The Honour of the Crowns: State–Indigenous Fiduciary Relationships and Australian Exceptionalism

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Abstract

The New Zealand and Canadian Crowns are guided in their dealings with Indigenous peoples by common law fiduciary duties. In both countries, these duties have evolved into the constitutional principle of the 'honour of the Crown', which requires governments to consult with Indigenous peoples when contemplating legislative and executive action affecting their distinctive interests, and to accommodate those interests where appropriate. To date, no comparable common law duty has emerged in Australia. This article revisits Toohey J's remarkable, but under-analysed, judgment in *Mabo v Queensland (No 2)* ('*Mabo (No 2)*'), in which His Honour found that Australian Crowns owe a general fiduciary duty to Indigenous peoples, arising by operation of law from the 'circumstances of the relationship' (rather than from a treaty or express undertaking). The judgment continues to influence contemporary Australian courts and, in the absence of a High Court of Australia majority finding to the contrary, the possibility remains that a general fiduciary duty may yet emerge as a principle of Australian common law. The article argues that fiduciary obligations of this kind are sorely needed in Australia, because the High Court has not accepted that relational or consultative obligations to Indigenous peoples attend the Crowns' exercise of the 'race power', or that these obligations are a precondition of the Crowns' reliance on the 'special measures' exception in the *Racial Discrimination Act 1975* (Cth). As it stands, Australian law permits and enables a degree of governmental unilateralism that is not compatible with the role of the Crown as a fiduciary. This article explores the possibility, suggested by Toohey J's judgment in *Mabo (No 2)*, that the common law of native title could yet be the wellspring of general fiduciary principles that could guide the conduct of Australian Crowns in their dealings with Indigenous peoples.

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* Associate Professor, Melbourne Law School, University of Melbourne, Melbourne, Australia. Many thanks to participants at the Unearthing New Zealand's Constitutional Traditions Conference (29–30 August 2013, Victoria University of Wellington Law Faculty, Wellington, New Zealand) and the Australasian Constitutionalism Symposium (13–14 December 2013, Melbourne Law School, Melbourne, Australia). Thanks also to the Melbourne Law School Research Service. Special thanks to Jon Altman, Claire Charters, Miranda Johnson, Bryan Keon-Cohen, Coel Kirkby, Cheryl Saunders, Christa Scholtz, Adrienne Stone, Rayner Thwaites, Lael Weiss and two anonymous reviewers for helpful comments on earlier drafts. I am indebted to Mark McMillan for insights offered during our many conversations about this project.

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I Introduction

In this article, I consider the absence in Australian common law of fiduciary or 'honour of the Crown' obligations that could condition the exercise of legislative or executive power in respect to Indigenous peoples. In Part II, I make a case for the necessity of constitutional principles like the honour of Crown that are designed to address the lack of Indigenous consent to settler state authority and to qualify the exercise of sovereign power vis-à-vis those peoples.[1] I argue that these aims are accomplished, in part, by shielding distinctive Crown–Indigenous relationships from the reach of general anti-discrimination law, so that these relationships are not precluded as forms of preferential treatment or racial discrimination. In Part III, I suggest that the evolution of the Crown–Indigenous fiduciary relationship has been complicated in Australia by the particular constitutional division of powers between the state and federal governments in land management and in the exercise of the 'race power'.[2] I argue that the Canadian Supreme Court's recent findings in *Tsilhqot'in Nation v British Columbia*,[3] in which the Court prescribed the sharing of fiduciary duty and honour of the Crown obligations between the provincial and federal Crowns, offers a rationale for an Australian approach that emphasises the obligations of the state Crowns and does not depend on primary Indigenous affairs jurisdiction being formally vested in the Commonwealth. In Part IV, I review the content of fiduciary duty and honour of the Crown obligations in Canada and New Zealand, and show that these have their origin in the Crowns' right of pre-emption vis-à-vis Indigenous property, rather than in treaties or executive undertakings. In Part V, I review Australian jurisprudence dealing with Indigenous fiduciary duty claims, beginning with Toohey J's landmark judgment in *Mabo v Queensland (No 2)*.[4] I show that jurisprudentially, the question of whether general fiduciary duties are owed by the Australian Crowns to Indigenous peoples has not been decided authoritatively. There remains a possibility that such an obligation may evolve in Australian common law as a concomitant of native title. Finally, in Part VI, I conclude that the distinctive relationship between settler governments and Indigenous peoples requires modes of engagement that are not facilitated by anti-discrimination law, and that the emergence of fiduciary principles in Australian common law could augment these frameworks in ways that improve Indigenous–State relationships and further Indigenous self-governance.

II The Backdrop: The Concept of the 'Crown' and its Function in Settler Democracies

Certain Indigenous rights pose a major conceptual challenge to human rights and anti-discrimination law in the settler liberal democracies. These are historic collective Indigenous rights to property and authority, and to the particular

1 A similar understanding of the State–Indigenous fiduciary relationship is developed in Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, 2011).

2 *Australian Constitution* s 51(xxvi).

3 [2014] 2 SCR 257 ('*Tsilhqot'in Nation*').

4 (1992) 175 CLR 1 ('*Mabo (No 2)*').

intergovernmental relationships that flow from those rights. In the law of Australia, as in Canada and New Zealand, indigeneity is an analogue of race, and so a 'prohibited ground' of discrimination. The right to non-discrimination is typically read broadly where race is implicated, so that laws differentiating on the grounds of race are permissible only where they can be defended as measures deemed necessary to achieve substantive equality for a disadvantaged group.[5] While substantive equality serves as a justification for some laws favourable to Indigenous peoples, and Indigenous peoples are typically materially disadvantaged relative to non-Indigenous majorities, 'special measures' or 'affirmative actions'[6] of this kind are narrowly conceived in international and domestic law. They must be premised on the need to alleviate disadvantage in the enjoyment of human rights and must be temporary, so that they do not 'lead to the maintenance of separate rights for different racial groups'.[7] Indigenous claims to the restoration of wrongfully taken historic property and power, along with the distinctive relationship with settler government that should attend these attributes, are not

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[5] For an analysis of these points and the related, but distinct, doctrine of 'legitimate differentiation' see Kirsty Gover, 'Settler–State Political Theory, "CANZUS" and the *UN Declaration on the Rights of Indigenous Peoples*' (2015) 26(2) *European Journal of International Law* 345. Broadly, it has been argued that certain forms of differential treatment, while premised on prohibited grounds, are non-discriminatory because they are reasonable, objective and directed towards a legitimate aim (usually in furtherance of substantive equality): UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XIV on Article 1, Paragraph 1, of the Convention: Definition of Racial Discrimination*, 42nd sess, UN Doc A/48/18 (1994) 114 [2]. Something similar was proposed by Sadurski in 1986: Wojciech Sadurski, 'Gerhardy v. Brown v. The Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986) 11(1) *Sydney Law Review* 5, and Sadurski's argument was deployed (controversially) in *Bropho v Western Australia* (2008) 169 FCR 59 and *Aurukun Shire Council v Chief Executive Officer, Office of Liquor, Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 to justify infringements of Indigenous property rights where those were deemed necessary to protect other members of the community from alcohol-related violence. The High Court of Australia has confirmed that 'special measures' (measures taken in furtherance of substantive equality to secure the 'adequate advancement' of certain racial groups: *Racial Discrimination Act 1975* (Cth) s 8 ('*RDA*')) are the only legitimate exception to the forms of differentiation prohibited by the Act, discontinuing the line of reasoning that supported some forms of 'legitimate differentiation' in Australian anti-discrimination law prior to 2013: *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*') (discussed in the text accompanying n 20 below). A comparable version of 'legitimate differentiation' persists as one strand of reasoning in Canadian jurisprudence on art 15(1) of the *Canadian Charter of Rights and Freedoms* (*Canada Act 1982* (UK) c 11, sch B pt 1), excluding a finding of discrimination where an applicant's 'human dignity' has not been adversely affected by the challenged measure (*Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 534–41 [62]–[75]). However, this approach has not been used by the Supreme Court to defend beneficial measures for Indigenous peoples in Canada (see *R v Kapp* [2008] 2 SCR 483, 511 [37], relying instead on s 15(2) of the Charter, which exempts such measures for disadvantaged groups from the application of the non-discrimination provision).

[6] The Committee on the Elimination of Racial Discrimination ('CERD') regards these concepts as interchangeable: CERD, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) 4 [12] ('*General Recommendation 32*').

[7] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4) ('*ICERD*'). See also *General Recommendation 32*, UN Doc CERD/C/GC/32, 7 [27]: 'the measures should cease to be applied when the objectives for which they were employed — the equality goals — have been sustainably achieved'.

properly accommodated within conceptions of substantive equality.[8] Indigenous rights are more appropriately understood as inherited, permanent entitlements and capacities that have their basis in the pre-colonial status of Indigenous communities as self-governing or sovereign peoples. These are not simply claims to a reasonable share of primary goods, but rather to a particular set of historical entitlements.[9] Indigenous collective claims of this kind sit very uneasily with current liberal understandings of either formal or substantive equality.

In response to these settler–State dilemmas, in the past several decades Canada and New Zealand have made a series of adaptations to their domestic administrative and constitutional law that effectively insulate human and Indigenous rights from one another in order to support distinctively intergovernmental State–Indigenous relationships.[10] The common law has assisted in this enterprise by supplying special property-based common law doctrines of fiduciary duty, which oblige governments to act for the benefit of Indigenous peoples, to consult with them when proposing to deal with their property and treaty rights, and to accommodate those interests where possible. While differently framed in each jurisdiction (as will be seen in the discussion that follows), these common law adaptations allow a degree of what might otherwise be deemed impermissible 'preferential treatment' of Indigenous peoples.[11] In Canada, this fiduciary duty has developed into the broadly framed constitutional principle of the

8 For an analysis of international and domestic law and jurisprudence on the 'special measures' problem for Indigenous peoples, see Kirsty Gover, 'Non-Discrimination and Full Equality' in Marc Weller and Jessie Hohmann (eds), The *UN Declaration on the Rights of Indigenous Peoples*: A *Commentary* (Oxford University Press, forthcoming).

9 A point well made by Curry and others. See Steven Curry, 'Indigenous Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 307. See also Margaret Moore, 'Indigenous Peoples and Political Legitimacy' in Jeremy Webber and Colin M Macleod (eds), *Between Consenting Peoples: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010) 143.

