Public office as/is a public trust

This heading 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 – 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 - 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.

In fact the term 'public trust' has been recognised and adopted in the statutes establishing anti-corruption bodies in NSW, Queensland, Western Australia and Victoria,[2] requiring those bodies to provide a safeguard against 'a breach of public trust'. And 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 the Commonwealth Government's Ministerial Code ('In recognition that public office *is* a public trust…')[3]

But 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[5] what are the public trust obligations and duties of a Member of Parliament as a public officer. 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

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[1] French, *'Public Office and Public Trust'*, the Seventh Annual St Thomas More Forum Lecture (2011), p. 8.
[2] For example, the *ICAC Act*. s. 8.
[3] https://www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards.pdf (Emphasis added in both quotes.)
[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 what the obligations of a public officer are.

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.

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.

The public trust notion in English and American law has a long history. In the 1980s and 1990s Professor Paul Finn[7] 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 behavior 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 misbehavior 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

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[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].
[7] Research School of Social Sciences, Australian National University. Later, a judge of the Federal Court.
[8] Finn, 'A sovereign people, a public trust' in P.D.Finn (ed.) *Essays on Law and Government, vol. 1.* (1995) Law Book Co., pp 10-11. (Footnotes omitted).

> 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]

'(T)here 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' during the 18th and 19th centuries', according to David Lusty, as well as occasional prosecutions in Canada and Australia.[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.[11] It wasn't until the last quarter of the 20th century that the common law offence was again prosecuted in the UK, Hong Kong, Australia and elsewhere.[12] The *Obeid case* demonstrates its continued use in Australia today, as will be seen later.

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.[13]

The person most responsible for reviving interest in the public trust doctrine was in fact Professor Finn, as he then was. I have mentioned earlier his many papers discussing the subject. Additionally he was a principal consultant to the Electoral and Administrative Review Commission (Qld) for its 'Review of codes of conduct for public officials' (he was quoted extensively in its report) and 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.

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.

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[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', (2014) 38 Crim LJ 337, at 340.

[10] Lusty, 'Revival of the common law offence of misconduct in public office', (2014) 38 Crim LJ 337, at 340.

[11] At p. 341.

[12] Ibid.

[13] French (2011) at p. 12. The quotation is from PD Finn, 'The forgotten "Trust": The People and the State' in M Cope (ed) *Equity: Issues and Trends* (Federation Press, 1955) 131 at 134.

In 2013 former Chief Justice Sir Gerard Brennan said[14]:

> 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.
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> It has long been established legal principle that a Member of Parliament holds "a fiduciary relation towards the public" *R v Boston* (1923) 33 CLR 386, 412 per Higgins J and "undertakes and has imposed upon him a public duty and a public trust" ibid., at p 408. 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 *Horne v Barber* (1920) 27 CLR 494, 501:
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> > 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.
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> ….
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> Public fiduciary duties depend for their content on the circumstances in which power is to be exercised. The obligations cast on members of Parliament and officers of the Executive Government are many and varied and the law takes cognisance of the realities of political life, but asserts and, in interpreting statutes, assumes that the public interest is the paramount consideration in the exercise of all public powers. The many and varied demands made upon Parliamentarians – by constituents, by party, by lobbyists, by family and by friends – all call for a response. Fred Chaney spoke of these demands when he delivered the Inaugural Accountability Round Table Lecture at the Melbourne Law School in October 2011. He spoke of the compromises needed in government and the many claims on the loyalty of practising politicians. But he did not suggest that any of these claims should subvert consideration of the public interest. Whenever 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.
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> 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: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1,10. – the motivations for

[14] Sir Gerard Brennan (2013) 'Presentation of Accountability Round Table Integrity Award', Canberra, 11 December 2013, p. 3. Footnotes included within the text.

> 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.

The High Court cases from the 1920s referred to by Sir Gerard Brennan are relied on in the High Court's latest encounter with the public trust principle in the *Day case* as will be seen below.

In the quotation above, Sir Gerard Brennan referred to (former Senator) Fred Chaney's comments about the compromises needed in government and the many claims on the loyalty of practicing politicians. This was a matter that also concerned Professor Finn.

In 1992 he wrote about the 'modern nature of a parliamentarian's trusteeship'. He said[15]:

> 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, 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.
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> 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 behavior is not answered simply by calling an official a public trustee or fiduciary and by assuming that this carries set consequences…

But 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

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[15] Finn, "Integrity in Government'(1992*) Public Law Review*, p. 243 at p. 248. (Emphasis in the original.)

then was, pointed out that

> … public service legislation in Australia has served and serves public and constitutional purposes as well as those of employment.
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> 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 …[16]

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'.[17]

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.

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. This was rejected by all members of the Court.

