

**PRESENTATION OF
ACCOUNTABILITY ROUND TABLE INTEGRITY AWARD**

Parliament House
Canberra ACT

11 December 2013

The Hon Sir Gerard Brennan AC KBE GBS

ACCOUNTABILITY ROUND TABLE INTEGRITY AWARDS

Presentation at Parliament House, 11 December 2013

I join in the acknowledgement of the Traditional Owners, their Elders past and present, custodians of the land on which we meet and on which this Parliament House is built.

For those of you who work here day by day, familiarity may rob this building of its majesty and authority, but for those of us who come here on invitation or to inspect this symbol of Australian democracy, the building has a grandeur appropriate to an auditorium of the aspirations of the Australian people. I was honoured to attend here as the delegate of the Governor General to open formally the Parliament that was summoned to meet after the 1996 General Election. On that occasion, I was conscious of the importance of the separation of powers and I believed – correctly, I think – that the practice of appointing a judicial officer to open the Parliament was born of a misunderstanding of British precedent. I was uneasy then about fulfilling that role and I have retained some unease about any involvement in the political process. Hence, I had some misgiving about an invitation to a former member of the Judiciary to take part in a ceremony commending members of the political branches of government for what they have done in their political lives.

The separation of powers, a bastion of our freedoms, demands that a respectful reticence is maintained by the judicial branch of government about the conduct of the members of the political branches⁽¹⁾. And a similar inhibition, albeit not

¹My letter to Hon Tim Fisher 3 January 1997

so restrictive, applies to former judges. The public memory tends to attribute to former judges a set of values expressing legal rights and duties. Criticism of political conduct may be thought to be warranted by the law of the land, while commendation may be thought to be an endorsement of legal rectitude. There is another and more basic reason why judges or former judges should refrain from commenting on political conduct: they lack the lifetime experience needed to form a sound judgment of political conduct except in the more extreme cases. For these reasons I shall forego the opportunity to commend our Awardees or to compare their merits with the merits of other members of the Parliament. Determination of merit has been the prerogative of the Selection Committee established by the Accountability Round Table⁽²⁾ whose experience and competence entitle them to make the difficult assessments that lead to these Awards.

But it does not follow that the judiciary is not interested in the celebration and re-affirmation of the qualities expressed in the Awards criteria. The laws of the Parliament must be applied by the Courts and the Courts must give effect to the valid acts of the Executive Government, so the work of the political branches of Government provide the Courts with the rules to be observed in administering justice according to law. When the leading criterion for these awards is a candidate's "outstanding commitment to the public interest", it is clear that the

² The decisions were made by the ART Selection committee comprising Lyn Allison (former leader of the Democrats, and Senator), The Hon. Jim Carlton (former federal Liberal Party Minister), The Hon Dr. Ken Coghill, (former ALP member of and Speaker of the Victorian Legislative Assembly, Associate Professor, Business and Economics, Monash University), Harry Evans (Former Clerk of the Senate), Professor Charles Sampford (Director, The Institute for Ethics, Governance and Law) and Dr David Solomon, Queensland Integrity Commissioner. It was chaired by the Chair of the ART, Hon Tim Smith QC (retired Victorian Supreme Court judge and Adjunct Professor, Business and Economics Monash University).

Awards are intended to celebrate a democracy under a rule of law which advances the public interest. That is the essential characteristic of the rule of law in a free democracy. When judges are satisfied that they are working under a rule of law in the public interest, the administration of justice according to law presents no difficulties but rather a sense of satisfaction. It is a privilege therefore for a former judge to present Awards to members of the political branches of government commending their commitment to the public interest.

This notion of the public interest is not merely a rhetorical device – a shibboleth to be proclaimed in a feel-good piece of oratory. It has a profound practical significance in proposals for political action and in any subsequent assessment. It is derived from the fiduciary nature of political office: a fundamental conception which underpins a free democracy.

It has long been established legal principle that a member of Parliament holds “a fiduciary relation towards the public” (3) and “undertakes and has imposed upon him a public duty and a public trust”(4). The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee. As Rich J said(5):

“Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit”.

³ R v Boston (1923) 33 CLR 386, 412 per Higgins J

⁴ *ibid.*, at p 408

⁵ Horne v Barber (1920) 27 CLR 494, 501

Now how does this fit in with poll-driven politics, when actions are taken chiefly to ensure some electoral advantage? A case of this kind arose in England in 2001 concerning a local authority decision taken largely to gain an electoral advantage. The principle was explained by the senior Judge, Lord Bingham of Cornhill⁽⁶⁾:

“Elected politicians of course wish to act in a manner which will commend them and their party... to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party.”

