

Chapter 5

The Equitable Duty of Loyalty in Public Office

Stephen Gageler

There was a comic novel written by David Lodge in the 1960s which focused on a day in the life of a postgraduate student of English literature. The student had set out to write a thesis entitled 'Language and Ideology in Modern Fiction'. He had ended up working alone in the reading room of the British Museum attempting to finish a thesis, the title of which had been reduced to 'The Long Sentence in Three English Novels'. In the process, his life had become a pastiche of the texts he had studied. The novel ends with what, at the time it was written, was almost certainly the longest sentence in any English novel.¹

Like that postgraduate student of English literature, I started with a grand design. It was to explore and expound upon the 'The Public Trust', a concept to which Paul Finn first drew the attention of the modern legal reader in a series of publications in the late 1980s and early 1990s, and a concept which has since received attention in academic literature in the United States and Canada. The project held, at the outer reaches of its potential, the possibility of reimagining legal constraints on the exercise of governmental power in a way that was faithful to a tradition embedded deeply, if somewhat obscurely, within our legal tradition and that was also consistent with a contemporary moral understanding of the nature and functioning of government.

Like that postgraduate student of English literature, my ambition has narrowed. It has reduced to exploring how equity supplements statute and the common law by imposing proscriptive duties of loyalty on holders of public offices and by providing remedies to require accounting for gains made in consequence of breach of those duties.

One apology I can give for that much-reduced topic is that it is within the scope of the grand design with which I started. Another is that concentration on a topic of that specificity fits somewhere within the oeuvre of

1 David Lodge, *The British Museum is Falling Down* (MacGibbon & Kee, 1965).

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Paul Finn's work on fiduciary obligations. The younger and more doctrinal Finn eschewed attempts to find higher truth in legal labels attached to categories of relationship; he espoused instead the importance of identifying the source and content of particular equitable obligations.² The older and more philosophical Finn came to abandon what he saw as the 'illusion' of 'definitional certainty'; he placed his faith instead in the search for, and application of, a single 'fiduciary principle'.³ My choice and treatment of the reduced topic would satisfy neither the younger Finn nor the older Finn. But if either were to be the supervisor of my thesis, as the younger Finn once was of another and even narrower thesis, he would graciously acknowledge that there is at least some utility in someone attempting again to examine the topic.

The narrowing of my ambition should be acknowledged at the outset to have its own post-modern literary quality. In moving from the broad topic of 'The Public Trust' to the narrow topic of 'The Equitable Duty of Loyalty in Public Office', I have trodden a path which has led me to say nothing that has not been said by someone else in the past. Much of it has been said by Paul Finn himself, but some of it was said much earlier by others. One previous statement was in the course of a characteristically drawn-out argument on a demurrer which took place episodically over a 24-month period in the Court of Chancery before Lord Chancellor Eldon nearly 200 years ago. The Court of Chancery was then still a 'one-judge court'.⁴ The argument was about whether commissioners appointed under a particular statute which gave them power to levy rates to create a fund, then to be used by them to undertake specified public works, could be required to account at the suit of the Attorney-General as trustees of the fund. Arguing that they could not, John Leach KC, who was soon to be appointed the first Vice Chancellor and who was later to become Master of the Rolls, is reported to have said this:

There is no public officer, from the Crown downwards, who is not in some sense a trustee. ... The levying of rates is a public trust, as any act done under the authority of the Crown is a public trust. All the prerogatives of the Crown are public trusts; but has a Court of Equity anything to do with them? Can this Court call upon any person to account for a public trust? These commissioners are no otherwise trustees than any public

2 PD Finn, *Fiduciary Obligations* (Law Book, 1977) 1; see also reprint edition, Federation Press, 2016, 1.

3 Paul Finn, 'Fiduciary Reflections' (2014) 88 *Australian Law Journal* 127, 131; see also Federation Press, 2016.

4 The description is taken from John H Langbein, 'Bifurcation and the Bench: The Influence of the Jury on English Conceptions of the Judiciary' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge University Press, 2012) 67-82, 74.

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officer who has power to serve the public. It is a trust in him, inasmuch as it is not given for his own benefit.⁵

More than two years after it had begun, Lord Eldon ultimately rejected Mr Leach's argument. Lord Eldon held that the commissioners could be required to account at the suit of the Attorney-General as trustees of the fund. But he did not reject everything Mr Leach had to say. His holding was not on the wide basis that public officers were in general to be treated as trustees so as to come within the supervision of the Court of Chancery. It was on the narrow ground that the particular statute in question had the effect of establishing a trust for charitable purposes.⁶

What I ultimately have to say about the equitable duties of loyalty of the holder of a public office might fairly be said to be nothing more than an elongation of Mr Leach's final sentence. Even then, I am confident in raising more questions than those for which I am confident in providing answers.

Narrowing the Path

Lord Eldon's holding demonstrated the Court of Chancery's readiness to accept that a statute might, on its true construction, establish a trust in relation to property with the result that a statutory officer or statutory corporation might be subjected to the further equitable obligations of a trustee. There were other examples of the Court of Chancery holding that the effect of a statute was to create a trust of property to which the equitable obligations of a trustee were then attached,⁷ and those examples have been replicated in more recent case law.⁸ The Court of Chancery would also lend its remedy of injunction to restrain an exercise of statutory power for a purpose not permitted by the statute.⁹ The Court of Chancery did not, however, impose all of the equitable obligations of a trustee on holders of public office merely because they might be described as 'having a public trust and a public duty to perform'.¹⁰ If a public officer 'neglect[ed] to fulfil

5 *Attorney-General v Brown* (1818) 1 Wils Ch 323, 357-358.

