STUDENT NOTE

THE FIDUCIARY DUTY OF GOVERNMENT: AN ALTERNATE ACCOUNTABILITY MECHANISM OR WISHFUL THINKING?

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I. Introduction

Parliamentary sovereignty, as propounded by Dicey,[1] allows parliament the freedom to make and unmake any law it chooses. This concept, according also to Dicey, is central to a true liberal democracy.[2] It is of interest then to note that a majority of Australians would rather the protection of their rights be entrusted to an unelected and narrowly socialised judiciary than the members of the government which they themselves periodically elect.[3] What then is the source of this distrust in government, and, more importantly, what can be done to remedy it?

The answer to this question is perhaps the eternal quest of public lawyers, many of whom thought their journey had ended with the implementation of the new administrative law. Unfortunately, the administrative law reforms implemented following the report of the Kerr Committee[4] have been enveloped in their own hard fought struggle between the secrecy and efficiency requirements of government and the protection of individual rights.[5] In attempting to improve their own

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1 Craig, P, 'Dicey: Unitary, Self-correcting Democracy and Public Law' (1990) 106 *The Law Quarterly Review*, 105 at 106.

2 *Ibid* at 108.

3 McGuinness, PP (1993) 'Citizen Bill's Got the Right Stuff', *The Weekend Australian*, July 24-25, 2.

4 Commonwealth Administrative Review Committee, Report August 1971 ('the Kerr Committee' - Chaired by the Hon Mr Justice JR Kerr, CMG.).

5 *Australian Broadcasting Tribunal* v *Bond* (1990) 170 CLR 321 serves as a good example of this.

accountability, the government has, with limited success, enhanced the effectiveness of the available public law mechanisms. But is this the only feasible way to realise government accountability?

One alternative is the importation of private law mechanisms into the public sphere. Another is a convergence of the two bodies of law.[6] In his article 'Law, Institutions and the Public/Private Divide',[7] Professor Charles Sampford questions the legitimacy of the distinction between public and private law, and its application to modern institutions. Sampford questions the appropriateness of a legal system which refuses to combine the strengths of the two systems to combat weaknesses which became evident with the respective failures of vulgar Marxism and vulgar capitalism in the collapse of Communist Europe and the Western entrepreneurs.[8] What Sampford therefore proposes is an entirely new approach to the law governing institutions - this approach he has labelled institutional law.[9]

Sampford's basic proposition is that the status of incorporation should be altered from that of a right to a privilege. Accordingly, each institution would have to justify its existence on the grounds of both societal and membership benefits.[10] The function of the law, it is suggested, is then to keep these institutions operating in accordance with their justifications.[11] Sampford is quick to point out that this approach by no means asserts equal treatment for all institutions. Instead, it is posited that the degree of regulation and supervision be determined in accordance with the individual institution's justification.[12]

Though an ingenious approach to the regulation of institutions, there is a certain degree of oversight evident within the thesis. In his noteworthy attempt at constructing an alternative legal approach to institutions,

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6 Sampford, C, 'Law, Institutions and the Public/Private Divide' (1992) 20 *Federal Law Review* No 2, 185, at 214.

7 *Ibid* at 185-222.

8 *Ibid* at 213-214.

9 *Ibid* at 214.

10 *Ibid* at 214-216.

11 *Ibid* at 217-218.

12 *Ibid* at 220.

Sampford fails to consider who or what would be responsible for determining the validity of the proposed justifications. Additionally, consideration is not extended to what differences in justifications would lead to different levels of regulation and supervision. This question is crucial to the thesis. Without its answer the approach could simply be replacing the public/private distinction with another trivial divide.

Though the author does not accept unequivocally Sampford's argument, it does raise important questions; primarily, the possibility of extending, if not merging, private law principles to or with public law. Perhaps the most interesting and useful private law principle possible of importation is the fiduciary duty. However questions remain as to whether the importation would not only be desirable, but whether it would be possible. This is the concern of the author in writing this paper.

