AN ETHICAL FRAMEWORK FOR GOVERNMENTAL RESPONSIBILITY TO THE ELECTORATE

by

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Politicians regularly give undertakings to the electorate as to their future conduct in order to generate support for (re)election. The author analyses an ethical framework through which the conduct of politicians in this context may be evaluated. The main elements of the framework are accountability, public expectation, credibility and reputation, and public service. It is contended that, pursuant to such criteria, a case can be made for a change in the manner and form of governmental disclosure to the electorate, and for the implementation of a code of ethics governing public undertakings.

The State is the Actuality of the Ethical Idea[1]

I. Introduction

Given the practice of present and aspiring politicians of making 'election promises', it is reasonable to assume that the reason for so doing is the belief that these promises can influence the voting patterns of their electorate in their favour. Either one assumes that politicians have for decades been the victims of a grossly misguided perception or one concludes that undertakings made by politicians do in fact colour the judgment of voters. It may be that neither of those extremes is entirely accurate, but one is safe in concluding that pledges made by politicians *do* influence voter behaviour to some extent. That is, the voter *does* rely on the barrage of communication which emanates from the spoken and written word of politicians as a means of choosing for whom their vote is to be cast.

Once the date of the poll has passed, and with it much of the election hysteria, voters are faced with the reality of their choice. This aftermath often brings with it some degree of public discontent as political promises evaporate or are suddenly prefaced with broad disclaimers. For the moment the Opposition and vocal members of community groups condemn the breach of trust which they believe to have occurred. However, in the space of surprisingly short period of time, this alleged breach of trust is either forgotten or relegated to the deeper recesses of the minds of Opposition Party members. Evidence of broken promises assumes greater utility as a political point scoring technique rather than as a device available to the general public as a means of controlling the actions of our elected legislators, economic managers and international representatives. This is because the community appreciates the political promises are largely unenforceable, and are, at best, only a means of placing public pressure on politicians to abide by their prior undertakings.

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1 *Hegel's Philosophy of Right* (translated by Knox, Oxford University Press, 1978) at para 257.

Australia is touted as a great democracy, and often compared to nations which do not grant such a broad array of individual freedoms. The very strength of a democracy lies in the representation of a community by representatives chosen by that community. The elected representatives are entrusted with a mandate to act in the interests of that community. Correspondence between the actions of representatives and the platform upon which they were elected is a factor which contributes to the effective functioning of the democratic system. Given that the process of popular election is the essence of a democracy, it is imperative that individual voters are *correctly informed* of the candidate's or party's electoral platform, because, apart from any evidence of previous performance, this platform is the only evidence upon which the voter can assess whether that party or individual is worthy of the high position of trust which the latter seek. Even with evidence of previous performance, this assessment is based on the supposition that prior conduct will be reflected in future conduct.

If politicians are free to make rash undertakings or extravagant promises in their effort to influence voter behaviour in their favour, it would be the grossest breach of trust to act in a manner inconsistent with such undertakings or promises upon subsequent election. By so doing that representative is demonstrating him or herself to be unworthy of the trust placed in his or her hands. Claims for breach of contract or breach of fiduciary duty are commonplace in Australian courts where a plaintiff asserts that the defendant has acted in a fashion which is inconsistent with the duties placed upon him or her by reason of the relationship between them, be this relationship based upon contract or by reason of a fiduciary duty. Yet breaches of election undertakings by governments have far wider consequences than breaches of contract or fiduciary duty in private law. This notwithstanding, the general public accepts that political promises are not be taken literally. However, to suggest that election promises do not influence the electorate's decision is to ignore the rationale for politician's electoral campaigns.

A recent Gallop Poll conducted in the United States has placed Members of Congress in the bottom 30% of all professions in rating honesty and ethical standards, just above used car salespersons.[2] Given that public perceptions of used car salespersons connote dishonesty and the placing of personal interest above that of the client, a poll of this nature represents a damning indictment on the status of public representatives. The very essence of democracy is the election of persons of integrity to positions of responsibility in the community. If the public perceives that the elected representatives are not behaving with the utmost integrity, the public confidence in governments is reduced.

Is the problem therefore, one of governmental ethics? The issue of governmental ethics has been brought to the force recently in the wake of royal commissions, namely those involving "WA Inc", the State Bank of South Australia and the Fitzgerald Report in Queensland.[3]

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2 Falvey, 'The Congressional Ethics Dilemma: Constituent Service or Conflict of Interest?' (1990-91) 28 Am Crim LR 323.

3 In May 1992 the Electoral and Administrative Review Commission (Queensland) released a *Report on The Review of Codes of Conduct for Public Officials* (Report No. 92/R1) as a result of the Fitzgerald Report's recommendation that it "consider the proper relationship between public servants and their Ministers, the need for ethical education and the means whereby good management practices might discourage corruption" (page v).

Numerous public sector Codes of Ethics have been drafted and/or implemented in Australia in the past decade in an effort to guard against or reduce the likelihood of abuses of power by public officials.[4] Americans too have not been spared from alleged breaches of government ethical standards, resulting in the passage of the *Ethics Reform Act* by the Federal Congress in 1989, an initiative previously also undertaken by some state legislatures.[5] The community is witnessing the cycle in which a public commitment to 'ethical cleansing' arises subsequent to a period perceived to have been corrupt.[6] The primary focus of these royal commissions, Codes of Ethics and legislative developments is on governmental interests in private sector business activities which potentially give rise to conflicts between the personal interest of elected representatives and those of the constituent which those persons are elected to represent.

Comparatively little, however, has been expressed regarding the ethics of politicians' breaches of commitments made, or undertakings given, to the electorate. To suggest that a politician be held legally accountable for the verity of every statement made to the public ignores the reality that many such statements concern questions of estimation, judgment and economic prediction. For these matters to be the subject of legal accountability would jeopardise not merely the role of elected representatives, but also those of professionals in the private sector whose employment necessitates assessments as to unknown future events. However, is it unreasonable to expect a politician, who owes a duty of nation, state or local communities, to be held accountable for statements which are either presently false or misrepresent their true intentions? Professionals, such as accountants, auditors and solicitors, who owe a primary duty to their clients, have been the subject of a broadening legal duty not to engage in conduct in breach of that duty.[7] Can not one suggest that a political party which has campaigned on a electoral platform denying the formation of a coalition with a minor party, which subsequently breaches that undertaking in order to form a minority government, should be seen to have committed a breach of its mandate to the public? Are politicians in need of 'ethical cleansing'? Between matters of judgment or prediction and blatant misrepresentation of fact or intention lies a myriad of situations giving rise to ethical dilemmas. One must be capable of determining which of this conduct should be characterised as unethical, and this is precisely why an 'ethical framework' is required.

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4 For example, see *Guidelines on Official Conduct of Commonwealth Public Servants* (AGPS, Canberra, 1987); *Code of Conduct for Public Sector Executives* (New South Wales, 1989); *Code of Conduct and Ethics for Public Servants* (Draft for Discussion, New South Wales, 1990); *Local Government Code of Conduct and Manual* (New South Wales, 1990); *Code of Conduct for Officers of the Queensland Public Service* (Queensland Government Printer, 1988); *Minister's Code of Ethics* (Queensland Cabinet Handbook, 1990); *Guidelines for the Financial Management of the Office of the Minister* (Queensland, Department of the Premier, 1990); *Code of Conduct* (Queensland Police Service, 1990); *Pecuniary Interest Handbook: A Guide for Council Officers and Councillors* (Victoria, Local Government Department, 1989); *Rights, Responsibilities and Obligations: A Code for Public Servants* (Public Service Commission of Western Australia, 1988).

5 See Falvey, *supra* n 2; Coffin, 'The New York State Ethics in Government Act of 1987: A Critical Evaluation' (1988-89) 22 *Columbia Journal of Law and Social Problems* 269; Nolan, 'Regulating Government Ethics: When It's Not Enough to Just Say No' (1989-90) 58 *Geo Wash LR* 405.

6 Evatt, 'Independence brings Ethical Responsibility' *Financial Forum*, June 1993 at 7.

7 For example, regarding solicitors, see *Hawkins v. Clayton* (1988) 164 CLR 539; regarding accountants, see *Thorpe Nominees Pty Ltd v. Henderson and Lahey* [1988] 3 Qd R 216; *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1990) 23 FCR 1; regarding auditors, see *Pacific Acceptance Corporation Ltd v. Forsyth* (1970) 92 WN (NSW) 29; *AWA Ltd v. Daniels* (1992) 7 ACSR 759.