10 For a survey of these agreements and augmentations see Gover, above n 8. Examples include *Treaty of Waitangi* clauses in New Zealand legislation (eg *State-Owned Enterprises Act 1986* (NZ) s 9); the *Treaty of Waitangi* presumption of statutory interpretation (eg *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188); judicial deference to executive authority in matters implicating Treaty Settlements (eg *Hayes v Waitangi Tribunal* [2001] NZHC 354 (10 May 2001) [37] ('*Hayes*')); distinctive New Zealand Parliamentary Select Committee processes in the passage of Treaty Settlement legislation and references in New Zealand case law to the necessity of accommodating Maori customary law (*Takamore v Clarke* [2012] 1 NZLR 573; *Takamore v Clarke* [2013] 2 NZLR 733). In Canada, ss 25 and 35 of the *Constitution Act 1982* (*Canada Act 1982* (UK) c 11 sch B) protect Aboriginal rights and treaties from Charter-based claims, the *Canadian Human Rights Act* now accommodates Indigenous 'legal traditions and customary law' in challenges against First Nation governments (*Canadian Human Rights Act*, RSC 1985, c H-6, as amended by *An Act to Amend the Canadian Human Rights Act,* SC 2008, c 30, s 1.2), and numerous tripartite final land claim and self-government treaties have been concluded between provincial and federal governments and Aboriginal Nations and enacted in legislation: see, eg, *Nisga'a Final Agreement Act,* SC 2000, c 7; *Yukon First Nations Self-Government Act*, SC 1994, c 35.

11 In Canada, see, eg: *Guerin v R* [1984] 2 SCR 335 ('*Guerin*'); *Manitoba Métis Federation Inc v Canada (A-G)* [2013] 1 SCR 623 ('*Manitoba*'). In New Zealand, see, eg: *New Zealand Maori Council v A-G (NZ)* [1987] 1 NZLR 641, 664 (Cooke P) ('*New Zealand Maori Council 1987*'); *Te Runanga o Wharekauri Rekohu Inc v A-G (NZ)* [1993] 2 NZLR 301, 304 (Cooke P) ('*Te Runanga*'); *New Zealand Maori Council v A-G (NZ)* [2008] 1 NZLR 318, 337 (O'Regan J) ('*New Zealand Maori Council 2008*').

'honour of the Crown', now bolstered by s 35 of the *Constitution Act 1982*. A similar concept has also found some favour in New Zealand as a way to describe the fiduciary-like obligations of the Crown as a party to the *Treaty of Waitangi*.[12] Both doctrines mitigate against settler state unilateralism in Indigenous affairs, encourage and support State–Indigenous agreement-making, and, importantly, allow States and Indigenous peoples to establish and maintain their intergovernmental relations without recourse to general human rights and anti-discrimination law.

In contrast, the absence of a Crown–Indigenous fiduciary relationship in Australia and the lack of constitutional protections for either human or Indigenous rights means that Indigenous interests tend to be addressed and defended within an anti-discrimination framework that is ill-suited to the task of protecting them. This framework requires that protections for Indigenous property and self-governance be justified as measures to alleviate disadvantage (special measures or affirmative action).[13] In Australia, the Commonwealth has provided for special measures in the federal *Racial Discrimination Act 1975 (Cth)* ('*RDA*')[14] — replicating the operative sections of the *ICERD*,[15] which permits such measures when they are necessary to 'secur[e] the adequate advancement' of racial groups disadvantaged in the enjoyment of 'human rights and fundamental freedoms'.[16] This is the basis, for example, of the characterisation of the *Native Title Act 1993* (Cth) as a 'special measure'.[17] Special measures have been used in Australia to defend state laws from challenges brought by non-Indigenous applicants,[18] Indigenous non-beneficiaries,[19] and most controversially, by Indigenous 'beneficiaries' themselves.[20]

The shortcomings of the Australian version of special measures have been made apparent in the recent High Court of Australia case of *Maloney*.[21] In this case, the Court accepted that Queensland Government's criminalisation of alcohol possession in an Aboriginal community differentiated between Indigenous and non-Indigenous people on the grounds of race, but was nonetheless a special measure in the terms of the *RDA*, because it was designed to secure the 'adequate advancement' of Indigenous community members, most particularly, those vulnerable to alcohol-related violence. Significantly, the Court also held that special measures need not be accompanied by consultation with the community that is to be the beneficiary of those measures, if the measures were otherwise reasonably directed to the adequate advancement of that community.[22] In *Maloney*,

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12 *Treaty of Waitangi*, signed 6 February 1840, (entered into force 21 May 1840) ('the Treaty').
13 *General Recommendation 32*, UN Doc CERD/C/GC/32, 4 [12].
14 *RDA* s 8.
15 *ICERD* arts 1(4), 2(2).
16 Ibid art 1(4), cross-referenced in *RDA* s 8.
17 *Native Title Act 1993* (Cth) Preamble ('*Native Title Act*').
18 *Bruch v Commonwealth* [2002] FMCA 29 (13 March 2002).
19 *Gerhardy v Brown* (1985) 159 CLR 70 ('*Gerhardy*').
20 *Maloney* (2013) 252 CLR 168.
21 Ibid.
22 Several judges thought that a lack of consultation might, in some circumstances, be a factor relevant to the question of whether a measure could reasonably be deemed a 'special measure', but did not think this limitation was applicable on the facts. French CJ left open the possibility that 'in the absence of genuine consultation with those to be affected by a special measure, it may be open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted

then, the High Court declined to follow the jurisprudence of CERD on the necessity of consultation with the beneficiaries of special measures.[23] Likewise, the Court did not take up Brennan J's suggestion in *Gerhardy* that the 'wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement'.[24] The Court also did not draw on His Honour's important observation that '[t]he dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them'.[25] Consequently, anti-discrimination principles in Australia tend to obscure and undermine intergovernmental modes of engagement (including consultation) that could support Indigenous agency and self-governance. The absence of common law fiduciary duties contributes to this problem.

One part of the puzzle of Australian exceptionalism in Crown–Indigenous relations derives from the complexity of constitutional allocations of powers in Indigenous affairs between the Commonwealth and states, which is complicated by unresolved questions about the extent of the respective powers and prerogatives of the state and federal executives, or 'Crowns'.[26] The indeterminacy begins, of course, with uncertainty in Australia about the concept of 'the Crown' itself as a duty-bearing entity. The extent to which 'the Crown' should be understood as a proxy for, or equivalent of 'the State', 'the Government', 'the Executive' or 'the Sovereign' is a matter of considerable controversy in legal and political theory. Formally, at least, in the constitutional Westminster monarchies, the Crown is synonymous with the Executive Government (whatever questions remain about the boundaries of the executive branch and the range of entities that comprise the 'Executive' in increasingly complex public sectors). 'The Crown' can also refer to the Queen in her political and constitutional role, in which capacity she is a 'corporation'.[27] As it stands, there is no doubt that the Crown is a source of legal authority in the constitutional monarchies, exercising inherent prerogative powers independently of legislative mandates, alongside certain 'private' capacities shared with all natural and legal persons (the right to make certain contracts and to sue,

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for the sole purpose it purports to serve': ibid 186 [25]. Hayne J noted that '[a]t most, the fact that consultation has taken place may assist, in some cases, in determining whether a particular law meets the statutory criteria for a "special measure"': at 208 [91]. Bell J at 260 [247] allowed that

> [t]he nature and extent of the burden imposed by the law and the adequacy of the consultation with those who are to be affected by it are matters that may be relevant to the determination of whether it is a special measure. This is because a law limiting the enjoyment of the rights of a group enacted without adequate consultation with the group may not be capable of being reasonably considered to be appropriate and adapted to the sole purpose of securing the group's adequate advancement.

Cf 221–2 [134]–[136] (Crennan J, 238 [186] (Kiefel J), 300–1 [357] (Gageler J).

23 *General Recommendation 32*, UN Doc CERD/C/GC/32, 6 [18].

24 (1985) 159 CLR 50, 135.

25 Ibid.

26 See generally Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873.

27 Sir William Wade, 'The Crown, Ministers and Officials: Legal Status and Liability' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 23, 24.

for example),[28] and that it 'personif[ies]' a political community or body politic.[29] Much of the uncertainty that surrounds the concept of the Crown derives from the different personalities and institutional boundaries that attend each of these functions.[30] In any account, however, the concept of 'the Crown' seems to encompass not just the executive of the day, but a historically continuous corporate entity, separate both from society and from 'government', approximating 'the [S]tate'.[31] This separate identity is of particular import in the conduct of relationships with Indigenous peoples, because it enables the Crown to act in both public and private capacities, and to perform both regulatory and relational functions as context demands.

Federal systems like Australia, as Twomey has pointed out, readily draw attention to the multiple meanings and contexts of 'the Crown'.[32] Shifting and imprecise terminology plays a role in this uncertainty. In Australia, 'the federal executive' is the 'Commonwealth Government',[33] while the term 'the Crown' is usually reserved for the governments of the states and territories. The Crown is thus divisible within the Australian Federation in the sense that it personifies each of the States as a distinct legal entity and 'body politic'.[34] However, as Twomey notes, the question of '[w]hether the [s]tates have separate Crowns or fall under one federal Crown remains a matter of contention'.[35] There is no doubt that in the international realm and in its external relations, the Australian Crown is unitary; a single international legal person comprising the bodies politic of the states and the Commonwealth.[36] But do the state Crowns retain their corporate character in their own 'external relations' with Indigenous peoples, as a consequence of their primary and residual constitutional responsibility for land management, and their historically exclusive (and now concurrent) powers to make special laws with respect to the people of 'the aboriginal race'[37]? The locus of any fiduciary responsibilities in Australia will, of necessity, be determined by the interplay of Federal and state powers over land on the one hand, and over Indigenous peoples

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28 In Australia see *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*'). But see *Williams v Commonwealth* (2012) 248 CLR 156 ('*Williams*'), holding that the federal executive's powers to contract do not enable it to spend public monies without legislative authority.

29 Noel Cox, 'The Theory of Sovereignty and the Importance of the Crown in the Realms of the Queen' (2002) 2 (Winter) *Oxford University Commonwealth Law Journal* 237, 248.

30 Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, 1999) 33, 33.

31 Ibid.

32 Anne Twomey, 'Responsible Government and the Divisibility of the Crown' (Legal Studies Research Paper No 08/137, the University of Sydney Law School, November 2008) 6–9.

33 Peter Hanks, Patrick Keyzer and Jennifer Clarke (eds), *Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 7th ed, 2004) 121.

34 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 219 [63] (Gummow, Hayne, Heydon and Crennan JJ) ('*Cadia*'); *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 363; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 262; *Sue v Hill* (1999) 199 CLR 462, 501–2 [90]–[92] (Gleeson CJ, Gummow and Hayne JJ), 525 [165] (Gaudron J).

35 Twomey, above n 32, 8 citing Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) ch 21. See also Michael Stokes, 'Comment: Are There Separate State Crowns?' (1998) 20(1) 1 *Sydney Law Review* 127.

36 Twomey, above n 32, 8.

37 *Australian Constitution* s 51(xxvi) prior to amendment by the by the *Constitution Alteration (Aboriginals) Act 1967* (Cth).

as 'people of [a] race'[38] on the other. Some of this analysis has been done by Australian courts in the course of developing the common law of native title. In the next section, I examine the constitutional framework within which this body of common law has developed.

