Governments: Can You Trust Them with Your Traditional Title

Mabo and Fiduciary Obligations of Governments

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"Trust me, I'm from the government", is a statement made in many different forms and guises over recent centuries. It is a statement about which, indigenous peoples, who have survived the many British colonial intrusions might rightly be at least sceptical. They should not be alone in such scepticism. No litigant has yet succeeded in an action for breach of trust against the British government. Until recently, prospects of success in such an action against any of the governments in Australia would not have been much greater.

1. *Fiduciary Relationships*

The best known of the relationships which give rise to fiduciary obligations springs from an arrangement known as a "trust". Many other relationships are recognised as also giving rise to fiduciary obligations: the relationships of partners to partners, company directors to shareholders, guardians to wards, executors to beneficiaries, liquidators to creditors and bailees to bailors, to name a few.

Courts still struggle to isolate the essence of such relationships, and to define the basis of the obligations to which they give rise, and the nature and the content of the obligations.[1] It has not yet been suggested that the categories of such relationships are closed.[2]

As to the essence of the fiduciary relationship, Toohey J said in *Mabo v the State of Queensland*:[3]

> 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

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1 Finn, P, "The Fiduciary Principle" in Youdan T (ed), *Equity, Fiduciaries and Trusts* (1989).

2 *Mabo v the State of Queensland ("Mabo")* (1992) 175 CLR 1 at 200; 66 ALJR 408 at 491; ALR 1 at 156 per Toohey J citing inter alia *Hospital Products Ltd v Unites States Surgical Corporation* (1984) 156 CLR 41 at 96-97.

3 Ibid.

> discretion will be an incident of the first party's office or position. (Weinrib, "The Fiduciary Obligation" (1975) 25, *U Toronto LJ*, 1 at 4-8; *Guerin*, [1984] 2 SCR at 384. The undertaking to act on behalf of, and the power detrimentally to affect, another may arise by way of an agreement between the parties, for example in the form of a contract, or from an outside source, for example a statute or a trust instrument. The powers and duties may be gratuitous and "may be officiously assumed without request" (Finn, P, *Fiduciary Obligations* (1977) edn, at 201; *Guerin*, [1984] 2 SCR at 384.[4]

2. *The Common Law and the Recognition of Government Fiduciary Obligations*

What does a decision of the High Court that the common law of Australia recognises a form of traditional title which reflects the entitlement of the indigenous inhabitants in accordance with their laws or customs to their traditional lands, have to do with fiduciary relationships?

As the members of the High Court found, questions of governmental obligations towards traditional titleholders follow very quickly upon any consideration of the nature and protection of traditional title.

In the United States[5] and more recently in Canada[6] the courts have identified traditional title as a source of fiduciary obligations owed by governments to groups of indigenous inhabitants of those countries. Many of the authorities of the courts of those countries are extensively reviewed by the High Court justices in *Mabo*.

The British government has thus far escaped such untidy implications of its colonial activity on the back of a questionable distinction recognised by the courts between an enforceable fiduciary obligation and a non-enforceable "political trust" or "governmental obligation".[7]

The concept of a "political trust" was perhaps first articulated by Lord Selbourne in *Kinlock v Secretary of State for India*:[8]

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust — a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, ordinary courts of equity; in the higher sense they are not.

In *Rustomjee v The Queen*[9] the court seemed incensed that a subject should seek to recover from the Crown his or her share of moneys held by the Crown

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4 Id at 200.
5 *Cherokee Nation v Georgia*, 30 US 1 (1831) and *Worcester v Georgia*, 31 US 350 (1832).
6 *Guerin v The Queen ("Guerin")* [1984] 2 SCR 335; (1984) 13 DLR (4th) 321.
7 *Kinlock v Secretary of State for India* (1882) 7 App Cas 619; *Tito v Waddell (No 2)* (1977) All ER 129; and see discussion by Toohey J in *Mabo* at 66 ALJR 492.
8 (1882) 7 App Cas 619 at 625-626.
9 (1876) 1 QBD 487.