6 *Ibid*, 383-384. See also *Attorney-General v Heelis* (1824) 2 Sim & St 67, 76-77.

7 See generally, John Barratt, 'Public Trusts' (2006) 69 *Modern Law Review* 514.

8 For example, *Fouche v Superannuation Fund Board* (1952) 88 CLR 609, 640-641; *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145, 166-168.

9 See generally, J Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State* (Hart Publishing, 2008) 147-160.

10 *Drewry v Barnes* (1826) 3 Russ 94, 104.

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the [public] trust reposed in him', it was for the Court of King's Bench by mandamus to 'compel him to perform his duty'.¹¹

Thus, in 1882, Lord Chancellor Selborne was able to distinguish between two distinct kinds of trusts.¹² The first were trusts in the 'lower sense', being in respect of 'matters which are the proper subject of equitable jurisdiction to administer'. The second were trusts in the 'higher sense', 'such as might take place between the Crown and public officers discharging ... duties or functions belonging to the prerogative and authority of the Crown'. The first were 'within the jurisdiction of and to be administered by the ordinary Courts of Equity'. The second were not. Trusts of that second kind could be labelled 'political trusts'.¹³

Paul Finn did not challenge that orthodoxy when, in a project beginning in the 1980s and coming to fruition in the early 1990s, he sought to revive what he described as the 'forgotten trust': 'between the community (the people) and the State and its agencies'.¹⁴ Inspired in part by what was then a newly emerging understanding that 'sovereign power' in Australia no longer lay with the Parliament of the United Kingdom but derived from the Australian people,¹⁵ inspired in further part by the High Court of Australia having only recently left open the theoretical possibility that there might be fundamental values so deeply imbedded within the common law system as to be beyond the power even of a legislature to affect,¹⁶ and reacting to what was then the recent uncovering of widespread corruption at the highest level of government in a number of Australian States,¹⁷ Finn sought rather

11 Ibid, 104-105.

12 *Kinloch v Secretary of State for India* (1882) 7 App Cas 619, 625-626.

13 For example, *Tito v Waddell (No 2)* [1977] Ch 106, 211. See further, *Aboriginal Development Commission v Treka Aboriginal Arts & Crafts Ltd* [1984] 3 NSWLR 502, 513; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 589-592 [57]-[65].

14 PD Finn, 'The Forgotten "Trust": The People and the State' in M Cope (ed), *Equity: Issues and Trends* (Federation Press, 1995) 131-151, 131. See also Paul Finn, 'Integrity in Government' (1992) 3 *Public Law Review* 243; Paul Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters, Integrity in Government Project: Second Report* (1993); Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224; Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government*, Vol 1 (Law Book Co, 1995) 1-32.

15 For example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137.

16 *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

17 Significantly, the *Report of a Commission of Enquiry Pursuant to Orders in Council*, July 1989 (Qld) (the *Fitzgerald Report*); the *Report of the Royal Commission into the Commercial Activities of Government and Other Matters*,

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to infuse what Lord Selborne had referred to as trusts in the 'higher sense' with some measure of fiduciary principle. What that measure was, how closely it might track the equitable duties of a trustee, and to what extent it might be reflected in or translated into a legal principle which might be within the jurisdiction of a court to enforce, were never fully developed in his publications. His appointment to the Federal Court of Australia in 1995 cut short his academic pursuit of the project.

Finn's forgotten trust, to the extent that he was then able to develop it, was seen by him to have had its philosophical roots in John Locke's *Treatise on Civil Government* and to have reached the height of its recognition in enlightenment responses to perceptions of despotism.¹⁸ It was crystallised for him in 1776, in the words of the *Maryland Declaration of Rights* that '[a]ll persons invested with legislative and executive powers of government are the trustees of the public',¹⁹ and even more eloquently in the words of the *Pennsylvania Declaration of Rights* that 'all power being originally inherent in, and ... derived from, the people; therefore all officers of government ... are their trustees and servants'.²⁰ The 'inexorable logic of popular sovereignty', as he saw it, was that 'the donees of ... powers under our constitutional arrangements' were properly to be re-characterised as 'the trustees, the fiduciaries of those powers for the people'.²¹ What, for him, needed to be recognised was that 'trust', no less than 'sovereignty', was an intrinsic quality of our democracy and, as such, was properly to be described as a 'constitutional principle'.²²

In going on to argue that recognition of that higher trust of government as a constitutional principle would not 'threaten a radical revolution in the common law',²³ Finn implicitly acknowledged that a rule-of-equity conception of the Australian constitutional structure was in tension with the predominant rule-of-law conception. The rule-of-law conception, as Finn well understood, had come first to be articulated in the nineteenth century, and was most closely associated with the writings of Albert Venn Dicey, who had been emphatic in his view that the legislature was not 'in any legal sense a "trustee" for the electors'.²⁴ Principally under the intellec-

1992 (WA) (commonly referred to as 'the WA Inc Report'); and the *Report of the Royal Commission into the State Bank of South Australia*, 1992 (SA).

