

THE ROLE OF FIDUCIARY DUTY IN SAFEGUARDING THE FUTURE

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A fiduciary is said to be under a duty not to use his position or the power or opportunity it gives him to serve an interest other than his beneficiaries – his own or a third party's. A fiduciary cannot use his position, or knowledge or opportunity gained from it, to his own or someone else's advantage or to the beneficiary's disadvantage. Fiduciary duty is not a commonly applied concept to political or policy-making contexts. Courts have been traditionally reluctant to impose trust obligations on Government. It is fundamental to the principle of separation of powers that courts should not interfere in the governmental, administrative or executive functions of the Crown. Dal Pont and Chalmers [Equity and Trusts in Australia, 3rd edition, 2004] describe the government's duty to the people as trustee in somewhat limited terms - "the duty to comprehensively account faithfully and accurately to the people in a form that facilitates the public monitoring of the government's performance. This is required as a check upon misuse of the power conferred by the public to its representatives and as such, founds the basis of responsible government."

But despite the likely limited legal application of terms like fiduciary duty and public trust to questions of politics and government, it seems to me that fiduciary duty and public trust can be useful political constructs.

Most Australian adults own private property or aspire to. Most Australian adults also have children or plan to.

Most Australian adults look after that property reasonably responsibly with a view to passing it on to their children.

I can attest to the strong resistance to any public policy measures, like assets testing the pension, or aged care accommodation bonds, which threaten to run down these assets over the course of one's lifetime and prevent it being passed on to the children. The same is not true, however, for public property. We say we love our children, but we are acting with much more concern for our material wealth than for their future well being. We are not safeguarding our neighbourhood, our city, our country, or our planet. We are not meeting what I believe is an obligation to pass on to our children, and our grandchildren, a world, and an Australian way of life, in as good a condition as the one our parents and grandparents gave to us.

It may be helpful if parliamentarians or governments were to think of this obligation in terms of fiduciary duty or public trust.

When we were boys my brother and I explored an Australian bush which boasted Kookaburras, Koalas, Lyrebirds, Wombats and Platypus. When she was a girl my partner and her sister would run through water sprinklers on the front lawn on hot days to keep cool. When I was 25 I put down a deposit and bought a house. Later on I drove my children up the east coast of Australia to tropical Queensland. At night you could drive across the open spaces between the towns and hear yourself think. The legacy we are leaving our children may well have none of these things.

In central Victoria's woodlands the number of Kookaburras has declined by 30% in just four years. The number of Koalas in Queensland and New South Wales has declined dramatically, and it is possible that there are now fewer than 50,000 Koalas left in the wild. The same study that found the 30% decline in Kookaburras also found a 30% or greater decline in Robins, and even greater declines for various Honeyeaters, Flycatchers and Kingfishers.

The study noted that eucalypt flowering had declined significantly over the past 12 years of drought, and detected virtually no bird breeding in the latest survey periods.

Some 30% of Australia's bird species are now regarded as threatened, and internationally the number of birds listed as critically endangered continues to rise.

A fortnight ago a survey released by the International Union for Conservation of Nature found 17,291 species of plant and animal in some degree of danger – more than one third of 47,677 species surveyed.

As for water, we live in an age of permanent water restrictions, of rising water prices and declining water availability. The search is on for alternative sources of water such as desalination. It is clear that these alternatives are expensive – Victoria's Water Minister recently observed that water prices would be doubling, and so parlous is our water situation that this observation scarcely raised an eyebrow. Disputes about water entitlement in the Murray Darling are commonplace, and controversy rages over water harvesting in Queensland through projects like the Cubbie Station and Traveston Dam.

Our levels of housing affordability are in very poor shape. My parents' generation and my generation could save for a house and aspire to home ownership. Today's generation of young people is confronted by the steep walls of record high prices fuelled by competition from both an increasing population and from investors.

And instead of the open spaces we now have never-ending suburbs and traffic lights. We are behaving selfishly, with cavalier disregard for the interests of our children and future generations, and for the future of the Australian way of life.

Why is this happening? There is a variety of reasons, but one of them is the triumph of short-term over long-term thinking and policymaking.

The pressures in the direction of short-termism are obvious and need little elaboration. Governments and Members of Parliament are up for re-election every three or four years. Company directors and Chief Executive Officers don't even get that long. Their pay turns on annual profit and loss statements. Treasury Departments sweat on quarterly GDP numbers.