In this paper it is sought to investigate the creation of an 'ethical framework' as a standard within which political undertakings can be assessed. If ethics can be viewed as a general theory of right and wrong choices and actions, then the objectives and decisions of our elected representatives must come within the scope of an 'ethical framework'.[8] How the concept of ethics is defined determines the extent of a politician's duty to the community, and thus characterises the type(s) of behaviour that amounts to a 'culpable' breach of ethics. If one accepts the proposition that an initial concern with the ethics of a particular process often reveals cause for greater concern for the underlying nature or role of the actual activity in question,[9] the 'framework' assumes even greater importance. Once the framework is constructed, its scope can be expanded beyond political undertakings *per se*, to the general disclosure and reporting of relevant and reliable information from the government to the people.

II. What are Ethics?

Restraint on individual freedom is justified for society to function in an orderly manner. Such restraint must be grounded in "moral principles, rules, feelings, and dispositions ... the formulation and authoritative statement of laws [and] the enforcement of the law".[10] All of these foundations may be necessary in some circumstances, but one cannot formulate and enforce law without some moral principles, rules, feelings or dispositions.[11] Nor can one categorically state the legal enforcement is the only or the most effective means whereby human behaviour is regulated. Therefore, one must analyse the rationale for the restraint of individual behaviour. At present, political undertakings are rarely subject to *legal* analysis and enforcement. The motivation for adherence to previous statements can be argued to lie within opposition and public criticism. To accept this as the primary determinant of a politician's integrity is to place political point-scoring above the interests of the community, two criteria which may or may not coexist. One must ponder whether there are 'ethical norms' which can explain or at least justify the statements of politicians, and whether such norms should give rise to corresponding duties. If so, one must further identify the nature of the duties in question.

In order to determine the presence or absence of ethical norms within any society one must firstly comprehend the concept of 'ethics'. In the context of this discussion on governmental ethics, I have selected the following ethical systems as candidates for analysis and application: consequentialist systems and non-consequentialist systems.

Consequentialism dictates that the consequences or goal of an action dictate its 'rightness', and should, therefore, govern the outcome of any ethical dilemma. The consequentialist must assess what is or is not a favourable consequence. Utilitarianism is the best known consequentialist theory. Utilitarians argue that the conduct which engenders the greatest amount of favourable consequences, that is, the conduct which maximises utility, should govern the outcome of any ethical dilemma.[12] The principal difficulty with utilitarianism, and more generally, consequentialism, is that it justifies action which may be objectively unethical by the favourable consequence of that action. Notwithstanding this difficulty, it can be argued that consequentialism can be tailored to the governmental ethics debate. Politicians may justify misleading the Australian public in circumstances where, had a truthful statement bee made, there would, for example, have transpired unfavourable repercussions for Australian national security interests.

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8 Mackie, *Ethics: Inventing Right and Wrong* (Penguin Books, 1983) at 235.
9 Parker, 'Ethics at Work' (1993) 63(5) *Australian Accountant*, 21.
10 Mackie, *supra* n.8 at 234.
11 *Ibid.*
12 For more detailed analyses of utilitarian ethics, see Frankena, *Ethics* (Prentice-Hall Inc, 1963) at 29-35; Velasquez and Rostankowski (eds), *Ethics - Theory and Practice* (Prentice-Hall Inc, 1985), Ch 4; Sommers, *Right and Wrong - Basic Readings in Ethics* (Harcourt Brace Jovanovich, 1986), Ch 2.

Indeed, one can frame a persuasive argument in support of such a balancing of interests. However, in the context of political promises, could the consequentialist ideal be abused by politicians who justify the non-fulfilment of a prior undertaking by interests which they characterise as of greater benefit to the public? Could a political party justify a previously unpublicised alliance with a minority party on the grounds that it is in the interests of stable government? Moreover, could the political party which campaigns by giving inaccurate information regarding its intentions (or, for that matter, presenting inaccurate information about its opponent(s)), justify this by reference to its belief that its opponent's policies would have caused detriment to the nation? And this is presuming that considerations of self-interest do not influence the foregoing judgments. If politicians' behaviour is (to some extent) motivated by self-interest, this serves to add another (worrying) dimension to the consequentialist's dilemma. It is apparent that an ethical framework based solely upon the consequentialist model may generate little motivation for change in politicians' conduct and many justifications of a dubious nature.

Non-consequentialists, on the other hand, argue that the 'right' action is independent of its consequences. The action which is 'right' is that which does not violate true moral principle. The 'rightness' of an action is to be assessed by reference to a system of rules which may need to be ranked hierarchically to ensure consistency.[13] Refuted is the proposition that what is ethical is to be determined by the social norms of particular societies ('relativism') or by each individual ('subjectivism'). Kant, the most famous non-consequentialist, placed truthfulness above all other qualities which may define ethics. In his view, ethical conduct demands the telling of the truth regardless of the consequence, because without truth, society would be rendered chaotic.[14] It is interesting to evaluate Kant's thesis in the context of political promises. It was noted earlier that politicians do not rate highly in the public perception in respect of honesty and ethical standards. The trust which the public place in statements and promises made by politicians must influence, and to some extent also be influenced by, the perceived honesty of the representatives in question. If one accepts that democracy is the fundamental basis of our society, and further accepts Kant's hypothesis, it can be argued that the level of chaos in society corresponds to the public's perceived honesty of its elected representatives.

The appeal to the 'rightness' of an action bears some relation to the tenets of natural law, the system of law to which all positive man-made laws are argued to be subject. In fact, it has been asserted that "the doctrine of natural law is clearly an analogue of objectivism in ethics".[15] Natural law is said to be discoverable by reason and to be universal in application. Natural lawyers assert that an individual's obligation of obedience to the law is a consequence of the accord of positive law with natural law. Unfortunately, in the absence of an omnipotent being of supreme reasoning, there can be no arbiter as to what is 'right'. Courts adjudicate on the 'rightness' of positive law but cannot, by the very definition of natural law, adjudicate on issues of natural law.

Both consequentialist and non-consequentialist theories exhibit desirable characteristics. The utilitarian can find concurrence with the democratic notion of the government representing the majority, in that by the mandate of the majority the government can act in a fashion which promotes the greatest good. Disadvantage to the minority is justified by the consequent benefit to the majority. This notion is reflected by incidents of the Australian political and legislative system, particularly the adoption of majority votes to determine the political party in power, the

13 Singer, *Practical Ethics* at 3.

14 See Kant, *Foundations of the Metaphysics of Moral* (trans Beck, The Liberal Arts Press, 1959); Velasquez and Rostanowski, *supra* n 12, Ch 3; Frankena, *supra* n.12 at 25-28; Leys, *Ethics for Policy Decisions* (Greenwood Press, 1968), Ch 5; Sommers, *supra* n.12, Ch 1.

15 Mackie, *supra* n.8, at 233.

leadership of political parties, and the passage of legislation through the Parliament. The underlying philosophy is not one premised on the 'rightness' of the process. Rather, it presupposes that the actions of a majority of elected representatives will generate a result consistent with maximising the benefit to society. The consequentialist theory assumes even greater significance if one accepts that some political actions are motivated by the self-interest of the actors. To argue that politicians act without regard to the consequences of such action is to believe that political animals are a very rare breed indeed, that election involves not merely a change of occupation, but also a genetic transplant.[16]

The adoption of a non-consequentialist approach ideally operates to ensure that the conduct of elected representatives displays a universal standard of ethics. The latter recognises firstly, that the majority is not always 'right', secondly, that not all who support the ruling government support all that government's policies, and thirdly, that minorities ought be protected from undue discrimination by the majority. The minority is protected by the ruling government's adherence to a universal ethical standard. Singer has expressed the issue as follows:

> "... to submit moral issues to the vote is to gamble that what we believe to be right will come out of the ballot with more votes behind it than what we believe to be wrong; and that is a gamble that we will often lose".[17]

Therefore, in respect of political undertakings, any conduct adjudged ethical on grounds of consequentialism must be tempered by the control of a universal ethical standard capable of objective prescription. One may well ask, why the need for any reference to consequentialism? Does not the prescription of a universal standard represent the ideal? The answer to this query lies in the difficulty of defining the standard. If one does, like Kant, identify the standard as truthfulness, one must be able to identify 'the truth', and often the search for truth parallels the search for 'reality'. Even if one accepts multiple standards, for example, 'justice' or 'beneficence', what may represent 'justice' or 'beneficence' in any given ethical dilemma will not elicit the same response from all. Furthermore, to argue that ethics are governed by a higher universal notion rather than standards prevailing in the society in issue is to attribute to individuals the capacity to assume the position of Rawls' 'impartial spectator'.[18] Moreover, if practicality is a

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16 Were the self-interest of the representative to correspond to "public interest" (whatever this may be) this problem would not arise. Rousseau explained that, being vested with power and authority, those in government may tend to usurp the sovereign's authority, having characterised the latter as the expression of the general will. Moreover, the governors were, in his thesis, likely to perceive themselves as having an interest common to themselves but different from that in respect of the "public", an interest which he termed a "corporate" will. The issue therefore became one of checking the potential dominance of the corporate and preventing its abuse. See Dent, *Rousseau - An Introduction to his Psychological, Social and Political Theory* (Basil Blackwell Ltd, 1988) at 218-220.

