Mabo and the Racial Discrimination Act:

The Limits of Native Title and Fiduciary Duty Under Australia's Sovereign Parliaments

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There are many Aboriginal groups who see the *Mabo (No 2)*[1] decision as a door which has been left slightly ajar by the High Court, now waiting to be prized open by a series of test cases and political agitation. There are miners and pastoralists who see it as a door to be firmly closed before further uncertainty is caused. The decision is more a window of opportunity which will remain open but within very strict confines buttressed by an Aboriginal land claims process in each jurisdiction of the Commonwealth. There is greater consistency with precedent and certainty of limitation in the decision than many commentators have indicated.[2] The skeleton of principle of the common law has been maintained at some cost to dispossessed Aborigines.

Sovereignty is non-justiciable; the classification of the Australian colonies as "settled" is now beyond dispute in Australian courts. Compensation for past dispossession, prior to the passage of the *Racial Discrimination Act* 1975 (Cth), was payable only if the statutory scheme for dealing with wastelands and Crown lands did not exclude it expressly or by implication, and could be sought only within the relevant *Statute of Limitations* periods. Extinguishment of native title by valid Crown grant of a state to other parties prior to 1975 did not, of itself, found an action for compensation.

Vacant Crown land and public reserves may still be subject to native title. Native title holders will continue to enjoy the rights commensurate with their "ownership", enjoying the twofold protection of the Constitution, precluding acquisition of property on unjust terms, and the *Racial Discrimination Act*, the latter rendering unlawful actions which discriminate against persons on the basis of their race thereby impairing the enjoyment of their human rights in any field of public life, including the right to own property in association with others, the right to inherit, and the right not to be arbitrarily deprived of property.

The *Racial Discrimination Act* overrides any offending state or territory legislation ensuring that the law since 1975 accords protection to native title holders equal to that of other title holders with similar rights of use and ac-

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1 *Mabo v the State of Queensland*, hereafter *Mabo (No 2)* (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1, all page references will be to (1992) 66 ALJR 408.

2 See Brennan, F, "Mabo and Its Implications for Aborigines and Torres Strait Islanders" (1993) *UQLJ* 1.

cess, whatever their race. The High Court has shown no willingness to extend the concept of fiduciary duty beyond the bounds of the duty owed by the Crown to a third party at arms length enjoying discrete legal rights to property. The Court has no intention of entertaining theories of sovereignty or classification of colonial beginnings which divide or diminish the sovereignty of national institutions established under the Constitution. While lawyers investigate the limits of fiduciary duty and compensation claims, it is imperative that governments set up claims processes in all jurisdictions so that native title holders may be granted a secure and certain statutory title to their lands without extinguishment of native title. It will be in the interests of miners and pastoralists, as well as Aborigines, that there be a notification procedure whereby claims to native title can be registered and, in time, determined.

1. *"Settled" Colonies*

The Crown's acquisition of sovereignty over several parts of Australia cannot be challenged in an Australian municipal court. Sovereignty imports supreme internal legal authority which is vested in the legislature, executive and judiciary of the Commonwealth, states and territories, subject to the supreme law of the nation which is the Constitution. It broaches no limitation on Commonwealth and state powers except the limits set down in the Constitution and those limits which are necessarily implied.

Given the threefold classification of the colonial era, the Australian colonies were "settled" with sovereignty being adequately asserted once the land was occupied by persons acting with authorisation from the Crown. They were not conquered or ceded. By settling a previously inhabited territory as a colony, a European sovereign thereby subjugated the indigenous people as persons with no recognised prior sovereign. The settlement of a territory inhabited by persons presumed by their colonisers at the time "to be without laws, without a sovereign and primitive in their social organisation"[3] was equated with settlement of an uninhabited territory for the purposes of establishing sovereignty and determining the law applicable to all persons in the colony whether they be colonists or indigenous. New South Wales and all other Australian colonies were settled colonies in inhabited territory. Deane and Gaudron JJ say "...it must be accepted in this Court that the whole of the territory designated in Phillip's Commissions was, by 7 February 1788, validly established as a 'settled' British colony."[4] Though settlement was seen initially as applicable only to unoccupied territory,

> The annexation of territory by "settlement"came however to be recognised as applying to newly "discovered" territory which was inhabited by native people who were not subject to the jurisdiction of another European state. The "discovery"of such territory was accepted as entitling a state to establish sovereignty over it by "settlement", notwithstanding that the territory was not unoccupied and that the process of "settlement"involved negotiations with and/or hostilities against the native inhabitants.[5]

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3 Above n1 at 419-420.
4 Id at 438.
5 Ibid.

