

Land, Rights, Laws: Issues of Native Title



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The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

This paper looks at the scope for finding a fiduciary obligation owed by the Crown towards Aboriginal and Torres Strait Islanders in relation to dealings with native title. Such a duty has been recognised in Canada and has led to practical protections for Aboriginal people in relation to dealings with their property interests. In this paper, Dr. Larissa Behrendt considers the Australian judicial pronouncements on the issue and provides an overview of the possibilities for the finding of a fiduciary obligation in relation to native title in the Australian context.

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Bargaining on More than Good Will: Recognising a Fiduciary Obligation in Native Title

Larissa Behrendt

The issue of whether a fiduciary obligation is owed by the Crown in relation to its dealings with Aboriginal people has arisen in three areas:

- litigation seeking remedies for the implementation and effects of policies of removing Aboriginal children from their families,
- litigation seeking redress state actions amounting to genocide and/or cultural genocide,
- litigation seeking to establish and recognition of native title interests.

The Courts have expressly rejected the notion that a fiduciary obligation arises in the first two categories A fiduciary obligation was rejected in *Kruger v Commonwealth* (1997)¹ in relation to

the 'stolen generations' and by Justice Kirby in *Thorpe v Commonwealth* (1997)² and by the

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Federal Court of Australia in *Nulyarimma v Thompson* (1999)³ in relation to genocide. However, the question of whether such an obligation arises in relation to native title is still to be definitively answered by the High Court.⁴

The Shady Parameters of Fiduciary Obligation

A fiduciary is someone who has scope to exercise some *discretion or power* which will *affect* the beneficiary's legal or practical interests. The beneficiary is thus *vulnerable* to the exercise of that power. The fiduciary must assume some specific duty or authority to create a fiduciary obligation.

A fiduciary relationship is a trust-like relationship, without necessarily having all the elements of a legal trust. Some relationships have traditionally attracted the fiduciary obligation: trustee to beneficiary; agent to principal; solicitor to client; director to company; partner to partner. Meagher, Gummow and Lehane note that:

if a relationship is such that it is reasonable to suppose that one party to it reposes a substantial trust or confidence in the other ... or if one party has undertaken, whether at the request of another or without request, of his own motion ... to act on behalf of the other in a particular enterprise or transaction 'whenever the plaintiff entrusts to the defendant a job to be performed'.⁵

The categories of what constitutes a fiduciary obligation are not closed and there are no clearly defined limits on the rule of its applicability. As Chief Justice Gibbs stated in *Hospital Products Ltd v United States Surgical Corporation*:

There is no reason to suppose that these categories are closed ... Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.⁶

One of the key characteristics of a fiduciary relationship is that it is one of inequality, as Justice Mason notes:

The critical feature of fiduciary relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or a discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.⁷

Justice Dawson goes on to add:

Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position.⁸

The duties owed by a fiduciary are defined by the nature and circumstances of the relationship and the scope of the obligations it gives rise to. The precise obligations owed depend on the

circumstances of the case. If the fiduciary uses their position for their own benefit, their obligations expand.

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Established principles governing the conduct of fiduciaries prohibit them from using their positions to gain a private advantage and prevents them from placing themselves in a position that would give rise to a conflict of interest.⁹ In situations where a conflict of interest arises, a fiduciary cannot promote their own interests.¹⁰ A fiduciary cannot make a profit or give the appearance of a conflict of interest.¹¹ As an equitable rule and remedy, such rules are open to be applied to a broad range of circumstances and with flexibility to adapt so that it is difficult to generalise as to its applicability and impact. The development of these obligations has occurred in the commercial context but there has been some use of equitable principles in the relationship between government and citizens.

