

2018 WA LEE EQUITY LECTURE: EQUITY IN AN AGE OF UNCERTAINTY

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I INTRODUCTION

May I commence by acknowledging the honour done to me by asking me to give this, the nineteenth WA Lee lecture. I studied Equity, in part, under Professor Lee and he was a prominent member of the teaching community at my University College.

At that time, and later, I came to appreciate the extent to which his reputation was established, not just in Australia, but throughout the common law world. Perhaps the most telling of a number of indications, once publications such as the masterful *Ford & Lee* are put to one side, is the fact that when Donovan Waters QC, former Oxford don, STEP Honorary Member and one of the negotiators of the Hague Trust Convention,¹ visited Australia as a guest of STEP, the one Australian he specifically asked us to arrange for him to meet was Tony Lee.

So to give this lecture before an audience including Tony Lee fills me with not a little trepidation. He – and no doubt many others of you – will be immediately aware of any errors or imperfections. It is small consolation that, on this occasion at least, he will not be marking the paper.

In choosing the topic for the paper, I had in mind a paper given by the Hon Dyson Heydon, AC QC, to the first STEP Australia Conference.² Mr Heydon QC observed that:

The world called Turkey “the sick man of Europe”. Innumerable cartoons portrayed the sultan as emaciated, enervated, addicted to the hookah and the harem, clad in primitive looking robe and fez, worn out by vice. These judgments were short sighted. A regime which for centuries had kept both the Balkans and the Middle East under some not wholly inhumane control deserves respect. For there were frightful consequences for the world when the Balkans and the Middle East fell out of control. The sultans and their advisers asked themselves:

Are we on a downward path to inevitable extinction? Or do these setbacks strengthen the Empire by making it more manageable?

In hindsight the second question can probably be answered “Yes”, even though the servants of the Empire were only getting it into a fit shape to fall into the hands of its gravedigger, Mustafa Kemal Atatürk.

Similar questions arise about modern fiduciary liability. For this conference, centred on trusts, they are crucial, because the trustee is the archetypal fiduciary. Is fiduciary liability so sick that its life will soon move peacefully to its close? Or will it, by becoming smaller, also become

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¹ Adopted by Australia and implemented in the *Trusts (Hague Convention) Act 1991* (Cth).

² JD Heydon, ‘Modern Fiduciary Liability: the Sick Man of Equity’ (2014) 20 *Trusts & Trustees* 1006.



leaner and more effective? Or will its greedy and expectant heirs—contract, tort, restitution, and, most insatiably greedy of all, statute—, together with the agitation of their academic paladins, cause it to be torn apart by judicial violence?³

Mr Heydon concluded his paper as follows:

It is difficult to judge whether standards of fiduciary honesty, and standards of fiduciary care, skill and diligence have risen or fallen in the last century. But it is easy to conclude that modern standards are not high. That is a factor which ought to weigh strongly against any narrowing of the fiduciary regime. For to narrow the fiduciary regime not only reduces the remedies available to principals in particular instances. It also weakens the deterrent effect of the law in relation to future conduct. Thus, writing in criticism of *Mothew's* case,⁴ Getzler said:⁵

The prophylactic pressures of equitable procedure and remedy as applied to the loyalty duties may have point even in the sphere of duty of care; the stringent rules of causation, for example, are designed to put deterrent pressure on the fiduciary to reach a high standard where proof of misfeasance may be difficult to gather.

What will happen if the fiduciary regime withers or even dies? Are those owed duties by fiduciaries, as a class, likely to be better off if that takes place? Not in my opinion. That is why the signs of continuing or reinvigorated life in the fiduciary regime should be encouraged. The advent of new heirs to the fiduciary empire must be resisted more successfully than the Ottoman Empire resisted its would-be heirs—Greeks, Serbs and other Slavs, Arabs, and Ataturks.⁶

In this paper, I dare to suggest some answers to the questions posed by Mr Heydon QC. I suggest that it cannot seriously be questioned that standards of fiduciary honesty, and standards of fiduciary care, skill and diligence have indeed fallen in the last century. This conclusion militates very strongly in favour of his conclusion that those owed duties by fiduciaries will not be better off if the fiduciary regime is weakened. And of the potential heirs of the fiduciary empire, statute – most insatiably greedy of all in Mr Heydon's words – is making the most serious inroads.

II THE ADVANCE OF STATUTE

It will be of little avail to the people that the laws are made by men of their own choice, if the laws are so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated [sic], or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow.⁷

James Madison.

There is a welter of ill-conceived legislation—poor in quality and voluminous in quantity. The result is little more than the illusion of action without much in the way of the reality of

³ JD Heydon, 'Modern Fiduciary Liability: the Sick Man of Equity' (2014) 20 *Trusts & Trustees* 1006, 1006-1007.

⁴ *Bristol & West Building Society v Mothew* [1998] Ch 1 (which held a fiduciary's duties of care and skill are outside the duty of loyalty).

⁵ Joshua Getzler: 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 72

⁶ JD Heydon, 'Modern Fiduciary Liability: the Sick Man of Equity' (2014) 20 *Trusts & Trustees* 1006, 1022.

⁷ James Madison, 'Federalist, No.62' in *The Federalist Papers* (1788); James Madison, 'The Federalist No 62' in Terence Ball (ed), *Hamilton, Madison and Jay: The Federalist with Letters of "Brutus"* (Cambridge, 2003) 299-305, 304.

achievement, coupled with uncertainty and confusion about the law. Self-evidently, this is not conducive to justice, and, furthermore, it brings the legislature, even the rule of law, into disrepute.⁸

Lord Neuberger.

The fundamentals of the rule of law have developed over a long period, and have emerged because over many areas of human endeavor they have been tested and found reliable. What is necessary, therefore, when new laws are proposed, is that they be measured against the canvas of that historical knowledge, with the principles which underlie the rule of law at the forefront. Considerations of what may advance a particular goal, however worthy, which do not take into account the wider implications of proposals or the damage which they may do to the fabric of the rule of law are potentially most damaging to a free society.

The normal legislative process in democratic countries ensures this happens, because any proposal will be considered by a parliament of members from many different backgrounds, whose members are capable of taking into account the wider ramifications of proposals as well as the immediate needs of the moment. So proposals which attack fundamental principles of the rule of law, or which change the nature of society by requiring citizens to inform on one another, will normally not make it through the legislative process of a free democracy without challenge.

Increasingly, however, this process is subverted by the way in which international organisations operate. In its most extreme form, it involves national governments being told what to do by parties outside the nation in question. Thus the European Union (EU) lawmaking process, where it does not involve the creation of directly applicable EU law, proceeds by the issue of appropriately named ‘directives’ which national Parliaments are required to follow in formulating legislation. Failure to do so results in various types of adverse action which can be taken against the nation in question.

Such a process leaves no part to be played by the traditional lawmaking process of balancing competing interests, taking into account wider considerations, and measuring the proposal against the historical background and constitutional tradition of the country concerned. There is no choice. There simply has to be compliance.

At a less direct level is the operation of the so-called ‘peer review’ process adopted by both the Financial Action Task Force (‘FATF’) and, more recently, the OECD in relation to the anti-money laundering (‘AML’) Recommendations and Common Reporting Standard (‘CRS’). The process is almost colonial in its operation: teams of ‘experts’ are appointed by the central body to descend upon the country in question, examine both its laws and its implementation of them, and under threat of sanctions of various types (such as being put on black lists or grey lists) place the country in a position where its capacity to resist the proposals is limited.

Once again, the capacity for the usual democratic inputs into any legislative changes arising from this type of review is extremely limited if it exists at all.

It is, perhaps, for this reason that the most widely resonant message of the Leave campaign in the 2016 UK referendum on continued membership of the EU was ‘Take Back Control’. The notion that laws ought to be made by a Parliament whose members are responsive to the wishes

⁸ Lord Neuberger, ‘Justice in an age of austerity’ (Paper presented at the Tom Sargant Memorial Lecture, 15 October 2013) <<https://www.supremecourt.uk/docs/speech-131015.pdf>>.

of those who elect them is a fundamental democratic value which ought to command wide support.

That it does command such wide support—at least amongst electorates at large—can be seen from recent election results running through countries as diverse as Germany, Italy, Hungary, Poland, and the United States.

The extent of the change in sentiment amongst these electorates (and others) suggests, in the minds of many commentators, that there is a serious risk to the continued existence, or effective operation, of the rules-based international order. The existence of a stable rules-based international order is a matter of significant importance, particularly in the context of private wealth management using trusts. But it must be seriously questioned whether those responsible for the operation of major international organizations appreciate that the preservation of the rules-based international order requires, amongst other things, that the rules be such as can be broadly accepted and not simply imposed by international *diktat*. The more the proposed rules depart from traditional and important principles underlying the rule of law, the more likely it is that the recipients of the *diktats* (or their electorates) will rebel.