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[16] *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24.
[17] *Commissioner of Taxation v. Day* (2008) HCA 53 [34].
[18] *R v Quach* (2010) 27 VR 310; [2010] VSCA 106, at [46]

In *Obeid* the trust or duty issue in (3) (above) was argued on the basis that it was for the Crown to establish beyond reasonable doubt that it was Obeid's 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.[19]

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 Mr 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. 45(v) of the Constitution, *In re Webster*.[20] According to that decision the purpose of the provision 'was to secure the freedom and independence of Parliament from the Crown.'[21] 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 Barwick's interpretation was rejected by every member of the High Court in *Day*.

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

> 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

[19] *Obeid v. The Queen* (2018) 23 March 2018.
[20] (1975) 132 CLR 270; [1975] HCA 22.

[21] *Re Day [No 2]* [2017] HCA 14. At [14]

> 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. [22]

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.[23]

They continued[24]:

> 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 provisions [*Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 211; [1992] HCA 45.] 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 [*Wilkinson v Osborne* (1915) 21 CLR 89 at 98-99; [1915] HCA 92.] . In *R v Boston* [(1923) 33 CLR 386 at 400; [1923] HCA 59.] , Isaacs and Rich JJ spoke of a parliamentarian having a "single-mindedness for the welfare of the community".
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> More recently, it has been said [*Egan v Willis* (1998) 195 CLR 424 at 451 [42], 453 [45]-[46]; [1998] HCA 71.] 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 [*Horne v Barber* (1920) 27 CLR 494 at 500; [1920] HCA 33.]. There can be no doubt that if personal financial interests were to intrude, the exercise of those obligations would be rendered difficult or even ineffective.

They said the section 'looks to the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest.'[25]

Later, explaining why Barwick CJ's 'unduly narrow' approach should be rejected, they said[26]:

> 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

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[22] At [39]
[23] At [45]
[24] At [49], [50] Footnotes have been included within the text.
[25] At [66]
[26] At [72]

> 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.

Justices Nettle and Gordon, in their joint judgment, reached similar conclusions. In the course of their judgment they said:[27]

> Section 44(v) is located in Ch 1 of the Constitution, which provides for a system of representative government: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 229; [1992] HCA 45. a system that vests the legislative power of the Commonwealth in a Parliament s 1 of the Constitution. and gives the people of the Commonwealth control over the composition of the Parliament. See, eg, ss 7, 13, 24, 28, 32 and 41 of the Constitution. In that system of representative government, the elected representatives exercise sovereign power on behalf of the Australian people. *ACTV* (1992) 177 CLR 106 at 138. Parliamentarians "are not only chosen by the people but exercise their legislative and executive powers as representatives of the people". *ACTV* (1992) 177 CLR 106 at 138. 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" *R v Boston* (1923) 33 CLR 386 at 400; [1923] HCA 59. (emphasis in original).

Justice Keane reached similar conclusions and quoted[28] 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. (emphasis in original)

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 the judgments.

Dr David Solomon AM

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[27] At [269] Footnotes have been included within the text.
[28] At [179]

Ministerial access and the public trust

Dr David Solomon AM, Acting Queensland Integrity Commissioner

In February this year, I published a paper on "Nepotism, patronage and the public trust"[1] in which I explored in some detail the notion of the public trust. I quoted Professor Paul Finn (who was later a Federal Court judge) saying of the "public trust" doctrine, that it requires "that the officers of government, whether elected or appointed, are trustees for the people and as such are accountable to them … for the use and exercise of their offices."[2] And he said:

> The institutions of government, the officers and agencies of government exist for the people, to serve the interests of the people and, as such, are accountable to the people.[3]

Five years ago, my predecessor as Queensland Integrity Commissioner, Gary Crooke QC, gave a paper to the Australian Public Service Anti-Corruption Conference in which he also was concerned with what he described as a fundamental principle which underlies integrity in public administration:

> Those elected to, or appointed to, high public office are no more and no less trustees of the capital which they hold for use and benefit of the Community. In no way, is it within their remit as a trustee to do things other than for the public good and, in particular, they should never make use of capital for their own interest.[4]

Mr Crooke said:

> The esteem in which the holder of a high political office is held and the power to make decisions that goes with it, are part of the capital which the Community has accorded to the holder of the office to be held in trust for the Community's benefit. It is not for sale for sectional interest. A political party is a sectional interest.[5]

Mr Crooke made these comments to help illustrate why holding fundraisers, where invitees were charged large sums of money to attend a function with the promise that their subscription would earn them a right to speak to a decision-maker in their area of business or interest, was "a misuse of capital".

> There is an agenda underlying the invitation that is an inappropriate use of the capital entrusted to the individual. To my mind, it is parallel to the hypothetical example of a police officer who pulls up a motorist and asks the motorist to blow into the alcotest device. As the police officer approaches the motorist, he or she says "By the way, would you like to buy a ticket in the Police Station Social Club raffle?" It is the unspoken creation of an expectation

[1] Solomon (2014) (Accessible on www.integrity.qld.gov.au)
[2] Finn (1995) 'A Sovereign People, A Public Trust' in P. D. Finn (ed.) *Essays on Law and Government*, pp 9-10.
[3] Finn (1995) at p. 14.
[4] Crooke (2009), "Five Years as Integrity Commissioner: a retrospective" at p. 5. (Accessible on www.integrity.qld.gov.au)
[5] Crooke (2009), at p. 6.