under the Treaty of Nanking, being moneys paid by the Emperor of China to the Queen on account of debts due to British subjects by insolvent Chinese merchants. Having waited for perhaps 30 years for the Queen to do justice, his or her petition of right (the only available remedy) was met with judicial indignation expressed in the following terms:

> The notion that the Queen of this country, in receiving a sum of money in order to do justice to some of her subjects, to whom injustice would otherwise be done, becomes the agent of those subjects, seems to me really too wild a notion to require a single word of observation beyond that of emphatically condemning it. In like manner, to say that the sovereign becomes the trustee for subjects on whose behalf money has been received by the Crown appears to be equally untenable.[10]

> ... The more plausible analogy would be to say that her Majesty stood in the position of a trustee for creditors ... But even if the petition had been shaped in that way it would have been untenable, for this reason: that the Queen in making a treaty and receiving money under it, and exercising a high act of prerogative, is not at all acting as a trustee.[11]

> I must say upon that I entertain not the slightest doubt, whether this claim be treated as what it certainly purports to be on the face of the petition, a demand of a debt due from the Crown to the suppliant for money had and received by the Crown to his use, or whether it be treated as the claim of a cestui que trust to charge the Queen as trustee with the receiving of that money.[12] ... Now I must say that proposition startles one. It is not only derogatory to the sovereign's dignity, but I think it is repugnant to every constitutional principle.[13]

The result of the decision in *Tito v Waddell (No 2)*[14] is likewise transparently unjust. In that case the traditional inhabitants of Ocean Island took action against the British Government in relation to its exploitation of the island's phosphate deposits alleging a fiduciary relationship with the Banaban Islanders and breach of that relationship. The island was a British protectorate and the British Government granted an exclusive licence to an English company to occupy the island and work the phosphate. In 1913 the company and the resident commissioner on behalf of the government, entered into an agreement with the landowners which provided certain terms and conditions for the benefit of the Banaban community. The company's undertakings were subsequently purchased by the British Phosphate Commissioners: a body consisting of three individuals appointed by the governments of the United Kingdom, Australia and New Zealand. A long and complex course of events followed which included the imposition of certain terms and conditions disadvantageous to the islanders (including payment of monies to be held in trust for the islanders, and their resettlement). Megarry VC dismissed the claims and in particular the claim that any fiduciary relationship existed between the Banabans and the Crown on the basis that "the only trust there is in

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10 Id at 492 per Cockburn CJ.
11 Id at 493 per Blackburn J.
12 Id at 496 per Lush J.
13 Id at 497 per Lush J.
14 Above n7.

relation to the 1913 transaction is a trust in the higher sense, and not a true trust."[15]

So much for "trust me, I'm from the government".

3. *The Fiduciary Issue in Mabo*

The issue of fiduciary obligations is an aspect of *Mabo* which commentators have tended to overlook or at least to underestimate its potential significance. It is a live and potentially significant issue, threatening Australian governments with the prospect of being forced to honour assertions that they can be trusted.

It is very much alive — all seven justices accepted that enforceable fiduciary obligations might arise from dealings by governments (the "Crown") with traditional title. Even Dawson J (who alone stood against the principal result of the case) conceded the proposition, taking comfort in his finding that traditional title did not exist in Australia.

It is potentially significant — it provides the basis for an array of arguments which may eventually result in softening the implications of the majority finding that subject to the operation of the *Racial Discrimination Act* 1975 (Cth), properly authorised extinguishment of traditional title does not give rise to a claim for compensatory damages. If fiduciary obligations become established as a concomitant of traditional title, that association may provide considerable security and protection for traditional title from governmental interference.

4. *The Plaintiff's Arguments*

In *Mabo* the plaintiffs sought a declaration that:

> the defendant is under a fiduciary duty, or alternatively bound as a trustee, to the Meriam people, including the Plaintiff's, to recognize and protect their rights and interests in the Murray Islands.