17 Singer, *supra* n.13 at 191.

18 See Rawls, *A Theory of Justice* (Harvard University Press, 1971). Rawls (at 186) identifies that rational and impartial spectator as "a person who takes up a general perspective: he assumes a position where his own interests are not at stake and he possesses all the requisite information and powers of reasoning. So situated he is equally responsive and sympathetic to the desires and satisfactions of everyone affected by the social system. His own interests do not thwart his natural sympathy for the aspirations of others and he has perfect knowledge of those endeavours and what they mean for those who have them. Responding to the interests of each person in the same way, an impartial spectator give free reign to his capacity for sympathetic identification by viewing each person's situation as it affects that person". Rawls perceived the most natural way of arriving at utilitarianism as the adoption for society as a whole the principle of rational choice for one person. In his opinion, "it is by the conception of the impartial spectator and the use of sympathetic identification in guiding our imagination that the principle for one man is applied to society" (at 27). The impartial spectator ascertains the intensity of the desires of others and assigns them their appropriate weight in the one system of desire the satisfaction of which the ideal legislator then tries to maximise by adjusting the rules of the social system. Rawls observes that "it is tempting to adopt the approvals of the impartial spectator at the standard of justice" (at 187). However, from his standpoint of "justice as fairness", he finds no reason why the person in the "original position", characterised the hypothetical initial status quo which insures that the fundamental agreements reached in it are fair, would agree to the approvals of an impartial sympathetic spectator as the standard of justice (at 188).

criterion upon which an ethical framework is to be evaluated,[19] what is 'universal' or what is an 'impartial spectator' must, at least to some extent, be diluted in line with what the society in question dictates to be ethical.

The foregoing may constitute an admission that the definition of 'ethics' in the area of discussion (and possibly other areas) involves a question of balance, that what is 'ethical' may not be beneficial to all players. Notwithstanding, in the above discussion there have been identified some parameters which an ethical framework must address. Singularly, neither consequentialist, nor non-consequentialism, can provide the basis for conduct which is ethical, but rather a composite of the two. *The vulnerabilities exposed in applying a consequentialist model be guarded by the non-consequentialist's universal concept of 'right'. Similarly, this concept of 'right' must be interpreted in a fashion which admits relativism if it is to be a practical indicator of ethical conduct.*

Hence, it is not surprising that both consequentialist and non-consequentialist theories serve to define, and more importantly explain, ethical conduct in the context of public representations. In the subsequent discussion will be identified criteria generated from both the consequentialist and non-consequentialist schools of thought. Together they serve to create an "ethical framework" within which the conduct of politicians in their public undertakings can be assessed. Each theory is argued to support the same reforms: first, a form of governmental report card specifically directed at undertakings and their fulfilment or otherwise, and second, a code of ethics governing the making of public representations.

III. Ethical Conduct Stemming from the Representative Position (Non-Consequentialism)

The very concept of one person acting as a representative of others, and in doing so make decisions that affect the well-being of others, requires the latter to forsake some autonomy. In this context, the autonomy forsaken corresponds to the power conferred upon government to affect individual choice and action which would otherwise be the domain of the individual. In return, the people are entitled to expect certain conduct on behalf of the representative. The Chief Justice of the Australian High Court explained this notion in terms of representative government:

"The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised *on their behalf* by their representatives ... the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power *on behalf of* the Australian people".[20]

Merely propounding that politicians ought to be 'truthful' with the electorate is the reformulation of the general Kantian ideal applied to a particular situation. 'Truth', notwithstanding its apparent universality, is a malleable criterion. The 'truth' is to some extent subjective. For this reason, from a non-consequentialist viewpoint, one must search for a criterion capable of more specific application. Whereas this would partly forsake the desirable criterion of universality, it permits a more certain assessment of standards of ethics within government. Hence it is argued that ethical conduct by politicians should embrace notions which stem from, and are consistent with, their position as elected representatives. These notions should reflect initiatives designed to counterbalance, or control, the restriction on individual autonomy noted earlier. The relevant criteria which, it is contended, most accurately reflect such initiatives can be identified as

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19 See Singer, *supra* n.13 at 2.

20 *Australian Capital Television Pty Ltd v. Commonwealth [No. 2]* (1992) 66 ALJR 695 at 703 per Mason CJ. Emphasis added. See also *Horne v. Barber* (1920) 29 CLR 494 at 500 per Isaacs J, at 501-502 per Rich J; *Nationwide News Pty Ltd v. Wills* (1992) 66 ALJR 658 at 680 per Deane and Toohey JJ.

accountability and public service. Ethical conduct prescribed within the framework of accountability and public service is not a consequentialist concept. Rather, it evidences a concern with what the attributes of public representation necessarily require. Above other qualities, accountability and public service define ethics in public representative employment.

A. *Accountability*

Accountability involves the assumption of responsibility and an account of how this responsibility was discharged.[21] The most frequent connotation of the term 'accountability' is financial. However, the government's accountability to society extends beyond mere operating statements, statements of financial position and statements of sources and application of funds. To constrict accountability in this way is to ignore the government's mandate in respect of functions which are not dollar denominated. Governing extends beyond the economic, efficient and effective allocation of financial resources between competing claimants. This point is made by Mason CJ in *Australian Capital Television Pty Ltd v. Commonwealth [No. 2]*:

> "The point is that the representatives who are members of Parliament and Ministers of State are not chosen only by the people but exercise their *legislative and executive powers* as representatives of the people. And *in the exercise of those powers the representatives of necessity are accountable to the people for what they do* and have a responsibility to take account of the views of people on whose behalf they act".[22]

However, by analysing the requirements imposed on government in respect of financial accountability, that is, the obligation of external reporting, one may discover concepts which can be the subject of application to government accountability as a whole.

Taxpayers, consumers and business are the ultimate providers of funds for the activity of government, and are also the beneficiaries of the service provided by government.[23] For this reason, it may be said that the government is 'accountable' to the public. External reporting in the public sector became a major issue in the early 1970s.[24] It was catapulted into the limelight for several reasons. Prime amongst these was the increasing size and complexity of the public sector. The attendant worsening economic conditions raised an awareness of the need for government efficiency in the expending of funds. Furthermore, criticism was levelled at the widespread autonomy of public officials. The debate over government accountability continues to rage in the wake of recent allegations of government mismanagement of funds.[25]

From the accountant's perspective, the principal issue is one of regulation of disclosure in government reports of financial, and, more recently, non-financial, information.[26] The concern with accountability is reflected in the definition of a 'reporting entity' adopted by Statement of Accounting Concepts No. 1:

> "Reporting entities are all entities ... in respect of which it is reasonable to expect the existence of *users dependent* on general purpose financial reports for information which will be useful to them for *making and evaluating decisions* about the allocation of scarce resources".[27] (Emphasis added)

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21 Baker and Fryer, 'External Reporting in the Public Sector', *External Financial Reporting* (Australian Society of Certified Practising Accountants, 1993), M2.10.

22 *Australian Capital Television Pty Ltd v. Commonwealth [No. 2]* (1992) 66 ALJR 695 at 703. Emphasis added.

23 See Micallef, 'Making Government More Accountable', *Financial Forum*, November 1992, p.4.

24 Baker and Fryer, *supra* n.21 at M2.7. See also Finn and Smith, 'The Citizen, the Government and "Reasonable Expectations"' (1992) 66 ALJ 139 at 145.

25 See Russell and MacMillian, 'The New Accountability', *Financial Forum*, December 1992 at 8.

26 See Sutcliffe, Micallef and Parker, *Financial Reporting by Government Departments*, Discussion Paper No. 16, Australian Accounting Research Foundation, Melbourne (1991).