III The Australian Crowns, their Federation, and the Canadian Comparator

If the Australian Crowns are to follow the example of other settler Crowns and draw on their 'corporate' identity to manage their relationships with Indigenous peoples as polities, some attention must be given to the powers and prerogatives of the Australian Crowns inherited from the Imperial Crown and the scope of those powers after Federation. Two issues are discussed here. First, I examine the degree of continuity between the powers of the Imperial Crown and the executive power of the Crowns in right of the states (which they first inherited as colonies). Second, I consider the division of federal and state powers impacting on Indigenous peoples and their property. Each inquiry suggests that, in Australia, any general common law fiduciary obligations to Indigenous peoples would be shared among Crowns in right of states and the Commonwealth Government. The 2014 decision of the Canadian Supreme Court in *Tsilhqot'in Nation* confirms that this is now the way those duties are conceived and distributed within the Canadian Federation.

In the original Australian colony of New South Wales, the power to dispose of and acquire 'waste lands' was exercised as a common law prerogative by the Governor as the representative of the Imperial Crown.[39] This prerogative power was restrained by Imperial statute in 1842,[40] but no statutory obligation to protect the interests of Aboriginal Australians was imposed by this or any later Imperial Act, nor was such an obligation assumed by the Imperial Crown by way of treaty or proclamation.[41] Land management and 'control of the waste lands' was later vested in the legislatures of the newly self-governing colonies.[42] At Federation in 1901, most of the legislative powers of the newly formed Commonwealth government were enumerated in s 51 of the *Australian Constitution*. These are to be exercised concurrently with the residual legislative powers of the states,[43] and federal legislation takes precedence over inconsistent state laws 'to the extent of the inconsistency'.[44] There is no explicit constitutional power assigned to the Commonwealth in respect of land or land management, other than its power to make laws for 'the acquisition of property on just terms from any State or person'[45]

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38 *Australian Constitution* s 51(xxvi).

39 Adrian Bradbrook et al, *Australian Real Property Law* (Thomson Reuters, 5th ed, 2011) 341; *Wik Peoples v Queensland* (1996) 187 CLR 1, 139–40 (Gaudron J) ('*Wik*') discussing the commission of 1787 issued to Governor Phillip; *Commonwealth v Tasmania* (1983) 158 CLR 1, 208–9 (Brennan J) ('*Tasmanian Dam Case*').

40 *Sale of Waste Lands Act 1842* (Imp) 5 & 6 Vict, c 36.

41 *Wik* (1996) 187 CLR 1, 144 (Gaudron J).

42 See, eg, *Constitution Act 1902* (NSW).

43 *Australian Constitution* s 107; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 154 ('*Engineers' Case*').

44 *Australian Constitution* s 109.

45 Ibid s 51(xxxi).

(but it can and does regulate land where this is supported by other heads of power). Along with the states' residual powers, the common law prerogatives and executive powers held by the Crowns in right of the colonies were not altered by Federation and remain vested in the Crowns in right of the states.[46]

The substance and source of the executive powers of the state Crowns remains a matter of some controversy. Section 106 of the *Australian Constitution* expressly preserves the continuity of the pre-[F]ederation colonial constitutions and these 'lie almost wholly within the control of the respective [s]tates'.[47] Unlike the *Australian Constitution*, however, state constitutions make no express reference to 'executive power'.[48] It seems settled, nonetheless, that any common law executive powers inherited from the British Crown remain vested in the Crowns in right of the states, subject to legislative restrictions including the state constitutions themselves.[49] In the absence of express state constitutional provisions confining executive powers to a subset of underlying common law prerogatives, it seems likely that the very narrow set of federal 'executive powers', identified by the High Court as accommodated within s 61 of the *Australian Constitution*, would not similarly delimit the 'executive powers' of the Crowns in right of the States.[50] In other words, because s 61 determines the scope of federal executive power, but does not govern that of the state executives, common law Crown prerogatives may survive in a more intact and expansive form at the state level.[51] Could this feature of Australian federalism make it more likely that common law *duties* find purchase in respect of the states, even if these are found to be limited at the Commonwealth level by s 61?

The uncertain scope of the common law executive powers of the various state Crowns is further complicated by the High Court's view that Australia has a single body of common law.[52] The implication may be that state executive powers are uniform among the states, irrespective of the varied conditions under which the

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46 *Mabo (No 2)* (1992) 175 CLR 1, 52 (Brennan J); *Cadia* (2010) 242 CLR 195, 210–11 [30]–[34] (French CJ).

47 Cheryl Saunders, *The Constitution of Australia: a Contextual Analysis* (Hart Publishing, 2011) 41.

48 See *Constitution Act 1902* (NSW); *Constitution of Queensland 2001* (Qld); *Constitution Act 1934* (SA); *Constitution Act 1975* (Vic); *Constitution Act 1889* (WA).

49 Carney, above n 34, 255–6.

50 The text of s 61 offers little guidance on the scope of federal executive power: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. On the textualist reading of s 61 as definitive of executive power, see *Williams* (2012) 248 CLR 156; *Pape* (2009) 238 CLR 1. But see *Cadia* (2010) 242 CLR 195, 206–7 [21] (French CJ) upholding the common law basis of the prerogative of the Crown in right of New South Wales in 'mines of gold and silver'.

51 Support for this hypothesis can be found in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 303 FLR 87, 114–15 [128]–[133] ('*NSW Aboriginal Land Council*'), finding that 'there is nothing to suggest that the newly constituted colonies would operate on the basis that all executive action on Crown land would be unlawful unless authorised by statute': at 114, [130] (Leeming JA), and that s 2 of the *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54 '*expressly* proceeds on the basis that it does not abrogate the prerogative rights of the Crown in respect of waste lands … Far from impliedly abrogating that prerogative, s 2 proceeds on the basis that it continued': *NSW Aboriginal Land Council* (2015) 303 FLR 87, 115 [132] (emphasis in original) (Leeming JA).

52 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

Australian colonies were established and became self-governing. This implication has not yet been tested in court. Likewise, while it is clear that Commonwealth legislation may validly limit a state executive in the exercise of a prerogative,[53] including the 'state prerogative in relation to wastelands of the Crown',[54] the question of whether s 109 of the *Australian Constitution* invalidates exercises of State executive power that are 'inconsistent' with federal executive power (where there is no inconsistent federal legislation) is contentious and has not yet been resolved.[55] The most that can be said, then, is that the executive powers of the states, including those relating to land, are likely to be regarded as more dependent on underlying common law, and therefore potentially wider in scope, than the federal executive powers constrained by s 61. This suggests that because common law prerogatives to deal in land (including Indigenous land), were inherited by the colonies and for the most part not expressly given up to the Commonwealth in federation, any common law *duties* that accompany powers to deal with and make grants of land are similarly likely to be regarded as vesting primarily in the Crowns in right of the states. The effective concurrency and dispersion of the state–Indigenous relationship among the Australian state Crowns and the Federal Executive, then, could mirror that introduced in Canada by the Supreme Court's findings in *Tsilhqot'in Nation,* discussed below. Within the parameters of paramountcy, there seems no reason why a unified Australian common law could not attach (uniform) fiduciary duties to the state Crowns in the exercise of their power over Indigenous peoples.

It is clear from native title jurisprudence, at least, that it is the Crowns in right of the states that are primarily responsible for making the inconsistent grants and acquisitions that extinguished native title before and after Federation.[56] The first High Court case to recognise native title in Australia, *Mabo (No 2)*, confirmed that '[a]fter Federation, the power of the Crown to deal with land in Queensland and to extinguish native title by inconsistent grant remained in the Crown in right of the State'.[57] In the lead judgment, Brennan J explained the scope and limitations of the powers of a state to 'alienate [and] appropriate to itself' the waste lands of the Crown.[58] In the course of doing so, His Honour illustrated the overlap in Australian legal thought between the concepts of 'the Executive Government' and 'the Crown' in references to state governments:

> In Queensland, these powers are and at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the [s]tate in force from time to time. The power of alienation and the power of appropriation vested in the Crown in

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53 *Tasmanian Dam Case* (1983) 158 CLR 1, 140 (Mason J).

54 Ibid 141 (Mason J). See also ibid 214–15 (Brennan J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 92–3 (Mason J); *Mabo (No 2)* (1992) 175 CLR 1, 52 (Brennan J).

55 Carney, above n 34, 315; Leslie Zines, 'Commentary' in H V Evatt, *The Royal Prerogative* (Law Book, 1987) C11.

56 The Federal Commonwealth is also, of course, capable of effecting such extinguishments in the exercise of its constitutional powers to acquire property on just terms: *Australian Constitution* s 51(xxxi); see, eg, *Queensland v Congoo* (2015) 147 ALD 1.

57 *Mabo (No 2)* (1992) 175 CLR 1, 115 (Deane and Gaudron JJ).

58 Ibid 70.

> right of a [s]tate are also subject to the valid laws of the Commonwealth, including the *Racial Discrimination Act*. Where a power has purportedly been exercised as a prerogative power, the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case.[59]

The line between the respective jurisdictions of the Australian Commonwealth and state governments in matters involving Indigenous interests has been the subject of several high-profile High Court determinations. These have involved challenges to Commonwealth legislation enacted under the external affairs power[60] or the race power that is perceived to encroach on the land management powers of the states.[61] The race power is of particular import, since in its post-1967 form it can provide a basis for the enactment by the Commonwealth of special beneficial laws for Indigenous peoples. Paramountcy of federal legislation could have approximated in Australia the exclusive federal jurisdiction exercised in Indigenous affairs by the governments of Canada and the United States ('US') (and New Zealand by virtue of its unitary government). As will be shown, the Australian High Court has not embraced this conception of the race power, although the leadership shown by the Commonwealth in the enactment of beneficial federal legislation affecting Indigenous peoples, especially the *Native Title Act* and *RDA* cannot be discounted. The High Court, however, has not been willing to confine the Commonwealth in the exercise of the race power to the enactment of beneficial laws, nor has it included in its jurisprudence any reference to consultative obligations that could attend or limit the exercise of the power.

The race power grants to the Commonwealth the 'power to make laws for the peace, order, and good government of the Commonwealth with respect to … the people of any race for whom it is deemed necessary to make special laws'.[62] The phrase 'other than the aboriginal race in any [s]tate' was excised from s 51(xxvi) by the *Constitution Alteration (Aboriginals) Act 1967* (Cth), which was enacted as the result of an overwhelming affirmative vote in a constitutional referendum proposing the change. There seems no doubt that the original provision permitted the enactment of laws that were either beneficial or detrimental to the members of a particular race (albeit while reserving to the States the power to make such laws for the people of 'the aboriginal race').[63] Significantly, the power has been used by the Commonwealth only to enact legislation for Indigenous peoples.[64] However, in cases considering the exercise of the race power, the High Court has failed to conclusively determine the scope of the provision. In particular, while some judges have admitted the possibility that legislation could be ultra vires the power on its terms, there is no majority ruling on the subsidiary question of

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59 Ibid.

