“Law, Morality and the Public Trust”

The 2017 Blackburn Lecture to the ACT Law Society, 16 May 2017

A. Introduction

Thank you to the ACT Society for the opportunity to deliver the 2017 Blackburn Lecture, the 32nd in this important series.

Sir Richard Blackburn was farewelled from the ACT Supreme Court in 1985, the year I commenced legal practice. I did not have the personal opportunity to observe or learn from his rich personal qualities or widespread contributions to Australian law, including at University and through the Courts of the Northern Territory, the ACT and the Federal Court of Australia. I can only hope that my remarks today stimulate thought in the way he envisioned this lecture should when he gave the Inaugural Lecture on 21 May 1986.

The theme of the 2017 ACT Law Week is “Law and Justice in Your community”, an important theme. It reminds the many of us in the room today who are full time practising lawyers - whether as judges, barristers, solicitors or government lawyers – as well as those here today whose daily job is to exercise public power under the law, that sometimes it is good to disrupt our usual focus. Even if only momentarily, we need to put aside our conventional perspectives, as the specialists or the experts in the law, and think about law from the opposite end. What are the basic needs and legitimate expectations of the ordinary members of our community - whether they be citizens, permanent or temporary residents, or those here without lawful status – when it comes to the law?

And by "our community" we should include those persons who seek to engage Australia's international obligations but are held or languish in offshore places.

From this perspective, what would a moderately well-functioning and reasonably fair legal system look like? I am not looking for perfection here. Simply for the basic elements which our legal system should reflect if it is to command the respect and the general obedience of the ordinary folk of our community united under our written Constitution.

First, at a minimum, from the perspective of the ordinary citizen or subject, the law should be readily:

- Accessible,
- Understandable,
- Rational, and
- Capable of being complied with.

Secondly, where there is doubt about what the law commands, members of our community ought to be able to obtain access to skilled legal advice to determine their rights, and where necessary access to a tribunal or court to resolve controversies.

Thirdly, our tribunals and courts should be fair, independent and accurate in their understanding and application of the law.

As a community, we have much more to do to realise the first and second of these pretty basic objectives.
Let me give one example. The angst which was felt by many recipients of Centrelink payments earlier this year can be viewed as a failing of the law in these first two objectives. Some amongst the most vulnerable in society received threatening legal documents, in circumstances where it was very difficult for them to understand if the demands made on them were justified in law or to obtain accurate advice from the Government as to whether those demands were correct. In addition, these persons did not have ready access to advice, from properly funded Community Legal Centres or otherwise, on their basic rights.

Many important issues of this character are being explored and debated in various events organised by the Law Society this week. I also note that the charity supported by the Law Society over this week is a very important one, the Australian Indigenous Legal Centre, a body which is the only national accredited body for providing Indigenous Leadership Training Programs.

In addition to these three very basic objectives, I suggest that members of our community have certain even more fundamental expectations of the law. Put at its essence, they have the right to demand and expect that the law, in all its substantive rules and procedural niceties, strives to achieve a fair balance between various members of the community when they come into conflict, and equally a fair balance between members of the community and the State where the two collide. In each case, what constitutes a fair balance should reflect the interests of the more vulnerable person in the situation or relationship.

Today I wish to focus on the second of these, a fair balance between the vulnerable subject and the State. In doing so, I wish to draw upon, but also place my own perspective upon, the seminal and enduring ideas of Paul Finn, ideas which revolve around the notion that all public power within the State should be seen as held on a Public Trust for the community. The law imperfectly, necessarily incompletely and yet with stubborn persistence over time seeks to give effect to this fundamental notion. Law cannot play the full role here. There will always remain an area, often a large one, in which it will be solely or primarily the conscience of the holder of public power that can give effect to Public Trust. Hence the word "Morality" in my title today. It follows that those of us who have the privilege, at any point in time, of advising on the due exercise of public power, particularly in areas where the courts may never get to scrutinise it afterwards, have an added duty to provide clear and accurate advice on what the Public Trust demands in a given case.

To elaborate on my general theme, I wish to take three steps.