27 SAC1, para.40. The Statements of Accounting Concepts are largely the result of the work of the Australian Accounting Research Foundation (AARF) and provide the foundation for the 'conceptual framework' project undertaken by the Foundation at the behest of the Federal Government and the two major professional accounting bodies, the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants.

Pursuant to this definition, a government department can clearly be a reporting entity. Statement of Accounting Concepts No. 2 provides a definition of 'accountability':

> " 'accountability' means the responsibility to *provide information to enable users to make informed judgments* about the performance, financial position, financing and investing, and compliance of the reporting entity".[28] (Emphasis added)

Accountants are professionally, or more appropriately, *ethically* bound to apply SAC 1 and SAC 2 in the presentation of financial reports.[29]

If one translates the financial reporting obligation into a general ethical obligation of elected representatives, it can be argued that governments ought to provide reports to the public which detail how well the government has discharged its obligations to the persons which it purports to represent. Governments are already subject to many of the reporting obligations imposed by accounting standards.[30] The release of AAS 29 - Financial Reporting by Government Departments - is a reaction to the widespread public concern over governmental accountability. This standard, which applies to the first reporting period that ends after 30 December 1996 and later reporting periods, requires each government department that is a reporting entity to prepare general purpose financial reports.[31] A principal reason for this requirement is that "government departments are *accountable* to a wide range of users for the resources they control and the results of the deployment of those resources".[32] Apart from Parliament, the primary user of these reports, other potential users include those who provide the resources that governments control (such as taxpayers and creditors), those who receive goods and services or otherwise benefit from the activities of departments (such as consumers) and those who perform oversight or review services on behalf of members of the community (such as regulators, community groups and the media).[33] Many of these users are unable to command the disclosure of the financial information they require, and for this reason, are dependent upon general purpose financial reports prepared by government departments to satisfy their information needs.[34]

However, the drafters of AAS 29 recognised that "it is unlikely that financial reports will provide all the information required for economic decision making purposes, or for the discharge of accountability obligations".[35] Although the standard recognises that "both financial and non-financial information will be required by users for economic decision making, including assessments of accountability",[36]it falls short of imposing on government departments an obligation to report non-financial information. Given the evident need to assess government performance by non-financial measures, would not the concept of accountability dictate that, inter alia, governments should place *on the public record* undertakings given or promises made? Should not the government report to the public on the extent to which these undertakings or promises have been fulfilled? Whilst not deprecating the need for financial performance

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28 SAC 2, para. 5.
29 APS 1.
30 Pursuant to SAC 1, reporting entities shall prepare general purpose financial reports, which are to be prepared in accordance with Statements of Accounting Concepts and Accounting Standards (para 41). According to paragraph 25 of SAC 1:
"An implication of the reporting entity concept in the public sector is that a government as a whole, whether at the Federal, State, Territorial or local government level, would be identified as a reporting entity because it is reasonable to expect that users will require general purpose financial reports to facilitate their decision making in relation to the resource allocations made by, and the accountability of, those governments".
A separate accounting standard governs Financial Reporting by Local Governments (AAS 27).
31 AAS 29, para.17.
32 AAS 29, para. 20. Emphasis added.
33 AAS 29, para. 21.
34 AAS 29, para. 21.
35 AAS 29, para. 22.
36 AAS29, para.22.

indicators, would not such information assist individuals, the decision-makers, in casting their most important control in a democratic society, their vote? The following observations of Deane and Toohey JJ in *Nationwide News Pty Ltd v. Wills* are apposite in this context:

> "The ability of a voter to case a *fully informed vote* in an election of members of Parliament depends upon the *ability to acquire information* about the background, qualifications and policies of the candidates for election and about the *countless number of other circumstances and considerations*, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it".[37]

To this end, if, in the period shortly preceding an election, voters were to be given access to, or issued, highly condensed statements and/or reports containing an unbiased assessment of the performance of the government in its term of office, it is arguable that the electorate would be better placed to cast its vote. The Auditor-General's Office[38] and the Australian Bureau of Statistics currently generate such information, but in a form far removed from the overall condensed analysis of the nature suggested. Nor is the timing and scope of reports from those institutions directed to the issue at hand, the election of the government. Large public companies, which control resources not substantially fewer than those at the disposal of some government departments, are subject to periodic (and to a large extent, standard-form) reporting requirements by the *Corporations Law* as a means whereby persons affected by the company's actions can assess the company's performance in their particular field of interest.[39] This assessment determines whether the company deserves their continued support. Should not the electorate be similarly informed at the time in which it can register its decision to continue or withdraw support for the ruling government?[40]

One may ask, 'Would not voters' general perceptions of the government's competence and credibility over its term in government be sufficient to found an informed decision regarding the casting of their ballot?' In response, one may ask, 'If a person is to assess the performance of a

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37 *Nationwide News Pty Ltd v. Wills* (1992) 66 ALJR 658 at 680. Emphasis added.

38 In June 1994 the Minister for Finance, Mr Beazley, has announced the establishment of a bi-partisan Audit Committee of Parliament following concerns over the capacity of the Auditor-General to function independently as the auditor of government activities. Under the proposed new arrangements, the Auditor-General would be established as the sole auditor of all Commonwealth owned and controlled bodies, and the Australian National Audit Office would be granted statutory authority status. These reforms are directed primarily to strengthen the independence of the Auditor-General but do not address the content and format of the Auditor-General's reports.

39 The trend of the *Corporations Law* is towards "continuous disclosure". The *Corporate Law Reform Act* 1994 provides, *inter alia*, that unlisted "disclosing entities" must lodge with the Australian Securities Commission, on a continuous basis, information which if generally available would be likely to have a material effect on the price or value of the entities' securities. In addition, all "disclosing entities" would also be required to prepare half-yearly statements.

40 This analysis attributes to the electorate an understanding of and interest in the political process such that the information in question would indeed constitute a point of reference to which all (or most) members of the electorate would consult and assimilate. Although this is, in all probability, an unrealistic assumption, to premise an ethical framework upon ignorance and apathy is to condemn the worth of a democratic system. The importance of the democratic ideal is canonised in s.90 of the Australian Constitution which confers upon every citizen the duty to vote. This reflects the importance which the framers placed on the individual's vote. Moreover, the suggestion that the level of government accountability should be in any way dictated according to the electorate's interest in matters of government is inimical to the foundations of democracy.
The above expectations are almost Rousseaunian in character. Rousseau characterised sovereignty as an expression of the general will, the latter representing that which is in the common interest of all members of the community to which they belong. Hence, he presumed that all members of the society were appropriately concerned with the workings of government. Rousseau believed that the people as a whole formed the only power in the state not interested in perverting that power to self-interested ends. Hence, his theory has been described as "government by enlightened opinion". See Cobban, *Rousseau and the Modern State* (1968, George, Allen and Unwin) at 95.

large company over a period of time, would that person make such assessment by reference to his or her general impression from all the information which the company has made public in that period of time? Or would that person merely consult the company's annual report? No one person is possessed with the time and skill to faithfully assess every minute detail of a large company's operations (a task which, if attempted would no doubt herald the onset of 'information overload') but conversely, a decision maker (either internal or external to the company) would not conduct this assessment upon general impressions without reference to a condensed statement disclosing indicators of the company's performance within the person's decision making ambit. The argument is similarly applied to the voter's decision making task. The essence of successful decision-making is that the decision-maker be fully informed about the subject matter of the decision in question. That general perceptions are not the ideal determinants of voter decision making is further reflected in the increasing proportion of 'swinging voters'.

One may also analyse the accountability issue from a *legal* perspective. It was argued earlier that non-consequentialism provides a control in respect of abuses of the minority which may result from a purely consequentialist model. Similarly, the criterion of accountability could serve to uncover, and thereby limit, breaches of ethics by government. The concept of accountability in law arises, *inter alia*, in the law of fiduciaries. The fiduciary must not place his or her interest in conflict with his or duty, and is liable to account to his or her principal for profits deprived by reason of either or both the opportunity and knowledge acquired through that fiduciary position. Australian courts have characterised the basis of the fiduciary relationship be reference to: relations of confidence which may be abused;[41] an undertaking to act for or on behalf of or in the interests of another person;[42] a relationship between parties of unequal bargaining power;[43] or as a position of disadvantage, dependence or vulnerability.[44]

(1) *Trust Analogy*[45]

The archetypal fiduciary relationship is that between trustee and beneficiary. The reason for this is that a trustee is legally bound to deal with trust property for the benefit of the beneficiaries according to the terms of the trust instrument. Trustees are generally appointed as a vehicle through which wealth is distributed to specified persons or purposes. The modern trust instrument is often used as a means of co-ordinating a collective investment, and usually invests trustees with broad discretions as to dealings with trust property.[46] Australian courts have traditionally been reluctant to interfere with a trustee's discretion in the absence of substantial evidence that it is being exercised *mala fides*.[47] Apart from unanimous action to terminate the trust,[48] nor are beneficiaries *practically* able to dictate the manner in which the trustee exercises his or her duties

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41 *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR 41 at 69 per Gibbs CJ. See also Heydon, Gummow and Austin, *Cases and Materials on Equity and Trusts* (4 ed, Butterworths, 1993) at 215-216.