II THE ATTACK ON PRIVACY

It is becoming increasingly clear as time passes that conventional notions of confidentiality relating to the deliberations of trustees, and the affairs they administer, are being radically challenged by new laws, many of EU origin which either fail to take into account the special obligations of trustees or are actively hostile to the notion of a trust, and which have been enacted without any consideration of their potential effect on the law of trusts

To the already onerous duties of trustees, we can now add to the obligations that flow from the enactment at national level of the FATF Recommendations, supplemented in the EU by four (and soon to be five) anti-money laundering directives, and the laws designed to give effect to the CRS.

Non-compliance with these laws brings with it substantial penalties. However, inaccurate characterisation of the status of individuals who are the subject of reports under them can also lead to significant risks for the people concerned and place a trustee in breach of the trustee's fiduciary duties, given that the obligations of trustees do not extend to subjecting beneficiaries and others to investigations and tax assessments where these are not justified by law. The approach of 'when in doubt, make a questionable report' cannot be supported. Rather, the obligation of any person with a reporting obligation is to exhaustively ascertain the facts, and make a truthful and accurate report, if only because provision of inaccurate and voluminous information will only inhibit rather than assist the various regulatory authorities involved to perform their tasks.

In the EU's fifth AML Directive (AMLD5) which at least recognized the need for a 'legitimate interest' before requiring access to registers of trusts, and even more in a recent proposal to the European parliament (Taxe 3),⁹ the notion (recognized by Article 8 of the *European Human Rights Convention*)¹⁰ that individuals are entitled to privacy in relation to their personal assets

⁹ Alia Shoaib, 'EU Parliament to Launch Tax Inquiry in the Wake of the Paradise Papers', *Accountancy Age*, (online) 9 February 2018 <<https://www.accountancyage.com/2018/02/09/eu-parliament-launch-tax-inquiry-wake-paradise-papers/>>.

¹⁰ See also Christophe Jolk: Decision of the French Constitutional Court number 2016-591 QPC of 21 October 2016 'Mrs Helen S' (2016) 22(10) *Trusts & Trustees* 1165–67.

has been disregarded. There can be no question as to the need for full and honest disclosure of relevant matters to tax and other authorities where this is necessary for the purposes of taxation and other laws. But the notion that such disclosure is necessary beyond that setting is clearly misconceived. Nonetheless, the current EU proposals for disclosure of beneficial interests under companies and trusts currently under consideration involves no provision for the material to be on a register accessible only to law-enforcement authorities. Indeed, the proposal is precisely the opposite. We have certainly moved a long way from William Pitt's conception of the role of the individual and the state under English law:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter - but the King of England cannot enter! all his force dares not cross the threshold of the ruined tenement.¹¹

In doing this, the EU and European Parliament act as if they are strangely unaware of the likely consequences of their actions. In many countries, the need for privacy as to asset ownership arises not because of concerns as to taxation compliance, but for considerations of personal safety.¹² These considerations may relate to the possible activities of non-state actors, although sadly there are more than a few governments whose behaviour is little better than that of a criminal gang.¹³ These facts (which after all replicate events in relatively recent European history) cannot be unknown to the European Commission and members of the European Parliament, but they are simply ignored.

That is not to say that members of the European Parliament are totally unaware of the value of privacy: *Deutsche Welle* reports that:

European parliamentarians will not be obliged to disclose how they spend their expenses, the EU General court ruled on [25 September]. Journalists had attempted to use freedom of information requests to force transparency.

The European General Court ruled that members of the European Parliament (MEPs) should not be forced to disclose their expenses, as doing so could reveal personal information and thereby contravene EU privacy law.

The claim was brought before the court in Luxembourg back in 2015 by an association of journalists from all 28 EU member states. The group had demanded complete transparency into how EU parliamentarians and their assistants spend their allowances. Specifically, the reporters had asked for information concerning all money parliamentarians received on top of their basic salaries.

Prior to Tuesday's ruling, the European Parliament had refused freedom of information requests related to expenses paid out to its 751 MEPs, citing data protection rules and excessive workloads.

¹¹ William Pitt quoted in Henry, Lord Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (Richard Griffin and Co, 1855) vol 1, 42.

¹² See, for eg, the Chartered Institute of Taxation's submission to the OECD in relation to its proposed Mandatory Disclosure Rules in relation to CRS avoidance: Chartered Institute of Taxation, 'Response by the Chartered Institute of Taxation' in OECD, *Compilation of Comments: Public Comments on the Discussion Draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures* (18 January 2018) 37 <<http://www.oecd.org/tax/beps/public-comments-mandatory-disclosure-rules-for-CRS-avoidance-arrangements-offshore-structures.pdf>>.

¹³ See, for eg, Transparency International, *Corruption Perceptions Index 2017* (21 February 2018) <https://www.transparency.org/news/feature/corruption_perceptions_index_2017>.

The judges on the General Court agreed, finding that although one solution could be to redact personal information for public disclosure, this would amount to "an excessive administrative burden."

It is estimated that €450 million (\$530 million) of the parliament's annual budget goes towards MEPs' salaries, travel expenses and office costs. According to the Parliament's website, allowances currently amount to a monthly sum of €4,416 per lawmaker.

Critics have long expressed concern that EU taxpayer money may be subject to spending fraud. In March, the parliament's budget committee reported that far-right MEPs charged some €400,000 on champagne and expensive dinners in 2016.

Nevertheless, the Parliament remained adamant that all the necessary checks and balances are in place to mitigate the risk of fraud.¹⁴

So while the disposition of *private* assets and income are to be made public, the use made of *public* money by persons employed at public expense will not be. St Matthew's Gospel comes to mind:

Then spake Jesus to the multitude, and to his disciples, Saying, The scribes and the Pharisees sit in Moses' seat: All therefore whatsoever they bid you observe, [that] observe and do; but do not ye after their works: for they say, and do not. For they bind heavy burdens and grievous to be borne, and lay [them] on men's shoulders; but they [themselves] will not move them with one of their fingers.¹⁵

Even more egregious are proposals advanced by the OECD which (amongst other things) limit the opportunity for citizens to obtain confidential advice in the context of the CRS.

On 11 December 2017 the OECD released a 'Consultation Document'¹⁶ under cover of a media release which invited submissions by 15 January 2018.¹⁷ According to the media release 'no extension will be granted' of this period.¹⁸ The public discussion draft was 44 pages in length. It proposed the creation of numerous criminal offences and significantly limitations on the capacity of persons to receive confidential independent advice about their legal position, irrespective of whether or not their intention was the evasion of tax or another financial crime.

The consultation period expired on 15 January 2018. Given Christmas, Hanukkah, Kwanzaa and the New Year holidays (not to mention Chinese New Year which was also fast approaching), of which the OECD was presumably aware, and the importance, complexity and reach of the proposals, such a short period made a sham of the consultation exercise, particularly given that it had taken the OECD at least seven months to develop the proposals

¹⁴ 'EU Court Rules MEPs Expenses Should Remain Private' *Deutsche Welle* (online) 25 September 2018 <<https://www.dw.com/en/eu-court-rules-meps-expenses-should-remain-private/a-45630196>>.

¹⁵ *The Holy Bible* (King James Version) Gospel according to St Matthew 23:1-5.

¹⁶ OECD, *Public Discussion Draft: Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures* (2017) <<http://www.oecd.org/tax/beps/Discussion-draft-mandatory-disclosure-rules-for-CRS-avoidance-arrangements-offshore-structures.pdf>>

¹⁷ OECD, 'OECD Seeks Input on New Tax Rules Requiring Disclosure of CRS Avoidance Arrangements and Offshore Structures' (Media Release, 11 December 2017) <<http://www.oecd.org/tax/oecd-seeks-input-on-new-tax-rules-requiring-disclosure-of-crs-avoidance-arrangements-and-offshore-structures.htm>>.

¹⁸ *Ibid* [6].

following the *Bari Declaration*¹⁹ and, given its prior interest in the area,²⁰ most probably longer. It is difficult to see why this should not be regarded as anything other than window dressing, particularly since at least one national government has made it clear in private conversations that the proposal would go ahead. The expression ‘consultation avoidance scheme’ would not be out of place.