The exercise of the Crown prerogative to establish a new colony of this type by settlement was an act of state, the validity of which could not be challenged in the courts of the Crown. There is no statement in any judgment in Mabo which invites reclassification of the Australian colonies. All Justices, except Dawson J, proceed on the basis that New South Wales was a settled colony. While agreeing with the threefold classification, Dawson J saw no need to classify the Murray Islands as conquered, ceded or settled, because a determination assisted only in deciding what law, if any, was introduced by the new sovereign. In this case, the new law was "expressly declared by the new sovereign".[6] Toohey J who entertained the most expansive view of Aboriginal rights availed himself of the classification:

> There is no question of the annexation of the Islands by conquest or cession so it must be taken that they were acquired by settlement even though, long before European contact, they were occupied and cultivated by the Meriam people.[7]

The court has acknowledged that people were living here before European settlement and that they were organised in their own societies with a system of relationships governing use of land. However the court has accepted that the British assertion of sovereignty in a way consistent with eighteenth century international practice is unreviewable before the domestic courts established by the new sovereign. The colonies were "settled" colonies for the purpose of determining the applicable law in the absence of any express declaration by the sovereign. This legal classification is unreviewable in the courts even though there be acknowledgement by the bench that some lands in the colonies were relinquished by Aborigines only after hostilities or negotiations.

Though Brennan J (with Mason CJ and McHugh J agreeing) did review developments in international law regarding the occupation of *terra nullius* in contradistinction to territories "inhabited by tribes or peoples having a social and political organisation",[8] he and the other justices were adamant that "the acquisition of territory is chiefly the province of international law",[9] being a prerogative act, an act of state, "not justiciable in the municipal courts".[10] According to Deane and Gaudron JJ, so much "must be accepted in this Court".[11] Dawson J put it as a well established principle "that the municipal courts have no jurisdiction to entertain a challenge to an act of state".[12] Toohey J pointed out that if a European sovereign were to seize private as well as public property "in the act of acquiring sovereignty", even that seizure would be non-justiciable in the domestic courts of the sovereign.[13]

There is no point in Aborigines agitating the issues of sovereignty or colony classification in the Australian courts. In so far as these are justiciable issues, they have been definitively determined even though the plaintiffs in

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6 Id at 464.
7 Id at 483.
8 Id at 421.
9 Id at 423.
10 Id at 417.
11 Id at 438.
12 Id at 460.
13 Id at 484.

Mabo did not agitate the issues at any length, having accepted that the Islands were settled by Britain rather than conquered or ceded.

The sovereign of a settled colony established in inhabited territory accepted the indigenous persons as citizens and extended the operation of the sovereign's existing law equally to the indigenous persons and the colonisers. The common law of Australia as declared by the High Court in 1992 recognised the rights and interests in land of the indigenous inhabitants as at the date of settlement. On acquisition of sovereignty, the Crown acquired a radical title to the land which carried with it the beneficial ownership of all lands unowned and unoccupied by the indigenous people at the time of settlement. It also carried with it the Crown's right to the reversionary interest in any land owned, used or occupied by indigenous people once those people had surrendered or abandoned the land, or upon the land being acquired by an instrument of the Crown acting with lawful authority.

2. *Extinguishment of Title and Compensation*

The sovereign, through the relevantly empowered organ (legislature, executive or judiciary) could deal with the land of indigenous people in the same way as it dealt with the land of other citizens. Brennan J observed:

> As the settlement of an inhabited territory is equated with settlement of an uninhabited territory in ascertaining the law of the territory on colonisation, the common law which the English settlers brought with them to New South Wales could not have been altered or amended by the prerogative — only by the Imperial Parliament or by the local legislature.[14]

Toohey J was more strident:

> But seizure of private property by the Crown in a settled colony after annexation has occurred would amount to an illegitimate act of state against British subjects since in a settled colony, where English law applies, there is no power in the Crown to make laws, except pursuant to statute.[15]

Except for Aborigines in the immediate vicinity of Sydney Cove who may have been dispossessed of their land by an act of state between the time of the landing and the reading of the proclamation (26 January – 7 February 1788), Aborigines in New South Wales enjoyed ongoing title to their lands which was recognised by the common law. They could not be dispossessed except by persons acting with authority vested in them by virtue of an act of the Imperial Parliament. Once a local legislature was established, it could also authorise persons acting in the name of the Crown to dispossess persons of their lands. After the act of state establishing the Crown's sovereignty, no instrument of the Crown could effect dispossession of any person except with authority from a sovereign parliament. The royal prerogative, being the only fountain of power apart from a sovereign legislature, did not extend to the extinguishment of property rights recognised by the common law. Deane and Gaudron JJ say,

> The adjusted common law was binding as the domestic law of the new colony, and, except to the extent authorised by statute, was not susceptible of

14 Id at 420.
15 Id at 484.

> being overridden or negatived by the Crown by the subsequent exercise of prerogative powers.[16]

For the better part of two centuries, the legal dispossession of Aborigines was effected by Crown authorities and other citizens receiving Crown grants to lands. As Brennan J put it,

> The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists.[17]

This "subsequent extinction by a paramount power" had to draw its validity from Acts of the Imperial Parliament.