60 *Australian Constitution* s 51(xxix) ('*external affairs power*').

61 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Tasmanian Dam Case* (1983) 158 CLR 1; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*').

62 *Australian Constitution* s 51(xxvi).

63 See *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 402–3 [135]–[136] (Kirby J).

64 See, eg, *Native Title Act*; *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (later amended by the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth) to become the *Aboriginal and Torres Strait Islander Act 2005* (Cth)).

whether the power is confined to laws that benefit, rather than burden, members of a particular race, or should be so confined when used to enact laws for Indigenous peoples. The High Court has dismissed an argument that the Commonwealth's powers should be conditioned by an implied right of substantive equality, noting that the race power itself contemplates 'some legislative inequality' and 'destroy[s] the argument that all laws of the Commonwealth must accord substantive equality to all people irrespective of race'.[65] When the matter was directly argued before the Court in the *Hindmarsh Island Bridge Case*, of the four judges who considered the scope of the race power, two decided the power was not confined to beneficial laws (Gummow and Hayne JJ), and two admitted the possibility that some laws operating to the disadvantage of Indigenous peoples would be ultra vires the power (Gaudron J and Kirby J, the latter dissenting in the result).[66] As it stands, it seems that the Commonwealth's race power is now definitively limited only by the requirement that it be deployed in the enactment of a law deemed 'necessary' (as opposed to 'expedient or appropriate')[67] and that it be a 'special law' in the sense that it either 'confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race'[68] or is a law of general application that is of special significance to such persons.[69] The majority of the High Court in the *Native Title Act Case* raised the possibility that, in some circumstances, legislation purported to be enacted under the race power would be invalidated as a 'manifest abuse' of that power.[70] This possibility was accepted by Gummow, Hayne and Gaudron JJ in the *Hindmarsh Island Bridge Case,* but not

65 *Kruger v Commonwealth* (1997) 190 CLR 1, 44–5 (citation omitted) (Brennan CJ).

66 (1998) 195 CLR 337. Brennan CJ and McHugh J dismissed the appeal in a joint judgment without considering limitations on the scope of the race power: at 355–6 [13], 356–7 [15]. Gaudron J at 367 [44] thought the words 'for whom it is deemed necessary to make special laws' must operate to limit the scope of s 51(xxvi) and was of the view that while the power permitted laws that operated to the disadvantage of the people of a particular race 'it is difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid. Her Honour added at 367 [44] (citation omitted) that

> [i]t is even more difficult to conceive of a present circumstance pertaining to Aboriginal Australians which could support a law operating to their disadvantage. To put the matter another way, prima facie, at least, the circumstances which presently pertain to Aboriginal Australians are circumstances of serious disadvantage, which disadvantages include their material circumstances and the vulnerability of their culture. And prima facie, at least, only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances.

Gummow and Hayne JJ, in their joint judgment at 378 [82], and Gaudron J at 366–7 [42], left open the possibility that a law passed in 'manifest abuse' of the race power would not be upheld. Kirby J, in dissent found that the race power 'permits special laws for people on the grounds of their race. But not so as adversely and detrimentally to discriminate against such people on that ground': at 417 [165]. See also George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 (Winter) *Osgoode Hall Law Journal* 643, 656–7.

67 See *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 365–6 [40] (Gaudron J).

68 *Western Australia v Commonwealth* (1995) 183 CLR 373, 461 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*').

69 Ibid; *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 366 [40] (Gaudron J); *Tasmanian Dam Case* (1983) 158 CLR 1, 110 (Gibbs CJ): 'A law will be special if it has some special connection with the people of a race; it will not answer that description if it applies equally to people of all races'.

70 *Native Title Act Case* (1995) 183 CLR 373, 460 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

thought applicable to the challenged statute in either case.[71] The circumstances under which a law might constitute a 'manifest abuse' of the race power remain undetermined.

At first glance, the convoluted history of Australian federalism in Indigenous affairs, coupled with the concurrency of the race power and the High Court's agnosticism on its scope, seems to complicate the task of identifying a fiduciary Crown or Crowns. It is true that these questions do not arise in the same way in the Canadian Federation, because ostensibly exclusive responsibility to legislate for Indigenous peoples is vested in the Federal Government by s 91(24) of the *Constitution Act 1867*,[72] affirming the 'exclusive legislative authority of the parliament of Canada' over 'Indians and lands reserved for the Indians'.[73] This provision excises primary federal jurisdiction over Indian reserve lands, and importantly, Aboriginal title lands,[74] from the provinces' enumerated and residuary powers to enact laws for the regulation of 'property and civil rights in the province'.[75] However, a recent decision of the Canadian Supreme Court has introduced a degree of concurrency into the federal division of powers in state–Indigenous relations. Canadian federalism in Indigenous affairs has moved a step closer to that of Australia, while retaining the principle of the honour of the Crown and related fiduciary duties, a fact that augers in favour of the applicability of those principles in a federation like Australia's.

While the Canadian provinces have long been able to pass laws of general application that impact on Indians and reserved lands, the doctrine of inter-jurisdictional immunity has ensured that they could not pass laws encroaching on the 'core' of the federal government's powers under s 91(24) — that is, laws relating exclusively or directly to Indians and to the 'core of Indianness'.[76] Additionally, while provincial laws of general application apply to 'Indians in the province' via s 88 of the federal *Indian Act*,[77] and the Supreme Court has accepted that this did not extend to the provinces the power to extinguish Aboriginal title, until recently questions remained about the power of the provinces to regulate Indian lands within their territories.[78] The 2014 Supreme Court case *Tsilhqot'in Nation* has clarified this aspect of Canadian federalism, finding that provincial regulation of forestry on Aboriginal title land in British Columbia was not precluded by inter-jurisdictional immunity, so that 'provincial regulation of general

71 *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 366–7 [42] (Gaudron J), 378 [82] (Gummow and Hayne JJ).

72 *Constitution Act 1867*, (Imp) 30 & 31 Vict, c 3 ('*Constitution Act 1867*').

73 The Canadian Supreme Court's judgment in *Daniels v Canada* [2016] SCC 12 (14 April 2016) determined that Métis peoples and non-status Indians are also 'Indians' under s 91(24) of the *Constitution Act 1867*, but the impact of the decision on the federal and provincial jurisdiction is not yet known. In the US, Congress has plenary powers to legislate for Indians, a power derived from the 'commerce clause': *United States Constitution* art I § 8 empowers Congress to 'regulate Commerce … with the Indian Tribes'.

74 *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1117 ('*Delgamuukw*').

75 *Constitution Act 1867* s 92(13).

76 *Dick v R* [1985] 2 SCR 309, 326. See also *Delgamuukw* [1997] 3 SCR 1010, 1119 'provincial laws which single out Indians for special treatment are *ultra vires*'.

77 *Indian Act,* RSC 1985, c I-5 ('*Indian Act*').

78 *Delgamuukw* [1997] 3 SCR 1010, 1122. See also Kent McNeil, 'Aboriginal Title and Section 88 of the *Indian Act*' (2000) 34(1) *University of British Columbia Law Review* 159.

application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework'.[79]

Tsilhqot'in Nation provides the first positive determination of Aboriginal title in Canada. It affirms that Aboriginal title is an expansive and commercially valuable property right that 'confers ownership rights similar to those associated with fee simple'.[80] Aboriginal title holders have the right to 'exclusive use and occupation of the land … for a variety of purposes',[81] which are not limited to purposes 'integral to the distinctive culture of the [A]boriginal group claiming the right'.[82] Consequently, 'title holders have the right to the benefits of the land — to use it, enjoy it, and profit from its economic development'[83] (as long as those uses are reconcilable with 'the nature of the group's attachment to that land').[84] The case, accordingly, draws attention to the potential for Aboriginal title to expand the scope of federal jurisdiction within the territories of the provinces. This is especially the case in British Columbia, where the lack of treaties means that Aboriginal title claims have been lodged over most of the province's land mass. It is likely for this reason that, in the course of making the determination, the Court also reconfigured Canadian federalism in land management and Indian affairs. It did so by finding that s 35 of the *Constitution Act 1982*, protecting Aboriginal and treaty rights, 'displaces' the doctrine of inter-jurisdictional immunity.[85] Effectively, Aboriginal title lands do not fall within the protected 'core' of federal jurisdiction established by s 91(24).[86] The *Tsilhqot'in Nation* judgment thus confirms that 'honour of the Crown' duties also apply to the provincial governments in the exercise of their legislative powers.[87] Provincial governments may pass laws of general application that impact on Indians and Indians lands (including Aboriginal title lands) in the absence of inconsistent federal legislation, provided that they meet the justification test required by s 35 of the *Constitution Act 1982* by fulfilling their 'procedural duty [which] arises from the honour of the Crown',[88] to 'consult with the group asserting title and, if appropriate, accommodate their interests'.[89] Once Aboriginal title is established, incursions are permitted only if

79 [2014] 2 SCR 257, 318 [150].
80 Ibid 293 [73] (McLachlin CJ).
81 Ibid 292 [70] (McLachlin CJ), quoting *Delgamuukw* [1997] 3 SCR 1010, 1083 [117] (Lamer CJ).
82 *Tsilhqot'in Nation* [2014] 2 SCR 257, 273–4 [15] (McLachlin CJ), quoting *Delgamuukw* [1997] 3 SCR 1010, 1083 [117] (Lamer CJ). This test is the so-called 'Van der Peet test' that applies in determinations of Aboriginal rights (but not, as the Court notes, in determinations of Aboriginal title): *R v Van der Peet* [1996] 2 SCR 507, 549 [46] (Lamer CJ).
83 *Tsilhqot'in Nation* [2014] 2 SCR 257, 292 [70] (McLachlin CJ).
84 *Delgamuukw* [1997] 3 SCR 1010, 1083 [117] (Lamer CJ). For example, the land 'cannot be alienated in a way that deprives future generations of the control and benefit of the land' *Tsilhqot'in Nation* [2014] 2 SCR 257, 274 [15].
85 *Tsilhqot'in Nation* [2014] 2 SCR 257, 269 [2] (McLachlin CJ).
86 Ibid 318 [151] (McLachlin CJ) 'the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title'.
87 Ibid 295–6 [80], 301 [95], 305 [113] This had earlier been expressly stated in *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 540 [59] ('*Haida Nation*'), where the Court noted that since '[t]he duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty'.
88 *Tsilhqot'in Nation* [2014] 2 SCR 257, 295 [78] (McLachlin CJ).
89 Ibid 269 [2], 295 [78] (McLachlin CJ).

the procedural requirement has been met, and then 'only with the consent of the Aboriginal group'[90] or alternatively where 'government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups'.[91] In this way, *Tsilhqot'in Nation* can be seen as a move towards concurrency in the conduct of the Canadian Crown–Indigenous relationship.[92]

Tsilhqot'in Nation, then, provides some support for the proposition that, although the Australian Commonwealth Government does not have, and never has had, exclusive jurisdiction to make laws for Indigenous peoples, the principles of the honour of the Crown and attendant fiduciary duties could operate effectively at the state level. However, as noted, in its race power and *RDA* jurisprudence, the High Court of Australia has so far failed to accept that the Australian Commonwealth and state Crowns have distinctive relational or consultative obligations to Indigenous peoples. Could the Australian common law of native title provide a seedbed for the development of general fiduciary duties that would support such obligations? If so, could these evolve into a general constitutional principle akin to the honour of the Crown? To date, the 'honour of the Crown' is an unknown concept in Australian jurisprudence. The possibility of a general fiduciary duty on the part of Australian governments towards Indigenous peoples has, however, been discussed in several cases, most promisingly and authoritatively by Toohey J in *Mabo (No 2),* and has not been rejected by a majority of the High Court. In the following section, I review the content of Crown–Indigenous fiduciary relationship and the principle of the honour of the Crown in Canadian and New Zealand jurisprudence, and then show how these concepts have so far been approached in Australian jurisprudence.