In addressing this issue, two central questions will be examined. First, are present public law accountability mechanisms adequate and second, can government owe a fiduciary duty? Though the more concise of the two responses, the response to the first question raises the interesting issue of the utility of the present public law accountability mechanisms in light of the present shift in the public sector towards new managerialism. The inadequacies of the new administrative law will also be briefly considered in this response. The core proposition of this article, however, will be forwarded in response to the second question. Both the nature of the fiduciary duty and the areas in which government has already been held to owe such a duty will be considered. In conclusion, it will be argued that government does satisfy the criteria necessary to establish a fiduciary duty and that the extension of such a duty would be highly desirable in terms of government accountability. Despite this conclusion the author suggests that there are practical limitations which, at this stage in Australia's legal development, prevent the extension being made.

II. Are Present Public Law Accountability Mechanisms Adequate?

Before beginning this discussion, it is important to note that in this necessarily brief survey of the present public law accountability mechanisms, the author by no means intends to denigrate the reforms

made. The new administrative law has vastly opened the practices of government to scrutiny and provided mechanisms by which individual bureaucrats can be made accountable.[13] The following review of the reforms is simply made to highlight some weaknesses and tensions in its implementation.

The New Administrative Law

At the federal level,[14] the new administrative law, as recommended by the Kerr Committee,[15] consisted of five major stages: the establishment of the Administrative Review Council; the establishment of the Administrative Appeals Tribunal; the establishment of an Ombudsman; the enactment of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (the ADJRA); and the enactment of the *Freedom of Information Act* 1982 (Cth).[16] These reforms were all implemented with the general aim of promoting government accountability through enhanced public access to government decision-making and information and improved forms of redress for individuals who have suffered at the hands of maladministration.

As posited by Goldring,[17] these reforms were intended to increase government accountability not to parliament or the courts, but to individuals. The evolution of the institutions established under the new administrative law however has been once again to disenfranchise those the reforms were intended to assist. Consequently, the Administrative Appeals Tribunal has been labelled legalistic[18] and the Freedom of

13 Goldring, J, 'Public Law and Accountability of Government' (1984) 15 *Federal Law Review*, 1 at 37.

14 To which this discussion will be restricted.

15 *Supra n 4* at 112-118.

16 Goldring, J, 'The Accountability of Public Administrators and the Rule of Law in Australia' (1981) 1 *Lawasia N.S.*, 326 at 330-331.

17 Goldring, J, *supra n 13* at 22.

18 Goldring, J, *supra n 16* at 335; Airo-Farulla, G, 'The Administrative Appeals Tribunal' (1993) Vol 10 *Reading Materials for Week 7: Constitutional and Administrative Law*, Griffith University Law School, 1 at 30.

Information legislation has been criticised due to its excessive costs and bureaucratic delays.[19]

Other problems associated with the new administrative law stem from the comparative narrowness of the legislation in contrast to its common law counterparts. This narrowness has the effect of restricting the rights conferred by the legislation to a comparatively small group of citizens who can successfully fit their claims within the scope of the Acts.[20] Another difficulty with the application of the new administrative law is the judicial interpretation placed on the jurisdictions of the relevant institutions. Much of the effectiveness of the new administrative law is limited in this way. In particular, the jurisdiction of the Ombudsman to undertake investigations[21] and the availability of review under the ADJRA[22] is limited, restricting review of critical areas of government decision making. One last concern with the new administrative law worth mentioning is its failure to reform the 'standing' requirements originally acquired from the private law writ system.[23] The present test applied by the courts[24] operates to limit special interest groups acting in the interests of their members and the interests which the group represents when a

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19 Allars, M, *Introduction to Australian Administrative Law*, Sydney, Butterworths, 1990 at 152.

20 For example, the right to a statement of reasons by the decision maker conferred on citizens under s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) is not available at common law. Additionally, its availability under statute is limited due to the narrow opportunity for review under the Act due to the interpretation of the term 'decision'.

21 The Ombudsman is not entitled to investigate policy or unauthorised actions of administrators following the decision in *Booth* v *Dillion (No.2)* [1976] VR 434.

22 Following the decision in *ABT* v *Bond* (1990) 94 ALR 11, decisions, despite their effect on individual rights, are not reviewable under the ADJRA unless they are expressly provided for by statute.