At the outset, objection may be taken to the obligation to report the conduct of others. Perhaps the best known precedent for such laws is a provision of the *Law of 22 Prairial, Year 2*,²¹ which is not normally regarded as a high point of European jurisprudence. The offence of misprision of felony has been abolished in England and in the United States applies only to active concealment and not mere failure to report.²² The practice of the state imposing obligations on citizens to report their fellow citizens in more recent times has not been a happy one.²³

This proposal goes well beyond existing arrangements for advance disclosure of tax avoidance schemes which exist in some countries²⁴. Such disclosure is directed essentially to promotion of such schemes. In the present case what is sought to be criminalised is (amongst other things) the failure to report advice given to those who seek to ensure their conduct complies with the criminal law.

As the STEP submission noted:

... the responsibility of legislatures is to enact intelligible laws which achieve the purpose of the legislature. The responsibility of citizens is to comply with those laws and within those constraints to conduct economically viable enterprises or activities. Enacting a law which criminalises conduct such as failing to report a scheme “otherwise undermining the intended policy of the CRS” (or indeed requires citizens to know what that is, to the extent it is not expressed in the legislation) in no way satisfies that requirement. It is not as if the various national laws which implement CRS are simple and clear²⁵, and the obligations they create have many undesirable consequences unconnected with suppression of taxation or financial crime.

¹⁹ G7 2017 Italia, *G7 Bari Declaration on Fighting Tax Crimes and Other Illicit Financial Flows* (13 May 2017)

<http://www.g7italy.it/sites/default/files/documents/Bari%20Common%20Delaration%20On%20Fighting%20Tax%20Crimes_0.pdf>.

²⁰ On 5 May 2017, the OECD launched a disclosure facility on the Automatic Exchange Portal (allowing parties to share information on potential schemes, products, and/or structures that may be used to circumvent the Common Reporting Standard: OECD, *Common Reporting Standard: Share Your Insights on CRS Avoidance Schemes with Us*

<<https://survey.oecd.org/Survey.aspx?s=9b9dbd31c73e4b888753a8de3d22214&&forceNew=true&test=true>>. Parties may fill out the forms on an anonymous basis – indicating that the OECD does recognise the appropriateness of confidentiality, at least in some contexts.

²¹ ‘Every citizen has the right to seize conspirators and counterrevolutionaries, and to arraign them before the magistrates. *He is required to denounce them as soon as he knows of them.*’ (emphasis added). John Hall Stewart, *A Documentary History of the French Revolution* (New York: Macmillan, 1951), 528–31.

²² ‘It may be the duty of a citizen to ... proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh’: *Marbury v. Brooks*, 20 US [7 Wheat] 556, 5 L Ed 522.

²³ ‘East Germany Stasi Had 189,000 Informers, Study Says’, *Deutsche Welle* (online), 11 March 2008 <<http://www.dw.com/en/east-german-stasi-had-189000-informers-study-says/a-3184486-1>>.

²⁴ See, for eg, in the United Kingdom: HM Revenue & Customs, *Guidance: Disclosure of Tax Avoidance Schemes* (28 February 2018) <<https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview>>.

²⁵ A useful summary of some of the possible problematic applications of the CRS has been prepared by Filippo Noseda – see: *The Big Debate: Transparency Versus Privacy* (Mishcon Academy, 2018) <<https://academy.mishcon.com/the-report/>>.

To make matters even worse, the Consultation Document proposed that the obligation be retrospective so that it applied to advice given after 15 July 2014.

The right to confidential advice in the tax area is a paradigm case of the example given by Jessel MR in *Anderson v Bank of British Columbia*²⁶ in the context of litigation of the importance of access to confidential legal advice:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.²⁷

The Consultation Document sought to sidestep this issue by exempting advisers (referred to by the insulting and inaccurate OECD term ‘intermediary’) from disclosure requirements where there are obligations of professional secrecy.²⁸ But the effect of this is negated by a requirement proposed to be cast upon the recipient of the advice.²⁹ That, no doubt, is intended to pay lip service to the proposition that the privilege (to use the applicable term in the context of legal advice) belongs to the client, not the adviser. But that wholly misconceives the purpose of the privilege – it is to enable accurate advice to be obtained as to one’s legal obligations, and requiring disclosure by the client is equally destructive of it as is requiring disclosure by the adviser.

The consultation period expired on 15 January 2018 following the Christmas/New Year break. On 18 January 2018 the OECD published the 29 submissions which had been received in response to its Consultation Document.³⁰

These responses, notwithstanding the short time available to their authors, made some critically important points. Submissions were made by (amongst others) the Chartered Institute of Taxation,³¹ the Council of Bars and Law Societies of Europe,³² the German Association of Tax Advisers,³³ The Law Society of England and Wales,³⁴ and STEP.³⁵

²⁶ (1876) 2 Ch. D 644.

²⁷ Ibid 649. In the taxation context, one might add the discussion of the topic in the CFE/AOTCA/STEP Model Taxpayer Charter: Michael Cadesky, Ian Hayes and David Russell, *Towards Greater Fairness in Taxation – A Model Taxpayer Charter* (IBFD, 2016) 163-173.

²⁸ OECD, above n 16 [76] Table item 3.1.

²⁹ Ibid [76] Table items 4.1 and 4.2.

³⁰ OECD, *Compilation of Comments: Public Comments on the Discussion Draft on Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Offshore Structures* (18 January 2018) <<http://www.oecd.org/tax/beps/public-comments-mandatory-disclosure-rules-for-CRS-avoidance-arrangements-offshore-structures.pdf>>.

³¹ Ibid 37.

³² Ibid 45.

³³ Ibid 73-74.

³⁴ Ibid 97.

³⁵ Ibid 121.

The Council of Bars and Law Societies of Europe made the point that:

The right to consult a lawyer privately serves the important public interest of enabling individuals to seek advice on their legal position without be constrained by the fear that the information they provide will subsequently be revealed. Professional secrecy of lawyers is a fundamental principle imperative for the rule of law and the proper administration of justice, without it there would be no proper protection of the clients' fundamental rights.³⁶

The Law Society's submission expressed the 'hope that respondents' views are afforded greater respect than might be suggested by the imposition of such a short consultation period'.³⁷ Any hope that the powerful submissions from significant professional bodies would influence the OECD in any way seems to have been totally misplaced. On 8 March 2018 (a mere seven weeks following the closure of the date for submissions) the OECD issued its final document.³⁸ The final document neither addressed any of the points made by the submitters, nor contained any substantial departure from the original proposals apart from deferring the point at which retrospectivity commenced to 29 October 2014.

Indeed, the outcome was even more indefensible than the original proposal. Amongst the arrangements identified as CRS avoidance arrangements are:

A "CRS Avoidance Arrangement" is any Arrangement for which it is reasonable to conclude that it is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof, including through:

....;

- (b) the transfer of a Financial Account, or the monies and/or Financial Assets held in a Financial Account to a Financial Institution that is not a Reporting Financial Institution or to a jurisdiction that does not exchange CRS information with all jurisdictions of tax residence of a Reportable Taxpayer;³⁹

The largest investment and capital market in the world, the United States, falls squarely within this description because it is not party to the CRS reporting arrangements (and under the present Administration is unlikely to become so). So we have the extraordinary position that the OECD (substantially financed by the United States) is recommending creation of a criminal offence where advice to make an investment within the United States is given if one of the considerations (or perhaps the principal consideration – it is not clear what the proposal intends) involved in the choice of investment location is the fact that the investment will not be reportable in the following circumstances:

- (a) a person receives advice from a professional adviser who is under an obligation of confidence and does not report the advice;
- (b) a professional adviser with a confidentiality obligation does not advise the recipient of the advice, that the advice should be reported; or
- (c) a person who is not a professional adviser subject to obligation to secrecy fails to report

³⁶ Ibid 45.

³⁷ Ibid 97.

³⁸ OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* <<http://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf>>.

³⁹ Ibid 14 (Rule 1.1).

the advice.⁴⁰

One does not have to be an admirer of the current United States Administration to say that application of its current approach to dealing with people who displease it (i.e. defunding the persons concerned) would be well warranted in this case. Perhaps the only reason why it will not do so is that the OECD's CRS and related initiatives will do a great deal to increase the likelihood that the United States will become an inbound investment destination – moreover one which does not regard tax and regulatory competition with the same disfavor as the EU does.

What in fact it is to be hoped will happen is that at national level saner approaches will prevail (or, at the very least, constitutional protection of fundamental human rights will be available). The professional bodies listed above are not without influence throughout the world and hopefully they will play a part in this process.