They argued that such a duty arose from the unilateral assumption of control by the Crown over the native inhabitants on annexation, the policy of protection of the native inhabitants adopted by the Crown and the creation of a reserve for the use and benefit of the native inhabitants.[16] They argued that it arose by reason of the relative positions of power of the Meriam people and the Crown with respect to their interests in the land and from the course of dealings with the land by the Crown since annexation.[17]

They argued that the content of the duty imposed an obligation on the defendant, among other things, to preserve or have regard to the traditional land rights of the plaintiffs, to exercise any discretionary powers conferred by statute or otherwise in a manner which preserved or had regard to these rights,

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15 Id at 227.
16 Above n2 at 163 per Dawson J.
17 Above n2 at 199 per Toohey J.

and an obligation to pay proper compensation for any extinguishment or impairment of these rights.[18]

5. *Judicial Responses*

Brennan J, with whom Mason CJ and McHugh agreed[19], did not find it necessary to consider the existence or extent of a fiduciary duty in this case but on the basis of his finding that traditional title may be surrendered on purchase or surrendered voluntarily to the Crown, cited one circumstance in which such obligations might arise. The extent of his consideration of the issue was:

> If native title were surrendered to the Crown in expectation of a grant of a tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation... .[20]

This goes no further than to restate the basic proposition of the case he cites in support of his proposition: *Guerin*.[21].

Neither did Deane and Gaudron JJ tackle the issue directly. They discussed the enforcement and protection of traditional title in general terms, noting its vulnerability to extinguishment by inconsistent grant by the Crown and stated:

> Notwithstanding their personal nature and their special vulnerability to wrongful extinguishment by the Crown, the rights of occupation or use under common law native title can themselves constitute valuable property. Actual or threatened interference with their enjoyment can, in appropriate circumstances, attract the protection of equitable remedies. Indeed, the circumstances of a case may be such that, in a modern context, the appropriate form of relief is the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title ... In particular, rules relating to requirements of certainty and present entitlement or precluding remoteness of vesting may need to be adapted or excluded to the extent necessary to enable the protection of the rights under the native title.[22]

Dawson J considered the issue somewhat more fully, if only as an opportunity to restate his conclusion that any traditional rights the plaintiff's may have had over the Murray Islands have been extinguished. He briefly considered the US and Canadian cases and distinguished them only on the basis (contrary to the majority decision) that in Australia, traditional rights are not recognised or have been extinguished:

> ... assuming that the plaintiffs had traditional rights in those lands, I have reached the conclusion that those rights have been extinguished. It is in the end for that reason that I have also concluded that there is no fiduciary duty imposed upon the Crown... [23]

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18 Above n2 at 163-164 per Dawson J.
19 Above n2 at 15.
20 Above n2 at 60.
21 *Guerin* (1984) 13 DLR (4th) 321.
22 Above n2 at 113.
23 Above n2 at 164.

Whilst his reasoning suggests the contrary, the tone of his judgment leaves an impression that Dawson J might not be quick to embrace the concept of fiduciary obligations in future cases even where the issue cannot be avoided and where it is found, on the basis of the majority decision in this case, that traditional rights exist and have not been extinguished.

He distinguished between the fiduciary relationship said to exist generally between the Indian tribes and the US Government and the more specific fiduciary or trust obligation (identified in *Guerin*[24]) upon the Crown in dealing with surrendered reserve land but observed that both have their roots in the existence of traditional title:

> ... once it is accepted ... that aboriginal title did not survive the annexation of the Murray Islands, then there is no room for the application of a fiduciary or trust obligation of the kind referred to in *Guerin* or of a broader nature. In either case the obligation is dependent upon the existence of some sort of aboriginal interest existing in or over the land.[25]

Dawson J then considered the nature of a trust created under the *Land Act* 1910 (Cth) and concluded that the terms of the trust as gleaned from that Act are inconsistent with the preservation of any form of traditional title and that it was more akin to an administrative arrangement than a conventional trust. He declined to pronounce finally upon whether or not a trust of this kind will create any enforceable rights in equity against the Crown or the "trustees"[26] but said:

> ... [i]n establishing a reserve, the Crown is not creating an interest in the land in anyone else which can form the subject of a fiduciary or trust obligation owed by the Crown to that other person or persons. It is merely setting aside Crown land for a particular purpose. The Crown retains absolute control over the disposition of that land and the legislation does not prevent, but expressly enables the Crown to revoke the reserve ... [27]

Toohey J dealt with fiduciary relationships in more detail than any other of the justices and in a way necessary for his decision.