18 Finn, 'The Forgotten "Trust": The People and the State', above n 14, 131.

19 Quoted in Finn, 'Public Trust and Public Accountability', above n 14.

20 Quoted in Finn, 'The Forgotten "Trust": The People and the State', above n 14, 131 (emphasis added).

21 Finn, 'A Sovereign People, A Public Trust', above n 14, 14.

22 Ibid, 15.

23 Ibid.

24 Quoted in Finn, 'The Forgotten "Trust": The People and the State', above n 14, 134.

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tual stewardship of Louis L Jaffe in the United States and William Wade in the United Kingdom, the rule-of-law conception had come substantially to be revised in the 20th century to accommodate administrative discretion.²⁵ Championed by Sir Gerard Brennan in the 1980s and early 1990s,²⁶ it had come to be at the forefront of public law consciousness in Australia.

That dominant rule-of-law conception to which Finn was reacting, when reduced to its most basic level, comes to this. The primary constraint on the exercise of governmental responsibility lies in the political responsibility and accountability of the legislature to the electorate. Judicial review of administrative action serves to enhance the political responsibility and accountability of the legislature, first by closely confining the scope for public officials to exercise non-statutory executive powers (traditionally referred to as the prerogatives of the Crown), and second by ensuring that public officers exercising statutory powers act strictly within the legislated limits, and subject to the legislated conditions, on which those powers are expressly or impliedly conferred. Just how judicial review of legislative action might be seen to relate to the political responsibility and accountability of the legislature to the electorate presents the 'counter-majoritarian difficulty' which Alexander Bickel identified in the early 1960s,²⁷ which scholars of constitutional law have debated ever since, and which I have spent the best part of my own professional life seeking to understand and explain.²⁸

Finn cautiously drew back from suggesting that either legislative or executive power within our constitutional structure were to be radically re-conceived as being held on some form of judicially enforceable social trust. A suggestion of that kind would have been in direct opposition to the overwhelming popular commitment to democratic processes of self-government which had led to the establishment of representative and responsible government in the Australian colonies in the 19th century, which had led to the establishment of the Commonwealth of Australia at the turn of the

25 Stephen Gageler, 'Whitmore and the Americans: Some American Influences on the Development of Australian Administrative Law' (2015) 38 *University of New South Wales Law Journal* 1316.

26 For example, *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70-71, citing Louis L Jaffe and Edith G Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 39-41.

27 Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press, 1986) 16.

28 Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162; Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138.

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20th century,²⁹ and which had continued to sustain what was, for all its weaknesses, in world terms an extraordinarily stable Australian democracy for what was then most of the 20th century. Some serious shortcomings in the operation of the institutions of representative and responsible government, as they had come to exist in Australia, were in the process of being exposed when Finn's 'forgotten trust' project was getting underway, and no sensible person in Australia would have argued publicly against considering new mechanisms to enhance their accountability. But very few would have argued that an appropriate means of ensuring the accountability of those institutions of government was through the conferral of supervisory jurisdiction on some form of modern day court of conscience. In words John Hart Ely had used in a chapter entitled 'Discovering Fundamental Values', in his then recently published and highly influential book on constitutional theory entitled *Democracy and Distrust*, although such a model of government had ancient precedents, '[a]fter nearly twenty-five centuries, almost the only people who seem[ed] to be convinced of the advantages of being ruled by philosopher-kings [were] ... a few philosophers'.³⁰

The responses generated from within the system of representative and responsible government in Australia to the failings of public administration which had prompted Finn to think and write about the concept of the public trust in the 1980s and 1990s were more piecemeal and prosaic. One was the legislative establishment of freedom of information regimes.³¹ Another was the enactment of whistle-blower legislation.³² Another was the creation, in a number of States, of offices of the Ombudsman, along the lines of that created by the Commonwealth Parliament as part of a suite of administrative law reforms in the 1970s.³³ Another was the establish-

29 Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43 *Federal Law Review* 177.

30 John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980) 59-60, quoting Robert A Dahl, *Democracy in the United States* (Rand McNally College Pub Co, 1976) 24.

31 *Freedom of Information Act 1982* (Cth); *Government Information (Public Access) Act 2009* (NSW); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1989* (ACT); *Information Act 2002* (NT).

32 *Protected Disclosers Act 1994* (NSW); *Whistleblowers Protection Act 1994* (Qld); *Whistleblowers Protection Act 1993* (SA); *Public Interest Disclosures Act 2002* (Tas); *Whistleblowers Protection Act 2001* (Vic); *Public Interest Disclosure Act 2003* (WA); *Public Interest Disclosure Act 1994* (ACT).

33 *Ombudsman Act 1976* (Cth); *Ombudsman Act 1974* (NSW); *Ombudsman Act 2001* (Qld); *Ombudsman Act 1972* (SA); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA).

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ment by the legislatures of two States of novel and powerful investigatory and reporting agencies.³⁴ The reforms were collectively significant. Jim Spigelman suggested in 2004 that the reforms had then gone so far as to have created what could be described in aggregate as a fourth branch of government. Borrowing from Bruce Ackerman, Jim Spigelman labelled it the 'integrity branch'.³⁵

Legislation establishing investigatory and reporting agencies in both New South Wales and Queensland in the 1990s adopted the terminology of 'breach of public trust' to describe one element of the 'corrupt conduct' into which an agency was empowered to investigate and on which it was empowered publicly to report.³⁶ The terminology remains on the statute book in New South Wales where its legislative use has been publicly acknowledged to have been inspired by the writings of Finn.³⁷ It has never been legislatively defined. But plainly it refers, in context, to a category of misconduct and not simply to conduct which might result in the grant of some equitable remedy were it to be engaged in by a private trustee.