Public fiduciary duties depend for their content on the circumstances in which power is to be exercised. The obligations cast on members of Parliament and officers of the Executive Government are many and varied and the law takes cognizance of the realities of political life, but asserts and, in interpreting statutes, assumes that the public interest is the paramount consideration in the exercise of all public powers. The many and varied demands made upon Parliamentarians – by constituents, by party, by lobbyists, by family and by friends – all call for a response. Fred Chaney spoke of these demands when he delivered the Inaugural Accountability Round Table Lecture at the Melbourne Law School in October 2011. He spoke of the compromises needed in government and the many claims on the loyalty of practising politicians. But he

⁶Porter v Magill [2002] 2 AC 357, [2001] UKHL 67, para21

did not suggest that any of these claims should subvert consideration of the public interest. Whenever political action is to be taken, its morality – and, indeed, its legality – depends on whether the public interest is the paramount interest to be served.

True it is that the fiduciary duties of political officers are often impossible to enforce judicially⁽⁷⁾ – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry “whatever it takes” is not consistent with the performance of fiduciary duty.

Fred Chaney sought to identify what he called “the sea anchors” which would “enable the electorate to discern the direction of travel” of a government or an alternative government, by which politicians could “demonstrate ... how they will judge where their duty lies” and by which “we can see integrity in their actions.” But Fred Chaney insisted that politics “must be much more than the technology of power” and he expressed a need “to define our national purpose, to have a light on the hill”, a need “to re-engage the electors by giving them a story about Australia that they can believe in.” I respectfully and heartily agree.

The political realities of which Fred Chaney spoke are not likely to be correctly evaluated by those who are unfamiliar with the political process. For that reason, the Button and Missen Awards are determined by, and derive their authority and legitimacy from, the judgment made in exercise of the combined

⁷ The Courts will not invalidate a law of the Parliament for failure to secure the public interest: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1,10.

talents and experience of the members of the Accountability Round Table's Selection Committee. They are familiar with the varied moral demands made of those who throw their hats into the political ring. It would be impossible, or at least it would be inappropriate, for a judge to determine the recipients of these Awards.

The criteria for the Awards identify the issues on which the Accountability Round Table place an especial importance: transparency and accountability in government, good Parliamentary practice and the institution of Parliament, justifiable changes in political policies and practices and protection of political and civil rights. Eligibility for these awards is restricted to candidates who commit to these objectives with honesty and civility and who demonstrate their independence and/or political courage. These are qualities of political leadership that can command the confidence of the Australian people.

Generally speaking, political action must accord with popular opinion but popular opinion does not always perceive where the public interest truly lies. Sometimes false or out of date information swamps popular opinion, sometimes popular opinion may fall short of the vision appropriate to a confident nation in a changing world. True political leadership is needed when such issues arise, leadership that can "re-engage the electors by giving them a story about Australia that they can believe in".

A headline issue of the recent election illustrates the problem of determining political action in the public interest. Both major political parties proposed to quash the miserable trade of people smugglers by imposing hardship on refugees who have been smuggled. This is an excruciating problem, and it raises

major issues which affect not only asylum seekers but the self-image of the Australian people. Can we justify inflicting injuries on the innocent in order to hurt the pockets of the guilty? Can we maintain our humanitarian quota of migrants or is it being destroyed by people smugglers? Are we really concerned by the risk of deaths at sea or is our principal concern the survival and arrival of un-visaed refugees? Is policy to be determined by a fear that an uncontrolled flood of foreigners will damage the comfortable order of our lives? These grave issues call for leaders who are noted for their honesty, civility and political courage and who articulate a vision for an honourable and confident nation. The nation will be served by leadership which formulates policies and decides on practical measures that take account of Australia's position as a wealthy Western country in the Asian hemisphere, retaining the rule of law and our traditional cultural links but bound to respond to the human crises affecting thousands of people in Iraq, Syria, Afghanistan, Sri Lanka and other countries where civilised living is destroyed by conflict.

These Awards celebrate the values that underpin leadership of high quality and standing and we are grateful to the Accountability Round Table for identifying such values and promoting their acceptance among those who serve this nation in the political branches of government.

And we congratulate those who are to receive these Awards this evening, thanking them for their service to our nation and for the example of outstanding commitment to the public interest and honesty, civility, independence and/or political courage that they have given.