As to the source of fiduciary obligations, after noting that the kinds of relationships which can give rise to a fiduciary obligation are not closed and setting out what he saw to be the bases of such relationships,[28] he turned to the defendant's arguments.

To the defendant's argument that there is no source for any obligation on the Crown to act in the interest of traditional titleholders and that, given the power of the Crown to destroy title, there is no basis for a fiduciary obligation he said:

> This can be answered in two ways. First, the argument ignores the fact that it is, in part at least, precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interest of that person (*Hospital Products Ltd* (1984) 156 CLR at 97; Weinrib, "The Fiduciary

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24 Above n2 at 166.
25 Above n2 at 166-167.
26 Above n2 at 167.
27 Above n2 at 168.
28 Above n2 at 200-201.

> Obligation", (1975) 25 *University of Toronto Law Journal,* 1 at 4-8); the very vulnerability gives rise to the need for the application of equitable principles. The second answer is that the argument is not supported by the legislative and executive history of Queensland in particular and of Australia in general.[29]

The legislative and executive history to which he referred included the policies of "protection" by government and the creation of reserves.

The defendant also put forward the "political trust" argument. Toohey distinguished *Kinlock v Secretary of State for India*[30] and *Tito v Waddell (No 2)*[31] on the basis that they turned on the construction of an instrument to determine whether it created an express trust.[32] He found that the obligation relevant in the *Mabo* case arose as a matter of law because of the circumstances of the relationship.[33]

He considered the question arising from *Guerin*;[34] whether the fiduciary obligation found by Dickson J in that case depended on the statutory scheme prescribing the process by which the Indian land could be disposed of, and concluded:

> In its terms the fiduciary obligation found by Dickson J depended on the statutory scheme prescribing the process by which the Indian land could be disposed of (*Guerin* [1984] 2 SCR at 348-350; (1984) 13 DLR (4th) at 356-357). But the relevant elements of that scheme appear to be that the Indians' interest in land was made inalienable except by surrender to the Crown, arguably an attribute of traditional title independent of statute in any case.[35]

In the circumstances of *Mabo*, he concluded that traditional title was the source of a fiduciary relationship:

> ... if the Crown in right of Queensland has the power to alienate land the subject of the Meriam people's traditional rights and interests and the result of that alienation is the loss of traditional title, and if the Meriam people's power to deal with their title is restricted in so far as it is inalienable, except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown. ... [36]

In this statement Toohey J saw as conditions necessary to give rise to the fiduciary obligation, two circumstances both of which all other justices (except Dawson J who did not advert to the second) agreed existed. First, that the Crown has power to alienate land the subject of traditional title,[37] and second, by that traditional title is inalienable except to the Crown.[38]

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29 Ibid.
30 (1882) 7 App Cas 619.
31 Above n7.
32 Above n2 at 202.
33 Ibid.
34 (1984) 13 DLR (4th) 321.
35 Above n2 at 202-203.
36 Above n2 at 203.
37 Brennan J with whom Mason CJ and McHugh J agreed, above n2 at 63: Deane and Gaudron JJ, above n2 at 89; Dawson J, above n2 at 138; Toohey J, above n2 at 193.
38 Brennan J with whom Mason CJ and McHugh J agreed, above n2 at 60: Deane and Gaudron JJ, above n2 at 88.