The first step is re-state some of the key elements of Finn’s basic thesis, relying here not only on his extensive publications, but the address he gave on this very occasion some 21 years ago. The second is to identify a few areas in our law in which, particularly over the last 21 years, the basic notion of the Public Trust has been recognized. The final step is to say something about Morality and its role in the protection of the Public Trust.

B. Finn’s thesis on the Public Trust

Necessarily, there will be some over-simplification or personal perspective in what I now say.¹ One of Finn’s core underlying ideas was that all power of the State - whether the State is considered as a body or as it acts through individual public officials - is held on a Public Trust,
that is a trust for the benefit of the society and body of citizens and subjects as a whole, as well as a trust for those individuals directly affected by individual exercises of public power.

Finn regarded this as an idea sourced in legal and political history and philosophy, particularly from the United Kingdom and United States common law traditions. The law instantiates the idea in varying areas and varying doctrines over time. It can be seen in the criminal law, in offences of misuse of public office; in tort law, in torts such as misfeasance in public office; in equity, such as in the liability of public officers to account for gains made by use of their office; in electoral law; and so on.

For Finn, the idea has sound Australian constitutional underpinnings. All power under our written Constitution comes from the people. We the people are the true sovereign in the polity. Power must be held on trust for us.

Finn saw a unity between these ideas and doctrines and the more general concern of the law, whether in its public or private arms, to protect those who are the more vulnerable. I take the liberty of quoting how he put the point in delivering this lecture 21 years ago:

“It has been a routine function of the courts within their province to protect from the untoward, persons who are in positions of vulnerability in their relations and dealings with others and with government. In some periods that function has been discharged with solicitude; in others with reticence. But it has always been there. And it is a function which we should from time to time openly proclaim for it embodies a significant part of the civilizing role of the courts themselves.”

Finn went on to recognize the rise of the Statute:

“It must, of course, be recognized that today it is Parliaments and not the courts which rightly have assumed primary responsibility for maintaining the conditions for civilised existence and for civil behavior in our society. Statute, in consequence, provides the better measure of our collective sense of responsibility to the vulnerable in society…”

However, even accepting the ubiquity of the modern Statute, and its Constitutional pre-eminence over the common law and equity, Finn still argued for a role for fundamental ideas like the Public Trust to inform the development of the law.

In this approach, Finn remained true to the essence of the common law method – a place where we depart substantially from the Civilian or Continental lawyer. It is a central part of the role of the Court in a common law system to develop the law case by case. Each case can be properly decided only by close attention to facts of the particular case and to the closest previous precedents. Equally, deep principles can and do guide the law’s development from time to time. A central part of the common law method is to uncover what those deep principles; to find the right cases to apply them; and to turn their generality into more specific rules and doctrines capable of application to resolve concrete disputes.

C. The Modern Law of Public Trust in Australia

When Finn delivered this lecture in 1996, he identified a range of areas in which the Australia High Court, particularly in the early 1990’s, was playing a growing role in protecting the individual against what was perceived to be the ever more pervasive power of the State. He saw this as part of the broader theme of the courts protecting the more vulnerable.

He instanced the implied freedom of political communication; the increasing emphasis on rules of statutory construction which require Parliament to speak with unmistakable clarity if it intends
to authorise interference with fundamental rights, freedoms or immunities, citing *Coco* (1994);  
the general implication of a requirement of procedural fairness as a condition of government decision making, citing *Annetts* (1990);  
a “measured acceptance” of the civilian engendered idea of proportionality; and an accelerated erosion of the privileges of the State in dealing with the citizens, citing the earlier *Commonwealth v John Fairfax* (1980), amongst other points.

These developments in public law have only accelerated in the ensuing 21 years and are still unfolding. I will say more about them individually shortly.

I wish to do so in the context of arguing that Finn’s notion of Public Trust remains a helpful underlying or unifying principle in understanding these critical developments in the law. That is not to say it is the only way to understand them.