The best way I can think of to defeat short-termism is to persuade the community to look beyond the immediate and to consider the world they will be living in in the years ahead. I also think it would be helpful if we developed new indicators of

community performance and downgraded our obsession with GDP. Such performance indicators would place more focus on long-term economic, social and environmental outcomes.

Politicians and business leaders will take a more long-term view if the community demands it of them. That demand, however, seems a long way off. Politicians are geared to maximizing GDP. They expect that anything short of a full-throttle, flat to the floor approach to GDP will be attacked by political opponents, and fear the electoral consequences of these attacks.

Politicians wrestle with the question of whether the electorate is selfish or altruistic. Clearly there is no one size fits all answer to a question like that – it varies from person to person, it varies from issue to issue, and it varies across time and circumstance.

Voters are regularly assumed to be selfish, and to be principally concerned with economic self-interest. In the debate over global warming, for example, many of those wanting action, including me, make regular use of Nicholas Stern's conclusion that "the costs of inaction will exceed the costs of action". We try to get across a message to people that they will be financially better off if we do act, a message addressed to those members of our audience who we fear are principally motivated by financial concerns.

My father, who shares my concern about the number of endangered species in the world, says to me, "Get the evidence about those plant and animal species which have been the source of medicines, which restore our health and lengthen our lives, and point out the short-sightedness of allowing species whose potential value we are unaware of to become extinct." He makes a good point, of course, but there is a part of me which is resistant to it because I feel it concedes too much ground to forces I disagree with – who believe that unless something has an economic value that it has no value at all.

What I feel is that other species have a place in the world too. We should be able to share the world with them. I know they don't vote, but I don't think this means they have no rights at all and can be cheerfully consigned to oblivion.

I think the world for my children and their children will be a poorer place if it does not have the cackle of the Kookaburra or the whip crack of the Whipbird, but for me it is more than simply about the quality of their lives. It is a moral question, a values question, about whether we have the right to steamroll other species into oblivion in our never-ending quest for material wealth.

So you can see I cast the fiduciary net pretty wide. Others cast it rather more narrowly. Given that I think our responsibilities as policy-makers extend to other species, you'd be right in assuming that I think our responsibilities also extend to other peoples in other countries, and to a responsibility for the well-being of the world as a whole.

But this is not immediately clear from the concept of fiduciary duty. Many representatives see their responsibility as being limited to representing the interests of their voters, and no-one else. Many governments see their responsibility as being limited to looking after their country and no-one else. This lies behind Ross Garnaut's description of climate change as a diabolical policy problem. The negotiations in the lead up to Copenhagen suggest that although there is widespread awareness that we are all in the same boat, everyone seems to want someone else to pick up the oar and start rowing. The climate crisis is the most spectacular example of Garret Hardin's "tragedy of the Commons" – if we approach it in terms of economic self-interest, from a self-centred or selfish point of view, it makes sense for every country to go to Copenhagen and try to get away with doing as little as possible, and try to persuade everyone else to do as much as possible.

And yet if we all take that view, the planet will go to hell in a hand basket. The boat we are all in will slowly gather momentum and end up sailing over Niagara Falls.

So I have a strong view that fiduciary duties involve concern about the welfare of people in other countries. I have advocated a lift in our country's refugee intake of

45%, from 13,750 to 20,000, and a lift in our overseas aid to meet the United Nations target of 0.7% of Gross National Income. These are compassionate, humanitarian, internationalist proposals, and I have little difficulty persuading people on the left to support them.

But I also seek to win support for these proposals from the right by arguing that the compassionate approach is also the smart approach. I believe that the problems we read about in the news every day, and worry about as we go to sleep at night – terrorism, war, boat people – have at their heart conflicts over access to scarce resources – land, water, food, energy. Too many people; not enough land, water, food, energy, to go around. And that if we don't get in there and try to help deal with these underlying problems, then they will come back and bite us on the backside in the form of terrorism, war and boat people.

So the compassionate thing is also the smart thing, and there is good reason why both those on the left and those on the right should embrace this approach, and good reason why our fiduciary duties should not be defined as stopping at our electorate boundaries. So how should the concept of fiduciary duty be applied to the great policy challenge of our time, global warming?

First, whatever the political pressures we're under, and no doubt they're significant, we have a duty to take a science-based, evidence-based approach. I note that Senator Nick Minchin recently said on Four Corners that climate change, "for the extreme left, provides the opportunity to do what they have always wanted to do, which is to sort of de-industrialise the Western world. The collapse of communism was a disaster for the left and really, they embraced environment as their new religion".