Toohey J also found as a sufficient source of fiduciary obligations, the political assumption of responsibility for the welfare of Aborigines and Torres Strait Islanders and the provision of land for their benefit:

> ... if the relationship between the Crown and the Meriam people with respect to traditional title alone were insufficient to give rise to a fiduciary obligation, both the course of dealings by the Queensland Government with respect to the Islands since annexation — for example the creation of reserves ... and the appointment of trustees ... and the exercise of control over or regulation of the Islanders themselves by welfare legislation ... would certainly create such an obligation.[39]

As to the nature of the fiduciary obligations he had this to say, given the respective analogy of Crown and traditional owners as trustee and beneficiary in so far as the Crown alone empowered to deal with and effectively alienate or extinguish traditional title:

> In that case the kind of fiduciary obligation imposed on the Crown is that of a constructive trustee. In any event, the Crown's obligation as a fiduciary is in the nature of, and should be performed by reference to, that of a trustee.[40]

Dealing in a footnote with a circumstance broadly similar to that considered by Brennan J he said:

> The situation where a particular traditional title is dealt with by the Crown is distinguishable. This may occur where a parcel of land is alienated to a third party by the Crown with the consent of the traditional titleholders, as in *Guerin*. In such a case the Crown is clearly a trustee with respect to the particular traditional titleholders.[41]

And as to the content of the duty:

> [G]enerally, to the extent that a person is a fiduciary he or she must act for the benefit of the beneficiaries (*Hospital Products Ltd*; Finn, *Fiduciary Obligations* (1977) at 15). Moreover, this general mandate comprises more particular duties with respect to, first, the procedure by which a fiduciary makes a decision or exercises a discretion and secondly, the content of that decision. ... (Finn, *Fiduciary Obligations* (1977) at 15-16).[42]
>
> The obligation on the Crown in the present case is to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interest of the titleholders.[43]
>
> The content of the fiduciary obligation in this case will be different from that of an obligation arising as a result of particular action or promises by the Crown.[44]

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39 Above n2 at 203.
40 Ibid.
41 Above n2 at 204, n71.
42 Above n2 at 204.
43 Ibid.
44 Above n2 at 204. He cited as an example of an obligation arising as a result of particular action or promises by the Crown, the case of *Delgamuukw* (1991) 79 DLR (4th) at 482. Of that case he said that "the rights of the Indians protected by the obligation were those invoked by promises made by the Crown after extinguishment" of their title. "In the present case", he said, "extinguishment or impairment of traditional title would not be a source of the Crown's obligation, but a breach of it".

> A fiduciary has an obligation not to put himself or herself in a position of conflict of interests. But there are numerous examples of the Crown exercising different powers in different capacities. 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 account of those interests.[45]

Toohey J concluded that this fiduciary obligation owed to the Meriam people would be breached by a Crown extinguishmnet of traditional title.[46] As such, the traditional title of the Meriam people implicitly survived annexation, rendering any interference thereto by the Crown a breach of fiduciary obligation.[47]

6. *The Results*

The judicial responses to the arguments of the plaintiffs do not constitute binding precedent. Only Toohey J dealt with the fiduciary duty issue in a way that was necessary for his decision. It would be reasonable however to suppose that the High Court will consider seriously a claim in which traditional title is asserted as the foundation of fiduciary obligations owed by a government to traditional title holders in respect of a dealing by that government with their land.

It seems likely on the one hand, given an appropriate case that the High Court will decide that a surrender of traditional title to the Crown in anticipation of a grant of title to the land gives rise to enforceable obligations for which a remedy would lie in the event of the Crown dealing otherwise than in accordance with the anticipation of the former title holders.[48] It would be more speculative on the other hand to anticipate that the High Court will agree with Toohey J and decide that fiduciary obligations arise by virtue of the power of the Crown to extinguish traditional title by alienating the land or otherwise, independently of whether or not the power is exercised. In between lies an almost infinite range of circumstances of governmental "dealings" with traditional lands in respect of which it must be at this stage arguable that fiduciary obligations arise.

As to the nature of any fiduciary obligations that arise in relation to traditional title and as to the content of such obligations, again *Mabo* unleashes considerable potential for speculation about what the Court might in future decide, but does not provide binding authority. It matters little what classification might eventually settle on fiduciary relationships that might have as their source, traditional title. However described, the scope of their potential content will likely not alter a great deal. It is the scope of their content that has

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45 Above n2 at 205.