42 *Hospital Product Ltd v. United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 per Mason J. See also *United States Surgical Corporations v. Hospital Products Ltd* [1983] 2 NSWLR 157 at 208; Finn, *Fiduciary Obligations* (LBC, 1977) at 201.

43 *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR 41 at 69-70 per Gibbs CJ.

44 *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 CLR 41 per Dawson J. See also *LAC Minerals Ltd v. International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 63 per Sopinka J. Cf La Forest J at 39.

45 See further Finn, 'Integrity in Government' (1992) 3 Public Law Rev 243 (hereinafter Finn, 'Integrity in Government'); Finn, 'The Abuse of Public Power in Australia: Making Our Governors Our Servants' (1994) 5 Public Law Rev 43 (hereinafter Finn, 'Abuse of Public Power').

46 This was expressly recognised by the Australian Law Reform Commission in its Discussion Paper No. 50 *Collective Investment Schemes: Superannuation* (January 1992).

47 For example, see *James v. Evans* (1877) 3 VLR (E) 132; *Cain v. Watson* (1890) 16 VLR 88; *Cock v. Smith* (1909) 9 CLR 773 at 829 per Isaacs J; *Re Whitehouse* [1982] Qd R 196; *Karger v. Paul* [1984] VR 161.

48 *Saunders v. Vautier* (1841) Cr & Ph 240; [1835-42] All ER 58; *Sir Moses Montefiore Jewish Home v. Howell & Co. (No. 7) Pty Ltd* (1984) 2 NSWLR 406 at 411.

and powers as trustee. Even in circumstances where the trustee is subjected to outside control *ex post*, this in no way detracts from the fact that the trustee has committed some breach of fiduciary duty by reason of his or her trustworthiness will thereupon be open to doubt.

Although not traditionally characterised as fiduciary, the relationship between government and the electorate exhibits many, if not all, the hallmarks of a fiduciary relationship. This has been recognised, albeit to a limited extent, by the highest courts in Australia, New Zealand, Canada and the United States.[49] The government, like a trustee, is also concerned with the distribution of wealth. Edmund Burke recognised this over two centuries ago, stating that "all political power ... [is] ... in the strictest sense a trust; and it is the very essence of every trust to be rendered accountable".[50] In electing the government, the people are placing their confidence in the elected representatives, which according to their party platform and election promises, have a mandate to act in the interests of the people.[51] Once the elected representatives take office, the people's power to influence government action in the short term is limited.[52] Australian courts have been reticent to interfere with the relationship between the citizen and the government.[53] Therefore, it can be argued that the people are placed in a position of disadvantage, dependence or vulnerability in respect of the government. It can be argued that the Senate represents a control on government action. This, however, presupposes two conditions: (1) that the Senate is controlled by a different political party to that in government; and (2) that the attitude of senators is dictated by concerns different to those which dictate the attitude of members of the lower house. Moreover, even where the Senate refuses to pass legislation introduced by the government in the lower house on the ground that it is inconsistent with the government's electoral mandate, this does not detract from the fact that a *prima facie* breach of the electoral mandate, and, therefore, a breach of ethics has been perpetuated by the government in attempting to accord legal force to the measure in question.

The grant of authority over the property of another attracts consequent duties in relation to that authority.[54] "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".[55] As fiduciaries, politicians are obliged to exercise their authority for the benefit of the populace. Fiduciaries must give account to their principals of their success in the performance of their duties. In the context of the trustee-beneficiary relationship, the trustee must keep and render 'proper' accounts,[56] meaning accounts which are timely,[57] faithful, accurate and usually supported by documentary evidence.[58] These accounts monitor the trustee's performance of his or her duty to preserve trust property and obedience to the terms of the trust instrument.

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49 In Australia, see *Mabo v. State of Queensland* (1992) 175 CLR 1 at 111-113 per Deane and Gaudron JJ, at 200-205 per Toohey J. In New Zealand, see *New Zealand Maori Council v A-G* [1987] 1 NZLR 641 at 663-666 per Cooke P, at 682 per Richardson J, at 703 per Casey J, at 715 per Bissen J, *Te Runanga o Wharekauri Rekohu Inc v. A-G* [1993] 2 NZLR 301 at 304-306 (CA). In Canada, see *Guerin v. R* (1984) 13 DLR (4th) 321; *R v. Sparrow* (1990) 70 DLR (4th) 385. In the United States, see *Cherokee Nation v. Georgia* (1831) 30 US 1; *Worcester v. Georgia* (1832) 31 US 350; *United States v. Kagama* (1886) 118 US 375; *Lone Wolf v. Hitchcock* (1903) 187 US 553; *United States v. Mitchell* (1983) 103 S Ct 2961. Each of these cases involved the finding of a limited fiduciary relationship between government and indigenous people. However, the judgment of Toohey J in *Mabo* would appear to support the existence of a fiduciary relation in respect of persons on subject of peculiar *vulnerability* vis-á-vis specific government decision making. For a brief account of the relevant issues, see Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16 UNSWLJ 70 at 76-87.

50 As quoted in Macpherson, *Burke* (OUP, Oxford, 1980) at 32.

51 See *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 191 per McHugh JA.

52 See further Finn, 'Abuse of Public Power' *supra* n.45 at 49-50.

53 See VI. Role of Law.

54 *Hegel's Philosophy of Right*, *supra* n.1 at para. 261.

55 *Horne v. Barber* (1920) 27 CLR 494 at 500 per Isaacs J. See also *The King v. Boston* (1923) 33 CLR 386 at 412 per Higgins J.

56 *McKenna v. Lowe* (1878) 1 SCR (NSW) Eq 10; *Re Australian Home Finance Pty Ltd* [1956] VLR 1; *Hawkesley v. May* [1956] 1 QB 304.

57 *Strauss v. Wykes* [1916] VLR 200 at 204 per Madden CJ; *Re Craig* (1952) 52 SR (NSW) 265 at 267 per Roper J.

58 *Christensen v. Christensen* [1954] QWN 37.

In light of the relationship between government and the people, it can be argued that government owes, at a minimum, an ethical duty to comprehensively account to faithfully and accurately account the people in a form which facilitates the public monitoring of the government's performance.[59] This is particularly crucial at the time at which the public is called upon to exercise its only practical control on the conduct of government, election time.[60] This accounting represents a means of redressing the balance in bargaining power in favour of the people.

(2) *Company Analogy*

In Anglo-American society for almost 200 years it has been public policy that companies should not betray the trust of investors whom have provided the company's working capital. Over this time there have been numerous developments in the law aimed at implementing this policy. The success of these initiatives has been tempered by the fact that a company is "a legal person, without mind or conscience" and that a company cannot have a "moral or ethical sense" nor any "idea of fair dealing or simple honesty."[61] Auditors have traditionally been the watchdogs of corporate legality and arguably, corporate morality. It is only recently in Australia that corporations have been subjected to rigorous accountability requirements, in that the *Corporations Law* has given regulators the power to go behind the corporate veil in stated circumstances[62] and accorded legal force to accounting standards.[63] This legislation has also cast onerous obligations on companies concerning the content of financial statements.[64] If the policy to maintain the trust of investors has been difficult to implement with the aid of legal machinery in respect of companies, this poses serious questions as to how the people can be protected from government abuses of trust. Conversely, it may suggest that *legal* enforcement is not the ideal mechanism of securing the ethical conduct in issue. One must further determine what level of accountability will suffice to ensure that the people are correctly informed as to whether the government has and is behaving in an ethical manner.