The Government as a Fiduciary

As Dal Pont and Chalmers point out, the private trust cannot provide an exact analogy to the relationship between government and those who have entrusted them with power. The trust analogy needs to be modified to 'take account of the reality and complexity of public representation.' They argue that citizens forego part of their autonomy in handing over power to representatives and this indicates that trust and confidence have been placed in those elected representatives.¹² This assertion relies on Justice Mason's formulation of a fiduciary relationship in *Hospital Products*:

A [f]iduciary relationship may arise from an undertaking by one to act in the interests of another, by reason of trust or confidence placed by one in another, or by reason of a special vulnerability in one which the other is positioned to exploit.¹³

Dal Pont and Chalmers conclude that 'the relationship between the government and the electorate exhibits many, if not all, of the hallmarks of a fiduciary obligation.'¹⁴

Chief Justice Mason, in *Australian Capital Television Pty Ltd v Commonwealth [No. 2]* (1992) notes that, in a representative government and a representative democracy, '...the sovereign power which resides in the people is exercised on their behalf by their representatives.'¹⁵ Once in office, the power the electorate can exert over elected officials is limited. This has been interpreted as placing the electorate in a position of disadvantage and vulnerability in relation to the government which is 'empowered to affect the interest of the people with the sphere of autonomy that the latter have yielded to it.'¹⁶ It is argued that the government's power to affect the interests of its people, including their wealth, is subject to an obligation to deal with those matters for the benefit of the people according to the mandate of their appointment. The government can also affect non-pecuniary interests such as the freedom of movement or freedom of choice. The implications of this fiduciary relationship is to place the government under an obligation to deal with interests in an honest and fair manner. It must avoid conflicts of interest, cannot profit from its position as a fiduciary and must account for the performance of its duty.¹⁷

It is not difficult to conceptualise the government as owing a fiduciary obligation to account for the manner in which it administers its duties to those who have elected them.¹⁸ The courts, however, have been reluctant to attach equitable doctrines to government decisions and actions as a matter of policy, especially in relation to financial matters.¹⁹ This reluctance by the judiciary to second guess policy decisions arises because it is difficult to assess whether the government is fulfilling its duty in the best way to deliver on its responsibilities. A variety of differing, even contradictory, actions may be deemed to be appropriate for the enacting of 'responsible government.' Many actions of the government may be seen as detrimental to those they represent e.g. the levying of taxes, but may achieve some public benefit.

However, Chief Justice Mason in both *Hospital Products Ltd. v United States Surgical Corporation* (1984) and by concurring with Justice Brennan in *Mabo and Others v Queensland (No.2)* (1992)²⁰ recognised that the fiduciary obligation may extend to the government realm in situations where it mirrors its private law application. This means that the fiduciary obligation may be recognised where the government owes the duty to an individual or specific group, above that which is owed to the general public. A fiduciary obligation may derive from a power inherent in the government that, if exercised, would cause detriment to those particular people, vulnerable to the exercise of that power, which would give rise to a special duty for the government to consider. Indigenous people would fall into such a specific group and have been recognised in Canadian jurisprudence as beneficiaries of a fiduciary obligation owed by the Crown.

A Fiduciary Obligation Owed to Aboriginal People: The Canadian Jurisprudence

In Canada, a ‘trust-like’ relationship between the Crown and the First Nations was first found in *Regina v St. Catherine’s Milling and Lumber Co.* (1885),²¹ where it was asserted that all vacant lands were vested in the Crown, who has an exclusive right to grant them. Aboriginal people were held to not have the capacity to alienate their land or to confer title to those lands. The Judicial Committee of the Privy Council also referred to a trust-like relationship where, ‘reserves and proceeds of reserves, when surrendered or sold, were held by the crown as royal trustee for the Indians.’

The decision in *St. Catherine’s Milling* was interpreted to have established that Aboriginal people and their lands were ‘a political trust of the highest order’, a doctrine that gave rise to no legal consequences in the event of breach. This conception changed with the 1984 decision of the Court in *Guerin v The Queen*.²²

In 1955, the Musqueam Indian Band approved a surrender, in trust, of some of its reserve in Vancouver to lease to a golf and country club. The transaction had been discussed with the band but the Crown concluded a lease on terms not authorized by the Musqueam and less beneficial to them. The true terms were not disclosed to the band until 1970. Justice Dickson, with three judges concurring, held that the Crown’s obligations were not in the nature of a trust, but was trust-like. It is not a trust relationship, since not all the elements of a trust were present but the crown owes a duty:

This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.²³

The nature of Indian title (the fact that it was inalienable except to the Crown) and the provisions of the *Indian Act 1952* impose fiduciary duties on the Crown which are enforceable:

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in the lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. *The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.*²⁴ [Emphasis added]

Justice Dickson found that the Crown breached its fiduciary obligation because its agents induced the Musqueam to surrender the land on the understanding that it would be leased on certain terms. Equity would not permit the Crown to ignore the representations made in negotiating the surrender.