23 Airo-Farulla, G, 'Standing' (1993) Vol 13 *Reading Materials for Week 10: Constitutional and Administrative Law*, Griffith University Law School, at 3.

24 The current test is the recent reformulation provided in *ACF* v *Commonwealth* (1980) 146 CLR 493 at 526, where it was established that an individual only has standing to commence an action for breach of the public duty owed to them when they have an interest in that breach which is greater than the interest of the general public.

breach of a public duty has occurred. Such a test has particularly affected environmental conservation groups[25] and groups representing the interests of Aborigines.[26]

As this brief precis indicates there are several weaknesses, in terms of government accountability, evident in the new administrative law. These weaknesses centre upon the difficulty in obtaining statutory review and several jurisdictional limitations evident in the new legislation. In effect, these limitations restrict the extent to which the public can hold the executive accountable. Several recent changes in bureaucratic organisation have had a similar effect on government accountability, in particular, the changes made under 'new managerialism'. Though 'new managerialism' has not led to a diminution of present accountability mechanisms, many have been out-dated due to the broadened bureaucratic scope for management under the reforms. The next section considers this obsolescence and its effects.

'New Managerialism'

At the time the new administrative law reforms were implemented several other reforms were being initiated with regard to the improved management of the bureaucracy. These reforms centred on a shift from line-budgeting to program-budgeting, the development of a flexible Senior Executive Service and the adoption of strategic management practices. A comprehensive study of the reforms implemented is available in Emy and Hughes,[27] and it is sufficient to say, in overview, that private sector management techniques were incorporated into the public sector bureaucracy. It is critical to note however that the success of 'new managerialism' is a highly contentious issue,[28] and its effects upon government accountability remain largely undetermined.

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25 Airo-Farulla, *supra n 23* at 20.

26 In *Coe* v *Gordon* [1983] 1 NSWLR 419 it was held that an Aboriginal with no direct association with the land did not have standing to represent the general Aboriginal interest in that land.

27 Emy, H and O Hughes, *Australian Politics: Realities in Conflict*, Sydney, Macmillan, 1991 at 415.

28 See for example: Considine, M 'Managerialism Strikes Out' (1990) 49 *Australian Journal of Public Administration* No 2, 166; Paterson, J 'A Managerialism Strikes

Realistically, 'new managerialism' confers upon public administrators the broad-ranging discretion of private sector managers to manage with respect to obtaining specified goals. The difference between the two is that in the public sector the goals are set by democratically elected ministers rather than company directors. Another rather critical difference between the two is the failure of the 'new managerialists' to extend the private law accountability mechanisms, such as the fiduciary duty, to the wider-ranging discretion of public bureaucrats. This is of significant consequence. In the private sector, company directors are bound by their fiduciary duty to manage the company in not only the interests of the shareholders, but the interests of creditors, future shareholders and the company as a commercial entity.[29] No comparative duty is placed on public sector bureaucrats. Consequently, the new administrative law proves ineffective in holding administrators accountable in light of these reforms due to its focus on reviewing decisions and the absence of mechanisms by which to ensure administrators are acting in the interests of the public when taking managerial risks.

The previous discussion well evidences the difficulties faced, in terms of accountability, with the implementation of the 'new managerialism'. Although some writers consider it to be a less serious problem than this author sees it to be,[30] the conflict between 'new managerialism' and government accountability is sufficiently significant to warrant the investigation of further accountability mechanisms. The problems

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Back' (1988) 47 *Australian Journal of Public Administration* No 4, 287; Yeatman, A, 'Administrative Reform and Management Improvement - A New 'Iron Cage'?' (1986) 13 *Canberra Bulletin of Public Administration* No.4, 357; Hughes, O 'Public Management of Public Administration?' (1992) 51 *Australian Journal of Public Administration* No 3, 386.

29 *Darvall* v *North Sydney Brick and Tile Co Ltd* (1988) 6 ACLC 154.

30 Emy and Hughes, *supra n 27* at 428:

> There is some potential for conflict between management and accountability. If the public servant is to be managerially accountable, this could be seen as detracting from accountability, including that of a minister. However, this is unlikely to be a problem in practice. To begin with, the traditional accountability could hardly be said to work particularly well.

previously identified with the new administrative law provide additional support for this proposition.

