

Public Office as/is a Public Trust

David Solomon AM

Former Queensland Integrity Commissioner

INTRODUCTION

The title of this paper encapsulates two concepts used by judges and commentators to describe the obligations and duties of those elected or appointed to public office—that is, members of parliament, officials and others who discharge public duties. The first concept—public office as a public trust—is favoured by some judges who take the word ‘trust’ in its strictly legal sense, involving fiduciary obligations under equitable doctrines. Former Chief Justice of the High Court, Robert French, has referred to the ‘public trust metaphor’, saying the notion of public office as a public trust is an old one, ‘borrowed ... from the principles of equity which define the duties of trustees’.¹

The second concept—public office is a public trust—uses ‘public trust’ as a special kind of trust, involving obligations not necessarily the same as those that arise with private trusts. This is not to say that the ‘public trust’ is not a legal concept: as will be shown below, it is the basis on which successful criminal prosecutions have been brought against some politicians in recent years, most notably, the former NSW Minister, Eddie Obeid.

THE TERM ‘PUBLIC TRUST’ IN THE LAW

In fact, the term ‘public trust’ has been recognised and adopted in the statutes establishing anti-corruption bodies in New South Wales, Queensland, Western

¹ Robert French, ‘Public Office and Public Trust’, the Seventh Annual St Thomas More Forum Lecture, 2011. Transcript, p. 8.

Australia and Victoria,² requiring those bodies to provide a safeguard against ‘a breach of public trust’. It is also recognised as an ethical requirement in the Public Sector Ethics Act 1994 (Qld), which states in s. 6, ‘In recognition that public office involves a public trust ...’), and in the Commonwealth Government’s Ministerial Code (‘In recognition that public office is a public trust...’).³

The public trust principle is not restricted to criminal laws. It was used in aid of a decision by the High Court in 2017 holding that a South Australian Senator, Bob Day, was disqualified from sitting as a Senator under the Constitution.⁴ The High Court’s decision sets out in general terms what are the public trust obligations and duties of a Member of Parliament as a public officer.⁵ These include ‘that parliamentarians have a duty not to use their position to promote their own pecuniary interests (or those of their family or entities close to them) in circumstances where there is a conflict, or a real or substantial possibility of conflict between those interests and their duty to the public’ and that ‘the fundamental obligation of Members of Parliament in carrying out their functions was to act with fidelity and single-mindedness to the welfare of the community’.⁶ Significantly, the High Court’s decision also shows that these obligations and duties are fundamental, under the Constitution.

THE HISTORY OF THE NOTION OF PUBLIC TRUST

In one sense, there is nothing particularly new about the High Court’s views about the public trust in the Day case. The various judgments quote and adopt statements from judgments of the High Court dating back almost a century. But they come at a time when there is renewed interest in the notion of the public trust and the conduct that is required of (or forbidden to) members of Parliament and other public officers.

² For example, the New South Wales *ICAC Act* (1988). s. 8.3.

³ Australian Government, Statement of Ministerial Standards. Accessed at: <https://www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards.pdf>

⁴ *Re Day* [No 2] [2017] HCA 14.

⁵ The Court was unanimous in its decision but a number of different judgments were delivered. They provide slightly different formulations of the obligations of a public officer.

⁶ Submission by the Crown in the Obeid case, based on the judgments in Day, summarised in the judgment of Bathurst CJ in *Obeid v. R* (2017) NSWCCA 221 [55].

The notion of public trust has a long history in English and American law. In the 1980s and 1990s, Professor Paul Finn⁷ wrote a series of papers in which he explained the origins of the concept and its evolution. In one such article, he wrote:

Though one can point to a significant body of medieval law in England regulating the holders of public office, the common law idea that the officers of government held trusts for the public and were accountable to the public for the use and exercise of their offices, seems to have been consolidated, if not necessarily established, in the 17th century.

... In the shadow of the constitutional monarchy, and with governmental offices in the main formally held under the Crown, the judges of the 17th and 18th centuries were unable to draw the treasonable conclusion that public power came directly from the people. But by a more circuitous route they could still bring public officials into a trust relationship with the public: whatever the source of their power and position, if their offices existed to perform a public service (to discharge public duties) theirs were offices of 'trust and confidence concerning the public'.⁸

The relevant criminal law in the 18th century was set out in the following statement by Lord Mansfield in *R v Bembridge*, a case involving fraudulent behaviour by an accountant in the office of the paymaster-general of the forces:

Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatsoever way the officer is appointed. ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between King and the subject it is indictable. That such should be the rule is essential to the existence of the country.⁹

⁷ Research School of Social Sciences, Australian National University. Later, a judge of the Federal Court.

⁸ Paul Finn, 'A Sovereign People, a Public Trust' in P.D. Finn (ed.), *Essays on Law and Government*, Vol. 1., Sydney, Law Book Co, 1995: 10-11 (footnotes omitted).