Justice Gageler, writing extra-judicially in 2016 about the enduring significance of Finn’s work, describes Finn’s view as a “rule-of-equity” conception of the Australian constitutional structure, one which is in tension with the dominant “rule-of-law” conception. Under the dominant rule-of-law conception, traced back to A.V Dicey, the primary constraint on the exercise of government power lies in the political responsibility and accountability of the legislature to the electorate. Judicial review serves to enhance those constraints to the extent that it closely confines the scope for public officials to exercise non-statutory powers or that it holds public officers exercising statutory powers to strict limits and conditions set expressly or impliedly by the statute.

Gageler J’s assessment was that the mature Finn would not resile from his view that the most fundamental fiduciary relationship in society is that which exists between the State and the community, but would temper it with the appreciation that it may be too abstract for everyday legal use. At least in statutory settings, one should be slow to embrace expansively principles drawn from the law of trusts and fiduciary law to channel and control official decision-making.

Gageler J went on to offer his own self-described “narrow” example of how the Public Trust conception already has a sound footing in the law of equity. He identified authority and principle supporting the imposition of a proscriptive duty of loyalty on the part of public officers, in turn providing a basis for the recovery in equity of a benefit or gain obtained by a public officer in circumstances of actual misuse of position.

I wish to argue today that when attention is paid to the development across a variety of areas of our law over the last 21 years, we can see that each of the rule-of-equity and rule-of-law conceptions of our Constitutional framework have important explanatory force, and if anything, the Public Trust focus is greater than might have been foreseen when Finn gave this address 21 years ago. To the extent law and equity are working together, and the tenderness of one corrects the rigidity of the other, that is consistent with, and appropriate in the light of, the long course of our legal history. I will start with the Constitution itself.

*Re Day* (No 2)

On 5 April this year, the High Court ruled in *Re Day* (No 2) that Mr Day was incapable of being chosen or sitting as a Senator for South Australia because he had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth within s 44(v) of the Constitution.

The indirect interest arose in the following circumstances:

- at Day’s request, the Commonwealth leased a property from a company Fullarton Investments for use as Day’s electoral office.
• Fullarton Investments held the property on a trust under which Day was an ultimate beneficiary.
• Fullerton Investments had acquired the property on vendor finance from a trustee company controlled by Day, which in turn had borrowed from a bank guaranteed by Day.
• The Commonwealth was directed to pay the rent to a bank account labelled “Fullarton Nominees”, yet Day was the true holder of that account.
• This elaborate structure was designed to house the property in a way that appeared to distance it from Day, but to ensure the rent flowed through to the Day trust and no profit or loss was incurred in Fullarton Investments.9

The Court was offered two views of the purpose of s 44(v). The narrower view, citing Barwick CJ in 1975 in Webster, was that s 44(v) mirrored its progenitor in the House of Commons (Disqualification) Act 1782 (UK); as such it did no more than to ensure that the Public Service was not able to exercise undue influence over members of Parliament through agreements. Here, it was argued, the lease agreement did not give the Public Service any leverage over Mr Day, not least because under his elaborate structure his true interest in the lease was hidden from Commonwealth officials administering the lease.10

A broader view of the purpose of s 44(v), which the High Court unanimously adopted across four separate judgments, is that it serves to ensure that Members of Parliament will not seek to benefit by agreements with the Public Service, nor put themselves in a position where their duty to the people they represent and their own personal interests may conflict. This broader purpose was placed squarely on grounds of the Public Trust. Parliamentarians have a duty as representatives of the people to act in the public interest. They must act in good conscience, uninfluenced by other considerations, especially personal financial considerations.11 The various judgments in Re Day (No 2)12 are squarely based on two key High Court cases of the 1920’s which Finn had long urged embraced the Public Trust: Horne v Barber13 and R v Boston14. Issacs and Rich JJ in Boston had put the point at its essence: the fundamental obligation of a Member of Parliament had been and remained the duty to serve, and in serving to act with fidelity and with a single-mindedness for the welfare of the community.15

An immediate consequence of Re Day (No 2) is that other Members of Parliament may need to reflect upon the agreements they might have in place with the Public Service which they stand to benefit from financially.

A broader consequence is that Re Day (No 2) lays down, in the strongest of terms, a general conception of the role of a Member of Parliament being to serve, and serve only, the public interest. The same would also hold good for persons who hold office under Chapter II of the Constitution.