Usually there would have to be some express legislative warrant from the sovereign parliament of the day for dispossession without consent or compensation. According to Brennan J, native title was peculiarly susceptible to extinction at the Crown's pleasure. He (whose view commanded majority support) took the view that Crown grants, being given with statutory authority, could not be extinguished by the Crown without statutory authority. Any power enjoyed by the Crown pursuant to statute would be "presumed to stop short of authorising any impairment of an interest in land granted by the Crown or dependent on a Crown grant".[18] He was not satisfied, however, that there was any "comparable presumption affecting the conferring of any executive power on the Crown the exercise of which is apt to extinguish native title"[19]. The only inquiry which need be made in scrutinising the legality of the Crown's purported extinguishment of native title would be the statutory basis for the Crown's executive dealing with the land in making a grant. If the Crown were given power to grant the subject land, it could work an extinguishment without compensation, there being no presumption to the contrary. A legislature and executive which proceeded as if there were no such thing as native title would readily grant and enjoy the power. Valid extinguishment of native title without compensation would occur each time the power was exercised under a statutory regime which allowed the executive to deal with land as if it were vacant Crown land in which no one else had an interest. On this approach, only those lands which had never been dealt with would continue subject to the possibility of native title, and the traditional owners of any other lands would not be eligible for compensation unless there were some statutory warrant for same.

In the course of his dissent, Dawson J made the observation that there is "no general proposition to be found, either in law or in history, that the Crown is legally bound to pay compensation for the compulsory acquisition of land or any interest in it by the exercise of sovereign rights."[20] Dawson J being of the view that Aboriginal title was simply an occupancy which the Crown, as absolute owner, permits to continue, said:

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16 Id at 439.
17 Id at 429.
18 Id at 432.
19 Ibid.
20 Id at 459.

> The permission may be withdrawn.The extinction of Aboriginal title does not, therefore, require specific legislation. No doubt the intention of the Crown must be plain, but there is no reason in principle or logic why it should not be inferred by the course taken by the Crown in the exercise of its powers, whether in administering statute law or otherwise.[21]

Deane and Gaudron JJ took a different approach. Though they did not view the personal rights conferred by common law native title as constituting an estate or interest in the land, they insisted that such legal rights were not illusory and were infringed if they were extinguished without consent. Such extinguishment could readily be achieved by the Crown either by the grant of an inconsistent interest to a third party or by "appropriation, dedication or reservation for an inconsistent public purpose or use".[22] Yet unless there were legislation which expressly or by necessary implication excluded a claim to compensation for such extinguishment, proceedings for compensatory damages could be instituted. They did concede that during the times when most dispossession by the Crown occurred there were procedural impediments to the institution of such proceedings against the Crown by any party. Once proceedings against the Crown were permitted, Aboriginal claimants could have succeeded provided the proceedings were instituted within the prescribed limitation period. For all practical purposes, this line of reasoning produces the same result as the Brennan approach except in the case of recent wrongful extinguishment within the limitation period of the relevant jurisdiction. Absent legislative warrant, the purported exercise of paramount power would be unlawful, either failing to extinguish title or giving claim to compensation. Traditional native interests were thereby and only to this extent "preserved and protected under the law of a settled territory".[23]

Toohey J went one step further in theory, though the practical result is the same. He conceded that the Crown as sovereign has power to extinguish traditional title, just as it has power unilaterally to extinguish other interests in land. There is some doubt about what Toohey J meant by sovereignty, especially the sovereignty of Parliament. Having decided that the Crown owes a fiduciary duty to the holders of traditional title, he said:

> 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 title holders, or if the process it establishes does not take account of those interests.[24]

Toohey J provided no guidance on the validity of legislation which extinguishes such title and which expressly terminates or limits the fiduciary obligation. Presumably such legislation, being within power, is valid and can effect a new legal relationship between the Crown and indigenous subjects. Being valid, it cannot be a breach of a still existing obligation. Toohey J conceded that the remedy for past wrongful extinguishment "may have been lost by the operation of limitation statutes". He went on to confirm the status quo: "And nothing in this judgment should be taken to suggest that the titles of

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21 Id at 464.
22 Id at 452.
23 Id at 440, Deane and Gaudron JJ, referring to *Administration of PNG v Daera Guba* (1973) 130 CLR 353 at 397 (Barwick CJ, McTiernan and MenziesJJ concurring).
24 Id at 494.

those to whom land has been alienated by the Crown may now be disturbed."[25]

All judges were agreed that damages could have been claimed only for wrongful dispossession by actions instituted within the usual limitation periods. They also agreed that no Crown grants could be disturbed. For completeness, Brennan J considered proceedings by *scire facias* whereby the Crown can attempt to go behind a Crown grant when there has been a fraud perpetrated on the Crown. But this would be of no avail for traditional owners who might even claim that the Crown perpetrated a fraud on them.