⁹ *R v Bembridge* (1783) 93 ER 679 at 681, quoted in David Lusty, 'Revival of the Common Law Offence of Misconduct in Public Office', *Criminal Law Journal* 38 2014: 340.

In the 18th and 19th centuries, ‘there were frequent prosecutions for the common law offence of misconduct in public office (although seldom referred to by that precise name) in the United Kingdom and the United States’, as well as occasional prosecutions in Canada and Australia, according to David Lusty.¹⁰ While such prosecutions continued in the US in the 20th century, and a similar offence was prosecuted in Canada, elsewhere it was rarely utilised. It was not until the last quarter of the 20th century that the common law offence was again prosecuted in the UK, Hong Kong, Australia and elsewhere.¹¹ As will be seen later, the Obeid case demonstrates its continued use in Australia today.

Criminal prosecutions aside, according to Chief Justice French:

The importance of the public trust metaphor diminished over time with the rise of specific mechanisms for oversight and accountability, including statutory regulation of the public service, parliamentary scrutiny of official action, the political accountability of ministers and the employment arrangements of officials. However, a loss of faith in these mechanisms in the late twentieth century was, as Justice Finn has observed, ‘one of the principal stimuli to renewed interest in “the public trust” and its implications both for officials and for our system of government itself’.¹²

The person most responsible for reviving interest in the public trust doctrine, particularly in Australia, was Professor Finn, as he then was. I have mentioned earlier his many papers discussing the subject. Additionally, he was a principal consultant to the Queensland Electoral and Administrative Review Commission for its ‘Review of Codes of Conduct for Public Officials’ and was quoted extensively in its report. He was subsequently a leading consultant to the West Australian Royal Commission into the Commercial Activities of Government and other Matters – otherwise known as the WA Inc Royal Commission, which reported in 1992.

¹⁰ Lusty, ‘Revival’: 340.

¹¹ Lusty, ‘Revival’: 341.

¹² French, ‘Public Office and Public Trust’: 12. The quotation is from P.D. Finn, ‘The Forgotten “Trust”: The People and the State’, in M. Cope (ed.), *Equity: Issues and Trends*, Leichhardt, Federation Press, 1995: 134.

DEFINING THE PUBLIC INTEREST

The public trust doctrine requires a public officer to advance the public interest, as opposed to personal interests. This raises the further question of how the public interest might be determined, or if it is possible to say with any precision what it might be. In a speech given when presenting the 2013 Accountability Round Table Integrity Award, former Chief Justice Sir Gerard Brennan said:

This notion of the public interest is not merely a rhetorical device – a shibboleth to be proclaimed in a feel-good piece of oratory. It has a profound practical significance in proposals for political action and in any subsequent assessment. It is derived from the fiduciary nature of political office: a fundamental conception which underpins a free democracy.¹³

Drawing on cases from the 1920s to elaborate on his theme, Sir Gerard Brennan argued that:

It has long been established legal principle that a Member of Parliament holds ‘a fiduciary relation towards the public’ and ‘undertakes and has imposed upon him a public duty and a public trust’.¹⁴ 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. As Rich J said: ‘Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit’.¹⁵

Sir Gerard Brennan acknowledged that the demands placed upon members of Parliament and the Executive Government were ‘many and varied’ and that ‘the law takes cognisance of the realities of political life’. Nonetheless, the law ‘assumes that the public interest is the paramount consideration in the exercise of all public

¹³ Sir Gerard Brennan, ‘Presentation of Accountability Round Table Integrity Award’, Canberra, 11 December 2013.

¹⁴ The reference is to *R v Boston* (1923) 33 CLR 386, 412 per Higgins J.

¹⁵ The reference is to *Horne v Barber* (1920) 27 CLR 494, 501.

powers'.¹⁶ Citing former Senator and Government Minister Fred Chaney's reflections on 'the compromises needed in government and the many claims on the loyalty of practising politicians', Sir Gerard Brennan noted that Chaney 'did not suggest that any of these claims should subvert consideration of the public interest'. Instead, '[w]henever political action is to be taken, its morality – and, indeed, its legality – depends on whether the public interest is the paramount interest to be served by the intended action'.¹⁷

Sir Gerard Brennan summarised the duty of officials to the public interest as follows:

True it is that the fiduciary duties of political officers are often impossible to enforce judicially. 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.¹⁸ 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.¹⁹

POLITICAL DEMANDS AND THE PUBLIC INTEREST: RECENT STEPS TO FILL THE VOID

The compromises needed in government and the many claims on the loyalty of practising politicians that Sir Gerard Brennan and Fred Chaney addressed were matters that also concerned Professor Paul Finn. In 1992, he wrote about the 'modern nature of a parliamentarian's trusteeship'. He said:

It is right that we should be unrelenting in our insistence upon probity in government and in public administration. But equally we should not forget,

¹⁶ Brennan, 'Presentation'.