46 Ibid.

47 Above n2 at 214 and see also at 205.

48 To do so would be consistent with expressed views of a majority of the Court in *Mabo* (Brennan J, with whom Mason CJ, and McHugh J agreed, and Toohey J) and with the notions of equity and the constructive trust mentioned by Deane and Gaudron JJ (above n2 at 113).

greater practical implications and will attract greater focus of attention. The content of fiduciary obligations it seems will largely be determined by what is found to be their source. Where the source is a voluntary surrender accompanied by anticipation of a grant, it is the terms of the anticipation that will provide the content of the obligations. On the other hand where the source is mere vulnerability to extinguishment, the content will likely be directed to the prohibition or regulation of dealings with traditional title lands.

7. *Legal Implications*

It is possible to speculate with some confidence on the implications of the High Court's comments on fiduciary obligations in *Mabo* for the conduct, in the short term, of traditional title claims. It may be foolhardy, on the other hand, to speculate on the form and content of such doctrine of fiduciary obligations as might be developed in subsequent cases by Court and even more so to speculate on what might be the legal implications of any such doctrine.

There is little doubt that the comments made by the members of the High Court on the fiduciary duty issue will spawn many hopeful paragraphs in many statements of claim.

Taken in its totality, the reasoning of the Court on this issue invites claims to be made across a broad spectrum of circumstances. Assuming facts are available which suggest continuing Aboriginal tradition in relation to land to a relevant date, it could hardly be negligent for a pleader to ask a court to scrutinise with respect to fiduciary obligations, any dealing by the Crown as far back in time as is within the concern of equity. Indeed it may be negligent if he or she did not do so. Likewise it will be appropriate to advise Aborigines and Torres Strait Islanders who still have traditional links with lands (other than lands in respect of which traditional title has clearly been extinguished) that are in any way affected, or proposed to be affected by present or future governmental action, that they have an arguable case either to seek compensation in respect of, or to prevent, such action.

It is likely that every action in which traditional title to land is asserted (other than in respect of land, if there is any, which has not been the subject of any governmental action beyond the acquisition of sovereignty over it), will include an assertion of fiduciary obligations owed on behalf of a government, an assertion that those obligations have not been met, and a claim for a remedy in respect of such unmet obligations.

At least until the High Court has dealt further and directly with the issue of fiduciary obligations of governments in dealing with lands the subject of traditional title it is likely that general policy pronouncements and initiatives as well as particular statements by representatives and agents of governments will be put in issue in traditional title claims as a source of fiduciary obligations and as to the content of such obligations. Matters in Issue in traditional title actions will include: the history of governmental action with respect to the land in question, the implications of that action for the continuance of traditional title, as well as the history of governmental communications and relationships with Aborigines and Torres Strait Islanders generally within its jurisdiction, and with the claimants in relation to the particular land in question. Given such issues, discovery and inspection of documents will be

an enormous task for both parties and the range of documents relevant to matters in issue will likely include, in many cases, departmental records not previously subjected to public scrutiny and cabinet documents including records, where kept, of cabinet meetings.

If so, public interest immunity issues will become a major feature of traditional title litigation. This will test the nerves and sense of fairness of governments in relation to material they traditionally keep secret. Where a traditional title claim properly raises issues as to the existence and breach of fiduciary obligations by a government or its agents or representatives, there will be a clear public interest in the administration of justice which favours disclosure of traditionally secret material. This public interest will need to be balanced against any public interest in protecting such material from disclosure.[49]

Left to their own devices, the courts have in recent decades been increasingly expansive of the range of records of government deliberations and actions which they have been prepared to scrutinise in an appropriate case.[50] It now seems, at least in the view of Commonwealth Cabinet ministers, the courts have pushed too far into their domain. On 16 December 1992, in response to decisions of the Federal Court permitting disclosure of Cabinet notebooks in the case of *Northern Land Council v The Commonwealth and Energy Resources of Australia Limited*[51] (the *Northern Land Council* case) a Bill for an Act entitled the *Cabinet Notebooks (Access and Protection) Act* 1992 was introduced into the House of Representatives. If enacted, the resulting legislation will have the effect of proscribing the disclosure of Commonwealth Cabinet notebooks in any court proceedings other than the *Northern Land Council* case. If the states were to follow this lead, much potentially important evidence may be hidden.