Justice Wilson (with two judges concurring) held that the Crown did not generally hold reserve lands in trust for the band but the Crown did hold the lands subject to a fiduciary duty to protect and preserve the band's interests. She held that this derived from section 18 of the *Indian Act 1952*, 'Indian reserve land inalienable except to the crown', a statutory recognition of the nature of Indian title.²⁵ The obligation has its roots in the aboriginal title of Canada's Indians. Section 18 mandates acknowledgement of a historic reality, that Indians have:

a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it ... it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian bands with respect to the uses to which reserve land may be put and that s.18 is a statutory acknowledgement of that obligation.²⁶

The fiduciary concept was extended in *Sparrow v The Queen* (1990).²⁷ The Court ruled that constitutional recognition of Aboriginal and treaty rights in s.35(1) of the *Constitution Act, 1982* mandated a 'trust-like, rather than non-adversarial' relationship between Indians and the federal government.²⁸

Section 35(1) of the Canadian *Constitution Act, 1982* states: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.' Rather than generating rights it merely 'recognises and affirms', offering constitutional protection to rights that exist at the time the section was passed into law. The Supreme Court of Canada determined that the section does not provide an absolute protection. Section 35(1) protection can be overridden in certain circumstances, set out by the Supreme Court in the *Sparrow* decision. There the Court developed a two stage test to determine whether infringement of s.35(1) rights could be 'justified'. The test requires the Court to consider whether the legislation interferes with the aboriginal right; and, if there is an interference, whether this interference justified. This justification test also has two parts. First, is there a valid legislative objective? Second, consideration needs to be given to the special trust relationship between the government and indigenous peoples.²⁹

This is an expansion from the fiduciary obligation in *Guerin* in two ways. First, the source of the obligation derives from the historical relationship between the Crown and Aboriginal peoples, not merely the inalienable nature of Aboriginal title interests. Second, it has a broader application, tempering government's ability to infringe on Aboriginal and treaty rights. By applying in contrast, *Guerin* was more akin to private law transactions and was therefore more limited in scope. By applying s.35(1) to all treaty and Aboriginal rights, the fiduciary obligation is not just held in relation to Aboriginal title interests but arises in relation to any right protected by s.35(1).

Other obligations have been found to be owed by the Crown to Aboriginal peoples arising from the special and historical relationship between the two. Other rights have derived from this relationship. In *R v Jack* (1995) it was found that there existed a duty to provide the Indian band with full information on the conservation measures and their effect on the

This notion of consultation was extended that same year, in *R v Noel* (1995).³¹ In that case it was held that consultation requires the government to carry out meaningful and reasonable discussions with the representatives of Aboriginal people involved. The fact that the time frame for legislative action is short does not justify the government to push forward with the proposed regulation without proper consultation.

A further development in this notion of consultation occurred in *R. v Nikal*.³² It emphasised that the concept of reasonableness is an integral part of the ‘*Sparrow* justification test’ and must also come into play in aspects of information and consultation. The need for the dissemination of information and a request for consultations cannot simply be denied by either party.

Although a fiduciary relationship was originally found in *Guerin* to derive from the fact that Aboriginal title is inalienable except to the Crown, the *Sparrow* ‘justification’ test has expanded the circumstances in which a ‘special trust-like relationship’ between the Crown and Aboriginal peoples is said to exist. These two distinct streams of fiduciary and ‘trust-like’ relationships are often confused and the fiduciary obligation in *Guerin* erroneously imputed to have derived from an historic relationship. The recognition of a ‘trust-like’ in *Sparrow* may be of little comparative value in Australia since it was concerned with the development of a test to ascertain the extent of a Constitutional protection that does not exist in Australia. It is also similar to the general fiduciary obligation asserted by the plaintiffs in *Kruger v Commonwealth* (1997), *Thorpe v Commonwealth* (1997) and *Nulyarimma v Thompson* (1999). A fiduciary relationship and obligation was firmly rejected in each of those cases. *Guerin*, however, may be of more interest in the Australian context. It was a very narrow decision in which the finding of the fiduciary obligation was linked to the nature of native title (i.e. its inalienability except to the Crown), a feature shared with native title interests in Australia. Also, it related to a factual situation that closely mirrors the private law recognition of fiduciary obligation.