B. *The Theory of Public Service*

It has been said that "government ethics can be understood only if we first agree on the attributes of public employment".[65] The reason a society elects persons to positions of government as their representatives is because democracy in its purest form is unworkable.[66] If every individual had the potential to dictate the conduct of the society, the world would be a myraid of 'one person states'.[67] By electing representatives the people are relinquishing the bulk of their individual governing power. By definition then, *the representatives are given a mandate by the people to act in the people's interests, and further, to act in the service of the people.* The greater the power accorded to such representatives, the greater the scope for potential abuse of power,

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59 This is a stated objective of AAS 29, although limited to financial information. See AAS 29, para. 22.

60 It is interesting to note that this concern is not new. In the eighteenth century Rousseau commented upon the undue length of time elapsing between elections of the English Parliament which, in his opinion, enabled members to become almost entirely independent of their constituents, as a consequence falling under what he termed the influence of royal corruption. See Cobban, *supra*, n.40 at 42.

61 See Chambers 'The Ethical Cringe' (1991) 61(6) *Australian Accountant* 18 at 20

62 For example, see *Corporations Law* (Cth) s.588G (insolvent trading provision); s.588FGA (indemnification of the Federal Commissioner of Taxation for unremitted tax instalments by directors of a company in liquidation).

63 *Corporations Law* (Cth), s.298.

64 For example, see *Corporations Law* (Cth) s.297 (financial statements to comply with the format contained in Schedule 5); ss.301-302 (content of directors' statement); ss.304-5 (content of directors' report).

65 Nolan, *supra* n.5 at 410.

66 Rousseau observed that "In the strict sense of the term, there has never been, and there never will be, a real democracy. It is against the order of nature for the majority to govern and for the minority to be governed" (see Rousseau, *The Social Contract* (1762), Book III, Ch IV).

67 *Nationwide News Pty Ltd v. Wills* (1992) 66 ALJR 658 at 680 per Deane and Toohey JJ.

and the greater is their responsibility to act ethically in the service of the community. This is not to suggest that a person's ethical standards ought be determined by the scope of authority given to that person, but rather that the highest ethical standards must be imposed on persons upon whom are conferred the greatest authority over the conduct of a society.[68]

The 'public service vision' "established the premise that an employee was an agent for broadly defined public interests; it created special responsibilities; and it emphasised the importance of public employment, creating a moral calling for public service".[69] In characterising the government as an 'agent' of the people,[70] this formulation of the public service vision reflects the earlier assessment of the quasi-fiduciary relationship between the government and the people. More importantly, it steps beyond accountability *per se*. Governments are not merely accountable to the community which they govern. Nor are governments merely bound to act in the interest of the community. Upon governments is placed the duty to *serve* the community. Service, more than accountability, connotes *subservience*. Subservience of the government to the public will is a corollary of the public grant of power to government. This element of service operates to counterbalance potential abuse of this power. However, the wider public service vision cannot be achieved until a satisfactory system of accountability is employed,[71] such that the electorate is provided with relevant and reliable information which serves as a justification of the allocation of resources made.

Public service dictates that elected representatives should provide to the public an unbiased assessment of how successfully they have rendered their service. This assessment does not leave room for subjective appraisals of opposition policy, nor does it justify personal attacks on other representatives, or the deliberate diversion of community focus from the crucial issues at hand. The essence of democracy necessitates that voters are correctly informed about the choices with which they are faced. Voter disillusionment with or apathy against the major political parties must in some way reflect the failure of successive governments to satisfactorily provide the service with which they are elected to supply.

Were government to adopt a Code of Ethics and to provide an empirical summary assessment of its performance in the management of the affairs of the nation on a periodic basis, and particularly, shortly before a general election, would not voter confidence in government be increased? At least, would this not establish a better foundation for voter decision making? To place upon a government these responsibilities is to extend the service ideal beyond the individual parliamentarian to the collective forces of government.

The need for the dissemination of information about government has been recognised by the legislature and the courts. An example of this legislative recognition is the enactment of Freedom of Information legislation in Australia at both a federal and state level within the period of the last 13 years.[72] The law of governmental confidential information reflects judicial concern with public knowledge of government activity. This was clearly expressed by the High Court of Australia in *Commonwealth of Australia v. John Fairfax & Sons Pty Ltd*:

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68 Cf Finn, 'Integrity in Government' *supra* n.45 at 254-255; Finn, 'Abuse of Public Power' *supra* n.45 at 55.

69 Vaughan, 'Ethics in Government and the Vision of Public Service' (1989-90) 58 Geo Wash LR 417 at 421.

70 See 'Agency theory', *infra* n.76.

71 Vaughn, *supra* n.69 at 422.

72 *Freedom of Information Act* 1982 (Cth); *Freedom of Information Act* 1983 (Vic); *Freedom of Information Act* 1989 (ACT); *Freedom of Information Act* 1989 (NSW); *Freedom of Information Act* 1991 (SA); *Freedom of Information Act* 1992 (Qld); *Freedom of Information Act* 1992 (Tas); *Freedom of Information Act* 1992 (WA).

> "It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless the disclosure is likely to injure the public interest, it will not be protected".[73]

Only where it appears that such disclosure will be inimical to the public interest for reasons of national security, relations with foreign governments or in that the ordinary business of government will be prejudiced, will the disclosure be restrained. The issue is characterised as one of weighing the public's interest in knowing and in expressing its opinion against the public's interest in confidentiality. Whether a court permits disclosure or protects the confidence, its justification for so doing is founded in the notion of public interest. This constitutes implicit recognition that the government's mandate is the service of the people.

IV. Ethical Conduct from a Consequentialist Perspective

To appeal to the rightness of an action, specifically that of stewardship or public service, presumes the existence of an individual or body so peculiarly situated to be capable of rendering this judgment, perhaps an 'impartial observer'. Even were one to believe in the existence of such an individual or body, this would neither recognise nor explain conduct motivated primarily from a consequentialist ideal. Accepting that politicians, through their words and actions, do evidence a concern with the consequences thereof, any ethical framework that fails to address behavioural realities cannot practically be a candidate for implementation. These realities are addressed in the context of the credibility and reputation of public representatives, and the public expectation of ethical conduct. In each case, the assumption is that consequences to some extent dictate behaviour. Yet the reforms suggested in the previous part, justified pursuant to non-consequentialist theory, can also be obtained through the application of a consequentialist approach.

A. *Credibility and Reputation*

Adam Smith observed that "it is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest".[74] In a formulation of an ethical framework one must consider the self-interest of the actors. Persons will be far more likely to adhere to ethical standards in circumstances where such adherence is consistent with their own interests. In other words, favourable consequences of an action influence whether that action is decreed to be 'good'. A person's reputation and credibility may to a significant extent determine that person's position in society. One may therefore assume that, if a person's ethical standards and his or her credibility are closely related, which it is submitted is a valid assumption,[75] *a person's self-interest will coincide with ethical behaviour.* In this context, the

73 *Commonwealth of Australia v. John Fairfax & Sons Pty Ltd* (1981) 55 ALJR 45 at 52 per Mason J.

74 Smith, *The Wealth of Nations*, Book One, "Chapter II, Of the Principle Which Gives Occasion to the Division of Labour", Canaan E (ed) New York, Modern Library (1937) at 14.

75 This assumption presupposes the existence of sufficient controls within the system of government to guard against non-discovery of consistently unethical behaviour. Some of these controls have been discussed under the headings of "Accountability" and "Public Service".

question of ethics is one of determining, *inter alia*, conduct which is directed at maximising the credibility and reputation of a part of society.[76]

It has already been noted that the public expectation and accountability of politicians (and the relationship between the two) influence their credibility and reputation. Beyond this is the notion of leading by example. Consider the following dicta of the United States Supreme Court:

> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example".[77]

It may be argued that, apart from any other rationale, the *nature* of elected government in a democracy dictates that persons in power display an exemplary standard of ethical conduct.[78] The government that expects a greater standard of public conduct than that which it applies in respect of its own conduct will either lower community standards or be removed from office. However, were politicians to be seen to adopt standards of ethics more exacting than those regulating conduct in the ordinary course of society, would this not increase their credibility and reputation? If the record maintained cataloguing the government's performance in respect of its stated undertakings, or more generally, stated objectives, were to evidence the achievement of such undertakings or objectives, would this not increase the credibility of the government in the eyes of society? Would not the political party of highest credibility and repute be an appropriate candidate for government? As a corollary, would this not favourably affect the nation's *international* credibility and reputation. If our elected representatives could give practical effect to the motto of the London Stock Exchange: "My word is my bond", confidence in Australian government would be engendered from a national and international perspective. Moreover, as the Australian government represents the Australian community in international dealings and negotiations, the standard of ethics demonstrated by our government will reflect on foreigners' perceptions of individual Australians.