The Commonwealth could not extinguish such rights except upon payment of just compensation. Deane and Gaudron JJ said "any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s51 (xxxi)."[26] The states and territories now have to ensure compliance with the *Racial Discrimination Act* 1975. Any state law which limited the rights of a community of traditional owners to a more limited extent than the rights of other property holders would be overridden such that the traditional owners would continue to enjoy their legal rights to the same extent as others having rights and interests in land. An individual traditional owner could bring representative proceedings or claim interference with personal usufructuary rights. Brennan, Toohey and Gaudron JJ concisely stated the practical effect of the *Racial Discrimination Act* in *Mabo (No 1)*:

> ...if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks to extinguish it will now fail. It will fail because s10 (1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.[27]

A law which singles out traditional rights for extinguishment while leaving unaffected rights granted pursuant to statute and enjoyed by persons of many races and ethnic groups including the group who are traditional owners is still discriminatory because it impairs the sum total of rights of that ethnic native group while leaving the rights of others unaffected.

Since the proclamation of the *Racial Discrimination Act* on 31 October 1975, Australian law guarantees that traditional Aboriginal land holdings cannot be extinguished in a discriminatory fashion without compensation or consultation. Where mining tenaments or other interests in land have since been granted over vacant Crown land which was still then subject to native title, there would be a claim to compensation by the native title holders against the Crown provided it is brought within the relevant limitation period. It is unlikely that the failure to consult or compensate native title holders at the time of the issue of the grant would invalidate the grant itself.

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25 Id at 490
26 Id at 452.
27 (1988) 166 CLR 186 at 218-219.

3. *Fiduciary Duty*

Whereas the plaintiffs had not put lengthy submissions relating to issues of sovereignty and the classification of the Australian colonies as settled, conquered, or ceded, they had relied upon the developments in the United States and Canadian jurisprudence to suggest that the Crown owed a fiduciary duty to indigenous persons given the Crown's unilateral assumption of control over the lands of native inhabitants and also in light of the ongoing policy of protection of native inhabitants especially with the creation of reserves for the use and benefit of such inhabitants.

In *Guerin v The Queen*,[28] the Supreme Court of Canada considered the relationship between the Crown and some native peoples in Vancouver. Under the *Indian Act*,[29] there is legislative provision for native reserves to be held by the Crown for the use of Indian bands. Reserve lands cannot be sold, alienated, leased or otherwise disposed of until they had been surrendered by the relevant band to the Crown. No surrender is valid unless the majority of the band has assented to the surrender which then is accepted by the Governor-in-Council.

Reserve land the subject of this legislative scheme had been surrendered by the relevant band to the Crown, band members voting 41 to 2 in approval, so that the Crown could then lease the land to a golf club for profit which was to be shared by the band. The surrender was in these terms:

> To Have and to Hold the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.
>
> And upon the further condition that all monies received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.
>
> And We, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.

Four months later the Crown entered into a lease on very unattractive terms. The band did not receive a copy of the lease for another 12 years. The terms of the lease bore little resemblance to the terms discussed by the band and the Crown. The trial judge found that the Indians would not have surrendered their land if they had known the finalised terms of the lease. All Justices of the Canadian Supreme Court upheld the claim of the Indian band. Estey J treated the Crown as the Indian band's agent. The main two divergent viewpoints were expressed by Wilson J (Ritchie and MacIntyre JJ concurring) and Dickson J (Beetz, Chouinard and Lamer JJ concurring). Wilson J held that the fiduciary obligation was not created by the statutory scheme of the Indian Act; rather the statute recognised the existence of such an obligation. In her view, "the obligation has its roots in the aboriginal title of Canada's Indians".[30] Though the Crown did not hold reserve land in trust for the bands, it did "hold

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28 (1984) 13 DLR (4th) 321.
29 RSC 1952 c149 as amended.
30 Above n27, at 356.

the lands subject to a fiduciary obligation to protect and preserve the bands' interests from invasion or destruction".[31] Section 18(1) of the *Indian Act* provides:

> 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 whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

According to Wilson J the Crown's discretionary power had to be exercised on proper principles and not in an arbitrary fashion:

> It is not, in my opinion, open to the Governor in Council to determine that a use of the land which defeats Indian title and affords the band nothing in return is a 'purpose' which could be 'for the use and benefit of the band'. To so interpret the concluding part of s18 is to deprive the opening part of any substance.[32]

Once the band had surrendered its reserve land to the Crown, the Crown, in Wilson J's view, "became a full blown trustee by virtue of the surrender":[33]

> ...[t]he fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the band crystallised upon the surrender into an express trust of specific land for a specific purpose.[34]

The alternative approach of Dickson J was that the Crown was neither trustee nor agent for the Indian band but in a continuing relationship requiring it to discharge a fiduciary obligation which was *sui generis*. Given that there was no unjust enrichment to the Crown, there could not be a constructive trust. He would not countenance the Crown's obligation crystallising into a trust because there were not the complete elements of settlor, beneficiary, trust corpus, words of settlement, certainty of object and certainty of obligation.[35]