That is not to say the Public Trust, once invoked, solves all legal problems in every case. There are subtle nuances and differences between the various judgments in Re Day (No 2) even in the application of just one paragraph of the Constitution (s 44(v)). Was it the receipt of rent alone which triggered s 44(v), or were the other aspects of the elaborate structure sufficient to do so? What are the limits of an agreement with the Public Service – does it exclude an agreement which the Commonwealth enters but which is of general application, such as a bond issue? How does one identify the test for a pecuniary interest in an agreement in a way which provides the
greatest certainty of operation for a blunt disqualification provision consistent with its language and purpose? These questions remain for development in later cases.

**McCloy**

There are strong thematic links between the decision in *Day (No 2)* and the Court’s judgment some 18 months earlier in *McCloy*.16 In *McCloy*, the Court was faced with a *Lange* challenge to certain NSW electoral donation laws which placed a low monetary cap on permissible donations and separately banned donations altogether from certain classes of persons such as property developers.

The Court first had to ascertain the nature of the burden on the implied freedom of political communication. It accepted there was a burden, in the sense identified in its 2013 decision in *Unions NSW*18, that any restriction on the flow of private funds to parties or candidates burdened political communication itself, given the current model where public funding of parties and candidates is severely limited. However, the Court firmly rejected the plaintiff’s argument that there was a further aspect of burden of the implied freedom, namely that the freedom protects the ability of donors to make large donations to buy access to and make representations to parties or candidates. Guaranteeing the ability of the few to make large political donations to secure access to those in power would be antithetical to the core principles of our constitutional democracy19.

In going on to conclude that the burden as found was justified, the Court identified a range of legitimate ends to which the laws were directed, ends which are compatible with our system of government. It was a legitimate end to prevent corruption and undue influence in the government of State, whether *actual* corruption or undue influence or merely the *perception* of the same which may undermine public confidence in government and in the electoral system itself.

Further, corruption should be understood not just in the narrowest sense of “quid pro quo corruption” - a direct bargain of money for favours – but also in the broader sense of “clientelism” – where an office holder is so dependent on the financial support of certain wealthy patrons as the compromise the expectation that public power will be exercised solely in the public interest. Indeed, corruption could properly be understood in the even broader sense still of “war-chest corruption” – where the scale of monies falling into the hands of some so drowns out the voices of others as to threaten the equality of opportunity of the people to participate in the exercise of political sovereignty.20

Our High Court has reached a constitutional balance between freedom of expression and legitimate regulation of the electoral process which is starkly different to that pertaining in the United States under the First Amendment. Under *McCutcheon*21 and *Citizens United*22, the only permitted purpose for the Congress to impose restrictions on campaign finance is to target quid pro quo corruption or the appearance of such. One result is that wealthy individuals can use “super-pacs” to aggregate large sums of money which can then flow to favoured candidates.

These radically different results can in part be explained away by saying the *Lange* principle erects a structural guarantee not a personal right. But, at a deeper level, they are explained by the same notion of Public Trust manifest in *Re Day (No 2)*. Our Members of Parliament are expected and required to exercise their power with a single-minded dedication to what is in the public interest. Dependence on private monies for campaigning is a necessary evil in a system that does not cater for full public funding of elections. Yet receipt of such money can so easily slide into the individual candidate or party, in fact or perception, favouring the private interests of the
donors over the public interest, or into the voices of only some being heard. Accordingly, to hold our Members of Parliament to their Public Trust, individually and in their party formations, campaign finance restrictions here can travel legitimately well beyond those permitted in the United States.  

*Williams No 1 and No 2*

The decisions of the High Court in the two Williams cases, in 2012 and 2014, were largely unseen in 1996. They seem to fit neatly into rule-of-law paradigm. The scope for non-statutory executive power has now been significantly narrowed, at least if one takes as the starting point the Commonwealth Executive’s pre-2012 perspective on “normal”. Many situations that in the past would have been dealt with as pure Executive Power are now either brought under an Act or regulation, or alternatively routed through a s 96 grant to a willing State. The former avenue exposes the nature of the power to the review of Parliament, by defining the conditions for the exercise of the power in advance or at least creating the conditions for its disallowance afterwards. The later avenue exposes the exercise of the power to negotiation and agreement with a State or States and usually adds greater transparency to the exercise.

