

# **TRUST IN PUBLIC OFFICE**

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This is not a paper about the law of Equity, nor about Judicial review of administrative decisions.

My intention is simply to discuss a concept which provides, if you like, a general explanation of accountability which can inform any consideration of the acts of public officials in relation to misconduct, and the remedies that might be available, and which in reality underpins the work of all integrity agencies.

Legal cases speak of a fiduciary relationship as something which creates obligations on a person, usually as a result of a relationship with another. A general definition has proven elusive but there will ordinarily be an element of trust, confidence, reliance or vulnerability. Examples include a partnership and doctor/patient and solicitor/client relationships. There are, however, many others. The obligations of a fiduciary depend on the particular circumstances. The distinguishing obligation of a fiduciary is the obligation of loyalty which includes that a fiduciary must act in good faith and must not benefit from a conflict between personal interest and fiduciary duty.

A trust, where a person ordinarily holds something of value for others, is one form of fiduciary relationship.

I acknowledge the work of Professor, later Justice Paul Finn, who has written widely about the subject, and on whose work I have placed substantial reliance.

## **The general nature of obligations which attach to holders of public office**

The Royal Commission into Commercial Activities of Government and Other Matters – the WA Inc. Royal Commission – is notable for a number of things. First, the nature of its enquiry about extraordinary events surrounding the Western Australian State Government during a period between the mid to late 1980's. Second, the quality of the Commissioners, who consisted of Justice Geoffrey Kennedy, the outstanding judge of his time on the WA Supreme Court, Sir Ronald Wilson, a retired Justice of the High Court of Australia, and the

Hon. Peter Brinsden QC, a retired senior Supreme Court Judge. Third, its exploration of the trust principle in relation to public officials has been described as the most sustained Australian elaboration of it.

Some of those extraordinary events are worthy of brief mention. The State Government was said by the Royal Commission to have engaged in business dealings which “elevated personal or party advantage over their constitutional obligation to act in the public interest”<sup>1</sup>. Those dealings resulted in a loss of public money, estimated at a minimum of \$600 million.

In its second report tabled in November 1992, the Commission set out what it considered to be minimum standards of conduct for Public Officials.

It was said Public Officials:

- “- must act under and in accordance with the law;*
- must exercise their offices honestly, impartially and disinterestedly and be seen to do so;*
- must act fairly and with due regard to the rights and interests of the members of the public and of other public officials with whom they deal;*
- must exercise their offices conscientiously and with due care and skill;*
- must be scrupulous in their use of their position and of public property and of information to which they have access; and*
- must be prudent in their management of public resources”*

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<sup>1</sup> WA Inc. Report 2 para 1.1.2

Those general precepts were said to give rise to what was described as a web of more detailed and specific prescriptions which governed different facets of official behaviour, including:

- Conflict of interest.
- The receipt of gifts.
- The use and disclosure of information acquired in office.
- Spare time employment, or “moonlighting”.
- Movement from public sector to private sector employment, or the “revolving door”.
- Due process obligations.

In delineating those precepts the Commission set considerable store in a 1952 decision of the Supreme Court of New Jersey, which addressed the obligations of state officials there in the following terms:

*“[Public officers] stand in a fiduciary relationship [that is a relationship of trust] to the people whom they have been elected or appointed to serve...As fiduciaries and trustees of the public weal they are under an obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity...they must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves...their actions are inimical to and inconsistent with the public interest.*

*These obligations are not mere theoretical concepts or idealistic abstractions of no practical force or effect...The enforcement of these*

*obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people.”<sup>2</sup>*

The Commission also explained that the standards set out were, for the most part, founded in a trust principle.

In that regard, the Commission said two complementary principles expressed the values which underlay constitutional arrangements.

The first was the democratic principle. The second, “the trust principle” expressed the condition on which power was given to the institutions of government and to officials, both elected and appointed.

That principle was:

*“The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.”*

The principle was said to provide the “architectural principle” of our institutions, was a measure of judgment of their practices and procedures, and informed the standards of conduct to be expected of public officials.

### **The relevance of equitable notions of fiduciary obligation to public trust**

The concept of a trust, public or otherwise, is something which the lawyers of today would regard as being within the exclusive province of the law of Equity.

In its beginnings, the concept of a public trust owed more to the common law, but eventually Equitable concepts imbued it.

The existence of the public trust principle in relation to public officials has been recognised in Australia in decisions of the High Court, in Acts of Parliament which create integrity agencies like the Corruption and Crime Commission, and in Codes of Conduct across Australia.