Interim Summary

Thus far, this article has attempted to show two things: the inadequacy of the present government accountability mechanisms and the futility of the public/private law divide. As suggested earlier, one possible solution to the inadequacies demonstrated to this point is the importation of a fiduciary duty of government akin to that owed by directors of private companies. The present existence of public and private law prevents this amalgamation, but within an alternate accountability framework, such as institutional law, such an importation is not entirely unfeasible. Moreover, it could be argued that within the specific context of institutional law, it was indeed essential. Having already established that enhanced government accountability mechanisms are desirable, the remainder of this paper therefore concentrates on determining the feasibility of an absolute government fiduciary duty.

III. Can Government Owe a Fiduciary Duty?

The following response to the possibility of government owing a fiduciary duty will be divided into three sections: first, the nature of the fiduciary duty; second, the areas in which government has already been held to be a fiduciary and finally, the likelihood of extension.

The Fiduciary Duty - Are the Categories Closed?

Many authors agree that no single, satisfactory definition or explanation of the fiduciary duty exists.[31] This unfortunate situation has been recognised by Dawson J in the High Court:

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31 Ong, DSK, 'Fiduciaries: Identification and Remedies' (1986) 8 *University of Tasmania Law Review* No 3, 311; Gill, J 'A Man Cannot Serve Two Masters: The Nature, Existence and Scope of Fiduciary Duties' (1989) 2 *Journal of Contract Law* No 2, 115; Shepherd, JC 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *The Law Quarterly Review* No 1, 51 at 52.

> Notwithstanding the existence of clear examples, no satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary.[32]

Despite this, there are a number of pre-determined relationships to which fiduciary duties are assigned: partnerships, trustee/beneficiary, director/shareholder, solicitor/client, doctor/patient and agent/principal are examples of these.[33] The question then is whether these already established categories are closed, or whether they can be extended to incorporate a fiduciary duty of government.

The most useful Australian case in identifying the existence of a fiduciary duty is *Hospital Products Ltd* v *United States Surgical Corporation and Others*.[34] This case concerned the question as to whether a distributor owed a fiduciary duty to the company with which he had a distribution agreement. The majority of the High Court held that the distributor owed no fiduciary duty.[35] Though the factual situation of this case is of no consequence to the issue at hand, the references by the court to the requirements of a fiduciary duty are highly relevant.

As identified by Gill, there are three approaches to the fiduciary duty evident within the judgments in this case: the 'rigid fiduciary' approach; the 'narrow flexible fiduciary' approach; and the 'constructive trust' approach.[36] Each of these approaches will be discussed in turn. It is first necessary to identify the test adopted in determining the existence of a fiduciary duty by the New South Wales Court of Appeal. The necessity of identifying this test lies in the varying treatment it received by the members of the High Court. This test provides generally that a fiduciary duty will be established when a person undertakes to act in the interests of

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32 *Hospital Products Ltd* v *United States Surgical Corporation and Others* (1984) 156 CLR 41 at 141.

33 Flannigan, R 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* Autumn, 285 at 293.

34 *Supra n 32*; ("*Hospital Products*").

35 In dissent, Mason J held that the distributor owed a fiduciary duty with respect to the goodwill of the company; Deane J held that the distributor was a constructive trustee for profits made under the agreement: *ibid* at 125 .

36 *Supra n 31* at 124-134.

another. The test however is not absolute, it being necessary to show that a relationship of trust and confidence resulted from the undertaking to act in another's interests.[37]

The majority of the High Court held that this test was not inappropriate, but nevertheless, in the particular circumstances, found that the defendant was not a fiduciary to the plaintiff . The majority view, held by Gibbs CJ and Wilson and Dawson JJ, is what Gill has labelled the 'rigid fiduciary' approach.[38] This approach, whilst identifying that the categories of fiduciary duties are not closed, posits that the formulation of a precise definition of a fiduciary duty serves no purpose and that the existence of a fiduciary duty should be determined solely by analogy with existing fiduciary relationships. The subscribers to this approach also appear unlikely to extend the categories of fiduciary duty to commercial relationships where parties are dealing at 'arm's length and on equal footing'.[39] Ong posits that this stance was adopted by the majority due to the absence of 'implicit dependency' on behalf of the manufacturer in the particular circumstances.[40]