A complementary way of viewing the legacy of Williams is that it serves to enhance the Public Trust. In sheer empirical terms, the Commonwealth Executive is now called on, much more often, to defend or explain why a given decision is justified or appropriate or correct, that is, why a particular exercise of power can be said to advance the public interest. By exposing more exercises of executive power to the prospect of judicial review, or to the transparency of agreement with a State, the imbalance of power between State and subject that underpins the Public Trust is partially alleviated.

*Principle of legality*

The principle enunciated in Coco in 1994 no doubt had earlier underpinnings, including Potter v Minahan in 1908. However, in the last 21 years there has been a veritable explosion in the number and type of cases in which it has been applied by the High Court or lower Courts to read down legislation to avoid it impinging on the rights or liberties of a particular person.

The principle of legality sits on the boundary between constitutional and public law. It is often explained as derived from an understanding of the relationship between the judicial, executive and legislative branches of government, although interestingly the principle is not limited to the federal branch of government, where the separation of powers is clearest, but extends to State and Territory levels also.

The principle of legality, like the Williams principle, can readily be viewed as a rule-of-law conception. However, it is also important to the Public Trust. Most of the real-life work of statutes upon the life, liberty or affairs of the citizen or subject occurs not directly by operation of the statute but through administrative actions sourced in statute. Legality says to administrative decision-makers that, applying standards laid down over time by the common law, the more harsh, extreme or unexpected may be a result which appears to fall within the literal language of a statute, the greater the need to read again the statute again, again and again to see if on its true construction it does permit such an exercise of power.

That is, the legality principle is no doubt a reminder to Parliament when passing laws that it must be explicit in seeking to achieve outcomes which limit rights or liberties, and in doing so it enhances the accountability of Parliament. But more than this, it is also a salutary guide and
lesson-maker for those entrusted with an actual exercise of public power that may impact on individual rights, interests and liberties. Legality recognizes that most exercises of public power will have a private impact. Any proper conception of the public interest must be one which the particular statute truly has authorized, having regard to those impacts on individuals.

**Standards and scope of judicial review**

Let me mention three out of a much larger list of developments in judicial review over the last 21 years which I see as partly explained by the Public Trust.

First, the decision in *Plaintiff S157* in 2003 laid the groundwork for the death of strong privative clauses. All exercise of power by Commonwealth officials must be amenable to the constitutionally guaranteed writs of mandamus, prohibition or injunction under s 75(v). We now take this principle as a given, and Parliament has largely given up trying to create complete areas of immunity from judicial review for administrative action. The radical and enduring nature of the step taken in *Plaintiff S157* should not be forgotten. The United States Constitution does not contain an equivalent to s 75(v), and a similar result to *S 157* pertains there only to the extent that it can be discerned from the Bill of Rights. It might have been open for our High Court to read s 75(v) as a grant of original jurisdiction in those cases where the law – here including both the common law and statute – permitted those remedies to be available, but the Court went further. Why? Because, fundamentally, it would be inimical to the notion of Public Trust if islands of administrative power could be created beyond the purview of the law and Courts of federal jurisdiction. Similar considerations of course inspired the somewhat parallel decision in *Kirk* in 2010.

We should note the inclusion in s 75(v) of the remedy of injunction. As a constitutionally entrenched remedy, it carries within it, as Judge and now Professor Gummow has repeatedly and acutely developed, a body of equitable learning from the last two centuries in the United Kingdom and the United States, and to a lesser extent from our Australian tradition, for the holding of public officials to high standards of trust and behavior.

Second, we have the important decision of *Minister v Li* from 2013. That case drew together strands from various earlier authorities for the proposition that it is an implication that every statutory power is conferred subject to the condition that it will be exercised reasonably, unless the statute clearly provides otherwise. That is, every statutory power ordinarily now has both procedural constraints and substantive constraints.