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<sup>2</sup> Driscoll v Burlington Bridge Co 86A 2d 201 (1952) at 222 – 223 per Vanderbilt CJ (US)

By way of example, s8 of the *New South Wales Independent Commission against Corruption Act 1988* (“ICAC Act”), headed: “*General Nature of Corrupt Conduct*” includes as a requirement for one species of corrupt conduct: “*Any conduct of a public official ... that constitutes or involves a breach of public trust*”.

There are further requirements in the following section.

The Western Australian *Corruption and Crime Commission Act 2003* has a similar provision to s8 of the ICAC Act, doubtless derived from it.

Inherent in the concept of a trust is, of course, the existence of an obligation on the part of the trustee to justify his or her execution of it.

Thus, in the Gospel of Luke, Christ is said to have given to his disciples the parable of the steward, who was called by his master, and told:

*“Give an account of thy stewardship”.*

As stated in the decision of the US Court set out above, enforcement is essential to the soundness and efficiency of government.

### **The exercise of public power and standards of conduct**

Prof. Finn says that the concept of “public trust” has the twin concerns found in fiduciary law generally. Those are the question of the propriety (or legality) of the exercise of the public power and the standards of conduct to be expected of those entrusted with power. I have already referred to the standards of expected conduct that flow from the trust principle, and it is on the exercise of power that I intend to focus.<sup>3</sup>

Prof. Finn further points out that in England by the middle of the seventeenth century the notion that public power, legislative and otherwise, was fiduciary and the trust concept had become an established mode of thought. By the eighteenth century,

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<sup>3</sup> The Forgotten “Trust”: The People and the State. P.D. Finn *Equity, Issues and Trends* ed. M. Cope (1995)

both courts and the Parliament had described the personal obligation of those in public office, or exercising power under a statute, as a “*trust*”.

In Australian law the concept of fiduciary duties attaching to holders of public office passed into “virtual obscurity” in a matter of decades, after demonstrably being held to apply in the eighteenth and early nineteenth centuries.

One explanation for that was the rise of specific mechanisms for oversight and accountability such as: the advent of cabinet government, the consolidation of the principles of ministerial responsibility and the passing of comprehensive public service legislation.

A century on, the loss of faith in the efficacy of those mechanisms has been one of the principal stimuli to the renewed interest in the “public trust” and in its implications both for officials and for our system of government.

That has resulted in the creation of integrity agencies such as ICAC, the CCC and the CMC in Queensland, those bodies generally having the powers of a Royal Commission. The only mainland States that do not have such a body, Victoria and South Australia, are of course in the process of creation of the same.

Other regulatory bodies have also been created, such as Public Sector Commissions, regulatory documents such as Codes of Conduct created, often with regulatory status.

Barratt<sup>4</sup> points out that it was in 1827, that the House of Lords first held that persons in receipt of public moneys were liable to account in a court of Equity for the misapplication of funds; that is, such persons were subject to a public trust in respect of the funds, a remedy that was displaced by jurisdictional fusion and administrative audit surcharges.

As stated, the principle of public trust in relation to members of Parliament has been considered and pronounced upon in Australian law.

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<sup>4</sup> Public Trusts. John Barratt (2006) 69(4) MLR 514-542

The High Court held in 1920 in the case of *Horne v Barber*<sup>5</sup> that a contract for payment of a commission, part of which was to go to a Member of Parliament for bringing about a sale of land to the government, was null and void.

Isaacs J said:

*“When a man becomes a Member of Parliament he undertakes high public duties. Those duties are inseparable from the position, he cannot retain the honour and divest himself of the duties. One of the duties is that of watching, on behalf of the general community, the conduct of the Executive, of criticising it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament – censure, which if sufficiently supported, means removal from office. That is the whole essence of Responsible Government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses. The effective discharge of that duty is necessarily left to the member’s conscience and the judgment of his electors, but the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening, to say the least of it, his sense of obligation of due watchfulness, criticism, and censure of the Administration. It is not a question of whether there was a contract to use his political interest or influence, or of whether he posed before the Minister and the Board as a member or a land agent. It is, in this case, whether the services claimed for were services which were understood to be, or to include, those of a person whose public duty was inconsistent with the private transactions which are the subject of the claim.”*

Rich J expressly invoked the concept of breach of trust in arriving at the same conclusion.