Though no direct support for this assumption is evident in the judgment of Gibbs CJ, support for such a position does arise in the next approach taken in the case: the 'narrow flexible fiduciary' approach. This approach, adopted by Mason J and also the trial judge, accepts that the establishment of a fiduciary duty will be heavily influenced by two factors: the existence of an undertaking by one party to act in the interests of another; and a sense of 'vulnerability' arising from that undertaking.[41] The primary differences between this and the previous approach is the willingness of its upholders to extend the categories of fiduciary duties and the willingness to focus on the features of the relationship rather than attempting to characterise it.[42] This approach therefore qualifies the test posited by the Court of Appeal by suggesting

37 *United States Surgical Corporation* v *Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 208.

38 *Supra n 31* at 124.

39 *Hospital Products, supra n 32* at 70.

40 *Supra n 31* at 317.

41 *Supra n 31* at 129.

42 *Ibid* at 130.

that a fiduciary duty exists when a party has undertaken to represent the interests of another and there is a certain dependence by the beneficiary upon the fiduciary as a result of that undertaking.

The final approach is that adopted by Deane J: the 'constructive trust' approach. Of no particular relevance at this point,[43] it is sufficient to note for the purposes of this argument that Deane J, though not finding a fiduciary duty, found a constructive trust on the ground of unjust enrichment.[44]

Of these three approaches, what then is the current position in Australia? Unfortunately, the most recent decision pertaining to the extension of the categories of fiduciary duties was *Hospital Products*.[45] Since this case, two of the three judges upholding the 'rigid fiduciary' approach have retired from the bench. More importantly, the advocate of the 'narrow flexible fiduciary' approach has since been appointed Chief Justice. Consequently, it would be guesswork, in light of these circumstances, to attempt to determine the exact judicial standing on the requirements of a fiduciary duty. Fortunately, the academic approach to the duty is not so difficult to discern. The 'narrow flexible fiduciary' approach has come into favour[46] due to its flexibility in extending a fiduciary duty to commercial relationships and its restriction upon the establishment of fiduciary duty solely on the grounds of unjust enrichment due to the requirement of an undertaking to act in another's interests.[47] In light of recent cases which show a more flexible approach by the High Court towards establishing fiduciary duties,[48] and the academic support

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43 The notion of constructive trust will be raised again at a later stage.

44 *Supra n 34* at 125.

45 The Australian Digest [34-36] Pt VII. Fiduciary Obligations.

46 Gill, *supra n 31* at 130.

47 Shepherd, *supra n 31* at 74.

48 Two cases are of particular significance: *Chan* v *Zacharia* (1984) 154 CLR 178 where it was held that a fiduciary duty remains following the dissolution of a partnership, but before winding-up has occurred; and *United Dominions Corporation Ltd* v *Brian Pty Ltd* (1985) 157 CLR 1 where it was held that a fiduciary duty is owed by prospective partners or joint venturers before the exact nature of the relationship is determined.

for the 'narrow flexible fiduciary' approach, it is not unlikely that a similar approach could be adopted by the present High Court.

Despite the possibility of the inaccuracy of this prediction, the 'narrow flexible fiduciary' approach will be adopted as the basis for determining whether government does owe a fiduciary duty to the public for the purposes of this paper. The willingness evident in this approach to extend the categories of fiduciary obligations suggests that the categories are not closed, and that government, if it satisfies the test, may well be held subject to fiduciary obligations.

Established Fiduciary Duties of Government

Having identified a test which determines the existence of a fiduciary duty, it is necessary to identify those areas in which the government has already been held to owe fiduciary obligations. This necessity arises not only from the subsequent ability to assess the likelihood of the extension of the fiduciary duty beyond these areas, but to provide also a base for the establishment of an absolute fiduciary duty of government. The following discussion will summarise these areas.