Fiduciary Obligation as an Aspect of Native Title in Australia

Australia has not recognised a fiduciary obligation owed by the Crown when dealing with native title interests and there has been no acceptance of a more general trust-like relationship. Similarly, there has been no recognised duty to consult owed by the Government when infringing existing native title interests. In fact, the statutory obligation to negotiate with native title holders has been eroded by the *Native Title Amendment Act 1998*.³³ However, Courts have made observations regarding the possible existence of a fiduciary obligation arising in relation to native title interests.

Discussion of a Fiduciary Obligation in *Mabo* (No.2)

Justice Brennan (with Chief Justice Mason and Justice McHugh concurring) made brief mention of the possible existence of a fiduciary obligation arising in relation to native title:

If native title were surrendered to the Crown in expectation of a grant of tenure to the indigenous title holders, there may well be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation, but it is unnecessary to consider the existence or extent of such a fiduciary duty in this case.³⁴

This statement has been erroneously interpreted as recognising that a fiduciary obligation will arise only in this very specific circumstance. Justice Brennan, in fact, considered that the issue of whether a fiduciary relationship existed was not relevant in the *Mabo* case. His comments could equally be read as acknowledging that such a relationship may arise if the situation was analogous to private law recognitions of fiduciary obligations. Such a reading of Justice

Brennan's observation is consistent with Chief Justice Mason's observations in *Hospital Products Ltd. v United States Surgical Corp.* (1984).

Justice Toohey in the *Mabo* case gave the most expansive consideration of the recognition of a fiduciary obligation. He relied on the formulation by Justice Mason in *Hospital Products Ltd. v United States Surgical Corp.* (1984), referred to at the outset:

The critical feature of fiduciary relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or a discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.³⁵

Justice Toohey goes on to add:

Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other. The discretion will be an incident of the first party's office or position.³⁶

Justice Toohey relied on the Canadian case law in *Guerin* that established a fiduciary duty from the fact that native title was inalienable to the Crown. He noted that the Court in *Guerin* also found the duty came from the statutory scheme under s.18 of the *Indian Act* but that this, in turn, came from the inalienability of Indian land, echoing the common law. Justice Toohey affirmed the Crown's right to alienate the land of the Meriam people, and that the Meriam people's rights to deal with their land was so limited, which created a vulnerability that gave rise to a fiduciary obligation. He went on to say that:

The power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. The fiduciary relationship arises, therefore, out of the power of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power.³⁷

Justice Toohey noted what the practical effect of this fiduciary obligation would have on the Queensland Crown:

A fiduciary obligation on the Crown does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the titleholders, or if the process it establishes does not take into account those interests.³⁸

Justices Deane and Gaudron, while not specifically dealing with the issue of a fiduciary obligation, did note that equitable, trust-like duties may be owed by the Crown to native title interest holders in certain circumstances:

Actual or threatened interference [with native title interests] can, in appropriate circumstances, attract the protection of equitable remedies. Indeed the circumstances of the case may be such that the appropriate form of relief [may be] the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title.³⁹

Justice Dawson found that there was no fiduciary obligation but based his finding on the conclusions of his dissenting opinion that held that upon annexation, land became the property of the Crown and any rights to the land the plaintiffs have must be held under the Crown. The basis of his finding was rejected by the majority of the High Court when they overturned the doctrine of *terra nullius* and found that a native title interest existed.

The Jury is Still Out

Although a Full Bench of the High Court has yet to pronounce on the matter, Justice Kirby noted in *Thorpe v Commonwealth (No.3)* [40](#) that the fiduciary obligation noted by Justice Toohey in *Mabo (No.2)* was one that arose out of the inalienability of native title; it was not derived from the special historic relationship between Aboriginal people and the Crown. In *Thorpe (No.3)* [41](#) the claim that a fiduciary obligation was owed by the Crown to indigenous people on the basis of an historical relationship was rejected. *Thorpe (No.3)* was concerned with claims of genocide and assertion of indigenous sovereignty, not native title interests. Justice Kirby noted the distinction between the obligations found in the *Guerin* and *Sparrow* cases. In rejecting *Sparrow*, he did not reject *Guerin*.