In 1991 McEachern CJ of the British Columbia Supreme Court concluded a four year trial in *Delgamuukw v The Queen in right of British Columbia*[36] in which 35 hereditary chiefs claimed ownership of and the right to govern 98 separate territories and 13 other Chiefs claimed ownership of and right to govern another 35 territories, totalling 22,000sq miles in North West British Columbia. The plaintiffs failed on all counts except that they were entitled to a declaration that "subject to the general law of the province, they have a continuing legal right to use unoccupied or vacant Crown land in the territory for aboriginal sustenance purposes".[37] The Crown had unilaterally extinguished aboriginal rights to land but at the same time promised that the Indian bands could continue to have access to vacant lands. McEachern CJ limited the Crown's obligation to permitting Aboriginal people use of land for subsistence purposes "until such time as the land is dedicated to another purpose". Though conceding the Crown's power to dedicate public lands to other purposes, he said, "The Crown would breach its fiduciary duty if it sought arbi-

31 Id at 357.
32 Id at 357-8.
33 Id at 361.
34 Ibid.
35 Id at 342.
36 (1991) 79 DLR (4th) 185.
37 Id at 537.

trarily to limit aboriginal use of vacant Crown land".[38] McEachern CJ did observe that the duty owed by the Crown "is not a constitutionally recognised or affirmed right and is therefore subject to the general law of the province." It could be circumscribed by any enactment of the parliament (within constitutional power) and by any valid action of the Crown.

In *Mabo*, Dawson and Toohey JJ were the only justices to give any lengthy consideration to the submission put by the plaintiffs that the Crown owed them a fiduciary duty. Dawson J concluded that there was no fiduciary duty imposed upon the Crown because any traditional rights which existed in the lands had been extinguished. He distinguished the US doctrine of "a general trust relationship between the United States and the Indian people"[39] on the grounds that the doctrine is

> dependent upon a history of protection of the Indian tribes, as seperate domestic dependent nations with their own limited form of sovereignty and territorial and governmental integrity, the protection being undertaken by the United States Government either pursuant to legislation or otherwise.[40]

Dawson and Toohey JJ both referred to developments in Canada since *Guerin v The Queen*.[41] Dawson J, having satisfied himself that Aboriginal title did not survive the annexation of the Murray Islands, found "no room for the application of any fiduciary or trust obligation of the kind referred to in *Guerin* or of a broader nature."[42] Given that the Meriam people were unable to alienate their land except upon surrender to the Crown and presuming the Crown to have the power to alienate land the subject of the Meriam people's traditional rights and interests, Toohey J was satisfied that this power "and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown."[43] He held that the Crown was obliged "to ensure the traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interest of the title holders".[44] He thought the kind of fiduciary obligation imposed on the Crown was that of a constructive trustee.

Deane and Gaudron JJ showed little interest in the submissions relating to fiduciary duty. However when considering the enforcement and protection of common law native title, they did consider various heads of equitable relief including declarations, injunctions and the imposition of a remedial constructive trust "framed to reflect the incidents and limitations of the rights under the Common Law Native Title".[45]

Brennan J gave the concept of fiduciary duty even more scant attention observing simply that

> 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 the land so as to satisfy the expectation.[46]

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38 Id at 482.
39 *United States v Mitchell*, 463 US at 25 (1983), quoted at (1992) 66 ALJR 408 at 476.
40 (1992) 66 ALJR 408 at 476.
41 Above n27.
42 (1992) 66 ALJR 408 at 477.
43 Id at 493.
44 Ibid.
45 Id at 453.

He made it clear that it was unnecessary to consider the existence or extent of such a fiduciary duty in the *Mabo* proceedings.

Earlier, in the *Ranger* case, (*Northern Land Council v The Commonwealth*), the High Court had said it was leaving open the question whether or not there was a general fiduciary duty owed by the Crown to Aborigines because of the inalienability of Aboriginal interest in land and the duty of protection owed by the Crown to Aboriginal groups.[47] That question has been left open again in *Mabo*. There are indications that the Court is unwilling to go down the same path as the Canadians. For example, all members of the majority in *Mabo* are of the view that when a lease has been granted on terms inconsistent with the continuance of traditional title, traditional title will be completely extinguished and the full beneficial interest in land will revert to the Crown at the end of the lease. If the Crown owed a fiduciary duty, it would be arguable that the traditional landholding group as beneficiary would be entitled to be restored to beneficial use and occupation of land once a third party had exhausted its interest which was inconsistent with continued traditional Aboriginal use and access. Even though McEachern CJ in Canada took a very restrictive view of the extent of the fiduciary duty, he did countenance that land once conveyed and later returned to the Crown could become usable again by Indians. In such a case, "Crown lands that are leased or licensed, such as for clearcut logging to use an extreme example, become usable again after logging operations are completed or abandoned."[48]