A. Indigenous Peoples

Perhaps the most well-known of the fiduciary duties owed by government is the duty owed to indigenous peoples. This duty was first developed in America after the decision of the Marshall Court in *Cherokee Nation* v *Georgia*[49] where it was held by Marshall CJ that the Cherokee Indians were in a position of ward to their United States guardian. The duty was later developed, with respect to indigenous people, by the Canadian courts[50] and considered, though not accepted, by the Australian courts.[51]

The nature of the doctrine in the United States is dependent on the position of power held by the government over the Indians and the

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49 30 US (5 Pet) 1 (1831) cited by Chambers, RP 'Judicial Enforcement of the Federal Trust Responsibility to Indians' (1975) 27 *Stanford Law Review* 1214 at 1215-1216.

50 Most notably in *Guerin* v *The Queen* (1984) 13 DLR (4th) 321.

51 *Mabo* v *Queensland* (1992) 175 CLR 1.

subsequent discretion in exercising that power.[52] Typically, this relationship is defined as a trust, rather than a fiduciary duty,[53] with the state acting as trustee over the Indians' traditional lands. The doctrine itself is clearly established within America, however there is still uncertainty in its application, namely whether it exists outside the treaties signed with the Indians,[54] whether the trust continues once the ward gains competency[55] and whether the trust places a further duty on government to provide governmental services.[56]

This judicial reasoning has been recently adopted by the Canadian courts in the watershed case of *Guerin* v *The Queen*.[57] In this case it was held by Dickson J that the Crown owed a fiduciary duty to the Indians.[58] This fiduciary duty arose from the obligation of the Crown to act in the interests of the Indians and the subsequent discretion, resulting in a dependency by the Indians, in so acting.[59] In contrast to the American cases, the source of this fiduciary duty was the native title of the Indians to the land in question.[60] Other differences with the American reasoning include clear acceptance of the existence of the duty beyond the existence of treaties[61] and the limitation of the duty to the protection of proprietary rights.[62]

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52 In *United States of America* v *Kagama* 118 US 375 (1886) at 383-384 it was held that:

> these Indian tribes are the wards of the nation. They are communities dependent on the United States ... From their weakness and helplessness ... there arises the duty of protection and with it the power.

53 Notes (1984) 98 *Harvard Law Review* 422 at 422.

54 Chambers, *supra n 49* at 1220.

55 *Ibid* at 1235.

56 *Ibid* at 1245.

57 *Supra n 50*.

58 *Ibid* at 334.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 Johnston, DM 'A Theory of Crown Trust Towards Aboriginal Peoples' (1986) 18 *Ottawa Law Review* No. 2, 307 at 316.

The Canadian approach has been adopted to a certain degree by the Australian courts. It was established by the Australian High Court in *Mabo* v *Queensland*[63] that Aborigines who could show a continued existence with their land held native title to that land. One of the issues considered in this judgment was whether the government owed a subsequent fiduciary duty to the Aborigines.[64] Relying on Canadian precedent, the majority of the court held that no fiduciary duty was owed to the Aborigines. The refusal to find a duty in this instance should not be taken to be a strict refusal to apply the doctrine in future cases, as the majority did not deny the possibility, in principle, of finding such a duty.[65] The possibility of finding a fiduciary duty in Australia therefore does not seem as unlikely in the future as this case suggests.[66]

The establishment of a fiduciary obligation on government with respect to indigenous peoples is receiving consistent judicial support worldwide and the doctrine is evidently not beyond expansion.[67] The finding of such a duty is of considerable benefit in an attempt to establish an absolute fiduciary duty owed by the government to the general public.

B. Ratepayers

Of further utility is the fiduciary duty owed by local councils to ratepayers which has been established in the British courts. The essence

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63 *Supra n 51.*

64 Keon-Cohen, B 'Case Notes: *Eddie Mabo and Ors* v *The State of Queensland*' (1992) 2 *Aboriginal Law Bulletin* No 56, 22 at 23.

65 *Mabo, supra n 51*: see Deane and Gaudron JJ at 113, who held that the government was liable to equitable remedies if they were to breach the native title of the aborigines; and Dawson J at 165-6, who accepted the reasoning of the Canadian courts yet did not apply it due to his finding that there was no native title.