You will no doubt have noted in Justice Isaac’s judgment the statement:

*“The effective discharge of that duty is necessarily left to the members’ conscience and the judgment of his electors.”*

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<sup>5</sup> (1920) HCA 33; 27 CLR 494

That is, generally speaking, the Courts had no role to play, unless it be to decline to enforce an agreement, as there.

Three years later, in *R v Boston*<sup>6</sup> the High Court dealt with another case involving a payment to a parliamentarian, this time in a criminal context.

Chief Justice Knox referred to the payment in terms of there having been a breach of fiduciary duty, as the member had been put “*in a position in which his private interests and his duty to his employer are or may be brought into conflict with his public duty.*”

Higgins J said that: “*All the relevant cases rest on the violation of a public trust.*”

*Greiner and Moore*<sup>7</sup> was an early report of ICAC and concerned an attempt in 1992 by the then Greiner government in New South Wales to improve its slender majority in the lower House of Parliament by offering a senior government job to a disaffected former Liberal Member of Parliament who, if he took the job, would have to resign and would thereby create a by-election which the government would expect to win. It was not possible to appoint the member directly to the post. As a result and at the suggestion of the then head of the Premier’s Department, the Member was appointed to a senior position within that department, from which it was anticipated he would immediately be seconded to the job of choice. At the time of appointment applications had already closed and applicants interviewed. The Member was appointed immediately following his application.

In order for that initial appointment to occur, it was necessary under the *Public Sector Management Act* for the head of the department to form the opinion that the Member was the applicant of greatest merit.

ICAC found that the department head had not formed that opinion, but rather that the Member was appointed to the job to achieve the purpose described.

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<sup>6</sup> (1923) HCA 59; 33 CLR 386

<sup>7</sup> ICAC Report to NSW Parliament June 1992



A reference of the matter had been made to ICAC by Parliament in relation to Mr Greiner, and another Minister Mr Moore, and ICAC found that the appointment involved the performance of duty by both the Premier and Mr Moore in a way that was not impartial and also in a way that constituted a breach of public trust. It went on to find that each was thereby rendered liable to dismissal by the State Governor.

Accordingly, ICAC found there had been corrupt conduct in each case and so reported to Parliament.

As a consequence, both Mr Greiner and Mr Moore resigned.

An appeal to the Court of Appeal succeeded by majority<sup>8</sup>, partly on the ground that ICAC had failed to identify and apply any objective basis for the finding that the conduct could result in dismissal by the Governor, and the finding that there had been corrupt conduct was set aside.

As Gleeson CJ pointed out, the reasons of the Commissioner are not altogether consistent. In several places in the report he was at pains to say that both Mr Greiner and Mr Moore believed that what was to be done was lawful, before going on to then find they had acted corruptly.

However, both Gleeson CJ, whose implicit criticism of this new body and the rules under which it operated was acute, and Mahoney JA, who dissented as to the result, agreed the conduct was not impartial, Gleeson CJ stating the two men “found themselves in a position where there was a conflict between duty and interest” while the latter said that there was a breach of trust.

Justice Mahoney said there was a difference between conduct in the political sphere and the exercise of a statutory duty.

A public power could be exercised for the purpose of achieving a political object, and legislation could be passed to give effect to political interests or ideology beliefs, he said.

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<sup>8</sup> *Greiner v ICAC* (1992) 28 NSWLR 125

In Greiner and Moore's case, there was however an exercise of executive or administrative power, and the position was different. The judge said it was wrong to deliberately use power for a purpose for which it was not given and that public power had limits in addition to those imposed by the terms on which it was granted.

The ends for which public power might be exercised legitimately were limited by law, he said, and the power to appoint to a public office must be exercised for a public purpose, not for a private or political purpose.

As by law the appointment to the position in the Premier's Department had to be the applicant who was believed by the recommending officer to have greatest merit, for Greiner and Moore to acquiesce in that appointment, in the absence of such a belief, and for political reasons, was in the Judge's opinion a breach of public trust.

Following Greiner the ICAC Act was amended in 1994 to provide for each New South Wales House of Parliament to adopt a Code of Conduct and for a Ministerial Code of Conduct to be adopted. Corrupt conduct with respect to Ministers or Members of Parliament now requires a substantial breach of the applicable code. Alternatively, corrupt conduct by a Minister or Member of Parliament can also be established if it involves both a breach of the law and if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or Parliament into serious disrepute.

Findings of misconduct have been made under that provision in respect of members of the New South Wales Parliament.

There are English cases, which involve local government.