*Li* does not in terms go the full distance of a fiduciary or trust principle. However, it effects a fundamental raising of the bar for administrative decision-making. *Li* is not just about an expansion of the grounds of judicial review at the back end after a decision has been made and challenged; it is also about laying down at the front end a standard that the decision-maker must meet (absent clear statutory command to the contrary). A lawful decision requires more than taking into account relevant considerations and ignoring irrelevant considerations, in a way that risks becoming a “tick-a-box” exercise. It must go further and accommodate, in an appropriately balanced fashion, the various public and private interests affected by the decision.

Thirdly, the last 20 years have, if anything, strengthened the notion that common law judicial review in Australia is framed in terms of jurisdictional error. The experts in the room are well-versed, perhaps too well-versed, in how it came about that much federal administrative law, and by a follow-on (but not inevitably ordained) effect much State administrative law, has come to be
viewed in terms of jurisdictional error. The alternative, seemingly broader English common law model, followed elsewhere in places such as Singapore and New Zealand, has been eschewed. Taken at face value, review limited to jurisdictional error ought to confine the scope of review and leave significant room for administrative decision-makers to get things wrong on the merits and yet be left untouched by the courts.

Ten to fifteen years ago, comparative administrative law conferences would regularly decry the narrowness of jurisdictional error in Australia. However, those who practice regularly in administrative law, in migration law as well as beyond, will now regularly be heard to say that the ingenuity of judges for finding jurisdictional error is remarkable. Courts, in looking for jurisdictional error, examine, in the most exacting of ways, how the particular exercise of public law has played out, for this person, in his or her particular circumstances. By this means, decision-makers are regularly held to exacting standards of review, and I dare say, the Public Trust is enhanced.

An important recent article in the LQR argues that in the United Kingdom the growth of the modern administrative law is not simply, as is often presented, a story of “ever onwards and upwards” in which the judiciary from the 1960s and 1970s abandoned its earlier quiescence and, building on doctrines and remedies used to control inferior tribunals since Victorian times, fashioned a new body of law capable of subordinating the modern administrative state to the rule of law.

Rather, the authors argue, that by the 1960s there was a strong consensus amongst reformers in the UK that there was a need to create a new common law of public bodies, defining the proper extent of public powers and guiding decision makers into finding the right balance between the public and the private interest which usually come into conflict in any decision. The authors argue the subsequent leaps forward in the common law under Lord Diplock in fact fell far short of the objectives of the reformers. They criticize the modern administrative law of the UK as defining legality in a way that focusses solely on the public interest to the exclusion of the private interest in each case; as assessing legality in way that prefers text over purpose; and in confining the range of materials that a court can assess in considering legality. Ironically, while our jurisdictional error framework might be thought to exacerbate the narrow outcomes posited in the UK, in practice our Courts, under the leadership of the High Court, are very astute to avoid each of the pitfalls said to arise in the UK. If anything, our modern administrative law comes close to meeting the objectives of the original UK reformers even if by different route. In doing so, it enhances the Public Trust

*The criminal law*

Cases are working their way through the criminal law system of NSW where former Members of Parliament are being prosecuted for the crime of misuse of public office. These prosecutions seek to renovate ancient common law crimes to vindicate the Public Trust. One important issue they raise is the intersection between the Public Trust and constitutional principle. Is it correct, as is argued by one of the accused, that if a Parliamentarian uses his or her position to make representations to an officer of the Executive, to advance an undisclosed private interest, the courts must decline jurisdiction in crime and leave the matter to the exclusive remit of Parliament?
D. Morality – what role does it have to play in the Public Trust?

Let me come to the troublesome middle word in my title today: “Morality”. What does it have to do with the Public Trust and the work of lawyers and those in power?