Finn's breath of new life into the forgotten trust in Australia was some time later to inspire what has become an entire field of interdisciplinary academic endeavour in North America. The possibility of propounding a single fiduciary principle of such sweeping generality that it might be capable of explaining, and of governing, the exercise of all or most governmental power has been taken up and explored in academic literature in Canada³⁸ and increasingly of late in academic literature in the United States.³⁹ 'Fiduciary political theory' has been described as 'an intellectual project that seeks to recover the fiduciary foundations of public authority' so as to build on what has been described as 'the fundamental insight of fiduciary law', being 'that the use of discretionary power over the material, practical and legal interests of others must be constrained by obligations meant to

34 For example, *Independent Commission Against Corruption Act 1988* (NSW); *Police Integrity Commission Act 1996* (NSW); *Public Sector Ethics Act 1994* (Qld).

35 James Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724. See also Wayne Martin, 'Forewarned and Four-armed: Administrative Law Values and the Fourth Arm of Government' (2014) 88 *Australian Law Journal* 106.

36 *Independent Commission Against Corruption Act 1988* (NSW) s 8(1)(c); *Criminal Justice Act 1989* (Qld) s 2.23.

37 See, for example, Richard Ackland, 'ICAC Architect Gary Sturgess Should be a Household Name', *Sydney Morning Herald*, 16 April 2014.

38 For example, Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, 2011).

39 For example, Robert G Natelson, 'The Constitution and the Public Trust' (2004) 52 *Buffalo Law Review* 1077; Evan J Criddle, 'Fiduciary Foundations of Administrative Law' (2006) 54 *UCLA Law Review* 117.

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align the interests of agents and principals'.⁴⁰ Finn has been described as having 'inaugurated [that] fiduciary political theory revival'.⁴¹

Perhaps the most ambitious versions of the fiduciary political theory project to date are those which have sought to find a fiduciary foundation for international law in the notion that the responsibility of nation states for the wellbeing of their people 'constitutes a sacred trust of civilization',⁴² and which have argued that nation states collectively 'stand in the position of joint trustees of the earth's atmosphere'.⁴³ Less ambitious versions of the project have concentrated on seeking to apply what are variously described as fiduciary 'principles', 'concepts' or 'values' to more confined areas of the exercise of public authority. The project has to date generated fiduciary theories of spending,⁴⁴ of judging,⁴⁵ of agency rule-making,⁴⁶ and of gerrymandering.⁴⁷ Those engaged in it appear generally to acknowledge that their work remains at the theoretical end of the academic spectrum, and some have suggested that '[s]ome modesty is essential in this research project going forward'.⁴⁸ Leaving theoretical difficulties entirely to one side, much more would need to occur for the project to result in principles capable of being translated into concrete applications.

Finn had formed much the same view of the project when in 2010 he wrote briefly to revisit and defend his concept of the forgotten trust.⁴⁹ He

40 Ethan J Leib, David L Ponet and Michael Serota, 'Mapping Public Fiduciary Relationships' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 388–403, 388.

41 *Ibid.*, 396.

42 Evan J Criddle, 'A Sacred Trust of Civilization' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 404–421.

43 Evan Fox-Decent, 'From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism' in Ken Coghill, Charles Sampford and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Ashgate Pub Company, 2012) 253–268, 266.

44 Robert G Natelson, 'Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders' (2007) 11 *Texas Review of Law & Politics* 239.

45 Ethan J Leib, David L Ponet and Michael Serota, 'A Fiduciary Theory of Judging' (2013) 101 *California Law Review* 699.

46 Evan J Criddle, 'Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking' (2010) 88 *Texas Law Review* 441.

47 D Theodore Rave, 'Politicians as Fiduciaries' (2013) 126 *Harvard Law Review* 671. Compare Ethan J Leib, David L Ponet and Michael Serota, 'Translating Fiduciary Principles into Public Law' (2013) 126 *Harvard Law Review Forum* 91.

48 Leib, Ponet and Serota, 'Mapping Public Fiduciary Relationships', above n 40, 403.

49 Paul Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 *Federal Law Review* 335.

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did not resile from 'the simple proposition that the most fundamental of fiduciary relationships in our society is that which exists between the State ... and the community', but he did acknowledge that characterisation to be 'too abstract for everyday use'. '[A]t least in statutory settings', he then said, 'we should be slow to embrace expansively principles drawn from the law of trusts and from fiduciary law so as to channel and control official decision making'.⁵⁰

The Supreme Court of Canada has, in the last five years, twice rejected arguments based on the notion of statutory or non-statutory executive power being subject to affirmative obligations, described as 'fiduciary duties', to act in the best interests of vulnerable minorities.⁵¹ The Supreme Court has reiterated that duties of that nature 'generally arise only with regard to obligations originating in a private law context', that '[p]ublic law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship' and that '[a]s the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative functions'.⁵²

Here in Australia, four members of the High Court in 2008 endorsed the view expressed judicially by Finn J in 1996, consistently with the view he had earlier expressed academically that the higher trust of government should be recognised as a constitutional principle, when they observed in passing that public service legislation in Australia 'facilitates government carrying into effect its constitutional obligations to act in the public interest'.⁵³ That observation has not since been taken further. The significance of the constitutionally entrenched jurisdiction of the High Court being expressed to extend to 'all matters ... in which a writ of Mandamus or prohibition or an *injunction* is sought against an officer of the Commonwealth'⁵⁴ remains fully to be explored.⁵⁵ In the meantime, equitable remedies of declaration and injunction are being used increasingly in administrative law contexts to supplement the common law or constitutional writs or their modern

50 Ibid, 335-336.

51 *Alberta v Elder Advocates of Alberta Society* [2011] 2 SCR 261; *Manitoba Metis Federation Inc v Canada (Attorney)* [2013] 1 SCR 623.