IV Fiduciary Duty as a Concomitant of Aboriginal and Native Title

In New Zealand and Canada, courts have expanded the private law equitable concept of a fiduciary relationship to provide a set of principles applicable to the Crown in its dealings with Indigenous peoples. The extension of private law principles to this relationship has not been comprehensive. Courts have been careful to draw attention to the sui generis character of the Crown–Indigenous relationship, and to the use of private law concepts as 'analogies', rather than directly applicable legal rules. Thus, in New Zealand, the Court of Appeal has described the Treaty partnership as one characterised by 'responsibilities analogous to fiduciary duties',[93] and has held that 'the Treaty [of Waitangi] created an enduring relationship of a fiduciary nature akin to a partnership'.[94] In a recent Court of Appeal case, judges were careful to emphasise that

[90] Ibid 269 [2], 294 [76] (McLachlin CJ).
[91] Ibid 319 [152] (McLachlin CJ). See also ibid 318 [150] (McLachlin CJ).
[92] Ibid 317 [148] (McLachlin CJ).
[93] *New Zealand Maori Council 1987* [1987] 1 NZLR 641, 664 (Cooke P).
[94] *Te Runanga* [1993] 2 NZLR 301, 304 (Cooke P).

> [t]he law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty: good faith, reasonableness, trust, openness, and consultation. But it does so by analogy, not by direct application.[95]

In the same case, the Court denied that the Crown has a 'fiduciary duty in a private law sense that is enforceable against the Crown in equity', observing the difficulties that could arise from the direct application of private law fiduciary duties to the Crown in its dealings with Maori, including 'difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Maori under the Treaty, has a duty to the population as a whole' especially 'where [the Crown's] duty to one Maori claimant group conflicts with its duty to another'.[96]

Similarly, in Canada, the Crown's fiduciary duty to Indigenous Canadians has been described as 'trust-like',[97] and as a 'special trust relationship'[98] that is 'not a private law duty in the strict sense', but is 'is nonetheless in the nature of a private law duty'.[99] The concept of the Crown as a fiduciary via-á-vis Aboriginal peoples has been developed in a series of Supreme Court cases considering the obligation of the Crown in dealings with Indian interests in land. These cases have influenced jurisprudence and policy in Australia and New Zealand, although predictably, in different ways. *Guerin* marked the beginning of an important body of jurisprudence on Crown–Aboriginal relations that developed following the enactment of the *Constitution Act 1982* and in which the Crown's moral and political obligations were transformed into legally actionable commitments (although in *Guerin*, the Charter and the Aboriginal rights provision in s 35 of the *Constitution Act 1982* were not directly in question).[100] The Supreme Court navigated a middle path between the concept of a general public law duty that might otherwise fall to be dealt with as a matter of administrative law, and a private law duty of the kind accompanying traditional trust and fiduciary relationships. As a sui generis set of obligations, the Court held that the relationship in question in *Guerin* was not properly characterised as a 'trust' and resort to the private law of trusts was unnecessary. Justice Dickson, for example, was of the view that the Crown's obligation 'does not amount to a trust in the private law sense. It is rather a fiduciary duty',[101] albeit one that is 'trust-like in character'.[102]

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95 *New Zealand Maori Council 2008* [2008] 1 NZLR 318, 337 (O'Regan J).

96 Ibid 338 (O'Regan J). Cf the approach taken by the Canadian Supreme Court in *Wewaykum Indian Band v Canada* [2002] 4 SCR 245, 293–5 (Binnie J) ('*Wewaykum*'):

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting … as a fiduciary, it was the Crown's duty to be even-handed towards and among the various beneficiaries.

97 *Guerin* [1984] 2 SCR 335, 386 (Dickson J).

98 *R v Sparrow* [1990] 1 SCR 1075, 1114 (Dickson CJ) ('*Sparrow*').

99 *Guerin* [1984] 2 SCR 335, 385 (Dickson J).

100 [1984] 2 SCR 335.

101 Ibid 376.

102 Ibid 386.

Crucially, then, while the Supreme Court confirmed that the Crown, in its regulatory 'legislative or administrative' functions, was not normally viewed as a fiduciary, the fact that the Indian property interests were 'independent legal interest[s]' and 'not a creation of either the legislative or executive branches of government'[103] meant that the relationship could be approached through a narrower lens, on its own terms, as a particular set of duties arising from the 'historic reality' of Crown discretionary power in dealings with Indian property.[104] In *Guerin*, a First Nation had surrendered surplus reserve lands to the Crown so that they could be leased (such lands being inalienable except to the Crown), but the lease was concluded in terms less favourable than those accepted by the First Nation when they surrendered the land. While the *Indian Act* obliged the Crown to exercise its discretion for the 'benefit of the respective Band',[105] the fiduciary obligation of the Crown did not arise from the relevant provision of the Act, but instead, '[had] its roots in the [A]boriginal title of Canada's Indians,'[106] and arose from the fact that 'the Indian interest in the land is inalienable except upon surrender to the Crown'.[107] In this way, the Canadian Supreme Court locates the '*Guerin*-type' fiduciary relationship firmly within the doctrines of the common law — specifically, the doctrine of Aboriginal title. It does not locate the trust in the express, discreet voluntary assumption of responsibility by the Crown in particular cases, in treaties, or via its legislative mandates.

In more recent cases, the Canadian Supreme Court has expanded the *Guerin* concept of sui generis trust-like fiduciary duties to *include* the obligations established by s 35 of the *Constitution Act 1982*.[108] Thus, the G*uerin* principle of the Crown's 'trust-like' fiduciary duties to Aboriginal peoples was adapted in *Sparrow* and later cases to provide a 'general guiding principle'[109] for the interpretation of s 35(1), which protects the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada'.[110] This broader conception has been described as the duty to act in accordance with the 'honour of the Crown', a 'constitutional principle'[111] that encompasses, but extends beyond, specific fiduciary duties that might attach to particular Aboriginal interests.[112] Importantly for the purposes of this article, the 'honour of the Crown' is the source of the duty of provincial and federal governments to consult with Aboriginal peoples and accommodate their interests, even where those interests are 'unproven'.[113] The duty arises when 'the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it',[114]

103 Ibid 385 (Dickson J). See the affirmation of this point in *Manitoba* [2013] 1 SCR 623, 655–6 [58]: 'An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, legislation. Rather, it is predicated on historic use and occupation'.
104 *Guerin* [1984] 2 SCR 335, 349 (Wilson J).
105 *Indian Act* s 18(1).
106 *Guerin* [1984] 2 SCR 335, 349 (Wilson J).
107 Ibid 376 (Dickson J).
108 *Wewaykum* [2002] 4 SCR 245, 284 (Binnie J).
109 *Sparrow* [1990] 1 SCR 1075, 1108 [35] (Dickson CJ).
110 *Constitution Act 1982*.
111 *Beckman v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103, 130 [42] (Binnie J).
112 See especially *Manitoba* [2013] 1 SCR 623.
113 *Haida Nation* [2004] 3 SCR 511, 530 [37] (McLachlin CJ).
114 Ibid 529 [35] (McLachlin CJ).

and is calibrated to match 'the strength of the case supporting the existence of the right or title, and … the seriousness of the potentially adverse effect upon the right or title claimed'.[115] In other words, the procedural obligation to consult, derived from the 'honour of the Crown' does not depend on the existence of a proven Aboriginal right that could support a particular fiduciary duty. The 'honour of the Crown', rather, is a broadly framed constitutional principle that encompasses all Crown dealings with Aboriginal peoples. It entails a duty to consult them with respect to acts that impact on their claimed interests, a duty to appropriately accommodate those interests, and a duty to enforce positive law in light of the Crown's obligations, so that '[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably'.[116] The Canadian Supreme Court has stated, for example, that

> the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown.[117]

The scope of the principle thus extends beyond duties attributable to proven or existing Aboriginal property rights. This is the ideal to which Australia should aspire, especially in the absence of comparable relational or consultative duties in extant public law on Crown–Indigenous relations, the lack in Australia of state–Indigenous treaties that could supply such a duty, and the imperative of establishing a just constitutional relationship between Aboriginal and Torres Strait Islanders and Australian governments. The starting point may be, as it was in Canada, fiduciary duties arising from the Crown's dealings with native title.