As lawyers, we are trained to practise in four create great traditions of Western thought:

- **Positivism**: law is about finding the correct rule which has been laid down to govern the case at hand, not the rule as we would like it to be.
- **Empiricism**: law is about identifying accurately the relevant facts of the case at hand which may attract an available legal rule, and not being distracted by other facts.
- **Consequentialism**: law is often enough about a rational calculus of benefits and burdens of pursuing one course and eschewing another (think the *Wyong Shire Council* test of reasonableness in tort, or the increasing resort to proportionality and balancing in many areas of public and constitutional law).
- **Legal realism**: above all, there must be a cold, clinical assessment of what this judge, or this panel of judges is likely to do or find appealing.

These are enough to absorb most of our attention, but a small space should be reserved for Morality. Despite the efforts of our High Court over the last 21 years that I have identified above to instantiate duties in law which embody the Public Trust, the inescapable reality is that there remain, and are likely to remain, many areas of public power where the law will be insufficient to hold those in power to the Public Trust. In these areas, only Morality is left to protect the community.

Let me instance three broad areas.

First, the law often recognises there is a duty on a person in public power, but a duty is one of imperfect obligation. For example, in the *James Hardie* directors litigation, the NSW Court of Appeal under then Chief Justice Spigelman enunciated that ASIC as a civil prosecutor owed a duty of fairness, both to the Court and the Respondents, akin to the duty that a criminal prosecutor might owe. The tenor of that duty was that, where ASIC had access to relevant witnesses and an announced an intent to call them, it was unfair for ASIC to decline to call the witnesses and expose them to cross-examination which might have damaged ASIC’s case. The law remedied the unfairness by ruling that ASIC had failed to make out its case on liability.

In the High Court, ASIC did not dispute that it owed some sort of duty of fairness in prosecuting civil penalty actions, but persuaded the Court that the duty was not actionable as the NSW Court of Appeal had held. ASIC’s decisions on whether to call witnesses were its own business. The factual controversy should have been decided on the evidence called, not the evidence that might have been called.

Similar considerations prevail with criminal prosecutors. The High Court has been astute to observe that, while such prosecutors owe special duties of fairness within the system of criminal justice, the separation of powers requires that the Courts keep well clear of reviewing decisions whether to prosecute or not.

That is not to remove these decisions about public power totally from the remove of the Courts. Civil actions for damages for malicious prosecution, or misfeasance in public office, would remain available for the extreme case.
For the run of the mill case, the duties of fairness imposed on prosecutors, criminal or civil, will largely be duties of imperfect obligation. Accordingly, it will be the well-formed conscience of the prosecutorial arm that will be the true guide to whether the Public Trust will be upheld.

A hypothetical example may illustrate the point. Assume that a federal regulator is prosecuting a civil penalty suit where there are 10 alleged contraventions inter-related on the facts, each attracting a maximum penalty of $10m. Assume the case is arguable on liability but not strong. Would it be fair and proper for the regulator to engage in without prejudice negotiations with the respondent along these lines: if you admit contravention, we will submit to the court that your conduct should be viewed as a single course of conduct, attracting a potential maximum of $10m and we would agree to view it as “mid-range” conduct, deserving a total penalty of $5m; but if you contest the case we will argue each contravention should be considered to attract its own $10m maximum and we will argue for a total penalty in the range of $30-50m; your choice?

That conduct, due to the without prejudice nature of it, may never come to a court’s attention or be examinable except through the internal ethics of the regulator.

The second area concerns the increasing number of instances of exercise of public power where the limits which the Parliament has placed around the exercise of power are so broad or indefinite that often it will be nigh on impossible for a judicial review challenge to be mounted effectively.

To take an example from the migration area, it has been an increasing tendency of the Parliament in recent years, under both major parties, to confer on the Minister powers that affect the liberty or security of persons coming to Australia without prior permission, powers with one or more of the following features:

- The power is conferred by reference to criteria which are expressed in the broadest of terms (e.g. the “national interest”, or the “public interest”),
- The power is to be exercised personally by the Minister, but he or she has no duty to exercise, or even consider exercising, the power,
- The power may be exercised, or not, without giving the person affected a hearing,
- The power may be exercised, or not, without the need to give any reasons, and/or
- The power may be exercised by reference to national security considerations which are not put to the person for comment, and not disclosed in any reasons which may be given.