B. *Public Expectation*

By stating that public expectation of governmental ethics should play a role in determining ethical standards is, unless the public expectation represents the 'pinnacle' of ethical behaviour, to sway from objectivism. Objectivism is concerned with 'rightness' adjudged by a universal and objective standard, rather than some relative standard. As humans perceive the society relative or comparative to other societies, it is unlikely that objectivism in public expectation is practical.

The danger of adopting public expectations as a barometer of what is or is not ethical conduct is two-fold. Firstly, there is the danger that the society's expectations merely mirror the prevailing ethical standard in that society. If politicians reflect that standard, which is likely given that they are elected from the ranks of the public, there is no mandate for raising the ethical standard. This is erring at the opposite extreme from absolutism. Secondly, in light of documented public distrust

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76 A similar argument is raised by those who favour little or no regulation concerning the disclosure of financial information by public companies. 'Agency theory' characterises company management as an agent for the investor, who acts as principal. Proponents of this theory assume the agent expects that the principal will act in its own interests and, for this reason, in the absence of adequate disclosure as a means of monitoring the activities of the principal, the agent will price the company's securities according to the expectation of the principal's opportunistic behaviour. As a result, the value of the principal's human capital is reduced. Therefore, agency theorists contend that the principal possesses an incentive to enter into 'binding and monitoring contracts' with the agent in an effort to engender the trust of the agent. This is clearly in the interests of the principal in that the pricing of the company's securities and the value of its human capital influences how the principal is rewarded. An extended analysis of 'agency theory' may be found in the following works: Jensen and Meckling, 'Theory of the firm: Managerial behaviour, agency costs and ownership structure' (1976) 3 *Journal of Financial Economics* 305; Fama, 'Agency problems and the theory of the firm' (1980) 88(2) *Journal of Political Economy*; Watts, 'Corporate financial statements, a product of the market and the political process' (1977) 2(1) *Australian Journal of Management*.

77 *Olmstead v. United States*, 277 US 438 at 485 per Brandeis J (1928).

78 See Finn and Smith, *supra* n.24 at 146.

of politicians, public expectations of government ethics may be low. This is the danger of the public adopting a positive ('what is') rather than a normative ('what should be') perspective. If the converse is in fact the case, the public could adopt the perspective raised by Janis: " 'Since our group's policy objectives are good' the members feel, 'any means we decide to use must be good'".[79]

The upshot of the foregoing is that while ethics cannot practically be viewed in a vacuum, there are dangers in adopting a relative perspective. Finn and Smith identify the relevant query as follows: "what ... is the individual citizen entitled to expect of government in the manner in which it conducts its affairs for the community it serves?"[80] This represents a move from what the public do expect to what are or *should* be the reasonable expectations of the public? This formulation avoids the extremes, and consequent dangers, of absolutism and relativism. What remains to be determined is the characterisation of 'reasonable expectations'. Finn and Smith suggest that this requires a series of prior judgments concerning the relative positions and relationship of the parties.[81] This process can be assessed in the context of the fiduciary relationship discussed earlier. What should be the reasonable expectations of the public must be determined according to whether the relationship between it and government casts upon the latter an obligation to act in the interests of the former, and particularly the scope of this obligation.

As soon as one asks "What should be the public expectation?" one is in danger of imposing his or her own expectations as determinants of ethical conduct. By the same token, by asking merely "What do the public expect?" may foster mediocrity. Professionals, by reason of their expertise, assume a position of trust in society which must be subject to control for fear of abuse. In return for this public trust, many professions have formulated Codes of Ethics as a means of safeguarding the public from potential abuses of trust. As an example, consider the accounting profession in Australia. Accountants are professionally bound by a Code of Ethics which prescribes the standard of ethics which practising accountants must attain.[82] Although this standard is higher than the legal standard, it remains a minimum standard which practitioners are urged to better. It represents what the professional bodies perceive to be the minimum standard which can be reasonably be expected by the community of persons with accounting qualifications who engage in accounting work. This approach is predicated on the notion that individual character and conviction lies at the heart of true ethical behaviour.

However, this is not to suggest that a Code of Ethics cannot be a normative document. Carey defines a Code of Professional Ethics as:

> "... a set of rules and precepts designed to *induce* an attitude and a kind of behaviour on the practitioners of the profession concerned, which will encourage public confidence".[83] (Emphasis added)

That a Code of Ethics can assume a normative character was clearly recognised by the Electoral and Administrative Review Commission (Queensland) in its *Report on The Review of Codes of Conduct for Public Officials* in which the Commission recommended a Code providing for "generalised normative principles".[84] Such a Code of Ethics is an optimalist rather than a

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79 Janis, *Victims of Groupthink* at 204.

80 Finn and Smith, *supra* n.24 at 140.

81 *Ibid* at 143.

82 For example, see the *Code of Professional Conduct* (which is professionally binding upon members of the Australian Society of Certified Practising Accountants) and the *Rules of Ethical Conduct* (which are professionally binding upon members of the Institute of Chartered Accountants in Australia).

83 Carey, 'The Realities of professional ethics' in Loeb (Ed), *Ethics in the Accounting Profession* (Santa Barbara, John Wiley, 1978) at 86. See also Electoral and Administrative Review Commission (EARC), *supra* n.3 at 10.

84 Electoral and Administrative Review Commission (EARC), *supra* n.3 at 65. In this Report it was stated that a Code of Ethics provides a general statement of "fundamental values" supporting structure of government and administration and general ethical duty of public officials. Typical prescriptions identified included "performance of duty", "trusteeship of the public interest" and "disinterestedness" (p.10).

minimalist document, and therefore ascribes to the non-consequentialist concept of absolutism. Were politicians to be subjected to the rigours of a written Code of Ethics, would not the public expectation of politicians be greater? Would this not raise the standing of our elected representatives in the eyes of society? It is commonly asserted that one of the major hallmarks of a 'profession' is the existence of an established Code of Ethics governing its members. Where widespread abuse of a profession's position occurs, this presents a threat to its status and autonomy.[85] Were politicians to be visible perpetrators of unethical conduct, it may be that their status in the community would decrease, and that calls for outside monitoring of political conduct would surface. The inherent need for autonomy of a government in a democratic society would dictate that politicians will resist attempts to reduce their power. This leads to discussion on to the third ethical criterion, that of credibility and reputation.

V. The Change in Public Perception

It has been argued that ethics in government is to have as its basis criteria generated by both consequentialist and non-consequentialist theories of ethical conduct. To merit the confidence of the community government must behave in the fashion dictated by such criteria. Plato recognised that one of the most important strategies for a person who pursues the opportunities and benefits of injustice is to maintain a reputation for justice.[86] While not suggesting that politicians are persons who pursue "the opportunities and benefits of injustice", Plato clearly understood the importance of public perception.

Just as fiduciaries must avoid and be seen to avoid conflict of interest, government must not only be ethical but *be seen to be ethical* by the electorate.[87] Politicians must be seen in the public eye as persons of their word. Politicians must convince the public that undertakings given by them are not in the form of vacuous enticement for political loyalty. If the electorate perceives politicians as untrustworthy and views much of their public behaviour as juvenile, the government is a prime candidate for external regulation. The lack of separation between the executive and the legislature in Australia leaves only the judiciary as the organ of government as the external regulator.

However, this supposes that legal enforcement of government ethics is practicable and appropriate, a supposition which is questionable at best.[88]

Professions are motivated to initiate required standards of conduct to which their members must subscribe, at least in part, as a means of avoiding the imposition of external control upon the profession, thereby preserving autonomy. External control may be curial or quasi-curial/ administrative. To subject the public statements and undertakings of politicians to external control may embody a dangerous precedent in respect of autonomy of government and raise a separation of powers dilemma. By the same token, if parliamentarians are perceived to act in unethical ways, it has been argued that public confidence in government decreases and the very nature of democratic government is threatened. Therefore, the solution to this problem must lie either in changing public perceptions or in the subjection of government to external assessment, or a combination of both.

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85 ASCPA National Office, "What is a profession"? *Core I* (Australian Society of Certified Practising Accountants, 1992), M1.9.

86 Langan, 'The Ethics of Business and the Role of Religion' in Coady and Sampford (eds), *Business, Ethics and the Law* (Federation Press, 1993) at 55.