In the *Ranger* case, the plaintiff submitted that as a matter of statutory construction the Commonwealth came under a fiduciary duty to the plaintiff or to the Aboriginal people interested in the Ranger land when the Commonwealth entered into negotiations for an agreement under the statutory provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976. The court had no hesitation in unanimously ruling that the statutory scheme of the *Land Rights Act*, which in some circumstances would place the Commonwealth in a position opposed to the plaintiff, precluded the existence of any fiduciary duty. In negotiations and in considering the appointment of any necessary arbitrator, the Commonwealth would have regard to its own interests as payer of moneys, the interest of the Land Council being the interest of a payee.[49] The court indicated the possibility that the Commonwealth might come under a fiduciary duty to a land council if it were assisting with negotiations between the Council and a third party (a mining company) such that the Commonwealth would only be "the conduit for the benefits to be provided by the miners and received by the Aboriginals interested in the relevant land".[50] This would depend on issues of fact and "perhaps, on the nature of the interest of the Aboriginals (whether statutory or common law interest) in the land the subject of the negotiation".[51] The court observed that the question of the existence of the fiduciary relationship or a trust of some kind in these circumstances was one of fundamental importance which had not been argued on the stated case.

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46 Id at 430.
47 (1987) 61 ALJR 616.
48 Note 35 at 482.
49 (1987) 61 ALJR 616 at 619.
50 Id at 620.
51 Id at 620.

Now in *Mabo*, for the second time the court has refrained from spelling out the general principles of fiduciary duty and intimated that the particulars of any fiduciary relationship will depend on the particular facts of the case.

In the light of the Canadian jurisprudence and the approaches adopted in *Mabo*, some tentative conclusions can be offered. Where the Crown has dealt with land thereby making Crown grants to other parties, though with some reservation guaranteeing continued Aboriginal access and use, native title will not be extinguished and the Crown must have regard for the interests of the native titleholders. Absent the protection of the *Racial Discrimination Act*, there may be an underlying fiduciary duty owed by the Crown to protect the Aboriginal interests. The fiduciary duty will add no additional protection to that obtainable from the unamended *Racial Discrimination Act*. Similarly, where the Crown is obliged to allow native titleholders access to vacant Crown lands and to deal with such lands subject to the legal rights of the native titleholders, there will be no extra rights or protection to be gained by superimposing a fiduciary duty on the state Crown's statutory duty to accord equal protection to native land title under the *Racial Discrimination Act*. If the lands are to be dedicated to some contrary public purpose or allocated to others by Crown grant, the native titleholders will be entitled to equal treatment to other landholders under the relevant lands acquisition legislation.

Land which had been gazetted as Aboriginal reserve in Australian jurisdictions was less secure for the native titleholders prior to the *Racial Discrimination Act* than equivalent reserves under the *Indian Act* in Canada. There was and still is no legislative requirement for consent from Aborigines prior to extinguishment or degazettal. This indicates not only a different statutory regime but also a different relationship historically between the Crown and indigenous persons in the Australian colonies from what existed in Canada. Often in Australia, reserves were not solely dedicated to the use of those whose traditional country it was. Rather people from various areas were rounded up and placed on reserves in virtual prison conditions for their protection and the protection of pastoralists and their stock. Reserves were set aside for the benefit of any Aborigines or Torres Strait Islanders in the jurisdiction. In time individuals were able to earn their exemption whereby they could seek employment, living off reserves. In an era of assimilation, there was little thought of maintaining the relationship between the people and their land even within the reserve areas. Any supposed fiduciary duty was discharged by providing the opportunity for people to leave the reserves.

Aborigines living on reserves which are not their traditional country have no guaranteed right to continued occupancy nor to compensation for loss of the land that they have occupied for a long period of time. Reserve inhabitants without traditional native title may be able to interest the courts in the idea of a fiduciary duty owed them by the Crown which dispossessed them of their traditional lands, providing them only with meagre reserves for their survival. It is at least arguable that remaining reserves cannot be degazetted without the consent or compensation of Aboriginal persons having an interest in such land. Degazettal without consent or compensation would be a breach of the Crown's fiduciary duty to those people. In situations where Aborigines have been dispossessed of their lands but have been promised continued traditional use and access to flora and fauna, the Crown once again would have a fiduciary duty to continue providing such access or to compensate for its denial. However if a Parliament were to legislate prohibiting or restricting such ac-

cess for (say) sound environmental reasons, this would not be a breach of any fiduciary duty but a legitimate delimitation of the duty. Neither would it amount to an acquisition of property. It would be unchallengable in the courts.

In most cases, the content of the fiduciary duty would be co-extensive with the legal rights claimable by native titleholders protected as landholders or the equivalent under the *Racial Discrimination Act*. There is no indication in any judgment, except that of Toohey J, that the High Court has any interest in developing a separate jurisprudence of fiduciary duty as distinct from any statutory duty owed under specific land rights schemes or the *Racial Discrimination Act*. If the *Racial Discrimination Act* were to be repealed or significantly amended by the Commonwealth, there may be a need to consider further the existence of such a duty.