52 *Alberta v Elder Advocates of Alberta Society* [2011] 2 SCR 261, 278 [37], citing *Guerin v The Queen* [1984] 2 SCR 335, 385.

53 *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163, 181 [34], citing with approval *McManus v Scott-Charlton* (1996) 70 FCR 16, 24.

54 Section 75(v) of the Constitution (emphasis added).

55 See W Gummow, 'The Scope of Section 75(v) of the Constitution: Why Injunction but No Certiorari?' (2014) 42 *Federal Law Review* 241.

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equivalents.⁵⁶ Within mainstream legal thinking, however, the forgotten trust – although not entirely forgotten – remains largely undeveloped.⁵⁷

It has often been acknowledged that there is an analogy between some of the equitable principles applicable to trustees and some of the principles applied in the judicial review of administrative action, just as there is an overlap between some of the remedies.⁵⁸ Both being concerned with the curial supervision of the exercise of powers capable of affecting the rights or interests of other persons, it would be surprising if there were not a substantial similarity. But the analogy has not here been pressed very far. There would be some difficulties in taking it very far.

The paradigm of a trust enforceable in equity does not readily explain a great deal of the law that has developed legislatively and judicially, most rapidly in the second half of the 20th century, to govern judicial review of administrative action. That is because the paradigm of a trust enforceable in equity – requiring as it does for its recognition certainty of intention, subject matter and objects – is too stylised a form of relationship to accommodate the complexity of contemporary public administration. It is also because the trust paradigm is too managerial to be consistent with contemporary expectations about just and fair administrative processes and too paternalistic to reflect contemporary expectations about the appropriate role of judicial oversight of the actions of administrators. The imposition of a general presumption in favour of the observance of procedural fairness, perhaps the most significant and pervasive judicial development in the judicial review of administrative action to have occurred in the last quarter of the 20th century is, at its core, concerned with ensuring that those potentially affected by an exercise of power have an opportunity to speak for themselves to influence its exercise. Tellingly, that administrative law doctrine of procedural fairness has no equitable parallel in the private law of trusts; '[t]rustees have no obligation to consult the beneficiaries, unless they are required to do so by the terms of the trust or there is some

56 For example, *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157-158; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358-360.

57 For a relatively recent critical appraisal see John Glover, 'Public Officials, Public Trusts and Fiduciary Duties' in Ken Coghill, Charles Sampford and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Ashgate Pub Company, 2012) 69-98. See also Benjamin Franklen Gussen, 'The State is the Fiduciary of the People' [2015] *Public Law* 440.

58 For example, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 257 quoting Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 328.

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relevant statutory provision⁵⁹. Unlike the assistance traditionally afforded to a trustee, our system has never thought it proper to accommodate the prospect of an administrator seeking and acting on judicial advice.

Treading the Narrow Path

Lord Mansfield, like other common law judges of his era,⁶⁰ did not necessarily have the technical doctrines of chancery in mind when he spoke of 'equity'⁶¹ or of 'trust'. But it is plain that he had a fiduciary concept in mind when he explained, in a landmark judgment in 1783, that a public officer is indictable at common law for an offence of misbehaviour in public office. The law, he said, 'does not consist of particular cases but of general principles', and the relevant general principles were these:

[F]irst ..., if a man accepts an office of trust and confidence, concerning the public, ... he is answerable to the king for his execution of that office; and ... in a criminal prosecution. ... [Secondly,] where there is a breach of trust, a fraud or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable by a civil action, yet as that concerns the king and the public (I use them as synonymous terms), it is indictable.⁶²

As to the first of the principles stated by Lord Mansfield, it came later to be explained that 'an officer who discharges any duty in the discharge of which the public are interested'⁶³ holds an 'office of trust' in the relevant sense. Drawing on a decision of the House of Lords in 1853,⁶⁴ the High Court of Australia had no difficulty in the 1920s in holding a member of Parliament to fall within that conception, consistently with the principles of representative and responsible government as they had then developed. The High Court then held that the receipt of money by a member of Parliament as an inducement to use his official position for the purpose of influencing or putting pressure on a Minister or another public official was not only contrary to public policy,⁶⁵ but a crime, irrespective of whether the

59 *X v A* [2000] 1 All ER 490, 496. See also *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431.

60 For example, *Lane v Cotton* (1796) 12 Mod 472, 481.

61 For example, *Moses v Macferlan* (1760) 2 Burr 1005. See *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 606-607 [111].

62 *R v Bembridge* (1783) 22 State Trials 1, 155-156.

63 *R v Whitaker* [1914] 3 KB 1283, 1296. See generally, Paul Finn, 'Public Officers: Some Personal Liabilities' (1977) 51 *Australian Law Journal* 313, 314.

64 *Egerton v Brownlow* (1853) 4 HLC 1, 162, 174, 196.

65 *Horne v Barber* (1920) 27 CLR 494. See earlier *Wilkinson v Osborne* (1915) 21 CLR 89.

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end sought to be achieved was lawful.⁶⁶ It was sufficient that, by accepting the money, he put himself in a position where his interest and his duty conflicted.