The Canadian Supreme Court's findings on the *source* of the principle of the 'honour of the Crown' (and specifically whether it precedes the constitutional recognition of Aboriginal rights in s 35) have been couched in less than direct language. However, it is clear at least that '[t]he duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation'[118] and is 'engaged by'[119] and 'enshrined in' s 35.[120] The principle derives from the political and moral import of the act of sovereign acquisition itself. Thus the honour of the Crown arises 'from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people',[121] and is *supported by* the *Royal Proclamation 1763*[122] and by s 35.[123] It is also clear that the duties that 'flow from the honour of the Crown var[y] with the situation in which it is engaged' and that 'what constitutes

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115 Ibid 531 [39] (McLachlin CJ).
116 Ibid 522–3 [17] (McLachlin CJ).
117 *R v Badger* [1996] 1 SCR 771, 793–4 [41] (Cory J).
118 *Manitoba* [2013] 1 SCR 623, 659 [66] (McLachlin CJ and Karakatsanis J).
119 Ibid 660 [69] (McLachlin CJ and Karakatsanis J).
120 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, 563–4 [24] (McLachlin CJ).
121 *Haida Nation* [2004] 3 SCR 511, 528 [32], cited in *Manitoba* [2013] 1 SCR 623, 658 [66] (McLachlin CJ and Karakatsanis J).
122 *Royal Proclamation,* RSC 1763, App 11 No 1 ('*Royal Proclamation 1763*').
123 *Manitoba* [2013] 1 SCR 623, 658–9 [66] (McLachlin CJ and Karakatsanis J).

honourable conduct will vary with the circumstances'.[124] Accordingly, the application of the honour of the Crown principle does not dictate any specific fiduciary obligations on the part of the Crown. This approach was recently confirmed by the Supreme Court in *Manitoba*.[125] According to the Court, while the relationship between Aboriginal peoples (in this case, the Métis) and the Crown 'viewed generally, is fiduciary in nature', this does not mean that 'all dealings between parties in a fiduciary relationship are governed by fiduciary obligations'.[126] The honour of the Crown, including an obligation to consult, is at stake in all Crown's dealings with Aboriginal peoples. However, actionable fiduciary duties only arise in circumstances where the Crown has either assumed discretionary control over Aboriginal interests (those based on historic use and occupation) or has undertaken 'to act in the beneficiaries' best interests in the nature of a private law duty',[127] which entails an undertaking to protect Aboriginal interests 'in priority to other legitimate concerns'.[128] Accordingly, it seems likely that, if Canadian jurisprudence is to be taken as a guide, the best possible basis for the development of a general fiduciary obligation on the part of the Australian Crowns vis-à-vis Indigenous peoples would be found in the Crowns' dealings with existing native title rights or other Aboriginal interests in land. This, indeed, is the tenor of Australian jurisprudence to date, as will be seen in Part V below.

In New Zealand, the *Treaty of Waitangi* has provided a powerful fulcrum for the development of constitutional principles governing the relationship between the Crown and Maori. In a series of cases addressing legislative references to the principles of the Treaty, New Zealand courts have elaborated a concept of the Treaty 'partnership'. In the landmark case *New Zealand Maori Council v Attorney-General*, Cooke P observed that 'the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties'.[129] Canadian jurisprudence has also been received into that body of principle. The New Zealand Court of Appeal has noted that '[t]here are constitutional differences between Canada and New Zealand, but the *Guerin* judgments do not appear to turn on these', and has asserted that

> in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America.[130]

In a later case, Cooke P emphasised the relevance of comparative common law in this field, noting that

> the opinions expressed in this Court in the cases already mentioned as to fiduciary duties and a relationship akin to partnership have now been further

124 Ibid 663 [74] (McLachlin CJ and Karakatsanis J).
125 [2013] 1 SCR 623.
126 Ibid 652 [48] (McLachlin CJ and Karakatsanis J). See also *Wewaykum* [2002] 4 SCR 245, 288 [83] (Binnie J).
127 *Manitoba* [2013] 1 SCR 623, 657 [61] (McLachlin CJ and Karakatsanis J).
128 Ibid 657 [62] (McLachlin CJ and Karakatsanis J).
129 [1987] 1 NZLR 641, 664.
130 *Te Runanga o Muriwhenua Inc v A-G (NZ)* [1990] 2 NZLR 641, 655 [47]–[48] (Cooke P). A view endorsed more recently by Elias CJ in *Paki v A-G (NZ) (No 2)* [2015] 1 NZLR 67 124 [152] ('*Paki (No 2)*').

> strengthened by judgments in the Supreme Court of Canada and the High Court of Australia. In these judgments there have been further affirmations that the continuance after British sovereignty and treaties of extinguished aboriginal title gives rise to a fiduciary duty and a constructive trust on the part of the Crown … [citing *Sparrow*, and Toohey J's judgment in *Mabo (No 2)*]. The other judgments in the High Court of Australia are less definite on the fiduciary question … but clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty. In New Zealand the Treaty of Waitangi is major support for such a duty.[131]

Since the *Treaty of Waitangi* itself does not generate justiciable rights unless it or its principles are referred to in legislation,[132] judicial consideration of the fiduciary nature of the Crown's obligations to Maori has not proceeded far outside of debates about the statutory interpretation of 'Treaty clauses'. To date, then, the Treaty has not provided a source of actionable rights absent an express legislative reference to the Treaty.[133] The concept of Crown–Maori fiduciary duties was, however, recently revisited in the obiter dicta comments of several Supreme Court Judges in *Paki (No 2)*) (2015).[134] McGrath J noted that

> the unique nature of the relationship between the Crown and Maori may mean it is appropriate to recognise the existence of a sui generis fiduciary duty even though the application of general equitable principles developed in relation to private commercial transactions or relationships may not give rise to such a duty… [so that] a sui generis fiduciary duty would arise between the Crown and certain Maori, in the circumstances of particular situations, and against the background of the relationship constituted by the Treaty of Waitangi.[135]

Likewise, Elias CJ observed that the Crown's obligations to Maori may have a basis in the common law aside from its undertakings in the *Treaty of Waitangi*,[136] and may be broader than the understandings of fiduciary duty in private law, noting that:

> The language of 'fiduciary' obligations is now familiar in connection with the dealings between the sovereign and [I]ndigenous peoples, including in decisions of the courts in New Zealand. Although a usual characteristic of a fiduciary is loyalty, a fiduciary duty in the sense in which it has been recognised in respect of [I]ndigenous people in New Zealand and in Canada does not seem to depend on a relationship characterised by loyalty.[137]

At least one judge, however, indicated that he would be reluctant under any circumstances to draw on the law of private law fiduciary duties to characterise the

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131 *Te Runanga* [1993] 2 NZLR 301, 306 (Cooke P).

132 Although it may be used as 'extrinsic material' in statutory interpretation. See, eg, *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184.

133 See Paul McHugh, 'What a Difference a Treaty Makes — The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15(2) *Public Law Review* 87, 92.

134 [2015] 1 NZLR 67.

135 Ibid 133 [186] (McGrath J).

136 Ibid 124–5 [154] (Elias CJ): 'As *Re the Lundon and Whitaker Claims Act* indicates, whether the Crown is in breach of obligations derived from the common law as well as from the Treaty of Waitangi would require inquiry into the extent of the proprietary interest as a matter of custom.'

137 Ibid 125 [155] (Elias CJ).

Crown's obligations to Maori, and did not accept that such duties could independently generate equitable remedies through direct enforcement. Having questioned whether the Crown could be said to owe 'a duty of absolute loyalty' to Maori, William Young J noted that

> counsel for the appellants were not able to … point to cases in which the special rules applying to bargains between 'ordinary' fiduciaries and their beneficiaries — and, most relevantly, a requirement of retrospective justification — have been applied otherwise than where a duty of loyalty was owed.[138]

Beyond statements of principle, however, so far much of the need for a fully developed fiduciary conception of the Crown–Maori relationship has been obviated by the commencement of the *Treaty of Waitangi* settlements process. New Zealand has no statute governing the settlements process that could serve as a basis for legislative judicial review,[139] and so no 'Treaty clause' that would guide the development of Treaty principles directly related to the conduct of the Crown in the negotiation and settlement of claims. Having set out the principles of the *Treaty of Waitangi* in several major Court of Appeal judgments, the courts have remained reluctant to review the use of executive discretions during claims negotiations, including decisions on the recognition of claimant representatives and the boundaries of claimant communities,[140] and proposals related to the introduction of Treaty settlement legislation.[141] Similarly, legislation giving effect to Treaty settlement agreements (Deeds of Settlement) seems not to be subject to ordinary rules of parliamentary procedure.[142] This suggests that, while New Zealand judges are receptive to the fiduciary concepts developed in Canadian law, and to the idea of the honour of the Crown, for now, equitable remedies arising from the direct enforcement by Maori of fiduciary duties against the Crown are an unlikely prospect. The dominance of the *Treaty of Waitangi* as a source of principle, coupled with judicial and legislative deference to the executive in Treaty claims settlement, have curbed New Zealand reliance on Canadian precedent. What are the prospects for such borrowing in Australia?

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[138] Ibid 159 (William Young J). See also the relevant obiter dicta in *New Zealand Maori Council 2008* [2008] 1 NZLR 318, 337–8 (O'Regan J).

[139] Although the *Treaty of Waitangi Act 1975* establishes the Waitangi Tribunal, a permanent Commission of Inquiry tasked with making recommendations to the Crown on Maori claims under the *Treaty of Waitangi*: see the comments of McGrath J and William Young J in *Paki (No 2)* [2015] 1 NZLR 67, 134–5 [192–4] (McGrath J), 160 [288] (William Young J).

[140] See, eg, *Hayes* [2001] NZHC 354 (10 May 2001) [17].

[141] *Te Runanga* [1993] 2 NZLR 301. See also *Milroy v A-G (NZ)* [2005] NZAR 562.

[142] See for example, Ngati Ruanui Claims Settlement Bill 2002 (215-2) (Maori Affairs Committee) 2, discussed in Kirsty Gover, 'The Politics of Descent: Adoption, Discrimination and Legal Pluralism in the Treaty Claims Settlements Process' [2011] (2) *New Zealand Law Review* 261.

V The Fugitive Fiduciary: Jurisprudential and Conceptual Hesitancy in Australia

The possibility that a general fiduciary relationship between the Australia Crowns and Indigenous peoples might yet form part of Australian common law has not been authoritatively foreclosed.[143] Given the inadequacies of race power and 'special measures' jurisprudence, it is timely to revisit the advent of native title in *Mabo (No 2)*, and to consider more thoroughly Toohey J's finding that relational duties can be imposed by courts to condition the enormous power exercised by the Australian Crowns over Indigenous property rights. In this section, I consider the import of Toohey J's reasons, and then consider how his judgment has been received by later courts.

When the doctrine of Aboriginal title was first recognised in Australia common law, there was an opportunity for the High Court to elaborate on a collateral doctrine of fiduciary duty. However, *Mabo (No 2)* is inconclusive on the question of the Crown's fiduciary duty (in this case, the Crown in right of Queensland), and the claim that such a general duty existed was not squarely addressed in that case.[144] Instead, the possibility of a general fiduciary duty was raised by the claimants as an alternative to the native title claim, and with the exception of Toohey J, the judges gave it only cursory consideration. Justice Brennan thought a fiduciary duty may arise in a classically private law context, where native title has been surrendered in expectation of a grant of tenure, but that it was 'unnecessary to consider the existence or extent of such a fiduciary duty in this case'.[145] Justices Deane and Gaudron held that legal and equitable remedies would be available to protect native title once recognised, and that 'actual or threatened interference [with the enjoyment of native title] can, in appropriate circumstances, attract the protection of equitable remedies', including, where appropriate, the imposition of a constructive trust.[146] Justice Dawson found that native title did not exist on the claimed territory, but left open the possibility that a fiduciary duty may arise where native title (or some other '[A]boriginal interest' in land) exists:

> [O]nce it is accepted, as I think it must be, that aboriginal title did not survive the annexation of the Murray Islands, then there is no room for the application of any 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.[147]

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[143] See Larissa Behrendt, 'Responsibility in Governance: Implied Rights, Fiduciary Obligation and Indigenous Peoples' (2002) 61(2) *Australian Journal of Public Administration* 106, 115–6.