> of preferential treatment attending this, which will result in the inevitable conclusion by informed public opinion that the activity is untoward.[6]

And he said:

> This process has been going on for some time, not only in Queensland but also in Australia and overseas. In part it has regard to desirable aspects of public administration in that it is quite open, to the extent of recording attendances and treating the subscriptions as reportable donations. Neither of these factors addresses the question as to whether such conduct is right in principle.[7]

Unfortunately, in five years nothing has changed – or rather, not for the better. We are still seeing some senior ministers at the Commonwealth and State levels putting a price on access. They run or participate in party fund-raisers where the entry price depends on whether the donor can sit with and talk to a minister. In some cases the "donations" are reported to the appropriate electoral authorities, though the need for this to occur is being removed as minimum reporting limits are increased. These days in Queensland it is unnecessary to declare donations of less than $12,800 – the LNP fundraiser on October 9, 2014 cost the 100 attendees $5,000 each.

In recent years there have been two important advances in Queensland in making more open the lobbying of government officials, including Ministers. First, Ministers have been making public edited versions of their diaries every month. However this does not extend to revealing who they meet and talk with at fundraisers. Second, the Government made it possible for the Integrity Commissioner to make rules requiring lobbyists to reveal all their lobbying contacts with government representatives, including Ministers. However this only applies to registered third party lobbyists. It does not cover directors, managers or employees of corporations, lobbying on behalf of their own firms, and it does not cover representative industry bodies such as the Property Council or the Queensland Resources Council that are enormously influential as lobbyists. The Government has refused to extend lobbying rules to cover this kind of lobbying, rejecting a number of submissions by me, and a unanimous recommendation of an all-party parliamentary committee.

So the situation is worse than that which concerned Mr Crooke in 2009: the "subscriptions" of people buying access to Ministers are no longer reportable. The public is deliberately kept in the dark by the organisers of these fund-raisers and by the Ministers concerned about who are paying quite significant sums of money to gain access to Ministers, presumably, in many cases, in an effort to influence them, though no doubt some may find this simply a convenient and convivial way to make a donation.

Apart from "everyone does it", which is no excuse for improper behaviour, the other justification for selling ministerial access is that political campaigns have to be funded from somewhere. Yes, but surely the activity that provides the fund has to be ethical: government ministers can't take bribes to allocate mining licenses or contracts, its illegal; they can't offer jobs in the expectation that appointees will donate part of their salaries to an election slush fund; it would be immoral and improper. Nor should they be able to prostitute their ministerial office by selling access.

Ministers don't own the offices they hold. They belong to the State. Those who occupy them are obliged to act only in the public interest. Ministerial office is not property that can be utilised for the private benefit of the minister or for his or her political party. Any benefit that is derived from the

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[6] Crooke (2009), at p. 7.
[7] Crooke (2009), at p. 6.

office belongs to the State – something that is now recognised in the way gifts from foreign dignitaries and others are dealt with.

Selling access to ministers is a breach of the public trust. It is unethical and it should be illegal. The fact that some governments have changed political donation rules to make it possible for donors to keep their identities secret does not provide a justification for the practice. What it does do is confirm in the public mind the low regard they have for politicians.

The breach of the public trust doctrine leads to the undermining of another kind of trust. Trust has many meanings. Probably the most common is, as the Macquarie dictionary puts it, "reliance on the integrity, justice of a person…",[8] as when one says, "I trust you (or him or her)". It is a notorious fact that public perceptions about the ethics and honesty of Australian politicians have been steadily falling and are at a low level – just 12 per cent of respondents in a 2014 poll rated federal and state MPs very high or high for ethics and honesty, just above real estate agents (9 per cent) - compared with top rating nurses (91 per cent).[9] There are many reasons for this – the phenomenon is not confined to Australia – but conduct such as that described above may well contribute to the low standing of our MPs.[10]

Those who abandon their public trust obligations by selling access to their ministerial offices are helping to destroy the efforts that have been made by governments and most politicians to try to demonstrate to the public their desire to promote ethical conduct by MPs and the steps they have taken to establish mechanisms that try to ensure that they act with integrity.

16 October 2014.

[8] Macquarie Concise Dictionary, fifth edition, 2009.
[9] Morgan poll, 11 April 2014 at *www.roymorgan.com*, article 5531.
[10] See, Andrew Leigh, "Explaining distrust: Popular attitudes towards politicians in Australia and the United States" in *The Prince's New Clothes: Why do Australians Dislike their Politicians?* UNSW Press, Sydney, 2002.