But it is a pity that there appear to be those in the OECD who see George Orwell's *1984* not as the cautionary tale it was intended to be but as a model of governance to which to aspire. A moment's reflection will see where that leads, as Orwell's work ends:

He gazed up at the enormous face. Forty years it had taken him to learn what kind of smile was hidden beneath the dark moustache. O cruel, needless misunderstanding! O stubborn, self-willed exile from the loving breast! Two gin-scented tears trickled down the sides of his nose. But it was all right, everything was all right, the struggle was finished. He had won the victory over himself. He loved Big Brother.⁴¹

III CONFIDENTIALITY – TAX AND BENEFICIAL OWNERSHIP DISCLOSURE

To these concerns can be added the peculiar application of the reporting regime in relation to trusts. For present purposes reference is made the UK legislation but if the applicable jurisdiction is elsewhere, it is local law that will need to be consulted. In the Australian context it is the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), which in the context of a trust requires reference to the *Social Security Act 1991* (Cth) and which refers explicitly to the FATF recommendations,⁴² and Subdivision 396-C of Schedule 1 of the *Taxation Administration Act 1953* (Cth) which creates reporting obligations for the purposes of the CRS and the OECD Commentary thereon.

The applicable UK provisions are to found in *The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (UK) ('the AML Regulations') and the *International Tax Compliance Regulations 2015* (UK) ('the CRS Regulations').

The AML Regulations define 'beneficial owner' differently for different ownership structures, depending on what is the subject of the beneficial ownership. The approaches to beneficial ownership and the defined categories are quite inconsistent. In order to be a beneficial owner

⁴⁰ The Commentary to the Model Rules attempts, in paragraph 5, to avoid this outcome by noting that information may be provided under a FATCA Inter-Governmental Agreement. However such information may not be exchanged for the simple reason that it is not available to the United States authorities. See Peter Cotorceanu, *Hiding in Plain Sight* (2015) 21 *Trusts & Trustees* 1050.

⁴¹ George Orwell, *1984* (Penguin, first published 1949, 2011 ed) 342.

⁴² *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 11; *Social Security Act 1991* (Cth) s 1207V.

of a corporation, effectively a 25 per cent interest or actual control is required:

5.—(1) In these Regulations, “beneficial owner”, in relation to a body corporate which is not a company whose securities are listed on a regulated market, means—

- (a) any individual who exercises ultimate control over the management of the body corporate;
- (b) any individual who ultimately owns or controls (in each case whether directly or indirectly), including through bearer share holdings or by other means, more than 25% of the shares or voting rights in the body corporate; or
- (c) an individual who controls the body corporate.⁴³

Few would cavil with these tests which bear considerable resemblance to reality.

On the other hand, for a trust, the defined ‘beneficial owner’ may (and usually will) have no ownership at all:

6.—(1) In these Regulations, “beneficial owner”, in relation to a trust, means each of the following—

- (a) the settlor;
 - (b) the trustees;
 - (c) the beneficiaries;
 - (d) where the individuals (or some of the individuals) benefiting from the trust have not been determined, the class of persons in whose main interest the trust is set up, or operates;
 - (e) any individual who has control over the trust.
- (2) In paragraph (1)(e), “control” means a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to—
- (a) dispose of, advance, lend, invest, pay or apply trust property;
 - (b) vary or terminate the trust;
 - (c) add or remove a person as a beneficiary or to or from a class of beneficiaries;
 - (d) appoint or remove trustees or give another individual control over the trust;
 - (e) direct, withhold consent to or veto the exercise of a power mentioned in sub- paragraphs (a) to (d).⁴⁴

The notion that a settlor is a beneficial owner of the trust assets would, at least outside the category of revocable trusts, surprise most competent trust lawyers but obviously not the parliamentary drafter. Indeed, the notion that a class of person can be a beneficial owner would

⁴³ *The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK)* s 5.

⁴⁴ *The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK)* s 6.

surprise.

In Australia, we do not have these infelicities of drafting, although the terms of the *Social Security Act 1991* (Cth) provision betray a similar lack of understanding of the meaning of beneficial ownership and an extended prolixity extending over two pages (as to which see Appendix 1).

A further provision of interest is Regulation 23. It provides:

23. If—

- (a) a person enters into any arrangements, and
- (b) the main purpose, or one of the main purposes, of the person in entering into the arrangements is to avoid any obligation under these Regulations,
- (c) these Regulations are to have effect as if the arrangements had not been entered into.⁴⁵

That legislation imposing such severe penalties should contain such obvious fundamental uncertainties does not speak well for the technical skill of the originators of the legislation, or of the Parliament whose responsibility it is to ensure that badly written and self-contradictory legislation does not make it to the statute book. The observations of Kitto J in relation to some poorly drafted Australian taxation legislation come to mind:

Section 260 is a difficult provision, inherited from earlier legislation, and long overdue for reform by someone who will take the trouble to analyse his ideas and define his intentions with precision before putting pen to paper.⁴⁶

The fact that the legislation here under consideration is relatively recent only makes its deficiencies more unfortunate. In Australia, the fate of section 260 in the Courts has led to a somewhat differently drafted anti-avoidance provision in the *Taxation Administration Act 1953* (Cth) which, being one full page in length, reflects the Australian preference for prolix drafting techniques.⁴⁷

IV CONFIDENTIALITY AND DATA PROTECTION

In a second category are data protection laws. It will be recalled that the conventional view has been that trustees' internal deliberations are entitled to confidentiality. The best known exposition of that view is that of Salmond LJ in *Re Londonderry's Settlement*:

The settlement gave the absolute discretion to appoint to the trustees and not to the courts. So long as the trustees exercised this power with the consent of persons called appointors under the settlement and exercised it bona fide with no improper motive, their exercise of the power cannot be challenged in the courts—and their reasons for acting as they did are, accordingly, immaterial. This is one of the grounds for the rule that trustees are not obliged to disclose to beneficiaries their reasons for exercising a discretionary power. Another ground for this rule is that it would not be for the good of the beneficiaries as a whole, and yet another that it might make the lives of trustees intolerable should such an obligation rest upon them: *In re Beloved*

⁴⁵ *International Tax Compliance Regulations 2015* (UK) r 23.

⁴⁶ *Newton v Commissioner of Taxation* [1957] HCA 99 [34]. The original general anti-avoidance rule—which incidentally bears more than a little resemblance to regulation 23 of the CRS Regulations.

⁴⁷ *Taxation Administration Act 1953* (Cth) s 396-130.

Wilkes's Charity; In re Gresham Life Assurance Society, Ex parte Penney. Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens.⁴⁸

This has already changed in much of the common law world, although under the somewhat attenuated version of data protection law to be found in Part IIIC of the *Privacy Act 1988* (Cth) it has yet to do so in Australia,⁴⁹ except in relation to trusts with relevant connections to the European Union and (post-Brexit, should it occur) the United Kingdom. It is open to beneficiaries of trusts in jurisdictions with comprehensive data protection legislation such as the *Data Protection Act 1998* (UK) and its successor the EU *General Data Protection Regulation* ('GDPR'),⁵⁰ conferring right to access data, to correct it, and to have it expunged to use Data Subject Access Requests ('DSARs') to demand to be told what personal data the trustees or advisers to the trustees hold about them, assuming, of course, that those trustees or advisers are Data Controllers of that data within the meaning of the legislation.

*Dawson-Damer and Ors v Taylor Wessing LLP*⁵¹ concerned a request for access to data held by English solicitors, who had advised the trustees of a Bermudan trust, by the trust beneficiaries. They sought it, amongst other reasons, to advance their position in litigation against the trustees. In Australia such a claim would fail. So the following extract from the leading judgment (of Arden LJ) is telling as to the extent to which the law has been changed.

'... in this jurisdiction it is clear that a trustee cannot be obliged, save by an order of the court, to disclose documents'⁵². Mr Taube submits that it cannot have been the intention of Parliament that that position should be circumvented by an SAR, and accordingly there should be a purposive interpretation of 'legal professional privilege' in the Legal Professional Privilege Exception so that it includes documents within the trustee's right of non-disclosure. Mr Taube submits that a purposive interpretation would be in keeping with the approach to European Union (EU)-derived legislation generally, and with the UK's manifest wish to protect legal professional privilege.

But a relevant purpose or aim of the Directive has to be identified. Mr Taube focuses on the purposes of disclosure in the Directive which are to enable a person to correct errors in personal data. Mr Taube submits that that purpose is not furthered by requiring a firm of solicitors to disgorge material because they keep records only to record their clients' instructions which may not be accurate. I have great difficulty in seeing why this matters since a data subject is likely to be legitimately concerned if legal advice has been given on the basis of mistaken fact. Mr Taube cannot point to any other aim or objective in the Directive which might support the purposive interpretation he seeks. So in my judgment he fails to establish such an interpretation.

⁴⁸ [1965] Ch 918, 936G.

⁴⁹ Part IIIC establishes a scheme for reporting notifiable data breaches, but makes no other provision of the type discussed here. However given the consequences for permissible data transfer in GDPR and the requirement of comparable protection (see, for eg, GDPR Arts 45 and 46) it may be expected that there will be significant pressure for legislative change.