As Justice Kirby observed, the fiduciary obligation arising from the nature of native title has not been decided. He said:

The result is whether a fiduciary duty is owed by the Crown to the indigenous peoples of Australia *remains an open question*. This Court has *simply not determined it*. Certainly, *it has not determined it adversely to the proposition...*[42](#)
[Emphasis added]

Potential for Australian Recognition

The elements that give rise to a recognised fiduciary relationship and fiduciary obligation are evident in the nature and vulnerability of the native title interest. A fiduciary has the scope for the exercise of some discretion or power. The Federal Government has the power to extinguish native title interests subject to the *Racial Discrimination Act 1975* (Cth). It can extinguish those interests unilaterally. This power, recognised by common law, has been augmented by legislation, namely, the *Native Title Act 1993* (Cth) and the *Native Title Amendment Act 1998* (Cth). Indigenous title in these legislative frameworks is in fact treated as subordinate to, not on par with, interests held by other land owners. Second, the exercise of this discretionary power will affect the beneficiary's legal or practical interests. Native title holders may lose their interests irrevocably. Furthermore, the Crown is enriched in extinguishment as it then takes the land unencumbered. Native title holders derive some protection from the *Racial Discrimination Act 1975* (Cth) but this is tenuous. For example, the protections offered by the act can and have been repealed in relation to specific operations of the native title legislative regime. Third, the beneficiary is thus vulnerable to the exercise of that power. Native title holders are unable to alienate their rights to anyone but the Crown and this places them in a particularly vulnerable position. Native title holders are also vulnerable because they have relatively few avenues of redress for infringement of those

rights. This is especially so with the legislative erosion of the circumstances in which Aboriginal people have a right to be consulted in relation to extinguishment.

The strongest declaration that there is perhaps no fiduciary obligation owed by the Crown in relation to dealing with native title interests was given by Chief Justice Brennan in *The Wik Peoples v The State of Queensland (1996)*:[43](#)

To compare the relative positions of the Crown and the holders of native title is not to show the existence of any relevant fiduciary duty. Indeed, the proposition that the Crown is under a fiduciary duty to the holders of native title to advance, protect or safeguard their interests while alienating their land is self-contradictory. The sovereign power of alienation was antipathetic to the safeguarding of the holders of native title.

Chief Justice Brennan's pronouncement must be appreciated in the context in which it was made. He was making observations in relation to the operation of a legislative act, the *Land Act 1910* (Qld), not on principles of common law in general. In fact, earlier he stated that:

The duty is said to arise from the vulnerability of native title, the Crown's power to extinguish it and the position occupied for many years by the indigenous inhabitants vis-a-vis the Government of the State. These factors do not by themselves create some free-standing fiduciary duty. It is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary) to the exclusion of the interest of any other person or the separate interest of the beneficiary.⁴⁴

This statement seems consistent with his decision in *Mabo* and Chief Justice Mason's decision in *Hospital Products* that a fiduciary obligation may be owed by the Crown if the relationship and obligation are analogous to a private law fiduciary duty. Chief Justice Brennan's observations in *Wik* do assert that a fiduciary principle, as a private law duty, will not stand up to a contrary legislative enactment, such as a legislatively enacted mining agreement. This is when the obligation is owed by a private individual or entity. There are equitable principles that may prevent the Crown from infringing on its own fiduciary obligations.

However, Chief Justice Brennan's observation that the inalienability of native title could not give rise to a fiduciary obligation owed by the Crown because it would be contradictory raises more questions than it answers. This seems erroneous as it implies that the very characteristic that gives rise to a fiduciary obligation, vulnerability, is evidence that such an obligation does not exist. It is the apparent contradictions and conflicts which underly the duties owed by the fiduciary to the beneficiary, and his/her position of power in relation to a vulnerable beneficiary that give rise to the equitable remedy in the first place.

Historical differences between Canada and Australia are often held up as infringing on the applicability of Canadian jurisprudence in the Australian context. Justice Dawson relied on such an argument in *Mabo (No. 2)*: He notes in his judgement that Australian law should be distinguished from the law of the United States because there was no recognition of the

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domestic dependant nation status here.⁴⁵ He also noted that the Canadian situation was different in that:

[I]t has been suggested that in Canada, as in the United States, the Crown in fact has a broader responsibility to act in a fiduciary capacity with respect to its Aboriginal peoples. That responsibility is said to arise out of the Crown's historic powers over, and assumption of responsibility for, those Aboriginal rights and out of the recognition and affirmation of existing Aboriginal rights contained in s.35(1) of the Canadian Constitution.