66 Toohey J in *Mabo* held that there was a fiduciary duty in that case: *ibid* at 200-205. Toohey J followed the reasoning of Dickson J in *Guerin* in holding that a fiduciary duty exists where '[o]ne party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position.'

67 It was suggested by Peter McHugh in 'The Role of Law in Maori Claims' (1990) *New Zealand Law Journal* 16, that a similar duty could be placed on the New Zealand government with respect to the Maoris.

of this duty is that local councils owe a fiduciary duty to ratepayers with respect to the manner in which rates collected by the councils are spent.[68] This duty, as noted by Supperstone and Goudie, extends beyond the negative duty not to waste public funds to the positive obligation to apply funds in the best possible manner.[69] A similar duty has been found to exist by the Scottish courts.[70] To date the finding of the duty has been restricted to those instances where there has been an administrative discretion to apply funds, however this is not necessarily indicative of any limitations placed upon the finding of the duty. Airo-Farulla suggests that such a limitation may simply be due to the raising of the issue in the context of administrative law where review of administrative decisions has been sought. Again, the finding of such a duty is of assistance, though the approach has not been adopted by the Australian courts, in that it establishes the possibility of a government fiduciary duty outside the special circumstances of that owed to indigenous peoples.

C. Public Officials

The last area to be raised concerning the establishment of a fiduciary duty owed by government is a narrow body of case law in the United States which has established that public officials in general owe a fiduciary duty to the public whom they serve.[71] This case law was relied upon in the *Report of the Royal Commission into Commercial Activities of Government and Other Matters*[72] where it was recommended that the establishment of a fiduciary duty of government could be of some benefit in regulating the standards of conduct of public officials.[73] Though a similar line of reasoning has been adopted in Australia,[74] the duty has been held to be unenforceable, comparable to a political trust.[75]

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68 *Bromley LBC* v *Greater London Council* [1983] AC 768 per Lord Wilberforce at 815.

69 *Judicial Review*, London, Butterworths, 1992 at 267.

70 Crawford, C 'A Distinctly Scottish Fiduciary Duty' *The Scots Law Times*, December 7 1984 , 333-336.

71 *Driscoll* v *Burlington-Bristol Bridge Co* (1952) 86 A. 2d 201.

72 (1992) Government of Western Australia.

73 *Ibid* at 4 - 8.

74 *R* v *Boston* (1923) 33 CLR 386.

75 *Tito* v *Wardell* [1977] 1 Ch. 106.

Consequently, though of intellectual interest, the duty owed by public officials is of little use in establishing an absolute fiduciary duty upon government.

Should an absolute fiduciary duty be imposed on government?

Having considered the areas in which government has been found to owe fiduciary obligations, what then is the likelihood of finding an absolute fiduciary duty owed by government to all members of the public? Having established earlier in this paper that the categories of fiduciary duties are not closed, determining the likelihood of extension should simply be a matter of applying the test, but is this necessarily the case?

The test which, for reasons of simplicity previously explained, has been adopted by the author provides that the government could be held a fiduciary with respect to the general public if it could be established that the government undertook to act in the interests of the public, and that the public was correspondingly dependent upon the government to act in accordance with its undertaking. It is well recognised in liberal democratic theory that, when elected, members of the government undertake to act in the interests of the public. Consequently, this aspect of the test is satisfied. Analogies can be drawn with the ratepayer cases and the established duty owed by a director to shareholders in satisfying the next element of the test. In both instances the dependency element is held satisfied by the courts due to the ability of both the government and the director to adversely affect the interests of the people they represent. Similarly, the general public is dependent upon government fulfilling its undertaking in that the public would be in a position of considerable vulnerability were that undertaking not fulfilled. The two limbs of the test can then, at least in theory, be satisfied.