87 Cf Finn, 'Abuse of Public Power' *supra* n.45 at 56.

88 See VI. Role of Law.

VI. The Role of Law

Hegel stated that "To the righteous no law is given".[89] If government were to adhere to the highest ethical standards in relation to undertakings and promises made to the electorate, there would clearly be no need for the law to intervene. Were elected representatives to feel morally bound to act according to the criteria of accountability, public expectation, credibility and public service, norms of acceptable conduct would be dictated by a form of *opinio juris*.

Widespread community lack of confidence in government bears testimony to the fact that there is a need for legal intervention. As noted by Gilmore "The worse the society, the more law there will be".[90] However, while law may secure individual freedoms, does law actively promote ethical behaviour?[91]

The authors of a leading Australian text on contract law make the following statement in relation government undertakings to the public:

> "Apparently, "definite policy" is something which, if asserted by anyone from the community at large, would be binding, but does not have this effect when put forward by a government or its agencies!"[92]

A. *Application by Example – Public Undertakings*

To return to the subject of the introduction of this paper, consider public undertakings given by government to the community at large or significant sections of the community. Plaintiffs who argue the existence of a contractual relationship with government on the basis of alleged governmental undertakings have not traditionally fared well in the Australian High Court. The Court has often justified its stance by distinguishing between those arrangements which have legal consequences and those of an administrative or political character.[93] Statements of government policy have not been given legal effect because of the absence of an intention to create legal relations.[94] The breach of government undertakings as reflected by its policy statements have been justified by resort to the principle that contracts which fetter administrative action may be invalid.[95] In *Ansett Transport Industries (Operations) Pty Ltd v. The Commonwealth* Mason J (as he then was) phrased the dilemma in the following manner:

> "Public confidence in government dealings and contract would be greatly disturbed if all contracts which affect public welfare or fetter executive action were held not to be binding on the government or on public authorities ... Yet ... the public interest requires that neither the government nor a public authority can by a contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future".[96]

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89 *Hegel's Philosophy of Right, supra* n.1 at para. 270.

90 Gilmore, *The Ages of American Law* (Yale University Press, 1977) at 111.

91 Alexander, 'Independence brings Ethical Responsibility' *Financial Forum*, June 1993 at 8.

92 Greig and Davis, *The Law of Contract* (LBC, 1987) at 217.

93 See for example, *John Cooke & Company Pty Ltd v. The Commonwealth* (1922) 31 CLR 394; *Australian Woollen Mills Pty Ltd v. The Commonwealth* (1954) 92 CLR 424; *Administration of Papua and New Guinea v. Leahy* (1961) 105 CLR 6. In the United States, the courts have approached the problem by creating the "political questions doctrine". Under this doctrine, the court can refuse to decide a question on the ground that it involves a "political question", even though the plaintiff has standing. A question is "political" where there is (1) a "textually demonstrable constitutional commitment of the issue" to the executive or congress; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) a need for an antecedent policy decision by the executive or congress; (4) an imperative need for deference to the executive or congress. See *Baker v. Carr* 369 US 186 (1962).

94 See for example, *Milne v. A-G (Tas)* (1956) 95 CLR 460.

95 *Rederiaktiebolaget Amphitrite v. The King* [1932] 3 KB 500 at 503 per Rowlatt J.

96 *Ansett Transport Industries (Operations) Pty Ltd v. The Commonwealth* (1977) 139 CLR 54 at 74-75.

Finn and Smith note that "if government in its rights and liabilities is to be treated more leniently ... than an ordinary individual, a principled justification should be given for that different treatment".[97] The logical consequence of the 'fettering doctrine' is that general undertakings made by government to the electorate do in no way bind the government's future action.[98]

Relatively recent developments in the law of promissory estoppel[99] and negligent misrepresentation[100] have signalled the High Court's willingness to attribute legal effect to some undertakings and representations made by government and government authorities. However, these cases have involved undertakings and representations made to one individual or company. Government undertakings to the whole or a section of the community remain legally unenforceable, yet it is such undertakings, more so than those made to individuals, which bring to the fore the question of ethical conduct. The breach of undertakings made to the electorate as a whole have the greatest capacity to reduce public confidence in government, and, for this reason, constitute the most perilous threats to integrity of government.

Hegel declared that the concept of 'right' steps into a determinate mode of being through the court of law.[101] To then blithely suggest that the courts should be the relevant forum to deal with general governmental undertakings is to oversimplify a complex problem. The first hurdle to overcome would be the drafting and legislative enactment of law capable of governing politicians' undertakings. To adequately cover the field of such undertakings and to attribute appropriate rights of enforceability correlative to the nature of the undertaking and breach, is not simple, and arguably, not possible. Questions of standing would have to be addressed, and more, importantly, the issue of remedies would provide an almost insurmountable hurdle. Moreover, the power thereby accorded to the court may represent an excessive increase in judicial power and a consequent imbalance in the separation of powers.[102] Commentators agree that laws governing the conduct of business through companies and unit trusts have only been partially successful in raising the standard of business ethics. To contend that the enactment of laws regulating governmental ethics will necessarily meet with greater success is to disregard experience. The Queensland Electoral and Administrative Review Commission expressed a more fundamental difficulty with equating law with ethics:

"Questions of law are ultimately able to be resolved by the courts. Matters of ethics are, almost by definition, unable to be resolved by resort to rules or laws. Ethics questions are matters of judgment about competing values, and therefore matters about which there may be continuing disagreement, ambiguity, or uncertainty".[103]

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97 Finn and Smith, *supra* n.24 at 146.

98 It is interesting to note that the same principle applies in the law of trusts: a trustee must not bind him or herself contractually to exercise a trust in a prescribed manner, to be decided by considerations other than his or her own conscientious judgment at the time, in respect of what is in the best interests of the beneficiaries (*Re Settlement of Wills* (1880) 6 VLR (E) 99; *Dunstan v. Houison* (1901) 1 SR (NSW) Eq 212; *Re King* (1902) 29 VLR 793 at 796 per Holroyd J; *Watson's Bay & South Shore Ferry Co. Ltd v. Whitfeld* (1919) 27 CLR 268 at 277 per Isaacs J). See also Finn, *Fiduciary Obligations* (LBC, 1977), Ch 7.

99 For example, see *Commonwealth v. Verwayen* (1990) 170 CLR 394.

100 For example, see *Shaddock (L) & Associates Pty Ltd v. Parramatta City Council* (1981) 150 CLR 225. But see *San Sebastian Ltd v. Minister Administering Environmental Planning and Assessment Act* (1986) 162 CLR 340.

101 *Hegel's Philosophy of Rights*, *supra* n.1 at para. 219.

102 Australian courts have traditionally eschewed forays into what could be characterised the domain of the executive. The courts' reluctance to issue injunctions interfere with parliamentary procedures illustrates this concern. In the words of Kirby P in *Eastgate v. Rozzoli* (1990) 20 NSWLR 188 at 193 "the mutual respect of each branch of Government for the other requires caution on the part of the courts before they make orders affecting the internal procedures of Parliament".

103 Electoral and Administrative Review Commission (EARC), *supra* n.3 at 21.

VII. Conclusion

Hence, there are strong practical and ideological grounds for rejecting the intrusion of the legal system into the sphere of governmental ethics. A more profitable avenue is to create a framework designed to motivate ethical conduct. However, to presume that there exists a simple solution to the dilemma raised in this paper is tantamount to casting upon oneself the title of an oracle. It is fundamental to the effective functioning of a democracy that the elected representatives account in a timely, accurate and understandable manner to the people regarding the performance of their function, such that the electorate's decision whether to continue support for the present government can be characterised as 'informed'. It is the thesis of this paper that the joint application of desirable features of both major ethical systems, consequentialism and non-consequentialism, can provide a framework for governmental ethics. Accountability and public service, as the non-consequentialist elements, represent ideals derived from the nature of representative government itself as opposed to being justified by reference to the consequences of their implementation. On the other hand, the inclusion of credibility and public expectation in the framework represents the reality that the consequences of particular actions are empirically the only yardstick against which the desirability of such actions can be measured. Via an analysis of these components a theory *explaining* and *justifying* governmental responsibility to the electorate was formulated.

The framework propounded generated potential avenues through which the people's perception of the standard of governmental ethics, and the standard itself, could be raised. The focus of these avenues was two-fold, a Code of Ethics, and a periodic condensed statement of governmental performance available to the electorate. I have not attempted to prescribe the content of either document, but instead to conceptualise, form first principles, a framework within which governmental responsibility to the people can be better understood and modified in a manner consistent with the ideals of the democratic state.