Isaacs J wrote in one of those cases in the High Court that 'the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses' lay in the existence of a duty on the part of a member of Parliament of 'watching on behalf of the general community the conduct of the Executive'. He continued:

The effective discharge of that duty is necessarily left to the member's conscience and the judgment of his electors, but the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration.⁶⁷

Rich J wrote in the same case:

Members of the Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interest of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law.⁶⁸

Isaacs and Rich JJ, writing together in the last of the cases, summed up the position in terms that the 'fundamental obligation' of a member of Parliament had historically been and remained 'the *duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare for the community'.⁶⁹

As to the second of the principles stated by Lord Mansfield, it was clear enough from the explanation Lord Mansfield gave that conduct indictable as an offence at common law for misbehaviour in public office was conduct of a nature which would be actionable at common law or in equity had the relationship which existed between the public officer and the public existed instead between private individuals. But was conduct for which the public officer was indictable at common law for the offence of misbehaviour in public office also actionable against the public officer at common law or in equity?

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

67 *Horne v Barber* (1920) 27 CLR 494, 500.

68 *Ibid*, 501.

69 *R v Boston* (1923) 33 CLR 386, 400. See, for an extended discussion, Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect, 2000) 271-272.

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Whatever procedural or conceptual difficulties might have been seen to stand in the way of giving an affirmative answer to that question at the time of Lord Mansfield appear to have fallen away by 1858, when the Judicial Committee of the Privy Council came to uphold on appeal a decision rendered at first instance in the Court of Chancery of the Province of Upper Canada which held that the Mayor of the Corporation of the City of Toronto held on trust for that corporation a profit he had made from purchasing debentures issued by a railway company. The issue of the debentures by the railway company was authorised by a decision of the corporation to pass a by-law, and the Mayor had participated in making that decision.⁷⁰ The Mayor, said Knight Bruce LJ, delivering the advice of the Privy Council, may not have been an agent or trustee within the common meaning or popular acceptance of either term, but 'he was so within the reach of every principle of civil jurisprudence, adopted for the purpose of securing, so far as possible, the fidelity of those who are entrusted with the power of acting in the affairs of others'.⁷¹ Addressing an argument that the governmental character of the decision to pass the by-law was inconsistent with the imposition of civil liability on the Mayor, in the course of which it was suggested that 'members of the British Legislature often vote in Parliament respecting matters in which they are personally interested in and do so without censure or risk',⁷² Knight Bruce LJ said this:

[N]either the governing character nor the deliberative character of the Corporation Council makes any difference, and that the Council was in effect and substance a body of trustees for the inhabitants of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly. With regard to members of a Legislature, properly so called, who vote in support of their private interests; if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which Courts, however, are nevertheless bound to apply those principles where they can be applied.⁷³

The Supreme Court of the United States adopted essentially the same approach in 1910 in holding the Government of the United States to be entitled to a decree in equity for the amount received by an executive as

70 *Bowes v City of Toronto* (1858) 11 Moore PC 463. See generally, Lionel Smith, 'Loyalty and Politics: From Case Law to Statute Law' (2015) 9 *Journal of Equity* 130.

71 *Bowes v City of Toronto* (1858) 11 Moore PC 463, 518.

72 *Ibid*, 523-524.

73 *Ibid*, 524.

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payment from the profit gained by others from contracts he administered. It was not necessary for the Government to prove fraud or abuse of discretion on the part of the officer or that the Government had suffered actual loss. The governing principle was expressed in the familiar prophylactic language of equity and was explained to result from the 'fiduciary character' of the officer as an 'agent' of the public. So, it was said:

The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes a gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.⁷⁴

Something of the same approach appears to have been adopted by the House of Lords in 1951 in a minimally reasoned decision which held the Crown to be entitled to money received by an army sergeant as a secret payment for assisting illicit dealers in spirits by accompanying them past army check-points in his uniform.⁷⁵ The sergeant was, it was said, relevantly in a 'fiduciary relationship' and was accountable for the money he had made from taking advantage of his position even though his receiving it was a criminal act.⁷⁶ The paucity and obscurity of the reasoning of the House of Lords stands in marked contrast to that of the Supreme Court of New Jersey the following year, in a case involving fraud and corruption by members of a Commission appointed to administer public funds. In a passage which Paul Finn became fond of quoting, Vanderbilt CJ said this:

Public officers [hold] positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve ... As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity ... They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly.⁷⁷

The absence of any similar, very clear statement of principle concerning public officers elsewhere might possibly be explained on the basis that, in the relatively few cases to have come before appellate courts in which equitable remedies have been sought in relation to corrupt conduct by public

74 *United States of America v Carter* 217 US 286, 306 (1910).

75 *Reading v Attorney-General* [1951] AC 507.

76 *Ibid*, 516, referring to *Attorney-General v Goddard* (1929) 98 LJKB 743.

77 *Driscoll v Burlington-Bristol Bridge Co* 86 A 2d 201, 221 (1952).