[144] Camilla Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16(1) *University of New South Wales Law Journal* 70, 75. See also David Tan, 'The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune?' (1995) 69(6) *Australian Law Journal* 440.

[145] *Mabo (No 2)* (1992) 175 CLR 1, 60.

[146] Ibid 113.

[147] Ibid 166–7.

Justice Toohey's judgment, however, provides a tantalising outline of how a general Crown–Indigenous fiduciary relationship might develop in Australia.[148] His Honour provided a compelling and thorough exegesis that deserves more critical attention than it has received so far. For this reason, I draw attention now to the logic of Toohey J's reasoning in *Mabo (No 2)* and to the use he made of Canadian precedent.

In response to the argument that there was no legal source for a fiduciary duty on the part of the Crown vis-à-vis the Indigenous claimants, Toohey J pointed to evidence of a 'policy of protection' in Australian legislation and executive action.[149] His Honour referred first to 'more general indications' of such a policy, including 'the stated policy of protection underlying the condemnation of purported purchases of land by settlers from Aborigines'[150] (referencing the 'John Batman incident')[151], and noting that

> even the general presumption that the British Crown will respect the rights of indigenous peoples occupying colonized territory … itself indicates that a government will take care when making decisions which are potentially detrimental to aboriginal rights.[152]

His Honour further noted that, aside from the general policy of protection discernible in Australian law, the 'course of dealings by the Queensland Government with respect to the [Meriam] Islands since annexation' would, by itself, ground its fiduciary obligation to the Meriam Islanders.[153] In support of this proposition, His Honour noted the creation of reserves on the islands, the appointment of trustees to manage those territories, and the range of welfare legislation enacted to regulate the lives of the Meriam Islanders themselves.[154]

Crucially then, according to Toohey J, the existence of a fiduciary obligation did not turn on the content of an express (voluntary) trust. Rather, His Honour said, 'the kind of fiduciary obligation imposed on the Crown is that of a constructive trustee',[155] and '[t]he obligation relevant in the present case arises as a matter of law because of the circumstances of the relationship'.[156] In particular, drawing on *Guerin*, Toohey J observed that the fiduciary obligation arose from the inalienability of 'traditional rights' as legal entitlements not sourced in legislation, and the consequent power exercised over those rights by the Queensland Crown:

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148 See discussion in Larissa Behrendt, 'Bargaining on More than Good Will: Recognising a Fiduciary Obligation in Native Title' (Issues Paper No 2(4), Native Title Research Unit, May 2000).

149 *Mabo (No 2)* (1992) 175 CLR 1, 201.

150 Ibid.

151 In June 1835, grazier John Batman concluded a treaty with members of the Kulin Nations, purporting to buy a large portion of their traditional territory. The treaty was declared void by the Governor of New South Wales in August 1835, asserting the Crown's monopoly over sales of land in the colony. See Bain Attwood, *Possession: Batman's Treaty and The Matter of History* (Melbourne University Press, 2009).

152 *Mabo (No 2)* (1992) 175 CLR 1, 201.

153 Ibid 203.

154 Including the *Native Labourers' Protection Act of 1884* (Qld), the *Torres Strait Islanders Act of 1939* (Qld) and the *Community Services (Aborigines) Act 1984* (Qld).

155 *Mabo (No 2)* (1992) 175 CLR 1, 203.

156 Ibid 202.

> [I]f 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.[157]

Therefore, in Toohey J's view and in line with *Guerin*, the general fiduciary obligation owed to the Meriam Islanders arose from the nature of native title, especially its inalienability and its particular vulnerability to extinguishment by the Crown, because '[t]he power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused'.[158]

Reflecting on the content of the obligation, Toohey J observed that the duties entailed would be 'tailored by the circumstances of the specific relationship from which it arises' noting that 'generally, to the extent that a person is a fiduciary he or she must act for the benefit of the beneficiaries'.[159] The duties are imposed on the Crown by equity in order to police the exercise of its unusual power, but do not permit interference with the parliamentary capacity to legislate. Instead, as Toohey J observed,

> [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.[160]

Accordingly:

> 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 interests of the titleholders. For example, the Crown could not degazette the Islands, thereby terminating the reserve, or simply alienate the Islands contrary to the interests of the Islanders; nor could it take these or any other decisions affecting the traditional title without taking account of that effect. If it did, it would be in breach of its duty and liable therefor.[161]

Since no such extinguishment of native title had taken place on the Meriam Islands, Toohey J did not embark on an inquiry into the extent of the Crown's liability for breach of the duty, noting that he was in any case not asked by the plaintiffs to do so.[162]

Justice Toohey's judgment, finding the source of fiduciary obligation in the 'circumstances of the relationship' between Australian Crowns and Indigenous peoples (and, specifically, between the Queensland Crown and the Meriam

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157 Ibid 203.
158 Ibid.
159 Ibid 204.
160 Ibid 205.
161 Ibid 204.
162 Ibid 205:

> It should be noted that the plaintiffs seek no more than recognition of a fiduciary duty or a trust; they do not ask the Court to spell out the consequences of a breach of that duty or trust. In particular they do not seek compensation or damages in respect of any past interference with the rights and interests of the Meriam people in the Islands.

Islanders), has been debated in later cases. The strongest indication to date that a general fiduciary duty may *not* form part of Australian common law appears in the obiter dicta statements made by Brennan CJ in the High Court's 1996 decision in *Wik.*[163] Brennan CJ expressly denied the possibility that the power imbalance between Indigenous peoples and the Crown was sufficient to establish a fiduciary duty, and made the remarkable observation that

> the proposition that the Crown is under a fiduciary duty to the holders of native title to advance, protect or safeguard their interests while alienating their land is self-contradictory. The sovereign power of alienation was antipathetic to the safeguarding of the holders of native title.[164]

It must be noted, however, that in this passage Brennan CJ was engaged in an analysis of Queensland's *Land Act 1910* (Qld), which confirmed the power of the Governor-in-Council to grant pastoral leases over land now claimed to be burdened by native title.[165] On this question His Honour concluded that

> [a]t the time when the 1910 Act conferred the power of alienation on the Governor in Council, native title was not recognised by the courts. The power was not conditioned on the safeguarding or even the considering of the interests of those who would now be recognised as the holders of native title.[166]

It may well be, reading Brennan CJ's comments in the context of the judgment as a whole, that His Honour rejects the categorisation of the Crown–Aboriginal relationship as one entailing fiduciary duties in all instances, but recognises that such duties may flow from the course of dealings between the Crown and Indigenous peoples with respect to native title rights. This much is suggested by his observations on the circumstances in which such a duty might arise:

> The duty is said to arise from the vulnerability of native title, the Crown's power to extinguish it and the position occupied for many years by the [I]ndigenous inhabitants *vis-à-vis* the Government of the State. These factors do not by themselves create some free-standing fiduciary duty. It is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed.[167]

Since Brennan CJ's observations in *Wik,* a number of general fiduciary duty arguments have been advanced by Indigenous peoples in the litigation of claims against State and Commonwealth governments. None of these have been successful on the fiduciary duty ground, although none of the resulting judgments have definitively rejected the possibility that a general fiduciary duty could be found in appropriate circumstances. Notably, many of these claims were not premised on property interests. They include assertions that the removal of Indigenous children from their families under the notorious 'Stolen Generation' policies breached the Crown's fiduciary duties to those families, including under circumstances where children were institutionalised as wards of the state,[168] along

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[163] (1996) 187 CLR 1.
[164] Ibid 83.
[165] Behrendt, above n 148, 9.
[166] *Wik* (1996) 187 CLR 1, 83.
[167] Ibid 95–6 (citation omitted).
[168] *Collard v Western Australia [No 4]* [2013] WASC 455 (2 April 2014) ('*Collard*'); *Cubillo v Commonwealth* (1999) 89 FCR 528 ('*Cubillo*').

with claims premised broadly on acts of alleged genocide committed by government officials in connection with the removal of Indigenous children.[169]

Fiduciary duty was also argued in *Coe v Commonwealth*,[170] which concerned applications by the defendants to strike out all or part of the plaintiff's pleadings in a sovereignty-based claim brought on behalf of the Wiradjuri nation. The plaintiffs made use of *Guerin* and Toohey J's judgment in *Mabo (No 2),* as support for their argument that the State of New South Wales had fiduciary obligations (that it later breached) because it had represented that it recognised Wiradjuri title, land rights and law.[171] Chief Justice Mason rejected this part of the Wiradjuri statement of claim, noting that he 'doubt[ed] that the judgments in the two cases sustain the way in which the statement of claim presented the claim, that is, a fiduciary duty arising from a representation'.[172] The Chief Justice declined to comment on the correctness of Toohey J's analysis in *Mabo (No 2),* but left open the possibility that even if Toohey J's finding (that a general fiduciary duty could arise from the circumstances of the Crown–Indigenous relationship) was incorrect, then Dawson J's more narrow suggestion (that a fiduciary duty may arise where an '[A]boriginal interest in land' exists) might well be sustained:

> On an application to strike out it would not be appropriate for me to decide whether the statement made by Toohey J correctly reflects the law or whether Dawson J is right in suggesting that the subsistence of an aboriginal interest in land is essential to the creation of a fiduciary relationship of the kind which the plaintiff seeks to set up.[173]

Most recently (and most promisingly), in *Bodney v Westralia Airports Corporation Pty Ltd*[174] the applicants argued that the Commonwealth's acquisition of land over which they claimed native title was done in breach of the Crown's fiduciary duties, and had not been accompanied by the requisite consultation.[175] Because of this breach, they argued, the extinguishment of native title was not effective, and the land acquired by the Commonwealth should instead be held on trust for the native title holders.[176] Justice Lehane considered Toohey J's analysis in *Mabo (No 2)* noting that Toohey J had accepted that native title could be validly extinguished by legislation, and that the Meriam Islanders in that case had not claimed specific relief for breach of fiduciary duty. Justice Lehane cautioned further that 'none of the other judgments in *Mabo (No 2)* supports the existence of a fiduciary obligation of the kind discussed by Toohey J'.[177] However, His Honour was nonetheless prepared to admit that the Crown's conduct in relation to

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169 *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677 ('*Thorpe*'). See also *Nulyarimma v Thompson* (1999) 96 FCR 153, 214 [225] (Merkel J): 'Toohey J's view cannot assist the applicant in the present case as his claim, as set out in the application, is not based upon the extinguishment, directly or indirectly, of a native title right or interest'.

170 (1993) 118 ALR 193 ('*Coe*').