A further procedural implication for traditional title claim litigation pursuant to the *Mabo* statements on fiduciary obligations is that they might provide some comfort to persons who might properly be joined as defendants because of a present interest in the land held from the Crown. In so far as it is held that the present interest was granted in breach of fiduciary obligations owed to traditional owners, the holder of the present interest will be able to look to government to make good any losses suffered as a result of the outcome of the litigation. On the other hand, the implication for governments is that its exposure to potential liability will be multiplied. A government may be liable both to the traditional title holders and to persons holding present interests in the land.

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49 *Northern Land Council v Commonwealth and Energy Resources of Australia Limited* (1991) 30 FCR 1 at 38.

50 See, eg: *Sankey v Whitlam* (1978) 142 CLR 1; *Alister v The Queen* (1984) 154 CLR 404; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394; *Attorney-General v Jonathan Cape Ltd* [1976] QB 752; *Burma Oil Co Ltd v Bank of England* [1980] AC 1090; *Carey v The Queen in Right of Ontario* [1986] 2 SCR 637; *Harbours Corporation of Queensland v Vessy Chemicals Pty Ltd (1986)* 12 FCR 69; *Northern Land Council v The Commonwealth and Energy Resources of Australia Limited* (1991) 30 FCR 1.

51 (1990) 24 FCR 576 (Jenkinson J); (1991) 30 FCR 1 (Full Court). At the time of writing, the matter is before the High Court awaiting decision.

There are at least four categories of circumstances and issues involving consideration of fiduciary obligations owed by the Crown upon which the High Court will no doubt be asked to rule in future cases: first, circumstances involving voluntary surrender of traditional title to the Crown in anticipation by traditional titleholders of a grant of a defined title to them or to a third party; second, circumstances involving the compulsory or unilateral acquisition of, or extinguishment or impairment of, traditional title by the Crown; third, circumstances involving the revocation or other dealing by the Crown with lands set aside or reserved for the use and benefit of Aborigines or Torres Strait Islanders; and fourth, involving the general proposition that fiduciary obligations arise merely because traditional title is vulnerable to extinguishment by, and is inalienable except to, the Crown.

If the courts develop a doctrine which links traditional title to government fiduciary obligations, substantive legal implications will be extensive. With respect to past dealings with land, the Crown may incur a substantial total liability. With respect to future dealings with lands over which traditional title is extant, the Crown will, where a fiduciary relationship exists, be constrained in its dealings by the obligations concomitant with that relationship. Whether comprising a mere enforceable requirement to do what it has promised the traditional title holders it will do in relation to their land, or whether comprising requirements that a government obtain the consent of the titleholders, ensure that independent advice is available to them, and not act otherwise than in their interests, the imposition of fiduciary obligations will profoundly change the nature and processes of dealings by governments in Australia involving land in which Aborigines and Torres Strait Islanders have traditional interests.

An issue outside the scope of this paper is the issue of compensation for extinguishment of, or interference with the rights comprising traditional title. A majority of the High Court held that lawful extinguishment within the power of the Crown does not of itself give rise to a claim for compensation. If the Court when asked decides that fiduciary obligations will in an appropriate case be owed by governments to Aborigines and Torres Strait Islanders in relation to dealings with land, that decision might provide in those cases an alternative and perhaps equivalent remedy: damages for breach of fiduciary obligations. An action for breach of fiduciary duty will have one major procedural advantage for claimants: it will not be subject to statutes of limitations time limits as would a claim for compensation for wrongful extinguishment.

8. *Policy Implications*

Judging from recent governmental activity, the first policy question arising generally from *Mabo* is whether or not to allow the courts to remain in control of traditional title and associated issues in Australia or whether all or some of the legal issues are to be addressed or overtaken by policy and legislative initiatives.[52]

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52 That is a large topic outside the scope of this paper. My own view is that the matter is of such import as to warrant considerable effort and dialogue over coming decades including

A second tier policy implication will be the need for governments to decide how to respond to individual actions commenced by putative traditional title holders of land. It will need to be decided whether to defend every case on principle or whether and on what basis to negotiate settlements of cases.