⁵⁰ *Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [4.5.2016] OJ L 119/1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679>>.

⁵¹ [2017] EWCA Civ 74 (Arden LJ) [52]–[54].

⁵² See, generally, Lynton Tucker, *Lewin on Trusts* (19th ed, Sweet & Maxwell, 2015) 909.

Accordingly, in my judgment, the DPA does not contain an exception for documents not disclosable to a beneficiary of a trust under trust law principles. The fact is that they are not within the Legal Professional Privilege Exception, and no other exception has been suggested.⁵³

Dawson-Damer and Ors v Taylor Wessing LLP has accordingly created a potential nightmare for trustees and their advisers. Whilst aspects of the reasoning in *Re Londonderry's Settlement* (and particularly its reliance on the notion of the beneficiaries' right to information having its source in proprietary rights) have been criticized in later cases such as *Schmidt v Rosewood Trust Ltd*,⁵⁴ the confidentiality principle for which it stands, summarized by Briggs J (as he then was) in *Breakspear and Ors v Ackland and Anor* in the following terms, remains an important one:

... it is in the interests of beneficiaries of family discretionary trusts, and advantageous to the due administration of such trusts, that the exercise by trustees of their dispositive discretionary powers be regarded, from start to finish, as an essentially confidential process. It is in the interests of the beneficiaries because it enables the trustees to make discreet but thorough inquiries as to their competing claims for consideration for benefit without fear or risk that those inquiries will come to the beneficiaries' knowledge. They may include, for example, inquiries as to the existence of some life-threatening illness of which it is appropriate that the beneficiary in question be kept ignorant. Such confidentiality serves the due administration of family trusts both because it tends to reduce the scope for litigation about the rationality of the exercise by trustees of their discretions, and because it is likely to encourage suitable trustees to accept office, undeterred by a perception that their discretionary deliberations will be subjected to scrutiny by disappointed or hostile beneficiaries, and to potentially expensive litigation in the courts.⁵⁵

There have, however, been dissenting voices, of which the dissenting judgment of Kirby P in *Hartigan Nominees Pty Ltd v Rydge* is a particularly forceful example.⁵⁶

The *Data Protection Act 1998* (UK), however, comprehensively overrules that principle and moreover, does so even where the information sought is for the purposes of litigation where the disclosure procedures available in that litigation would not require provision of the information, something which in other circumstances might be regarded as questionable. The fact that information is sought other than for the purpose of protecting privacy (by correcting errors) is irrelevant.⁵⁷

The cases recognize the potential application of the civil law doctrine of *abus de droit*, said in the present context to be similar to the common law concept of abuse of process.⁵⁸

To further complicate matters, whilst the *Data Protection Act 1998* (UK) recognized legal professional privilege,⁵⁹ it is only legal professional privilege in relation to proceedings in the UK as noted above.⁶⁰ Such an approach, even if required by the legislation, is hardly consistent with the role of English legal professionals advising over a wide range of matters across the

⁵³ *Dawson-Damer and Ors v Taylor Wessing LLP* [2017] EWCA Civ 74 (Arden LJ) [52]–[54].

⁵⁴ [2003] 2 AC 709.

⁵⁵ [2008] EWHC 220 (Ch) [54].

⁵⁶ (1992) 29 NSWLR 405.

⁵⁷ *Dawson-Damer and Ors v Taylor Wessing LLP* [2017] EWCA Civ 74 [105]–[111]. See also *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Ors, Deer v University of Oxford* [2017] EWCA Civ 121 [86].

⁵⁸ *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Ors, Deer v University of Oxford* [2017] EWCA Civ 121 [88].

⁵⁹ *Data Protection Act 1998* (UK) sch 7 [10].

⁶⁰ *Dawson-Damer and Ors v Taylor Wessing LLP* [2017] EWCA Civ 74 [39]–[45].

world.

Of course, trustees and their advisers may still resist compliance with a DSAR if this would require disproportionate effort on the part of the data controller in finding and supplying the requested information. All may not be lost, therefore.

However, now that the EU GDPR has taken effect,⁶¹ even this limited line of defence might be illusory or prove unattractive. This is because one of the underlying concepts behind GDPR is that data controllers are supposed to be able to readily identify where an individual's data is held in order that the individual can exercise their more extensive rights (for example, to have data deleted or transferred somewhere else). It will not sit well with data protection regulators if data controllers respond to DSARs with the response, 'I can't find your data.' The GDPR is directly applicable in the UK without the need for local enacting legislation, although in due course, this too will be incorporated in domestic law along with the remainder of European law. And the GDPR has explicitly extraterritorial operation.⁶²

Data protection rights do not exist in a vacuum. They are underpinned by competing rights provided for in the EU Charter of Fundamental Rights. Recital 4 of GDPR reflects this when making it clear that the protection of personal data is not an absolute right.

Beneficiaries' rights to exercise DSARs may well be outweighed when balanced against the rights of the settlor to confidentiality, particularly where individuals do not know that they are beneficiaries and the settlor does not want them to know (often for very good reason). And, of course the potential for applications of this sort to be made provides a perverse incentive to trustees and others to provide no information at all to beneficiaries where this is legally possible in order to preclude the expense and inconvenience (and disregard of settlor's wishes) inherent in the disclosure regime.

The confidentiality of trustee deliberations has been protected in other jurisdictions by statute which would override data protection laws.⁶³

It should not be thought that objections based on costs are overstated. In Dr Deer's case against the University of Oxford, the University in the course of carrying out searches ordered by the Court reviewed over 500,000 e-mails and other documents at a cost of some £116,116.⁶⁴

The position could be made clearer by the UK Government, should it choose to deal with this issue directly. GDPR allows for EU Member States to restrict DSAR rights where this is necessary and proportionate to safeguard the rights and freedoms of others. But this will be of no assistance where the GDPR is operating extraterritorially.

The GDPR establishes a tiered approach to penalties for breach which enables the Data Protection Agencies to impose fines for some infringements of up to the higher of four per cent

⁶¹ from 25 May 2018: Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [4.5.2016] OJ L 119/1, art 99.

⁶² Ibid art 3.2.

⁶³ See, for eg, *Trusts (Jersey) Law 1984* s 29, *International Trusts (Consolidated) Law of 1992 and 2012 (Cyprus)* s 11 and *DIFC Trust Law 2018*, Art 66(2).

⁶⁴ *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Ors, Deer v University of Oxford* [2017] EWCA Civ 121 [26].

of annual worldwide turnover and €20 million (eg breach of requirements relating to international transfers or the basic principles for processing, such as conditions for consent). Other specified infringements would attract a fine of up to the higher of 2 per cent of annual worldwide turnover and €10 million. A list of points to consider when imposing fines (such as the nature, gravity, and duration of the infringement) is included.

These penalties arguably should have a wider application: where data is obtained and published without consent, those who profit from it (such as media organizations) arguably should be liable unless they can show that there was no reasonable basis for concluding they were unaware that the data they publish was published without the consent of the data subject.

That applies with particular force where the information in question has been acquired by the data controller under compulsive powers (as will be the case with information obtained under the so-called common reporting standard and the trust register). There already exists the very substantial risk that those to whom such information is passed lawfully will misuse it—tax prosecutions have become a favoured means of suppressing dissent for a number of authoritarian regimes, while other recipients are, by reason of corruption or poor governance, unlikely to treat the information properly. But on top of that, the risk of unlawful access to (‘hacking’) such information cannot rationally be denied: it is simply delusional to believe that such information will remain confidential, even in the hands of the most reputable and efficient government authorities as experience with (for example) the (UK) National Health Service has shown. The GDPR makes no provision for penalties to be payable by government authorities who do not comply with it.

As the GDPR recognizes, privacy is a fundamental human right. Its protection requires rigorous enforcement, not only in respect of those with an obligation to keep personal information confidential, but also in respect of those into whose hands it comes in breach of confidentiality obligations.

V CONSEQUENCES – THE FINANCIAL INDUSTRIES

A useful link between the two parts of the paper is provided by Australia’s experience in the company law and financial services field. The Royal Commission has revealed a pattern of systemic misconduct and arguably even more importantly a failure of the regulatory system to deal with dishonesty and conflicts of interest. In its Executive Summary, the Interim Report observes that:

When misconduct was revealed, it either went unpunished or the consequences did not meet the seriousness of what had been done. The conduct regulator, ASIC, rarely went to court to seek public denunciation of and punishment for misconduct. The prudential regulator, APRA, never went to court. Much more often than not, when misconduct was revealed, little happened beyond apology from the entity, a drawn out remediation program and protracted negotiation with ASIC of a media release, an infringement notice, or an enforceable undertaking that acknowledged no more than that ASIC had reasonable ‘concerns’ about the entity’s conduct. Infringement notices imposed penalties that were immaterial for the large banks. Enforceable undertakings might require a ‘community benefit payment’, but the amount was far less than the penalty that ASIC could properly have asked a court to impose.⁶⁵

⁶⁵ Commonwealth of Australia, ‘Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Interim Report’ (28 September 2018) vol 1, xix
<<https://financialservices.royalcommission.gov.au/Pages/interim-report.aspx>>

And that:

The law already requires entities to ‘do all things necessary to ensure’ that the services they are licensed to provide are provided ‘efficiently, honestly and fairly’. Much more often than not, the conduct now condemned was contrary to law. Passing some new law to say, again, ‘Do not do that’, would add an extra layer of legal complexity to an already complex regulatory regime. What would that gain?