¹⁷ The reference is to Fred Chaney, 'Integrity in Parliament – Where Does Duty Lie?', Melbourne Law School, 11 October 2011. <https://www.accountabilityrt.org/wp-content/uploads/2011/10/Inaugural-Lecture-Fred-Chaney.pdf>

¹⁸ The reference is to *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1,10.

¹⁹ Brennan, 'Presentation'.

as a media-driven Australian public opinion seems in danger of doing, that the processes of the democratic, representative and party-based system to which we have committed ourselves, are based, in part at least, upon the striking of compromises, upon securing and using influence, upon obtaining advantages for constituents, and – let it not be gainsaid – for Members of Parliament and for Ministers. Necessarily, limits, and strict ones at that, must be placed upon the compromises and the like we are prepared to countenance in allowing our systems of government to function. But unless we recognise in the roles we have given our politicians and in the laws that bind them, that in some degree and for some purposes, compromise, the use of influence, and advantage seeking and taking are tolerable is not necessary features of our public life, we run the risk of demanding standards of our elected officials which are beyond their reach and which also may be prejudicial to the very public purposes we ask them to serve for our benefit.

My argument is not for the tolerance of corruption. Far from it. It is for the recognition that the standards of conduct properly to be expected of a given class of officials are, first and foremost, the standards of role ... Our quest for what is meet in official behaviour is not answered simply by calling an official a public trustee or fiduciary and by assuming that this carries set consequences...²⁰

This partial void can be filled by what parliament and, where relevant, the common law say about the standards that must be met. In 1996, Justice Finn, as he then was, pointed out that:

... public service legislation in Australia has served and serves public and constitutional purposes as well as those of employment. From 1862, Australian public service legislation has imposed strictures and limitations upon the employment and non-employment (or private) conduct and activities of public servants; the acquisition of personal interests conflicting with duties of office ...²¹

²⁰ Paul Finn, 'Integrity in Government', *Public Law Review* 1992: 248 (emphasis in the original).

²¹ *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24.

Referring to this judgment, Justices Gummow, Hayne, Heydon and Kiefel, in a High Court decision, stated ‘Such legislation facilitates government carrying into effect its constitutional obligations to act in the public interest’.²²

The Obeid case is a recent example of the way the common law seeks to enforce the trust principle through the criminal law. Obeid was a former Minister in NSW. He was charged that he, while holding office as a Member of the Legislative Council, ‘did in the course of or connected to his public office wilfully misconduct himself by making representations’ to a public servant with the intention of seeking an outcome favourable to a company in which he had an interest ‘knowing at the time he made the representations that he had a commercial and/or beneficial and/or family and/or personal interest in the said tenancies which he did not disclose to’ the public servant. The NSW Court of Criminal Appeal, applying a decision by the Victorian Court of Appeal,¹⁸ held that the elements of the offence of misconduct in public office were:

- (1) a public official;
- (2) in the course of or connected to his public office;
- (3) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.²³

On appeal, Obeid argued that the court proceedings involved an assessment of the standards, responsibilities and obligations of a Member of Parliament, which meant the matter fell within the exclusive jurisdiction of the Parliament and was not within the cognisance of the Court. All members of the Court rejected this argument.

In the Obeid case, the trust or duty issue in point (3) above was argued on the basis that it was for the Crown to establish beyond reasonable doubt that it was Obeid’s

²² *Commissioner of Taxation v. Day* (2008) HCA 53 [34].

²³ *R v Quach* (2010) 27 VR 310; [2010] VSCA 106, at [46].

sole purpose to advance his or his family's pecuniary interests. This meant it was not necessary to specify the specific obligations and duties of a Member of Parliament. An attempt by senior counsel for Obeid to have the court consider what those obligations and duties would be was rejected by the High Court on a special leave application. It was unnecessary to do so because of the way the Crown had put its case in the trial.²⁴

As mentioned earlier, the High Court considered the obligations and duties of parliamentarians in the Day case. That was one of a number of cases considered by the High Court (in its role as the Court of Disputed Returns) following the 2016 Federal Election concerning the constitutional qualifications (or lack of them) of some MPs and Senators. At issue was whether Day was disqualified from sitting as a Senator because of the provisions of s 44(v) of the Constitution, which states (in part):

Any person who:

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth ...; shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

At issue were arrangements for the lease of property in which Day had an interest that was to be leased by the Commonwealth for use as Day's electoral office. A significant issue that had to be met by all members of the High Court, was a decision by Chief Justice Barwick, sitting alone as the Court of Disputed Returns, in the only other case considered by the Court concerning s 44(v) of the Constitution, *In re Webster*.²⁵ According to that decision, the purpose of the provision 'was to secure the freedom and independence of Parliament from the Crown.'²⁶ Such a view, if followed in the Day case, would mean there could be no disqualification, because Day's financial arrangements would not allow the Commonwealth to influence Day's parliamentary activities. However, in *Day*, Barwick's interpretation was rejected by every member of the High Court.