In Bromley London Borough Council v Greater London Council<sup>9</sup> in 1983 the House of Lords dealt with the lawfulness of a decision by the Greater London Council (GLC) to impose a levy on its constituent councils so as to be able to decrease fares on London's buses and tubes by 25 per cent, following an election promise by the newly elected Labour Party, and its Mayor, Mr Ken Livingstone.

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<sup>9</sup> (1983) AC 768

The levy was significant because not only did it cover the cost of the decrease in fares but also the consequential loss of a government grant of millions of pounds that followed from the decision to reduce fares.

The Bromley London Borough Council challenged the decision in part on the basis that the GLC had breached a fiduciary duty owed to ratepayers.

The Court of Appeal quashed the decision to charge the levy.

The appeal to the House of Lords was dismissed, and, three of the five judges expressly referred to the existence of a fiduciary duty.

Lord Diplock said that:

*“(A) local authority owes a fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory function, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage ...”*

As to the course sought to be pursued by the GLC:

*“That would, in my view, clearly be a thriftless use of moneys obtained by the GLC from ratepayers and a deliberate failure to deploy to the best advantage the full financial resources available to it ...”*

In a later decision of the House of Lords, *Magill v Porter*<sup>10</sup> the impact of the concept of a public trust in political decision making was also considered.

This case was referred to in the media as the “homes for votes” scandal.

In local government elections in May 1986 the Conservative Party retained control of a city council with a much reduced majority. In the belief that home owners were more likely than council tenants to vote Conservative, the leader and deputy leader

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<sup>10</sup> (2002) 2AC 357 (CA), 497 (HL)

of the council, formulated a policy to sell, pursuant to powers under the relevant Housing Act, 250 council properties a year in eight marginal wards, in an attempt to change the demographic.

An auditor was engaged under relevant legislation and certified that the leader and deputy leader and others had engaged in wilful misconduct.

In a leading judgment in the House of Lords, Lord Bingham said it was a general principle of public law that:

*“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.”*

As to the consequences of that, the Judge said:

*“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 are conferred betray that trust and so misconduct themselves. This is an old and very important principle”.*

In the result, the Conservative leader, Dame Shirley Porter, and her deputy were required to make good the sum of 31 million pounds, an amount which eventually increased, with interest and other costs, to about 45 million pounds.

Although a daughter of the founder of the Tesco supermarket chain in the UK, Dame Shirley apparently found this a challenging impost and eventually the council agreed to settle for a mere 12 million pounds.

Being in public life clearly has attendant risks.

**Acknowledgement of a place for Realpolitik**

At the time of the ICAC inquiry, and prior to his resignation as Premier, in a speech to the House Mr Greiner suggested a finding of corruption would have far reaching consequences and would be the “death of politics” as being a prohibition against political activity while in public office.

His observations included:

*“Under the English common law very serious obligations to act in the public interest are placed on those elected to public office, and yet our highest public officials are at the same time part of a political system which is about what is in many ways a large private interest in terms of winning or holding a seat or holding office. This is a very difficult philosophical matter. In simple terms, the philosophy, which was once called disinterestedness, meant that once elected to Parliament members were obliged to ignore the interests of their constituents and act only in what they considered to be the national interest.*

*We here in Australia chose not to adopt that view of parliamentary office. When the Labour movement gave us the party system last century a clear decision was taken to embrace politics and make it an integral part of our system.*

Prof. Finn suggests that necessary changes to legal, constitutional and political thought have not been made so as to enable use of the public trust in a principled way to explain and justify the standards now required of officials. He points out, echoing the Greiner speech, (or the converse):

*“As late as 1853 English courts could still adhere to 18<sup>th</sup> century Burkean notions of the parliamentarian’s trusteeship:*

*‘In the framing of laws, it is [a Member of Parliament’s] duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature.’*

*But if, in its fullest extent, this ever was other than an aspiration the development of political parties and the rise of the career politician no longer admitted of its unqualified acceptance. To put the issue bluntly: is a parliamentarian who subordinates his or her individual judgment to the binding force of party discipline, guilty of a dereliction of duty? The question itself admits of only one answer. But it goes to the heart of a dilemma now being experienced in a number of common law countries, particularly in the application of corruption laws to parliamentarians and Ministers.”*

Further, in relation to the creation of bribery related offences, he suggests:

*“These offences are workable enough when applied to non-elected officials (public servants, the officers and employees of statutory authorities, etc.) in respect of their conduct in office. But while they have a necessary and vital role in sanctioning the venal conduct of Members of Parliament and Ministers, if applied strictly and inexorably to them they could render the modern practice of government unworkable.”*

In the Court of Appeal in Porter v Magill<sup>11</sup> Schiemann LJ said:

*“It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality. ... R v Waltham Forest London Borough Council, Ex p Baxter [1988] QB 419. ... The essence of the case ... is contained in the following quotation from the judgment of Russell LJ:*

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<sup>11</sup> *ibid*

*'Party loyalty, party unanimity, party policy, were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other considerations which are required for a balanced judgment. If, by blindly toeing the party line, the councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote [is] potentially flawed.'*

In the House of Lords, Lord Bingham was somewhat more circumspect:

*"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 life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for 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 for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council."*

One application of the recognition given to political considerations is the weight given to the circumstance that a decision maker is a Minister, as mitigating against an imputation of bias.<sup>12</sup>

In Greiner, Mahoney JA referred to, but was left unpersuaded, by the “death of politics” speech.

Political considerations are no doubt relevant to any consideration by a court of a decision made by an elected official.

Further, a distinction must presently be drawn between an exercise of legislative power in Parliament at least, and the exercise of an executive or statutory function.

At the end of the day, however, it seems reasonably likely that if a court was of the view that the public interest was not a real factor in an executive or statutory decision, but rather the decision was almost entirely motivated by partisan political interest, it could act.

### **The way forward**

The principle of the public trust and the existence of a fiduciary duty owed by public officials to those whom they serve are now recognised and accepted in our legal and political systems.

There is a plethora of recent regulation of, in particular, non-elected public officials, such as to provide in most jurisdictions a reasonable level of accountability.

I would respectfully agree with Prof. Finn that an adoption of the public trust principle as the well spring from which all obligations flow would assist with further development.

What then of elected officials?

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<sup>12</sup> Hot Holdings Pty Ltd v Creasy (2002) HCA 51; 210 CLR 438



A significant breach of trust will be likely to amount to misconduct, in some jurisdictions at least.

Further, the UK decisions in Bromley, and particularly, Porter, are more than mere judicial review of the improper exercise of a statutory discretion, and reveal a preparedness by a court to interfere with a political decision that results from a plain breach of trust, where the expenditure of public money is involved.

Barratt<sup>13</sup> submits:

*“Jurisdiction to impose personal liability on all functionaries who control public moneys ... thus appears in principle to be available as a consequence of public trusts, despite the absence of precedent.”*

Questions of the standing to bring an action for an account where there has been a misuse of public funds are really beyond the scope of this paper, other than to say that given the present state of the law there would likely to be an issue where an ordinary citizen brought an action, and the aid of the attorney general would be required so as to permit a relator action.

In that respect, Barratt suggests that in *Attorney General v IBA*<sup>14</sup> Lord Denning and a colleague “strongly suggested” that the court could under its inherent jurisdiction interfere to prevent a refusal by an Attorney General to permit an action if that was an abuse, so as “to ensure the law was obeyed”.

Such a refusal could of course itself be a breach of public trust.

However, as the law presently stands in Australia, the court may not interfere with an attorney general’s refusal to permit a relator action.<sup>15</sup>

Finally, can I draw your attention to a lecture given by the Chief Justice of Australia, Justice Robert French, in June last year, entitled “Public Office and Public Trust”, which traversed *inter alia* the early High Court and recent UK cases I have referred to.

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<sup>13</sup> *ibid*

<sup>14</sup> (1973) 1 QB 629

<sup>15</sup> *Barton v R* (1980) HCA 48; 147 CLR 75

After setting out the passage from Lord Bingham's judgment in *Porter* set out above, his Honour observed:

*"The case illustrates the potential for the application of principles derived by analogy from equitable doctrines relating to private trust arrangements."*

### **Some practical illustrations**

The Commission conducted a protracted investigation involving Members of Parliament and other public officials which began in 2005, and resulted in a large number of Commission reports (11 reports). The investigation related to the funding of local councillors by a developer of a large development in the State's south at Smith's Beach. It unfolded that the former Premier of WA, Mr Brian Burke and a former Senior Labour Minister, Mr Julian Grill, were involved in widespread lobbying activities.

Three matters arising out of the Smith's Beach investigation, although, apart from the first, not at the time dealt with on the basis of breach of trust, are I think pertinent to the discussion.