Let me observe that I don't hear anyone proposing that we de-industrialise the Western world. Proposals to move to solar, wind and geo-thermal energy, or for greater energy efficiency or electric cars, do not represent an atom of de-industrialisation. Proposals for solar panels and rainwater tanks promote the kind of household self-reliance one would expect a champion of rugged individualism to be enthusiastic about.

More worrying, it suggests Senator Minchin is so stuck in the Cold War battles of the past, locked in time with the fall of the Berlin Wall 20 years ago, that he is going to see this issue through ideological blinkers rather than look at the science, look at the evidence, look at the facts.

Apparently he would rather see his own city of Adelaide sizzle and burn rather than admit that the left is right about this issue. Discharging a fiduciary duty means taking the blinkers off and being prepared to look at the facts.

Second, I think fiduciary duty fits neatly with the definition of sustainability developed in 1983 by a United Nations Commission headed by Norwegian Prime Minister Brundtland: "Meeting the needs of the present without compromising the ability of future generations to meet their own needs". Sustainability is a somewhat over-used word, having been fought over and prostituted by various vested interests. But the core idea of safeguarding the future remains as important as ever.

So how can we realistically use the forthcoming talks at Copenhagen to tackle climate change and discharge that trust obligation to meet the needs of the present without compromising the ability of the future generations to meet their own needs?

One thing I think is particularly important, but in constant danger of being left out, is the issue of protecting tropical forests.

According to Al Gore's book "Our Climate – A Plan to Solve the Climate Crisis", the carbon dioxide emissions from deforestation are second only to the burning of fossil fuels for the production of electricity and heat as the largest source of global warming on the planet. An estimated 20-23% annual CO₂ emissions – more than that of all of the cars and trucks in the world - result from the destruction and burning of forests. Almost 20% of the Amazon forest has already been destroyed, and Brazil is responsible for 48% of all deforestation in the world.

African forests have been purchased by Chinese interests and are being chopped down for large-scale agriculture to grow food for import to China.

Indonesia and Malaysia are clearing rainforests to produce palm oil plantations for export to North America and Europe to feed the demand for biofuels.

This ongoing forest clearing exacerbates the clearing of the past. According to the World Resources Institute we only have half of the forest cover we had 300 years ago. Indeed scientists estimate that more than 40% of the extra CO₂ that has accumulated in our atmosphere has come from deforestation in past centuries. Deforestation has a double impact on the climate – most of the carbon contained in logged trees goes into the atmosphere, and the destroyed trees no longer pull CO₂ from the air.

The Australian Government is aware of the problem and has announced a \$200 million International Forest Carbon Initiative designed to help reduce emissions from deforestation and forest degradation in developing countries. Reducing emissions from deforestation and forest degradation goes by the acronym 'REDD'. The international community agreed in Bali that action must be taken on REDD, to establish the necessary systems and financial mechanisms to ensure long-term emission reductions. The International Forest Carbon Initiative is Australia's contribution to this global effort.

The Initiative aims to show that REDD can be part of an equitable and effective post 2012 global climate change agreement. A central element of the Initiative is taking practical action through collaborative Forest Carbon Partnerships with Indonesia and Papua New Guinea. Actions include assisting developing countries, particularly Indonesia and Papua New Guinea, to develop their own national forest accounting systems, and partnering with a consortium led by the Clinton Climate Initiative to use Australia's National Carbon Account System as a platform for a global forest carbon monitoring system.

This is important work. But it needs to be said that the outcome for REDD, and for the whole question of getting agreement at Copenhagen to protect tropical forests, is on a knife edge. At the moment the United Nations Framework Convention on Climate Change working definition does not discriminate between native forests and plantations, such as the Indonesian palm oil plantations.

Such an approach does nothing to protect any of the thousands of species I mentioned before which are under threat. Deforestation wouldn't be monitored or detected.

There is a proposed safeguard, which says "REDD will not incentivise the conversion of native forests to plantations", but it is a matter of dispute – in United Nations treaty negotiating language, it is in square brackets.

It would be a tragedy if Copenhagen did not produce clear initiatives and outcomes aimed at protecting the world's remaining tropical forests.

I believe we need to act to tackle climate change, and that that action needs to include protecting our tropical forests. I said at the outset I thought that concepts such as fiduciary duty and public trust are potentially useful in thinking about public policy, and this seems clear in this instance – the tropical forests are part of our global heritage, and we have a duty to protect them.

But for this concept to be made really meaningful, it could use some legal status. That is one reason why Copenhagen is so important. A global treaty backed by national ratification provides a legal basis for action. A lot is riding on Copenhagen.