Chief Justice Kiefel, and Justices Bell and Edelman, said in their judgment:

²⁴ *Obeid v. The Queen* (2018) 23 March 2018.

²⁵ (1975) 132 CLR 270; [1975] HCA 22.

²⁶ *Re Day* [No 2] [2017] HCA 14, at [14].

A conclusion that s 44(v) has some purpose wider than the protection of the freedom and independence of parliamentarians from the influence of the Crown is inescapable. That wider purpose can only be the prevention of financial gain which may give rise to a conflict of duty and interest.²⁷

They said the object of s 44(v):

... is to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict.²⁸

They continued:

A construction of s 44(v) which proceeds from an understanding that parliamentarians have a duty as a representative of others to act in the public interest is consistent with the place of that provision in its wider constitutional context. The representative parliamentary democracy, for which the Constitution provides, informs an understanding of specific provisions²⁹ such as s 44(v) and assists in determining the content of that duty, which includes an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations.³⁰ In *R v Boston*, Isaacs and Rich JJ spoke of a parliamentarian having a 'single-mindedness for the welfare of the community'.³¹ More recently, it has been said³² that Parliament has important functions to question and criticise government on behalf of the people and to secure accountability of government activity. This is not a new idea.³³ There can be

²⁷ At [39].

²⁸ At [45].

²⁹ The reference is to *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 211; [1992] HCA 45.

³⁰ The reference is to *Wilkinson v Osborne* (1915) 21 CLR 89 at 98-99; [1915] HCA 92.

³¹ (1923) 33 CLR 386 at 400; [1923] HCA 59.

³² The reference is to *Egan v Willis* (1998) 195 CLR 424 at 451 [42], 453 [45]-[46]; [1998] HCA 71.

³³ The reference is to *Horne v Barber* (1920) 27 CLR 494 at 500; [1920] HCA 33.

no doubt that if personal financial interests were to intrude, the exercise of those obligations would be rendered difficult or even ineffective.³⁴

They said the section ‘looks to the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest’.³⁵ Later, explaining why Barwick CJ’s ‘unduly narrow’ approach should be rejected, they said:

To give s 44(v) a limited operation, when it is accepted that it is intended to operate more widely, would be to deny its true purpose. Moreover there is much to be said for the view that the provision has a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy. So understood there can be no warrant for limiting its operation because of the consequences which might follow for a person who is disqualified.³⁶

Justices Nettle and Gordon, in their joint judgment, reached similar conclusions. In the course of their judgment they said:³⁷

Section 44(v) is located in Ch 1 of the Constitution, which provides for a system of representative government:³⁸ a system that vests the legislative power of the Commonwealth in a Parliament³⁹ and gives the people of the Commonwealth control over the composition of the Parliament.⁴⁰ In that system of representative government, the elected representatives exercise sovereign power on behalf of the Australian people. Parliamentarians ‘are not only chosen by the people but exercise their legislative and executive powers as representatives of the people’.⁴¹ The fundamental obligation of a Member of Parliament is ‘the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community’.⁴²

³⁴ *Re Day* [No 2] [2017] HCA 14, at [49], [50].

³⁵ At [66].

³⁶ At [72].

³⁷ At [269].

³⁸ The reference is to *ACTV* (1992) 177 CLR 106 at 229; [1992] HCA 45.

³⁹ S 1 of the Constitution.

⁴⁰ See, for example, ss 7, 13, 24, 28, 32 and 41 of the Constitution.

⁴¹ *ACTV* (1992) 177 CLR 106 at 138.

⁴² *R v Boston* (1923) 33 CLR 386 at 400; [1923] HCA 59, (emphasis in the original).

Justice Keane reached similar conclusions and quoted more fully the statement of Justice Isaacs in *The King v. Boston*:

The fundamental obligation of a member in relation to the Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation ... is *the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.⁴³

CONCLUSION

The judgments in the High Court indicate that members of Australian parliaments have a duty to act 'in the public interest'; that they have a 'fundamental obligation' to 'serve'; that they should act 'with fidelity with a single-mindedness for the welfare of the community'; that they are obliged 'to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations'; that they should avoid putting 'themselves in a position where their duty to the people they represent and their own personal interests may conflict'. The term 'public trust' was not used by any member of the court, but it is a convenient shorthand for the obligations set out in their judgments.

⁴³ *Re Day* [No 2] [2017] HCA 14, at [179].