### **Case Study One**

Mr Bowler, was at the relevant time the Minister for Resources, and agreed to use his position to delay a decision to be made by him under the Mining Act at the request of Mr Burke, and Mr Grill, whose client was Precious Metals Australia (PMA).

In short, PMA were attempting to obtain mining tenements held by BHP Billiton at Yeerlirrie, a Uranium deposit in WA. They had lodged applications for exploration licences over the area and the fate of those applications was in the hands of Mr Bowler. Mr Bowler told Mr Grill that he intended to terminate the applications by PMA. Mr Grill, through various telephone conversations and during a social dinner with Mr Bowler and Mr Burke requested that Mr Bowler delay his decision to terminate the PMA applications so as to enable Mr Grill and Mr Burke to negotiate a financial settlement from BHP to cover PMA's costs on the basis that PMA would agree to withdraw the applications. These costs were in fact about \$60,000.

Mr Bowler agreed to, and in fact delayed, his decision to terminate PMA's applications. He subsequently accidentally and prematurely terminated the PMA applications (because they were made in the name of a wholly owned subsidiary – Victory Street).

The Commission formed the opinion that Mr Bowler had engaged in serious misconduct, in the alternative misconduct that was a breach of trust, because he agreed to delay making and implementing a Ministerial decision in the public interest, so as to advance the financial interest of PMA and its agents.

### **Case Study Two**

The next example also concerned Mr Bowler, in his capacity as a member of the Economics and Industry Standing Committee (the Economics Committee). In 2004 he released a draft report of the Economics Committee's inquiry into vanadium mining to Mr Grill by email. Mr Grill was still at that time a lobbyist for PMA and PMA was a major stakeholder with a commercial interest in the results of the Economics Committee inquiry.

Significant amendments were made to the draft report by the Executive Director of PMA after the draft report was provided to him by Mr Grill.

Ultimately, the report was tabled by the Economics Committee with many of the changes made by PMA, in circumstances where other members of the Economics Committee (apart from Mr Bowler) were unaware that draft report had been released to PMA or that changes had been made to the draft report by PMA.

The Legislative Assembly later referred the matter to a privileges committee which after inquiry recommended Mr Bowler's suspension from Parliament. That duly occurred.

The Chairman described the unauthorised release of the draft report as a serious breach of process and trust.

### **Case Study Three**

This matter involved Mr McRae, who was then the Acting Minister for Planning and Infrastructure. The Commission found that he sought fundraising assistance for his election campaign from Mr Grill in circumstances where he deliberately linked the exercise of his ministerial power for the benefit of a client of Mr Grill's, to a request for assistance from Mr Grill for his political fundraising.

During the relevant period Mr McRae's electorate was a marginal ALP seat. The need to pursue funding for election campaigns was always a priority. Mr McRae had scheduled a dinner to take place and had hoped to sell at least 50 tickets priced at \$275 each. The dinner would have generated in excess of \$10,000 for the campaign. Unfortunately, the timing coincided with other ALP fundraising events, resulting in a low number of ticket sales.

At the same time Mr McRae, dealt with a development matter involving a client of Mr Grill's, and reversed a decision on advice, that Mr Grill's client, a developer, be required to further advertise prior to proceeding with the development. The reversal of the decision avoided costs associated with delay.

Two days later during a telephone conversation Mr McRae represented to Mr Grill that he had not yet made a decision.

The Commission found that Mr McRae had engaged in serious misconduct by deliberately linking the potential exercise of Ministerial power to the seeking of a benefit.

Finally, simply as a matter of interest I would briefly mention some recent Commission investigations.

### **Recent Commission Reports**

In the last 2 years the Commission has tabled reports relating to wide ranging misconduct which has underpinning it the public trust principle and is indicative of officers acting in breach of that trust:

- Department of Health – a leading hand in a Children’s Hospital Café who stole almost \$200k over several years;
- Department of Planning and Infrastructure – motor vehicle inspectors who received bribes to certify vehicles as roadworthy, when they had never inspected those vehicles;
- University – a lecturer seeking sexual favours in exchange for providing students with higher marks;
- An international English language testing regime administered by a University being compromised by an employee taking bribes to falsify scores;
- Department of Education – a teacher accessing child pornography; and
- Public sector procurement – purchase of high cost toner cartridges outside of procurement policy by numerous public officers from a company which offered gifts to the officer making the purchase including, digital cameras, TV’s and gift vouchers.

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<sup>i</sup> Commissioner, Corruption and Crime Commission

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