Should the existing law be administered or enforced differently? Is different enforcement what is needed to have entities apply basic standards of fairness and honesty: by obeying the law; not misleading or deceiving; acting fairly; providing services that are fit for purpose; delivering services with reasonable care and skill; and, when acting for another, acting in the best interests of that other? The basic ideas are very simple. Should the law be simplified to reflect those ideas better?⁶⁶

Equitable principles, I suggest, would answer these questions by saying that less, rather than more, law is the better approach and that the current legislative approach of simply requiring a check the box approach to voluminous legislation obscures rather than illuminates the essential principles involved.

As the interim report noted:

In December 1999, Treasury released its Corporate Law Economic Reform Program Paper No. 6 (CLERP 6). Although extensive amendments have been made to the legislation passed to implement CLERP 6, a number of its underlying principles have endured. One of those principles was to fold sales and advice relating to insurance and superannuation into the regulation of securities. That regulatory framework was premised on independent intermediation and the use of mandatory disclosure as a means of investor protection.

...

Importantly, CLERP 6 did not provide that financial advisers were to be independent from product issuers. It is not clear whether the authors considered the possibility that financial advisers may be employed or authorised by issuers of products about which they advise, a situation that is now widespread. Nor did CLERP 6 engage with the fiduciary duties or other general law obligations that may attach to financial advisers but conflict with their employment conditions. The financial advice industry is still caught in this structural link between product issuers and the adviser’s legal obligation to act in the best interests of the client.⁶⁷

And, after a consideration of the overall regulatory regime, as amended by the so-called Future of Financial Advice (FoFA) reforms,⁶⁸ the Interim Report somewhat tentatively suggests that:

As noted above, CLERP 6 and the regulatory framework it instituted relied heavily on disclosure to rationalise customer decision-making and impose transparency on licensees. The potential for complexity and duplication in the documents I have just described may derogate from that aim.⁶⁹

Put another way, the complexity of the law detracted from, rather than reinforced basic

⁶⁶ Ibid xx.

⁶⁷ Ibid 77, 78.

⁶⁸ Effected by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth); *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

⁶⁹ Commonwealth of Australia, above n 64, 99.

equitable principles: it did not highlight the essential fiduciary obligations of many of the actors concerned, and it did not lead to a process of adequate enforcement of basic standards of honesty and ethics.

VI TRADE UNIONS

The lack of such a process in another context was a theme to which Mr Heydon QC returned in his landmark report on aspects of the Australian industrial relations system and, in particular, what he viewed as the failure to apply proper standards when dealing with the assets and rights of others. In the words of the Final Report of the Royal Commission:

The case studies examined have revealed widespread misconduct that has taken place in every polity in Australia except for the Northern Territory. There is little that is controversial about the underlying facts. Almost all of the underlying facts have been established by admissions to the Commission, incontrovertible documents, decisions of courts and tribunals or well-corroborated testimony.

There has been much perjury.

Nor is it only union officials who have been involved.

Of course what has been described is not universal. It may not even be typical. But you can look at any area of Australia. You can look at any industry. You can look at any type of industrial union. You can select any period of time. You can take any rank of officeholder, from Secretaries down to very junior employees. You can search for any type of misbehavior. You will find rich examples over the last 23 years in the Australian trade union movement.

These aberrations cannot be regarded as isolated. They are not the work of a few rogue unions, or a few rogue officials. The misconduct exhibits great variety. It is widespread. It is deep-seated.

Nor can the list be regarded as complete. It would be utterly naïve to think that what has been uncovered is anything other than the small tip of an enormous iceberg. It is inherently very hard to identify most types of misconduct by union officials. So far as it is typified by hard core corruption, there is no ‘victim’ to complain, and the parties to the corruption have a strong incentive to keep it secret. Whistleblowers are unlikely to be found for various reasons including a well-founded fear of reprisals. ... But it is clear that in many parts of the world constituted by Australian trade union officials, there is room for louts, thugs, bullies, thieves, perjurers, those who threaten violence, errant fiduciaries and organisers of boycotts.⁷⁰

Many of these words apply in a wider world where the rule of law is absent.

VII POLITICS

In a more genteel world, we can reflect on the political system. The intersection of politics and fiduciary principles is well exemplified in the case of *Magill v Porter*.⁷¹

The appeal to the House of Lords was conducted on the basis of a statement of agreed facts

⁷⁰ Commonwealth of Australia, ‘Royal Commission Final Trade Union Governance and Corruption: Final Report’ (December 2015) vol 1, 12-13 <<https://www.tradeunionroyalcommission.gov.au/reports/Pages/Volume-1.aspx>>.

⁷¹ [2001] UKHL 67.

and issues which, as summarized by Lord Scott of Foscote, provided:

- (1) As a consequence of local government elections in May 1986 reducing the Conservative majority from 26 to 4, Dame Shirley, the leader of the Conservatives on the Westminster Council, was determined that a greater majority should be achieved at the 1990 elections (paragraphs 9 and 10 of the statement).
- (2) Eight marginal wards, the "key wards", were identified. The intention of Dame Shirley and Mr Weeks was to reduce the number of Labour voters and increase the number of Conservative voters in these key wards. The target was an overall increase of 2,200 Conservative supporters in these wards (paragraphs 13 to 15).
- (3) This increase was to be brought about by selling council-owned residential properties in the eight key wards when they became vacant. It was believed that owner-occupiers were more likely to vote Conservative than were council tenants (paragraphs 16 and 28).
- (4) The Director of Housing advised in May 1986 and again in March 1987 that if all council properties in the eight key wards were designated for selling, the council would not be able to meet its statutory housing obligations (paragraphs 18 and 29).
- (5) Nonetheless, at a meeting on 24 March 1987, attended by Dame Shirley and Mr Weeks, it was decided to sell annually 250 properties in the eight key wards (paragraph 35).
- (6) On 5 May 1987 Mr Sullivan QC met council officials in consultation. He was informed that the majority (Conservative) group wished to target sales in marginal wards for electoral advantage. He advised that this would not be lawful, that the designation of properties for sale had to be done for proper reasons and that, in identifying the properties to be sold, the same criteria had to be applied across the whole city (paragraph 40).
- (7) The critical paragraph in the agreed statement of facts is paragraph 42. It reads:

"On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course ... of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards."

That was the policy eventually carried into effect via the housing committee decision on 8 July 1987 (paragraph 58 of the statement). It led to the sale of 618 council properties (some were let on long leases for substantial premiums). It is clear that the policy was adopted by the chairmen's group, led by Dame Shirley and Mr Weeks, and was thereafter promoted by Dame Shirley and Mr Weeks, as well as by others, not in order to achieve sales city-wide but in order to achieve 250 sales per annum in the eight key wards. And those sales were for the purpose of replacing probable Labour voters by probable Conservative voters. The city-wide policy was no more than a cloak to give apparent legality to the sales in the eight key wards which leading counsel had rightly warned would be unlawful unless part of a city-wide policy adopted for a proper reason. The sales of the 618 properties involved the exercise of local government powers to sell council properties (see section 32, Housing Act 1985) not for the purpose for which those powers were granted but in order to increase the number of Conservative voters in marginal wards. It has not been in dispute before your Lordships that this purpose for selling is an unlawful purpose.⁷²

⁷² [2001] UKHL 67 [142]-[143] (Scott L).

As Lord Scott put it:

132. This is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government. Like Viola's "worm i' the bud" it feeds upon democratic institutions from within (Twelfth Night).

133. When detected and exposed it must be expected, or at least it must be hoped, that political corruption will receive its just deserts at the polls.⁷³ Detection and exposure is, however, often difficult and, where it happens, is usually attributable to determined efforts by political opponents or by investigative journalists or by both in tandem. But, where local government is concerned, there is an additional very important bulwark guarding against misconduct. The Local Government Finance Act 1982 (now repealed but in force until 11 September 1998) required the annual accounts of a local authority to be audited by an independent auditor appointed by the Audit Commission (sections 12 and 13). The auditor had to satisfy himself that the local authority's accounts were in order (section 15(1) and (2)) and, also, had to "consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the [local authority] concerned or brought to the attention of the public ..." (section 15(3)).