Unfortunately, although it has been established that the extension of a fiduciary duty as a public accountability mechanism is desirable, there are practical problems with imposing such a duty on government. In particular, there are two considerable hurdles to making the desired extension: first, the difficulty in defining and mediating between interests represented by government and second, the remedies available for breach of such a duty. As the test outlined above provides, a fiduciary must act in the interests of the beneficiary. It is a necessary presumption of this

legal rule that the interests of the beneficiary can be defined. Consequently, before the government can be held to owe an absolute fiduciary duty, the government must be capable of clearly defining the interests they represent.

Though this may be possible in some instances,[76] it is not possible in others. In some departments,[77] the sheer multitude of interests represented, and the conflicting nature of these interests make it impossible for the department to act in the interests of the 'public'. Though multiplicity of interests is not intrinsically a difficulty, as can be discerned by analogy with the duty owed by directors, the sharp disparity between these interests is almost fatal. Although the director must represent several interests,[78] generally the ultimate aim of these concerns is the well-being of the corporation as a commercial entity. A similar unity of interests is not evident in many government departments. An example of this is the Department of Industrial Relations. This Department represents both the interests of labour and the interests of employers. It is not too difficult to identify a situation where these two interests would directly conflict and the Department would be forced to make a decision not advantageous to either one of the interests they represent. Would it be reasonable to then make government liable for not acting in the interests of a particular group of society in these circumstances?

This problem has been handled in the ratepayer cases by limiting the fiduciary duty owed by government to simply a duty to fairly balance the interests it represents.[79] However, considering the aim of importing this duty is enhanced government accountability, leaving such a fundamental decision to the judiciary would not be in the spirit of this objective.

The other problem that can be identified with holding government accountable as a fiduciary is the possible remedies available for breach of

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76 For example, it is quite clear that the interests the Department of Social Security represents are the interests of the welfare recipients.

77 For example those interests represented by the Department of Finance, the Department of the Environment and the Department of Industrial Relations.

78 *Supra n 29.*

79 *Bromley LBC* v *Greater London Council, supra n 68* at 815.

this duty. Once again, by analogy with the director/shareholder relationship, the most common remedy given is an account of profits made by the director in breach of their duty as it is very rare that the duty is breached and no profit is made by the director. Conversely, since it is not generally the objective of government to make a profit, it would not be too common an occurrence where a breach of fiduciary duty did give rise to a profit. What remedies would be available then to the general public if the fiduciary duty of government was established? Though there is some scope for equitable relief in the forms of injunctions and rectification orders, similar to those available to shareholders,[80] the sufficiency of these must be questioned. Accordingly, before such a duty could be held to exist, it would be necessary to investigate other remedies available for breach of the duty, perhaps even use of the mechanism of constructive trust.

What the above discussion therefore suggests is that, though theoretically the extension of a fiduciary duty to government from the already existing categories could be made, such an extension would not be likely until the law pertaining to fiduciaries is reviewed and adapted to the peculiarities of this particular duty. Additionally, changes would be required in the structure of public institutions to enable the institutions of government to operate with a specific purpose and for a specific public interest.

IV. Conclusion

The result of this study into the utility of holding government accountable as a fiduciary is once again to highlight the futility of the public/private divide. Returning once again to the arguments forwarded by Sampford, the divide prevents effective accountability mechanisms being imported. The question then needs to be asked as to whether Sampford is correct in asserting that what is needed is a new approach to the law governing institutions, both public and private.

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80 Redmond, P, *Companies and Securities Law: Commentary and Materials* 2nd Edition, Law Book Company, Australia, 1992 at 552.

Though already established that there are some limitations evident in the approach suggested by Sampford, the underlying thesis of his paper certainly seems more plausible following this discussion. Such plausibility stems particularly from the increased likelihood of successfully establishing an absolute government fiduciary duty in a legal framework where public and private law mechanisms are combined, than where the divide is maintained. Such an approach is perhaps what is needed to restore public confidence in government.

What then is to come of this discussion? It has been established that the increased public accountability of government which would result from it being held a fiduciary is desirable and theoretically possible, but due to the framework of law employed in Australia, practically impossible. In essence, this is a very negative prescription and one which the author is sure will not only be seen by many as unrealistic, but also untenable. Despite this, the author is confident that it will be sufficient to promote progress from the band-aid tactics of the new administrative law to a new initiative capable of answering the questions raised herein.