At some stage, the High Court may have to consider whether a “package” with these elements meets minimum constitutional standards under Chapter III. For present purposes, often enough, the Minister will have a choice between a whole range of decisions in any given case, some which may be good, and some bad. A good decision would balance in a rational and reasonable way the competing public and private interests involved in the given case. A bad decision would in an unthinking and rote fashion apply a pre-conception that one view of the public interest necessarily prevails over any other features of the case.

Thus, often, it will be only the well-formed conscience of the Minister that will uphold the Public Trust. And when I say “well-formed”, I mean to include that the public servants, and government lawyers, who place the information before the Minister, or who provide advice on the legality of the decision, must bring to bear all of their own professional skills, and own dedication to the Public Trust, to help the Minister make a decision which upholds the Public Trust.
The third area concerns exercises of pure Executive Power which, even after Williams, do not need the sanction of Parliament and have no clear or definite legal limits placed around them.

I only want to suggest some hypothetical examples, to provoke thought:

- A Minister is asked to authorise Australian personnel to assist in the rendition of an Australian suspect overseas, in a way which it is unlikely to come to light but which might invade the exclusive power of the courts under Chapter III?
- A Minister is asked to authorise electronic interception of the overseas bank account of an Australian suspect to empty the account of funds, in a way which is unlikely to come to light but which might be a s 51(xxxi) acquisition of property?
- A Minister is asked to authorise an executive warrant to intercept communications, in a way which is unlikely to be known to the suspect and thus practically unchallengeable under Ch II and s 75(v)?

Our only effective protection as a community may lie in the conscience and sense of Public Trust of the Minister and his or her government advisors and lawyers.

E. Conclusion

I have sought to show that, over the last 20 years, our law has strengthened its embrace of the Public Trust as one of the key guiding principles which moves the development of the law further to protect the vulnerable citizen or subject against the power of the State. In:

- Deciding who is disqualified from representing the people because of a conflicting interest,
- Determining the limits the Parliament can place on the flow of funds to candidates or parties which may distort the proper exercise of power solely in the public interest,
- Limiting the exercise of public power which is not regulated by statute,
- Reading down general words in statutes to limit exercises of power which may harm the vulnerable,
- Enhancing the scope of judicial review where the power is exercised beyond an available conception of the public interest or an available balancing of the public and private interest,
- Renovating common law crimes to meet the exigencies of modern day misuse of office by politicians,

we can surely see the leavening hand of the Public Trust, not necessarily always in the purest form of equitable doctrine and remedy, but always in inspiration and influence.

Beyond this, we as a community should demand that those in power, and those advising those in power, bring high standards of conscience to bear in those cases where the citizen or subject may be most at risk of exposure to the excessive use of State power but least able to resort to the courts or tribunals of the land for relief.

Justin Gleeson SC

Barrister, Former Solicitor-General of the Commonwealth of Australia

2  Annetts v McCann (1990) 170 CLR 596.
3  Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39.
5  ibid, at 134-135.
6  ibid, at 137-145.
7  Re Day (No 2) (2017) 91 ALJR 518.
8  ibid, at [87] – [91].
10 ibid, at [48] – [50], [98], [167], [262].
11 ibid, at [49] – [50], [98], [179], [269].
12 Horne v Barber (1920) 27 CLR 494.
13 R v Boston (1923) 33 CLR 386.
14 ibid at 400.
17 Unions NSW v NSW (2013) 252 CLR 530.
22 Indeed, in *McCloy* at [167] – [172], the judgment of Gageler J placed heavy emphasis on the two early High Court cases of *Horne v Barber* and *R v Boston* which, as noted above, were central to Finn’s thesis on the Public Trust and later embraced in all judgments in *Re Day (No 2).*
24 Potter v Minahan (1908) 7 CLR 277.
27 Kirk v Industrial Court (NSW) (2010) 239 CLR 531.
29 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332.
33 In constitutional law, see *McCloy* discussed above, but compare *Murphy v Commonwealth Electoral Commissioner* (2016) 90 ALJR 1027.
34 Morley v ASIC (2010) 247 FLR140.
36 Magaming v R (2013) 252 CLR 381 at [20].