...

144. In the Court of Appeal Kennedy LJ commented on the political reality that many government decisions, whether at local government level or in central government, are taken with an eye to the electoral effect they may have. He said:

"Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. In local, as in national, politics many if not most decisions carry an electoral tag, and all politicians are aware of it." ([2000] 2 WLR 1420, 1444)."

The Lord Justice was, of course, correct. But there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage. The agreed statement of facts places the policy adopted by the chairmen's group on 5 May 1987 fairly and squarely in the former category.⁷⁴

The immediate consequence was that the Councillors concerned were made liable to

⁷³ This ignores the fact that the corruption may negate or limit the capacity of the electorate to reject wrongdoing by such means as partisan gerrymandering, as (arguably) demonstrated by the difference in the share of the popular vote required respectively by the Democrats and the Republicans to obtain a majority in the United States House of Representatives, the outcomes intended in the case at hand, and voter suppression, as to which (for a recent example) see Ari Berman, 'Brian Kemp's Win in Georgia is Tainted by Voter Suppression' *Mother Jones* (online), 16 November 2018 <<https://www.motherjones.com/politics/2018/11/brian-kemps-win-in-georgia-tainted-by-voter-suppression-stacey-abrams/>>.

⁷⁴ [2001] UKHL 67 [142]-[143] (Scott L).

compensate the Council for the losses it had incurred. Perhaps the most regrettable part of the outcome is that the provision making the Councillors liable has been repealed. And of course had such action been taken in Parliament the members concerned would have most likely been protected by Parliamentary privilege.

Political dishonesty and ethical failings are not limited to the European side of the Atlantic, as the affairs of the Trump Foundation amply demonstrate.

In proceedings the President of the United States has described as ‘ridiculous’,⁷⁵ the New York Attorney General has sought dissolution of the Donald J Trump Foundation on the basis of an investigation whose findings are summarised in the following terms:

The... Foundation operated without any oversight by a functioning board of directors. Decisions concerning the administration of the charitable assets entrusted to the care of the Foundation were made without adequate consideration or oversight, and resulted in the misuse of charitable assets for the benefit of Donald J. Trump ("Mr. Trump") and his personal political and/or business interests. In sum, the Investigation revealed that the Foundation was little more than a checkbook for payments to not-for-profits from Mr. Trump or the Trump Organization. This resulted in multiple violations of state and federal law because payments were made using Foundation money regardless of the purpose of the payment. Mr. Trump used charitable assets to pay off the legal obligations of entities he controlled, to promote Trump hotels, to purchase personal items, and to support his presidential election campaign.

As set forth below, the Foundation and its directors and officers violated multiple sections of the (...specified laws ...), provisions that prohibit foundations from making false statements in filings with the Attorney General, engaging in self dealing, wasting charitable assets, or violating the Internal Revenue Code by, among other things, making expenditures to influence the outcome of an election. The Foundation's directors failed to meet basic fiduciary duties and abdicated all responsibility for ensuring that the Foundation's assets were used in compliance with the law. The violations that resulted were significant and not only ran afoul of the applicable provisions of the (...specified laws ...), but also resulted in the Foundation failing to comply with the terms of its own certificate of incorporation.⁷⁶

The particulars in support of these allegations certainly appear to support them. It is alleged (amongst other things) that:

- The Board of the Foundation has not met since 1999;⁷⁷
- Donations were solicited from the public for a Veterans event which raised over \$US 5 million and were then applied in accordance with directions of campaign staff at numerous events at which Mr Trump and the Trump Foundation were heavily publicised. No funds were contributed by Mr Trump or associated entities;⁷⁸ and

⁷⁵ “The sleazy New York Democrats, and their now disgraced (and run out of town) A.G. Eric Schneiderman, are doing everything they can to sue me on a foundation that took in \$18,800,000 and gave out to charity more money than it took in, \$19,200,000. I won’t settle this case!... ..Schneiderman, who ran the Clinton campaign in New York, never had the guts to bring this ridiculous case, which lingered in their office for almost 2 years. Now he resigned his office in disgrace, and his disciples brought it when we would not settle.” Donald J Trump, *Twitter*, 14 June 2018.

⁷⁶ New York Verified Petition 451130/2018, filed 14 June 2018
<https://ag.ny.gov/sites/default/files/court_stamped_petition.pdf> [2], [3].

⁷⁷ *Ibid* [26].

⁷⁸ *Ibid* [40]–[57].

- Funds were used to settle commercial lawsuits and to acquire a painting of Mr Trump which in due course was hung in one of his golf clubs.⁷⁹

In due course, according to the Petition, tax adjustments were subsequently made which recognised the improper use of the funds in question.⁸⁰ Even if, therefore, as has been asserted, the investigation preceding the Petition was politically motivated, much of what is alleged is not controversial (in the sense of being open to factual dispute).

Spending, as I now do, most of my time outside Australia, I am constantly made aware of international trends which I think are reflected in Australia itself. In my role as a member of the Liberal National Party I together with others tried to address these in a paper published by the Party Organisation in 2010 which we called the Integrity Paper.⁸¹ The Paper sought to recognise past failings on the conservative side of politics and to emphasise that:

- broken promises will not be tolerated by the public;
- corruption and lack of accountability will not be tolerated; and
- the great institutions of state must be respected.

Competent economic management (something which the public only vaguely understands) will not protect a government which fails in the areas outlined above.⁸² That ought to have been burned into the souls of every Queensland non-Labor voter by the events leading up to the 1989 election. Plainly it was not.

The Integrity Paper was developed prior to the 2011 leadership change. Campbell Newman expressly agreed to the terms of that document whilst he was Lord Mayor of Brisbane. However upon election as Party Leader, he announced that all previously developed policies were to be ignored. It turned out that applied to the Integrity Paper as well.

One of the points made in the Integrity Paper is that no secret electoral commitments should ever be made. The attacks on the Government by Alan Jones in relation to the Acland mine on the Darling Downs during the 2015 election reflected in part the making of such a commitment by the former Premier (alleged by Jones to have been dishonoured). One wonders how many times lessons have to be learned. At the very least, the terms of any commitment should have been made public at the time so no question of a secret deal or its being dishonoured could arise.

In government, the Parliamentary Party decided to unilaterally change the electoral funding laws (contrary to the principles outlined in the Integrity Paper and a unanimous decision of the 2013 LNP State Convention).⁸³ Politically, this proved a disaster. The removal of donation caps, increased disclosure limits,⁸⁴ removal of expense caps and the exigencies of fundraising

⁷⁹ Ibid [82], [87].

⁸⁰ Ibid [86], [88], [90].

⁸¹ *LNP: Responsible, Honest, Transparent in Government* (LNP, 2010).

⁸² A proposition recently demonstrated by the results of the 2018 mid-term elections in the United States.

⁸³ A precedent followed by the current government when it abolished the optional preferential voting system which was one of the outcomes of the Fitzgerald Inquiry.

⁸⁴ Even if the removal of donation caps and increase in the disclosure threshold were necessary for constitutional reasons, the failure to explain why these had been done was extraordinary. Other courses should have been considered, including leaving the legislation as it was until it was challenged by others, and the LNP refusing to accept donations in excess of the original limit (as the ALP dishonestly claimed to have done – the expenditure of funds directly by its principal donors (the Unions) meant it had little practical effect in their case). The resultant impression was that this was just a convenient rationale for a course predetermined by the

necessitated by these changes resulted in a continual attack on the Party's integrity in office. The public will simply not accept ministerial "pay per view". Nor should it. The decision by the Parliamentary Party to force the Organisation into the situation in which funds had to be raised in this way was both ethically indefensible and politically stupid.

The Integrity Paper also dealt with the need to avoid political appointments to positions requiring independence. As Sir Harry Gibbs concluded in relation to the appointment of judges:

No matter what the Court, to achieve the result that all appointments are solely on the basis of merit (i.e. legal excellence and experience coupled with good character and suitable temperament) it would seem essential that those making the appointments should seek and obtain adequate and informed advice from the judiciary and the profession. Various procedures may be suggested for ensuring that such advice is given, but no procedure will be effective if the will to appoint only the best is lacking. In the end, we must depend on the statesmanship of those in all political parties.⁸⁵

Such statesmanship and respect for process were notably absent when it came to the appointment of the replacement for De Jersey CJ.