In circumstances where there is a fiduciary relationship between the Crown and an Aboriginal group, it may be arguable that there has been equitable fraud by the Crown in relation to its conduct such that the Crown ought to have informed the Aboriginal group that they had a cause of action for past dispossession or compensation. It would be necessary to establish fraudulent concealment of the existence of the cause of action. In such a case, as the Canadian Supreme Court ruled in *Guerin*, the limitation period would not start to run until the plaintiff had discovered the fraud, or until the time when, with reasonable diligence, the plaintiff ought to have discovered it.[52] In *Mabo*, the High Court readily accepted that many Aboriginal groups may have lost their remedies by the operation of limitation statutes.[53]

4. *Establishing Native Title*

Vacant Crown land which may be subject to ongoing native title will be claimable by owners provided they can satisfy the evidentiary requirements of continued association with the land. Even in the *Mabo* litigation, Moynihan J was not prepared to conclude that Eddie Mabo himself had rights and interests in land. Mabo's claim had been based on a purported adoption by Benny and Maiga Mabo "with the consequence of his inheriting as the heir to either or both".[54] Eddie Mabo's mother died shortly after his birth and his father gave him into the care of his maternal uncle, Benny Mabo and wife Maiga who brought him up. Under Island custom, a child who had been adopted would become heir to the adopted parents, but, there was a need to distinguish adoption from a mere placing in care. Patrick Killoran who had for many years been director of the Queensland Department of Aboriginal and Islander Affairs was accepted in the *Mabo* proceedings as an expert, giving evidence of different classes of fostering and adoption in Island communities. Moynihan J formed the distinct impression that Eddie Mabo "was less than frank about his relations with his natural father from whom it now suits him to distance himself".[55] Moynihan J was not prepared to conclude that Eddie's father relinquished him to Benny and Maiga for the purpose of adoption.

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52 Avove n27, at 345.

53 See Toohey J ((1992) 66 ALJR 408 at 490), Deane and Gaudron JJ at 453.

54 Volume 3 of the Determination by the Supreme Court of Queensland of the Remitter from the High Court of Australia dated 27 February 1986, at 197.

55 Id at 151.

Failing proof of adoption, Eddie had to establish that Benny Mabo during his lifetime had disposed of an interest in the land to him. Once again, the court was unwilling to accept Eddie Mabo's evidence. Eddie claimed that such a disposal had been made orally by Benny many years ago when Eddie was quite young. Moynihan J observed "there is great scope for selective recollection or confabulation. There is reason to doubt whether such things could be spoken of to the young."[56] It also emerged during the proceedings that other Islanders who were more frequently resident on Murray Island made claims to some of the same blocks of land claimed by Eddie Mabo. In light of these conflicting claims, Moynihan J observed that "it may be them and not him who have the right he seeks to assert against the defendant in respect of some same blocks".[57] Moynihan J thought these matters could be resolved by the Murray Island court but foresaw that there could be enormous problems given the complexity and number of claims.

The High Court ruled that native title to particular land, its incidents and the persons entitled to land are ascertained "according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land".[58] It is immaterial that the laws and customs have undergone change "provided the general nature of the connection between the indigenous people and the land remains"[59] According to Brennan J (Mason CJ and McHugh J concurring), native title can be extinguished if the clan or group, by ceasing to acknowledge its laws and to observe its customs, loses its connection with the land.[60] Deane and Gaudron JJ, having observed that traditional law or custom is not frozen, said,

> Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land.[61]

They were of the view "that, at least where the relevant tribe or group continues to occupy or use the land", the members would not lose their rights through "the abandonment of traditional customs and ways".[62] Toohey J said, "So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life."[63]

5. *The Way Forward*

Though the *Delgamuukw* case is on appeal, it contains many lessons for the Australian experience. The litigation lasted for more than four years resulting in a judgment of over 400 pages. The gains for the Aboriginal groups were minimal and the inconvenience to all parties monumental. In his closing remarks, McEarhern C J said:

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56 Id at 197.
57 Ibid.
58 (1992) 66 ALJR 408 at 435 per Brennan J (Mason CJ and McHugh J concurring).
59 Ibid.
60 Id at 434-5.
61 Id at 452.
62 Ibid.
63 Id at 488.

> The parties have concentrated for too long on legal and constitutional questions such as ownership, sovereignty and 'rights', which are fascinating legal concepts. Important as these are, answers to legal questions will not solve the underlying social and economic problems which have disadvantaged Indian peoples from the earliest times.[64]

In his view, the "increasingly cacophonous dialogue about legal rights and social wrongs has created a positional attitude with many exaggerated allegations and arguments, and a serious lack of reality."[65] Having observed that the reserve system has "created fishing, footholds and ethnic enclaves", he expressed his personal view that "the Indians must decide how best they can combine the advantages the reserves afford them with the opportunities they have to share and participate in the larger economy", saying it was obvious that they must make "their way off the reserves". He did of course concede that it was for the people themselves to choose whether or not they lived on reserves or elsewhere. He concluded that "the remaining problems will not be legal ones. Rather they will remain, as they have always been, social and economic ones."[66]