171 Ibid 201–2.

172 Ibid 202.

173 Ibid 203–4, agreeing with Toohey J that such an obligation could not prevent the exercise of legislative power.

174 (2000) 109 FCR 178 ('*Bodney*').

175 Ibid 199–200.

176 Ibid 187–8.

177 Ibid 203–4 [63].

Indigenous property interests could give rise to fiduciary duties in circumstances where those interests had not been validly extinguished:

> the tendency of authority in the High Court … is against the existence of such a duty. That, of course, does not mean that circumstances will not arise in which the Crown has fiduciary duties, owed to particular indigenous people, in relation to the alienation of land over which they hold native title. Nor does it mean that where, in particular circumstances, a duty of that kind is breached (or a breach is threatened) a constructive trust might not appropriately be imposed.[178]

The missing link in *Bodney*, then, is a justification of the kind found in Toohey J's *Mabo (No 2)* judgment, for a *general* fiduciary duty sourced in the power exercised by Australian Crowns over native title interests.

In every case after *Mabo (No 2)* in which fiduciary duty has been argued by Indigenous claimants in an Australian court, the relevance of comparative jurisprudence from Canada, New Zealand and the US has been dismissed, usually by reference to the lack in Australia of an extant constitutional relationship or voluntary undertaking, which was deemed, in those cases, to be a precondition of a Crown–Indigenous fiduciary relationship. Judges have rejected (not unreasonably) analogies drawn between Australian Indigenous nationhood and the 'domestic dependent nation' status of US tribes as sovereigns.[179] Less convincingly, they have also incorrectly suggested that fiduciary duties in Canada are premised entirely on voluntary undertakings and constitutional or legislative guarantees (the *Royal Proclamation 1763*, treaties, the *Indian Act* and s 35 of the *Constitution Act 1982*),[180] and that fiduciary duties in New Zealand depend entirely on the relationship established by the *Treaty of Waitangi*.[181] More generally, judges have noted that the construction of *private law* fiduciary duties in Australia is narrower than that developed in equitable jurisprudence in Canada and the US, noting especially the Australian reluctance to use fiduciary duties to impose positive obligations beyond those required by 'loyalty',[182] and observing that fiduciary duty in Anglo-Australian law does not extend to the protection of non-economic interests.[183] In summary, only in *Bodney* has an applicant based a fiduciary duty

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[178] Ibid 204–5 [66].

[179] Ibid 202–3 [58]–[59] (Lehane J). See also *Coe* (1993) 118 ALR 193.

[180] See *Bodney* (2000) 109 FCR 178, 201–2 [54]–[55] and *Collard* [2013] WASC 455 (2 April 2014) [1145]–[1146] (Pritchard J), referring to the *Constitution Act 1982*.

[181] *Cubillo* (1999) 89 FCR 528. See also *Collard* [2013] WASC 455 (2 April 2014) [1147]–[1150] (Pritchard J).

[182] *Breen v Williams* (1996) 186 CLR 71, cited in *Cubillo* (1999) 89 FCR 528, 575 [132] (O'Loughlin J). Justice Dawson and Toohey referred to a Canadian case in which a doctor's fiduciary duty was held to require disclosure of medical records to a patient, noting at 94–5 (citation omitted) that the finding was

> reflective of a tendency, not found in this country, but to be seen in the United States and to a lesser extent Canada, to view a fiduciary relationship as imposing obligations which go beyond the exaction of loyalty and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong.

Likewise, Gaudron and McHugh JJ observed at 112–13 (citation omitted) that '[o]ne significant difference is the tendency of Canadian courts to apply fiduciary principles in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs'.

[183] *Paramasivam v Flynn* (1998) 90 FCR 489, cited in *Cubillo* (1999) 89 FCR 528, 574 [130]: 'In Anglo-Australian law, the interests which the equitable doctrines invoked by the appellant, and

argument on the Crown's dealings with an '[A]boriginal interest in land' and in that case the judge emphasised that the property interests in question had already been validly extinguished in accordance with legislation and so could not serve as the basis of a fiduciary obligation. Other applicants have introduced fiduciary obligations as a corollary of larger (and abstractly conceived) claims to sovereignty or territory, or pertaining to the removal and institutionalisation of Indigenous children where property interests were not at stake. In Australian post-*Mabo (No 2)* jurisprudence, then, a steady supply of fiduciary-based Indigenous claims is evident, but none has yet been argued on premises comparable to those accepted by Toohey J in *Mabo (No 2)*. The latest word on fiduciary duties in the context of native title, then, must be something close to the summation offered by Kirby J in *Thorpe*:

> Although in *Wik Peoples v Queensland* arguments were advanced based upon an alleged fiduciary obligation owed by the Crown to the [I]ndigenous peoples before the Court, once again this Court disposed of the matter without resolving whether such an obligation existed and, if it did, whether it entitled the Aboriginal claimants to relief in that case. The result is that whether a fiduciary duty is owed by the Crown to the [I]ndigenous peoples of Australia remains an open question. This Court has simply not determined it. Certainly, it has not determined it adversely to the proposition.[184]

The common law of Australia has not yet yielded a concept comparable to the Canadian and New Zealand concept of the Crown–Indigenous fiduciary relationship or honour of the Crown, but the scepticism shown about this possibility points to a deeper conceptual hurdle in Australian law and legal commentary — an unwillingness to recognise that the obligations owed by a settler state to Indigenous peoples *could* be qualitatively different to the general public and administrative law obligations it owes to other citizens and to the public at large. This (mis)understanding structures some of the major jurisprudential controversies in Australian law on Indigenous peoples. It may well be true that the limited language of private law fiduciary and trust relationships is inadequate to the task of characterising the Australian Crowns' moral and political obligations to Indigenous peoples. It is certainly true that the lack of express executive undertakings to Indigenous peoples could reasonably caution an otherwise receptive judiciary. However, the key feature of the private law analogy used to describe the Indigenous fiduciary doctrine in Canada, as in New Zealand, is that it allows the demarcation of Crown–Indigenous relationships from a government's general public and administrative law obligations. The doctrine of the 'honour of the Crown' is a sui generis principle precisely because it is based on the distinctive, historic intergovernmentalism that structures the Crown's dealings with Indigenous peoples and is the source of the unusually wide power it exerts over their interests and property. In other words, I suggest, part of the reason for deploying the fiduciary duty principles is to insulate these relationships from the general scope of public law. An important consequence of this exemption is that certain State–Indigenous relationships can survive the application of liberal principles of

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related doctrines, have hitherto protected are economic interests'. See also *Collard* [2013] WASC 455 (2 April 2014), [1152] (Pritchard J). For a useful general discussion, see Richard Joyce, 'Fiduciary Law and Non-Economic Interests' (2002) 28(2) *Monash University Law Review* 239.

184 (1997) 144 ALR 677, 688.

equality that would otherwise prohibit differentiation on the basis of race, especially those that cannot be justified as measures designed to alleviate Indigenous disadvantage.

VI Conclusion

I have argued that a Crown–Indigenous fiduciary relationship, whether or not accompanied by a principle of the honour of the Crown, secures two public goods in a settler society. First, and most importantly, it goes some way to addressing the non-consensual incorporation of Indigenous peoples into the liberal democratic settler polities, and so can mitigate the effects of the social contract failure that threatens to delegitimise settler governance. Accordingly, these duties support the legitimacy of the State and its powers by reaffirming the constitutive premises of settler statehood — specifically, the continuity of pre-State commitments undertaken by the British Crown and the English common law doctrines recognising Indigenous property rights. Second, the trust analogy affirms that the settler government acts as a corporate actor in certain of its dealings with Indigenous peoples, a move which establishes settler Crowns as historically continuous and apolitical entities, tasked with preserving the foundational constitutional law of the settler State. This, in turn, allows settler executives to bind their successors as institutions, by entering into relationships and agreements with Indigenous peoples that persist beyond the flux of politics and operate independently of changes in the ways those institutions are populated, in much the same way that executive prerogatives operate in international relations.[185] As discussed above, however, the conceptual and historical link between international relations and Crown–Indigenous relations is more attenuated in Australia than it is in the other western settler polities because of the historic denial to the Commonwealth of power to make ‘special’ laws for Indigenous peoples. As I have noted, one consequence of this attenuation is the channelling of Indigenous collective historic claims into anti-discrimination litigation.

The principle of the honour of the Crown in Canadian and New Zealand common law is supported by the establishment in those countries of claims settlement processes, managed by the executive branch, and premised on nation-specific negotiations with Indigenous claimant communities. The principle need not, accordingly, provide more than ‘rules of engagement’ for those processes, and so can be deployed to urge the parties to (continue to) deal with one another reasonably and in good faith and to comment on instances of procedural unfairness.[186] Consequently, private law analogies of fiduciary and trust law need not be pressed so far as to provide a set of legal remedies akin to those proprietary and material remedies provided to beneficiaries of trust and fiduciary relationships in civil suits. In Australia, however, a political land claims process, directed to the negotiation of group-specific settlements, has not emerged from the common law recognition of native title. Nor have broader reparative and relational

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[185] Janet McLean, ‘Government to State: Globalization, Regulation, and Governments as Legal Persons’ (2003) 10(1) *Indiana Journal of Global Legal Studies* 173, 175.

[186] See, eg, *Delgamuukw* (1997) 3 SCR 1010, 1123–4 [186] (Lamer J).

'reconciliation' processes addressing Indigenous claims to status, esteem, compensation and self-government, of the kind that feature in the Canadian contemporary treaty-making processes and in the New Zealand *Treaty of Waitangi* claims settlement process. A negotiation process was considered by federal government ministers in the wake of *Mabo (No 2)* but was ultimately rejected, in consultation with Indigenous representatives, in favour of the litigation process outlined in the *Native Title Act* and corresponding state legislation.[187] In this sense, *Mabo (No 2)* was a call to arms that was never taken up by the Australian federal executive. Perhaps this was not politically feasible precisely because of the fragility of federal jurisdiction in Indigenous affairs, relative to the robustness of state claims to residual power in land management. In any case, the *Native Title Act* was enacted — a voluminous statute that largely functions as a codification of common law Aboriginal title principles that extends those principles in some areas while diminishing them in others.[188] In light of the absence of a political settlements process at the federal level, the intense political controversy that accompanied the *Mabo (No 2)* decision, and the very comprehensive legislative regulation effected by the *Native Title Act*, it is perhaps not surprising that fiduciary duties have been viewed by Australian courts as an area in which only angels should tread. This may have stultified the development of jurisprudence on the constitutive obligations and duties of the Australian Crowns even as *Mabo (No 2)* revived judicial responsibility for the protection of Indigenous property rights. The content and form of those obligations should now be revisited, as part of the ongoing responsibilities of Australian governments to account for historic injustices, redress the imbalance of power between Indigenous peoples and the State, and support Indigenous agency in self-government and in Australian constitutionalism.

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[187] Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 44–6.

[188] See generally Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523.