As Lord Bridge of Harwich put it in *R v Tower Hamlets London Borough Council Ex p Chetnik Developments Ltd*:

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended...⁸⁶

The duty to act for proper purposes has been further reinforced by cases such as *Trafford v Blackpool Borough Council*.⁸⁷

The nature of the liability of the holders of public office, or senior corporate or community office, for breach of fiduciary duty is a matter of both considerable public interest and public comment. At times one could be forgiven for concluding that basic fiduciary principles which ought to apply to those holding public office are either ignored or, even worse, simply not understood (or overridden by parliamentary privilege).

Recent examples are, unfortunately, all too numerous to provide a comprehensive list. But the more egregious undoubtedly include (in the United Kingdom) the application of parliamentary expenses for purposes which, at least at first instance, appear quite remote from parliamentary business (for example, home maintenance and building repairs),⁸⁸ and the benefit flowing to the family of the President of the United States (or possibly even himself) from the use of his

Government to dispense with existing constraints. As often happens in such cases, the intended political beneficiary and the actual one were not the same – the principal beneficiary in fact was the Palmer United Party.

⁸⁵ Sir Harry Gibbs CJ, 'The Appointment of Judges' (Address to the Australian Institute of Judicial Administration, 23 August 1986) 14-15.

⁸⁶ [1988] AC 858, 872.

⁸⁷ [2014] EWHC 85 (Admin).

⁸⁸ See Editorial, 'Bringing the Emoluments Clause to Bear on Trump's DC Hotel' *Daily Mail* (online), 7 August 2018 <<https://www.dailymail.co.uk/news/article-1247503/Have-shame-Duck-house-moat-MPs-fought-expenses-payback-call.html>>.

family's hotels and golf clubs for official purposes.⁸⁹

There used to be a time when proper standards were rigorously applied and those who did not comply with them were frequently forced from public life. That does not, of course, mean that the past provides an unblemished record of propriety. Certain of the honours associated with the Lloyd George government come to mind in this regard. But, whether or not the apparent increased prevalence of these practices in recent times owes more to greater scrutiny than to a lapse in standards, their corrosive effect is undoubted: an expression, perhaps, in the public field of the proposition enshrined in Gresham's law that bad money drives out good.⁹⁰ There is, in truth, nothing particularly difficult about the application of core fiduciary principles to public office. These basically come down to three:

- other than officially approved emoluments, the holders of public office should take no benefit from holding the office (which is simply a reflection of the fiduciary principle that a trustee may not profit from his or her trust);
- powers conferred should be used only for the purpose for which they were conferred; and
- holders of public office should be honest and willingly accept an obligation to be accountable.⁹¹

The corrosive effects of departure from these principles cannot be overstated. It has led to high levels of cynicism and distrust within the community, so that even honest participants in the process may be unfairly regarded as having no better standards than those whose misconduct has caused the general community attitude. In turn this makes government increasingly challenging, particularly at a time when difficult choices must be made. One of the functions of those in public life is to lead the community, and if one's public declarations are thought simply to be a position of convenience taken for the moment (or even worse, a lie based on past mendacity) it is unlikely the community will follow.

The importance of fundamental principle, which I suggest is essentially a fiduciary principle, was summarised thus by the Charity Commission of England and Wales, whose recent report, *Trust in Charities, 2018*,⁹² noted that trust in charities had been eroded following scandals such as the Oxfam scandal:

Moreover, many of those who feel that their trust in charities has decreased in the past two years (and this cohort has increased in number to over 4 in 10 members of the public) say they

⁸⁹ See Kirsty Walker, 'Have they No Shame? Duck-house and Moat MPs Fought Expenses Payback Call' *Boston Globe* (online), 1 February 2010 <<https://www.bostonglobe.com/opinion/editorials/2018/08/06/bringing-emoluments-clause-bear-trump-hotel/76XhekGBkDfbHuRYfMsNIM/story.html>>.

⁹⁰ See Encyclopaedia Britannica, *Gresham's Law* <<https://www.britannica.com/topic/Greshams-law>> although the first recorded expression of the principle is much older, dating back to Aristophanes' *The Frogs*.

⁹¹ Australia enacted truth in politics legislation in 1983 modelled on the corresponding provisions of section 52 of the *Trade Practices Act 1974* (Cth) (subsection 329(2) of the *Commonwealth Electoral Act 1918*). It was repealed in 1984. See George Williams, 'Truth in Political Advertising Legislation in Australia' (Research Paper No 13, 1996-97, Parliament of Australia) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp13>.

⁹² Populus and Charity Commission for England and Wales, *Trust in Charities, 2018: How the Public Views Charities, What this Means for the Sector, and How Trust Can Be Increased* (July 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723566/Charity_Commission_-_Trust_in_Charities_2018_-_Report.pdf>.

are donating less money as a result. Those who do not trust charities are far less likely to have recently made repeat donations than those who do.⁹³

They report ‘a long-term growth in the % who self-report that their trust has decreased’ reaching a level of 45 per cent.⁹⁴ The report notes that the sector is now ‘less trusted.... than the average man or woman in the street’.⁹⁵ The foreword to the report states:

We need to understand that this is not about more or tighter rules, or ticking more boxes. It’s about organisational ethos and values. Nor is it about charities explaining things better; it’s about behaving differently. The public want greater authenticity not just more transparency, they want to know that charities are what they say they are. And conversely: when they see actions and behaviours that are inconsistent with a charity’s purpose and values (for example in fundraising or protecting staff and beneficiaries), their trust is undermined.⁹⁶

Whilst written in the context of charities, similar propositions apply in the world of commerce, employment, and politics. The consequence of the decline in fiduciary standards in public life is wholly, and dangerously, corrosive.

There is a wider consequence, however, perhaps best summed up in the aphorism usually attributed to George Bernard Shaw that a government which promises to rob Peter to pay Paul can always depend on the support of Paul. Put another way, if the political process is viewed simply as a means of self-enrichment by participants, any underlying principled basis for determining such matters as levels of taxation and government charges on the one hand and benefits on the other disappears. The political process becomes a free for all in which all participants look principally to the maximization of their own benefit. In such an environment, property becomes not the right of the owner but merely a temporary advantage at the convenience of the state, and the rule of law becomes not a fundamental principle of a free society but the means whereby the majority, unencumbered by any notions of respect for the interests of others, acts solely for its perception of its own interest.

The current situation of Venezuela provides an instructive, but by no means only, example of the consequences of such an approach (although in that case those imposing their wishes may well no longer be a majority).

This takes one back to the debates of the founding fathers of the United States, who were conscious of the dangers of unlimited majority rule and sought, therefore, to establish a republic rather than a democracy in the sense in which that term was then understood.⁹⁷ The ancient Romans had a similar concept of civic virtue to restrain the tendency to simply take what was available from the general wealth.

It is not as if these consequences were unforeseen. Writing in 1748, Montesquieu observed:

The people fall into this misfortune (i.e., the corruption of the principles of democracy) when those in who they confide, desirous of concealing their own corruption, endeavour to corrupt

⁹³ Ibid 3.

⁹⁴ Ibid 5.

⁹⁵ Ibid 3.

⁹⁶ Ibid 2.

⁹⁷ ‘... Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they are violent in their deaths’: James Madison, ‘The Federalist No 10’ in Terence Ball (ed), *Hamilton, Madison and Jay: The Federalist with Letters of “Brutus”* (Cambridge, 2003) 40-46, 44.

them. To disguise their own ambition, they speak to them only of the grandeur of the state; to conceal their own avarice, they incessantly flatter theirs.

The corruption will increase among the corruptors, and likewise among those who are already corrupted. The people will divide the public money among themselves, and, having added the administration of affairs to their indolence, will be blending their poverty with the amusements of luxury. But with their indolence and luxury, nothing but the public treasure will be able to satisfy their demands.

We must not be surprised to see their suffrages given for money. It is impossible to make great largesses to the people without great extortion: and to compass this, the state must be subverted. The greater the advantages they seem to derive from their liberty, the nearer they approach towards the critical moment of losing it.⁹⁸

It is not difficult to see elements of the process identified by Montesquieu at play in today's politics. As Montesquieu noted, what is involved is a symbiotic relationship between the corrupters and the corrupted. The outcome is a very diminished society.

One antidote in such cases would be a return to acknowledgement and rigorous application of fiduciary principles in public and corporate life. Mr Heydon's paper points to the need to do so, and the need to resist the siren songs of those who would diminish the role of equity in giving effect to these principles.

The alternatives are not pleasant to contemplate. The irrepressible optimism of the distinguished academic this lecture celebrates commands us to do better.

⁹⁸ Charles de Secondat, Baron de Montesquieu, '*L'Esprit des Lois*' ('The Spirit of Laws') in JV Pritchard (ed), *Encyclopaedia Britannica Great Books of the Western World* (T Nugent tr, rev edn, 1748), vol 38, 51.