Justice Dawson's approach is unsatisfactory because he relies on the following historical

distinctions:

- Australia not having recognised the sovereignty of Aboriginal people through a domestic dependant nation doctrine,
- Australia not having had the same ‘assumption of responsibility by the Crown’ for Aboriginal people and their rights, and
- there being no constitutional protection of Indigenous rights in Australia.

Justice Dawson argues that what creates the differences between the North American jurisdictions and Australia is the fact that there was recognition and rights protections in place there and there weren’t any here and because of this difference, we are going to continue to not recognise them.

Another difference often offered to distinguish Canadian jurisprudence from the Australian context is the constitutional protection provided by s.35(1). This constitutional distinction is often invoked erroneously. Section 35(1) only protects *recognised* Aboriginal and treaty rights; it does not generate or create them. The distinction between the two jurisdictions would be relevant to matters relating to the protection of such rights once they were recognised but has no role to play in comparative analysis as to whether those rights exist under common law. The observation that fiduciary obligations have a broader interpretation and reach in Canada⁴⁶ does not prevent the High Court from observing that all the elements recognised in fiduciary relationships in this jurisdiction arise in relation to native title interests.

A further objection that may be raised in recognising a Crown-Aboriginal relationship as a fiduciary one lies in the nature of the government itself. Governments govern for the good of the wider community; their duty to do so should not be limited by narrow duties to a section of it. At most, the obligation may be political; a political trust, not a fiduciary obligation recognised by the law. This argument runs counter to the observations of Justice Mason in *Hospital Products* which notes that it is only those sectors of the community with some special interest different to that of the broader community that give rise to the private law analogy that will create a fiduciary obligation in the public realm. The special nature and vulnerability of native title interests would seem to support their inclusion in Justice Mason’s formulation.

Possible implications of finding such a duty would depend on the nature of the relationship and obligation. It might be seen to bind the government to deal honestly and fairly in dealings with native title interest holders, prohibit the overriding of the obligation with inconsistent legislation that would then breach or infringe upon the fiduciary obligation held, or create a duty to consult with native title interest holders.

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Conclusion

The trend of cases in which the matter has been raised has been to reject claims that a fiduciary obligation arises out of the historic relationship between the Crown and indigenous people in Australia. While the High Court has not definitively decided that there can be no fiduciary obligation owed by the Crown to native title holders, there is room to speculate that in a situation that mirrors the circumstances in which the private law would recognise a fiduciary obligation, the Crown may find itself similarly bound.

If the High Court eventually decides this issue by ignoring the elements of a fiduciary obligation that arise between the Crown and native title holders, it will continue place Australia’s standards of protection of indigenous property rights well below those offered in the comparable jurisdictions of the United States and Canada.