Presumably each Australian jurisdiction now will find it in the interests of certainty for all parties that there be some system of Aboriginal land claims. Otherwise areas of vacant Crown land will be unavailable for mineral exploration and other uses except once anthropological determination has resolved whether or not there are persons having traditional title to land and therefore an entitlement as owners to be consulted and even compensated. The view of the three High Court justices that past dispossession without compensation or consent was wrongful confirms the political and moral claims of contemporary Aborigines for compensation for past dispossession. Evidentiary and procedural problems, including the Statute of Limitations, would preclude such compensation payments being ordered by the courts. However the acknowledgement of past wrongs by the court, including what Brennan J describes as the obtaining of the national patrimony "by sales and dedications of land which dispossessed its indigenous citizens"[67] strengthen the political and moral case for compensation. If the various jurisdictions are not going to grant Aborigines a resourced system of land councils, the Crown will still need to discharge its fiduciary duty, ensuring that Aborigines are not further dispossessed of existing Aboriginal reserves and that lands still subject to native title remain available for Aboriginal use. The Crown also will be obliged to provide the resources for the establishment of traditional land claims.

The Commonwealth's *Racial Discrimination Act* will ensure, as effectively as any notional fiduciary duty, that Aborigines retain native title in their lands. It is unlikely that the majority of the High Court will pursue Toohey J's approach whereby the fiduciary duty could conflict with long established notions of parliamentary sovereignty and the Crown's paramount power to deal with interests in land not derived from statute. This would be seen by the present bench to be an unwarranted interference with the skeleton of principle.

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64 (1991) 79 DLR (4th) 185 at 537.
65 Id at 539.
66 Id at 540.
67 (1992) 66 ALJR 408 at 427.

The limits of judicial creativity were tightly confined by Brennan J in his dissent in *Dietrich v The Que*en, five months after *Mabo*:

> Changes in the common law are not made whenever a judge thinks a change desirable. There must be constraints on the exercise of the power, else the Courts would cross "the Rubicon that divides the judicial and legislative powers" (to adopt Lord Devlin's phrase in his memorable paper "The judge as Lawmaker") ... In ultimate courts of appeal, the chief constraints are found in the traditional methods of judicial reasoning which ensure that judicial developments remain consonant not only with contemporary values but also with what I described in *Mabo v Queensland* as "the skeleton of principle which gives the body of our law its shape and internal consistency". The law must be kept in logical order and form, for an aspect of justice is consistency in decisions affecting like cases and discrimination between unlike cases on bases that can be logically explained. The greater the authority accorded to precedent by an ultimate court of appeal, the slower the pace of change. In such a court, there is room for difference in opinion as to the appropriate weight and subject matter of change. The principles of the law must be adequate to resolve disputes arising in contemporary society but, as Lord Wright said, the ideal of justice "can only be realised in the concrete, and within such limits as the practical conduct of disputes in Courts of Law permits".In practical terms, the courts are aware that rejection or discounting of the authority of precedent not only disturbs the law established by a particular precedent but infuses some uncertainty into the general body of the common law. The tension between legal development and legal certainty is continuous and it has to be resolved from case to case by a prudence derived from experience and governed by judicial methods of reasoning.[68]

Though much jurisprudential ink will be spilt over the proposed development of a fiduciary duty owed by the Crown to Aboriginal and Torres Strait Islander peoples, there is no indication from the majority in *Mabo* that the duty will have a content or an application any different from that which would obtain in relations between the Crown and other citizens with legal rights. Such a duty will add nothing to the statutory rights already enjoyed by native title holders because of the broad impact of the *Racial Discrimination Act*. If the court is to develop a jurisprudence of fishing rights, sea rights and common law rights to land for Aborigines who are not traditional owners, there will have to be an expansion upon the bases of the *Mabo* decision.

Opening the International Year of the World's Indigenous People on 10 December 1992, Prime Minister Paul Keating said the Mabo judgment should be seen as one of "practical building blocks of change":

> By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, Mabo establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past. ... Mabo is an historic decision — we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians.[69]

While the *Racial Discrimination Act* remains intact, there is no need to augment our jurisprudence with a fiduciary duty which is sui generis, pro-

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68 *Dietrich v The Queen* FC 92/044, 13 November 1992, at 24-5.

69 Keating P J, "Australian Launch of the International Year of the World's Indigenous Peoples", *Speeches*, ATSIC, Canberra, 1993, at 7.

vided all jurisdictions set up an appropriate claims process granting statutory title to native titleholders and provided the dispossessed and disinherited in urban areas are adequately compensated with government programmes appropriate to their needs and aspirations. As the failed plaintiff Eddie Mabo learnt, establishing traditional land claims requires evidence rather than assertion. Those who fail to establish such claims will need to agitate again the issue of self-determination if they are to gain recognition of special rights accorded on the basis of race and indigenous identity. Constitutional entrenchment of the right of self-determination would bear more fruit than judicial development of the Crown's fiduciary duty. It would provide a jurisprudential basis for empowerment rather than paternalism.