Fourth Estate.

But we must remember that, under the public office public trust principle, we, the people have the ultimate responsibility to decide whether and if so how and when to take action where there is a breach of the public trust principle; we have the power to change the elected public trustees. To disengage from our democracy simply because we have lost faith in it is to deny our responsibility. Further, if we fail to continue our engagement, then we are the ones who must accept the ultimate responsibility for the future failures of our democracy.

This is a major challenge. But it would have been much harder before we had the present forms of speedy electronic communication and access to information that is public. They in turn have improved in the 8 years since the ART came into existence. And there has been an increase in the number of people publicly expressing their concerns about the state of our democracy and the particular issues we have raised.

One of our new members, Carmel Benjamin AM, has decided to try to establish an independent network of people concerned about these issues and motivated to do something about them. She has created Ican – the Independent Community Accountability Network. In its first 3 months it has been joined by 53 people. She can be contacted at c.benjamin@bigpond.com

Conclusion.

Are these ideas whose time has come? There is only one way to find out.