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officers, the officers in question were, or were assimilated to the position of, employees of the Crown. It appears to have been on that basis that when the Privy Council came in 1993 to consider the status of money received as a bribe by a prosecutor in Hong Kong, in an appeal from a decision of the Court of Appeal of the Supreme Court of New Zealand, there was no dispute that he was accountable for that money to the Crown. The only issue was whether he held the money on trust for the Crown or was merely liable to pay it to the Crown as an equitable debt.⁷⁸

The Equitable Duty of Loyalty

For present purposes, questions can be put to one side as to whether the only equitable duties properly recognised as 'fiduciary' are duties of loyalty, and as to whether fiduciary duties of loyalty are only proscriptive in character.⁷⁹ Questions can also be put to one side as to the precise nature and scope of proprietary equitable remedies for breach of proscriptive duties of loyalty.⁸⁰

What the narrow and winding path of scattered cases to which I have referred demonstrates is some doctrinal support for the existence of a proscriptive duty of loyalty on the part of public officers which is equitable in nature. The younger Finn was inclined to be critical of the duty of loyalty on the part of a public officer being thought of as equitable. '[L]ittle service ha[d] been done to the fiduciary relationship', the younger Finn wrote, 'by forcing into its mould officers whose positions are, it is suggested, regulated by a distinct though similar body of public law'.⁸¹ The older Finn came to embrace it.⁸²

The subjection of public officers to an equitable duty of loyalty fits comfortably within the fiduciary principle as Paul Finn came more

78 *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324.

79 See *Bristol and West Building Society v Mothew* [1998] Ch 1, 18; *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165, 197-198 [74]; Matthew Conaglen, *Fiduciary Loyalty* (Hart Publishing, 2010) 6-31; James Edelman, 'The Role of Status in the Law of Obligations' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 26-27; Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 39-62, 41-43.

80 See W Gummow, 'Bribes and Constructive Trusts' (2015) 131 *Law Quarterly Review* 21.

81 Finn, *Fiduciary Obligations*, above n 2, 215; see also reprint edition, Federation Press, 2016, 231.

82 Finn, 'Fiduciary Reflections', above n 3, 128-131; see also Federation Press, 2016.

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generally to expound it. The key elements of his exposition of the fiduciary principle have been usefully drawn together by Dawn Oliver as follows:

First, but by no means uniquely, fiduciary law's concern is to impose standards of acceptable conduct on one party to a relationship for the benefit of the other where the one has the responsibility for the preservation of the other's interest. Secondly, again in common with other bodies of law, it does this by proscribing one party's possible use of the power and of the opportunities his position gives, or has given, him to act inconsistently with that responsibility. ... The fiduciary duty originates in public policy, a view of desired social behaviour. ... A fiduciary relationship, ultimately, is an imposed not an accepted one. If one needs an analogy here, one is closer to tort law than to contract; one is concerned with an imposed standard of behaviour.⁸³

Application of the fiduciary principle as so expounded to a person holding a public office gives rise to a number of interesting, overlapping and potentially quite difficult questions. Many of them do not lend themselves to abstract analysis. Many could not begin to be addressed in the context of a particular case without reference to other applicable bodies of law and administrative practice. Just as the particular equitable obligations that arise in the context of a particular contractual relationship must be moulded to contractual arrangements into which the parties may have entered, so too the precise incidents of the equitable duty of loyalty of a particular public officer would need to be moulded to the statutory or non-statutory arrangements under which the office might be created and regulated.

The first question is one of determining who is a public officer for this purpose. The answer to that question cannot turn simply on the source of the power that is exercised. Coercive, intrusive or pre-emptive powers are sometimes conferred by statute for the purpose of being exercised within the bounds set by those statutes in the commercial interests of the entities on which those powers are conferred. Australian examples are the roll-out powers vested in telecommunications carriers⁸⁴ and the power to veto wheat exports which was until recently vested in AWB Ltd.⁸⁵ Is it necessary for a person relevantly to be a public officer to be a person who

83 Dawn Oliver, 'Review of (Non-Statutory) Discretions' in Christopher Forsyth (ed), *Judicial Review & The Constitution* (Hart Publishing, 2000) 308, quoting from PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 2, 27, 54; see also Federation Press, 2016; and also referring to Paul Finn, 'Fiduciary Law and the Modern Commercial World' in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford University Press, 1992).

84 *Telecommunications Act 1997* (Cth) Sch 3.

85 *Wheat Marketing Act 1989* (Cth) s 57, considered in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

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has some identifiable duty to the public or some section of the public? Or is it sufficient that the person has the capacity to exercise or participate in the exercise of non-statutory executive power or a power conferred by statute which is not, on the proper construction of that statute, a power which the person is permitted to exercise for the person's own benefit? Asking the same question using the words of Mr Leach KC, might it be enough to say of the non-statutory executive power or a statutory power exercised by the person that it was 'not given for his own benefit'?

The second question is one of identifying the principles which inform the scope of the fiduciary duty when it arises. Consistently with an explanation given by Justice Deane in 1984, by which the older Finn was much influenced,⁸⁶ the requirement for the holder of fiduciary duty to account for personal benefit or gain has come to be expressed in Australia in terms of the operation of two distinct but overlapping 'themes'.⁸⁷ The first is 'that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict', the objective of which has been identified as being 'to preclude the fiduciary from being swayed by considerations of personal interest'. The second is 'that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity of knowledge resulting from it', the objective of which has been identified as being 'to preclude the fiduciary from actually misusing his position from his personal advantage'. Finn referred to the first theme as 'risk avoidance', and to the second theme as 'trust maintenance'.⁸⁸

The cases to which I have referred as indicative of an equitable duty of loyalty on the part of public officers can all be explained by reference to the second of those themes without need to refer to the first. The equitable duty of loyalty, were it to be confined to the theme of trust maintenance, would cover substantially the same ground as the common law offence of misbehaviour in public office. It would provide a basis for recovery in equity of a benefit or gain obtained or received by a public officer in circumstances where the public officer had actually misused his or her position. Bribes and secret commissions can be seen on that basis to be quite easy cases.