There will be opportunities for governments and their advisers to consider the negotiation of comprehensive settlements such as have occurred in Canada in recent years.[53] Such settlements could provide for all outstanding and potential claims in a region in an agreement which might include grants of land or acknowledgment of title over particular areas, payments representing compensation or damages and the recognition of rights of self-determination or self-government and opportunities for economic advancement.

Pending further pronouncements by the courts on the fiduciary duty issue, any government proposing to "deal" in any way with land in respect of which traditional relationships with that land are extant, might be wise to assume the existence of fiduciary obligations owed to relevant Aborigines or Torres Strait Islanders and seek their consent, provide opportunity for independent advice, and not to act otherwise than in accordance with their interests. Failure to do so will almost certainly invite litigation.

Given judicial statements in *Mabo* that the content of traditional title reflects the interests and rights possessed under the traditional laws and customs of the holders of the title[54] and that traditional title may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests,[55] "dealings" which might attract attention will include any effect on the status or use of land or the title to it, of the implementation of any legislative or policy initiative: the grant of proprietary or mining titles, the dedication, reservation or setting aside of land for any purpose, the construction of public works, use of lands for any public purpose, the restricting or permitting of any use of land by way of planning initiatives and maybe even, in certain circumstances, a failure by government to apply environmental assessment and review processes in respect of major public developments.[56]

The existence of fiduciary obligations along with requirements for just terms for the acquisition of property and the obligations of the *Racial Discrimination Act* provide very firm constraints against finding an easy, quick or quiet policy solution. Even the establishment of a tribunal to assess claims of traditional title such as proposed in the Commonwealth's "Discussion Paper

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educational initiatives to raise the level of awareness of the issues and implications of this belated recognition of prior Aboriginal title, litigation to seek the further judicial wisdom of the members of the High Court on the implications of their momentous decision, wide ranging consultations and negotiations with Aborigines and Torres Strait Islanders and an assessment and review of the constitution in light of what has now been confirmed about the legal basis for the settlement of Australia. It is my view that appropriate and just resolutions and directions are unlikely to be arrived at otherwise.

53 For example, see the James Bay and Northern Quebec Agreement and the *James Bay and Northern Quebec Native Claims Settlement Act*.

54 See, eg: Brennan J above n2 at 57; Deane and Gaudron JJ above n2 at 87-88; Dawson J above n2 at 129; Toohey J above n2 at 178.

55 See Brennan J above n2 at 61: Deane and Gaudron JJ above n2 at 112-113.

56 *Eastmain Band v Robinson* [1992] 1 CNLR 90; *Cree Regional Authority v Robinson* [1991] 4 CNLR 84.

on the High Court Decision on Native Title", if it were to have powers which in any way reduced or impaired traditional title beyond the mere application of the common law to determine the existence and extinguishment of traditional title, might give rise to a fiduciary duty based claim for damages for diminution of rights recognised by the common law.

Conclusions

It will likely be a source of comfort to those who will want to rely upon and seek expansion of the newly recognised concept of traditional title, that the concept be supported by and closely linked with a dynamic and developing concept such as fiduciary obligations.

It is too early to be writing definitive papers on fiduciary obligations arising from the recognition by the common law in Australia of a form of traditional title. Too many questions remain unanswered and can only be answered by the High Court in response to actions which properly raise the questions. Suffice it to say that it may well turn out that the comments about fiduciary obligations in *Mabo* will grow to be a substantial if not dominant feature of the awakening traditional title issue in Australia.

Australian common law regarding recognition of a form of traditional title is now largely in step with the common law of Canada and such views as are expressed by members of the High Court on the relationships between traditional title and fiduciary obligations of government indicate a willingness to consider seriously, if not follow Canadian precedents. It is to be expected then that the courts of these two nations will engage in considerable dialogue over coming decades on these crucial and interesting issues.

It may well turn out that with a little support from equity in the form of fiduciary principles, Aborigines and Torres Strait Islanders will be able to trust governments not to interfere with impunity with such of their traditional title as has until recently remained or presently remains.