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- [1.](#) (1997) 190 CLR 1.
 - [2.](#) (1997) 71 ALJR 767.
 - [3.](#) [1999] (unreported, Federal Court of Australia, FCA 1192, 1 Sept 1999).
 - [4.](#) The High Court rejected a claim that a fiduciary obligation arose in relation to s.44(2) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in *Northern Land Council v The Commonwealth (No.2)* (1987) 61 ALJR 616. This case was concerned with a statutory land claim, not a native title interest.
 - [5.](#) R.P. Meagher, W.M.C. Gummow and J.R.F. Leane, *Equity: Doctrines and remedies*, 2nd ed., 1984, p.124. Their Honours refer to *Reading v R* [1949] 2 KB 232, p. 236 and *Tito v Waddell* (No. 2) [1977] Ch. 106, p. 299 to support the last part of this formulation.
 - [6.](#) *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, p.69. Justice Gibbs stated that whether such a duty exists is a matter of fact: ‘Any test can only be stated in the most general terms and that all the facts and circumstances must carefully be examined to see whether a fiduciary obligation exists,’ p.72.
 - [7.](#) *Ibid.*, per Mason J, pp. 96-97.
 - [8.](#) *Ibid.*, p. 142.
 - [9.](#) *Moss v Moss (No. 2)* (1900) 21 LR (NSW) Eq 253.
 - [10.](#) Mason J, *Hospital Products*, op. cit., p. 103.
 - [11.](#) *Keech v Sandford* (1726) 25 ER 223; *Phipps v Boardman* [1967] 2 AC 46.
 - [12.](#) G.E. Dal Pont and D.R.C. Chalmers, *Equity and trusts: In Australia and New Zealand*, Sydney, Law Book Information Services, 1996, p. 117.
 - [13.](#) Mason J, *Hospital Products*, loc. cit.
 - [14.](#) Dal and Chalmers, loc. cit.
 - [15.](#) *Australian Capital Television Pty Ltd v Commonwealth [No. 2]* (1992) 66 ALJR 695, p. 703.
 - [16.](#) Dal Pont and Chambers, op.cit., p. 117.
 - [17.](#) *Ibid*, p. 119.
 - [18.](#) See *Australian Capital Television*, op. cit.
 - [19.](#) Dal Pont and Chambers, op. cit., p. 120.
 - [20.](#) *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1. Chief Justice Brennan’s judgement in *Mabo* is discussed in more detail below.
 - [21.](#) *St. Catherine’s Milling and Lumber Co v The Queen* (1888) 14 A.C. 46.

[22.](#) *Guerin v The Queen* (1984) 13 DLR (4th)) 321.

[23.](#) *Ibid*, p. 334.

[24.](#) *Loc. cit.*

[25.](#) Section 18 of the *Indian Act 1952* provides that reserves shall be held by Her Majesty for the use of respective Bands for which they were set apart. Lands shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to the Crown by the Band. It states:

Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine any purpose for which lands in reserve are used or are to be used is for the use and benefit of the band.

[26.](#) *Ibid.*, p. 357.

[27.](#) *Sparrow v The Queen* (1990) 1 S.C.R. 1075.

[28.](#) *Ibid.*, p. 1108.

[29](#) *Ibid.*, p. 1110.

[30.](#) *R v Jack* (1995) 16 BCLR (3rd) 201 CA.

[31.](#) *R v Noel* [1995] 4 CNLR 78.

[32.](#) *R v Nikal* [1996] 1 SCR 1013.

[33.](#) The right to negotiate with Aboriginal title holders was eroded in several ways by the *Native Title Amendment Act, 1998* (Cth). It reduced the number of matters to which the duty arises. By delegating responsibility for some areas to State Governments, alternative state consultation regimes will apply. The new Registration test will make it harder for plaintiffs to access the test. In addition, provisions in the original Act that provided for good faith negotiations by the government were omitted from the amended Act. The *Native Title Act 1993* (Cth) contained limited 'rights' for native title holders to 'negotiate' in relation to future acts that related to the creation of mining interests or the compulsory acquisition of land to confer to a third party. The government was required to notify interest holders of the proposals. They could respond in two months. There was a period (four to six months) within which good faith negotiations could take place to reach an agreement about the grant. Indigenous interest holders had no right to veto and the process was subject to a ministerial override.

[34.](#) *Mabo op.cit.* at p 60.

[35.](#) See note 7 above, and accompanying text.

[36.](#) *Mabo op. cit.*, p. 200.

[37.](#) *Ibid*, p. 203.

[38.](#) *Ibid*, p. 205.

[39.](#) *Ibid*, p. 113.

[40.](#) *Thorpe v Commonwealth* (1997) 71 ALJR 767.

[41.](#) Similarly, in *Nulyarimma v Thompson* (1999), which cited *Thorpe* and found that there was no general fiduciary obligation owed by the Crown arising from an historical relationship.

[42.](#) *Thorpe* p. 777.

[43.](#) *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* (1996) 187 CLR 1, pp.82-83.

[44.](#) *Ibid.*, pp.95-96.

[45.](#) This has been reinforced by the High Court in *Coe v Commonwealth*(No. 2) (1993) 118 ALR 193; (1993) 68 ALR 110.

[46.](#) For example, disinclination to follow the line of Canadian fiduciary obligation in *Breen v Williams* (1996) 138 ALR 259 where it was held that a fiduciary obligation was owed by a doctor to her patient.

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