It is in the application of the theme of risk avoidance to a public officer that more difficulty might be seen to arise. Paul Finn pointed out

86 Finn, 'Fiduciary Reflections', above n 3, 131; see also Federation Press, 2016.

87 *Chan v Zacharia* (1984) 154 CLR 178, 198-199.

88 Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters, Integrity in Government Project: Second Report*, above n 14, 30.

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that '[c]onflicts, and particularly undisclosed conflicts, might create a real temptation to actual abuse of office', '[b]ut unless succumbed to – unless actual abuse occurred – the criminal law remained neutral in the matter'.⁸⁹ Should equity go further? Should equity take an independent stance? Finn never said that it should or should not, but he did wisely point out some practical difficulties. He said this:

In one sense all public officers can quite properly be said to have conflicts of duty and interest inherent in them. The very idea of the neutral public servant, for example, presupposes that the individual officer will have his or her personal beliefs, biases, interests, preferences, associations, etc. It nonetheless posits that in the exercise of office the officer is to be expected to subordinate these to the positive requirements of the law, to the pursuit of prevailing official policy/lawful direction and, subject to these, to his or her own conscientious appreciation of the public interest. But the neutral public servant is not expected to be the neutered public servant. Where, despite the law, policy, directive, etc., some level of personal discretion remains (and this commonly is the case) the official both is to be expected to, and is entitled to, be influenced in some measure by his or her own beliefs etc. – provided always that the official in so being influenced reasonably believes that those beliefs are consistent with the public interest that is to be served in and through his or her official function. Officials, like other fiduciaries, are not to be expected or required 'to live in an unreal region of detached altruism'.⁹⁰

He continued:

In acknowledging the endemic presence of 'the personal' in official decision making, we have of necessity to accept that the potential exists (no matter how remote the likelihood of its realisation in fact) for the official decision to be abused in virtually each and every instance. If we are to have government at all, we have to live with the inevitability of that potential. It cannot be eliminated without eliminating official power itself. At best it can only be managed and even to do this complex, for the most part pragmatic, judgements have had to be made – judgements (a) which seek to discern types of circumstances in which the risk of abuse is considered to be appreciable; (b) which are sensitive to countervailing considerations; and (c) perhaps most importantly, which are capable of expression in a reasonably precise and workable regulatory norm.⁹¹

89 Ibid, 31. See also Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307.

90 Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters, Integrity in Government Project: Second Report*, above n 14, 9, referring, in the final sentence, to *Mills v Mills* (1938) 60 CLR 150, 164.

91 Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters, Integrity in Government Project: Second Report*, above n 14, 10.

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Justice Finn, in one of the last judgments he delivered as a member of the Full Court of the Federal Court, explained the concept of 'duty' in the 'conflict of duty and interest' formula of the risk avoidance theme as 'convenient shorthand', referring 'simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform', the identification of that function being 'a question of fact'.⁹² The concept of 'interest' is similarly a question of fact, and 'conflict' is one of degree. Were equity ever to apply the theme of risk avoidance as a basis for recovery of a benefit or gain obtained or received by a public officer, then the application of that theme to determine whether or not the circumstances in which the public officer obtained or received a benefit or gain were such that there existed a conflict between the officer's personal interest and the officer's public duty – or a significant possibility of such conflict – might be expected to adhere closely to standards of ethical conduct set out in applicable, clearly expressed, well-accepted and well-understood administrative guidelines or codes of administrative practice.

The third question is to whom accounting is to be made when a public officer receives a benefit or gain in breach of the officer's equitable duty of loyalty. The ordinary position in equity is that it is only a person to whom a fiduciary duty is owed who can complain of its breach. The ordinary position in equity is correspondingly that it is only a person to whom a fiduciary duty is owed who has the capacity to relieve the fiduciary of the full rigours of the fiduciary duty by giving informed consent to conduct which would otherwise constitute a breach. To whom is the duty of loyalty of a public officer owed? If the answer is that it is owed simply to the public, then the Attorney-General must have standing to enforce it, and analogy to a charitable trust might suggest that no-one would have standing to do so.⁹³ Does it follow that the Attorney-General could give informed consent to conduct which would otherwise constitute a breach? Might public disclosure or some lesser form of disclosure, of some interests in some circumstances, substitute for informed consent?

Yet another issue is the extent to which the equitable duty of loyalty might overlap with, and interact with, the apprehended bias rule.⁹⁴ Might circumstances which require a public officer to account in equity for a personal gain made as a result of an administrative decision also give rise to an apprehension of bias on the part of that officer in making an admin-

92 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 345-346 [179].

93 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 583 [39].

94 See Matthew Conaglen, 'Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias' [2008] *Public Law* 58.

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istrative decision? If so, how would the legal and equitable consequences be unravelled?

Conclusion

Paul Finn's grand vision of the 'The Public Trust' inspired an ambitious academic project. The project will be for others to complete. Uncontroversial within the scope of that vision is the modest and deeply historically rooted proposition that the holder of a public office has a duty to exercise public power only by reference to some version of the public interest: '[i]t is a trust in him, inasmuch as it is not given for his own benefit'. Uncontroversial, too, is the modest proposition that the holder of a public office can held be liable to account in equity for a benefit or gain obtained or received in circumstances where that trust has been breached. What remains perplexingly obscure is just when, and how, such an accounting might be required to occur.